

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF BARBADOS

B E T W E E N :

FAUZI ELIAS (Plaintiff)
Appellant

- and -

GEORGE SAHELY AND COMPANY (Defendant)
(BARBADOS) LIMITED Respondent

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CASE FOR THE APPELLANT

1. This is an appeal from the Judgment of the Court of Appeal of Barbados (the Honourable Mr. Justice D.A. Williams, Chief Justice (Acting), the Honourable Mr. Justice Worrell and the Honourable Mr. Justice Husbands) dated the 13th March 1981 allowing with costs the Respondent's appeal from the judgment of the Chief Justice dated the 23rd July 1979 ordering specific performance by the Respondent of a contract made on the 10th February 1975 and payment of damages and costs.

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2. The Respondent is the owner of the property at 19 Swan Street, Bridgetown, building known as Everybody's Store. In July 1960 the Respondent let the building to the Appellant, and since that date the Appellant has carried on business at the building.

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3. On the 10th day of February 1975 Mrs. Gloria Redman, a director and/or agent of the Respondent, telephoned the Appellant from the island of St. Kitts and told him that she and her sister Miss Gwen Sahely had discussed the sale of the building and they had decided to sell it to the Appellant for \$390,000.00. The Appellant said he would buy at that figure. An oral contract of purchase at

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this price was concluded. The Appellant asked Miss Redman to have her lawyer call him.

4. Shortly after the telephone conversation, Mr. Clyde Turney of the Law firm of R.G. Mandeville and Company telephoned the Appellant and asked him if he was buying the building for \$390,000.00. The Appellant said Yes and Mr. Turney told him to send to Mr. Turney a cheque for \$39,000.00. He further told the Appellant that Mrs. Redman had told him that she had sold the building for \$390,000.00.

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5. On the same day, the 10th day of February, 1975, for the purpose of placing himself in a position to complete the oral contract and of fulfilling the request of Mr. Turney, the Appellant went to the Canadian Imperial Bank of Commerce where he raised an immediate loan of \$39,000.00 and arranged to borrow \$250,000.00 to be available on completion and to be repaid in seven years. The Appellant then took a Manager's Cheque from the bank in the sum of \$39,000.00 to his own Lawyer, Mr. Henry Forde, whom he instructed to act on his behalf for the purpose of completing the contract. Immediately Mr. Forde spoke to Mr. Turney on the telephone. Mr. Forde said that the Appellant had agreed to buy the building from the Respondent for \$390,000.00 and Mr. Turney confirmed that he acted for the Respondent and that he had already spoken to the Appellant. In the course of the conversation, the terms of the agreed sale and purchase were confirmed as set forth in Mr. Forde's letter to Mr. Turney of the same date. This conversation concluded with agreement that Mr. Forde send over to Mr. Turney the cheque for \$39,000.00 with a covering note and that Mr. Turney would furnish a receipt.

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6. Pursuant to this arrangement, together with the cheque, Mr. Forde sent to Mr. Turney a letter in the following terms:-

"Dear Sirs,

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Re: Purchase of freehold premises known as Everybody's Store at Swan Street, Bridgetown from your client, Sahely & Co. Ltd. by Fauzi Elias (trading as Everybody's Store) or his nominees

Further to our conversation of this morning, I now enclose a cheque for \$39,000.00 drawn on Canadian Imperial Bank of Commerce by Fauzi Elias trading as Everybody's Store and payable to you as stakeholder in respect of

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the sale and purchase of the freehold premises, fixtures and fittings known as Everybody's Store. It is understood that the purchase price is \$390,000.00 of which the sum of \$39,000.00 is paid as a deposit to be held by you as stakeholder pending completion of the contract for sale. As I have discussed over the telephone the usual term will apply.

10 I should be pleased if you would forward the Agreement for sale to be signed by my client and if the contract will be between your client and Fauzi Elias (trading as Everybody's Store) or his nominees.

Please acknowledge receipt of this letter and let me have your receipt for \$39,000.00."

7. In response to the request in this letter, Mr. Turney provided such a receipt in the terms following:-

20 "\$39,000.00 BARBADOS 10.2.75

Received from Fauzi Elias the sum of Thirty Nine Thousand dollars and ----- cents being deposit on property at Swan Street, Bridgetown agreed to be sold by George Sahely & Co. B'dos Ltd. to Fauzi Elias and/or his nominees.

R.G. Mandeville & Co.,
per E. Clarke".

30 Mr. Turney banked the cheque and has at all times retained the sum so paid and at no time ---- tendered repayment. As at the 9th July 1979 (the first day of the trial) the Appellant had paid \$18,436.14 interest in respect of the loan of the deposit.

40 8. Thereafter despite repeated requests by the Appellant and without advancing any reason therefor, the Respondent failed and refused to complete the contract. Accordingly on the 8th day of December 1975, the Appellant filed his Writ herein claiming Specific Performance of the contract constituted or evidenced by the letter and receipt, all necessary and consequential accounts, directions and inquiries, and damages for breach of contract. By its Amended Defence, the Respondent denied any agreement for the sale and purchase of the building. It pleaded Section 2 of the Statute of Frauds Cap. 211 and by way of particulars that if the documents dated the 10th

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day of February 1975 constituted a memorandum of any of the terms of any contract, it was not a sufficient memorandum in that it did not contain the term that "the usual terms will apply". Alternatively, the Respondent pleaded that if the documents constituted evidence of an agreement to sell, such agreement was expressed to be subject to an agreement or contract for sale being completed and signed by the parties. The Respondent never denied in these pleadings or at the trial that in respect of the signature to the Receipt or otherwise Mr. Turney acted as agent of the Respondent or that Mr. Turney had authority so to act. Mr. Turney and his firm have at all times acted as the Attorney of the Respondent in these proceedings.

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9. The evidence adduced on behalf of the Appellant consisted of the evidence of the Appellant himself, his then lawyer Mr. Henry Forde and Mr. Paul Best, the Senior Assistant Manager of the Canadian Imperial Bank of Commerce. Although both Mrs. Gloria Redman and Miss Gwen Sahely, the sole directors and shareholders of the Respondent, were in Court during the trial, the only witness called on behalf of the Respondent was Mr. Turney. The evidence of the Appellant and Mr. Forde established the existence of the oral agreement⁽¹⁾ and the authority of Mr. Turney to sign the receipt.⁽²⁾ Counsel for the Respondent conceded at the trial that he was not arguing that the words in the letter "pending completion of the contract of sale" were the equivalent in law of the words "subject to contract".⁽³⁾

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(1) Page 12
lines 30-36
Page 14 lines
12-16. p.17
lines 9-10
(2) Page 12
lines 40-41
Page 13
lines 12-17
Page 15
lines 7-9
Page 16
lines 42-45
(3) Page 23
lines 25-26
Page 16
lines 42-45

10. The learned Chief Justice held that, where the evidence of Mr. Turney and Mr. Forde were in conflict, he accepted the evidence of Mr. Forde. He thereupon determined that there was a concluded oral agreement for the sale of the building and found significance in the wording of Mr. Turney's firm's receipt which used the phrase "AGREED TO BE SOLD". He held further that the oral agreement was evidenced by a note or memorandum in writing within the meaning of the statute of Frauds in so far as Mr. Forde's letter of February 10, 1975 was inextricably connected with the receipt of the same date. His judgment proceeded on the basis that Mr. Turney was duly authorised by the Respondent to sign the receipt and indeed that the Respondent raised no issue on this matter. The learned Chief Justice also found that the oral agreement was not "subject to contract" and did not contemplate further negotiation. (4)

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(4) Pages
32-33

11. The Court of Appeal, in the judgment of the Court delivered by the Honourable Mr. Justice D. A. Williams, accepted and confirmed the holding of the learned Chief Justice that there was a concluded oral agreement on the 10th February 1975 but nevertheless (reversing the Chief Justice) held such agreement to be neither binding nor enforceable. The grounds for its decision were as follows:-

10 (1) because the agreement was oral and there was at its date no contract in writing or sufficient memorandum in writing, the agreement was not "binding";

(2) because it was not "binding" Mr. Turney was not authorised by the Respondent to receive the deposit or sign the receipt and accordingly the receipt could not constitute a memorandum or a part of a memorandum in writing signed on behalf of the Respondent;

20 (3) it was legally impossible for Mr. Turney at the same time to receive the deposit as stakeholder and sign the receipt as agent for the Respondent.

(4) the words in the letter "pending completion of the contract" meant in law "subject to contract";

30 12. The Appellant failed to apply to the Court of Appeal for leave to appeal within 21 days after the date of the decision as required by Section 3 of The Barbados (Procedure in Appeals to the Privy Council) Order 1966 because of default of the Registration Office, Bridgetown, Barbados in making available to the Appellant a copy of the decision within such period, and on application after the expiration of such period the Court of Appeal held itself incompetent to grant leave because the requirement that application be made within such period was mandatory and not directory. Your Majesty in Council granted
40 Special leave to appeal on the 15th October, 1981 intimating in the course of the hearing of the application for such leave (though this was neither pleaded nor argued in the Courts below) that the Appellant might be able to invoke and rely on the doctrine of part performance.

13. It is the contention of the Appellant that in the circumstances herein set forth:

(1) the oral agreement of the 10th February 1975 (in respect of the making of which there are

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concurrent findings by the Courts below) was at all times in law "binding" though until the creation of a sufficient Memorandum or a sufficient act of part performance "unenforceable" (see e.g. Steadman & Steadman (1974) 2 A.E.R. 977 at 981a per Lord Reid and at 1990 a per Viscount Dilhorne and at 995 f per Lord Simon);

(2) the decision of the Court of Appeal that Mr. Turney was not authorised to sign the receipt was based on the erroneous holding that the oral agreement was not binding;

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(3) the Court of Appeal ought to have held that Mr. Turney was so authorised having regard to the Respondent's pleading, the fact that the Respondent did not argue the contrary below, the evidence before the Chief Justice and the judgment of the Chief Justice.

(4) the letter and the receipt constitute a contract for the sale of the building;

(5) alternatively the letter and the receipt or the receipt alone constitute a sufficient Memorandum of the oral contract;

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(6) alternatively the conduct of the Appellant, and in particular the raising of the loans of \$39,000.00 and \$250,000.00, the payment of interest on the loan of \$39,000.00, the instruction of his lawyer and the payment of deposit of \$39,000.00 individually and collectively make it inequitable to refuse to complete the contract and constitute sufficient acts of part performance to take the oral contract outside Section 2 of the Statute of Fraud (see Steadman v. Steadman supra).

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(7) in view of the concession by the Respondent at the trial, the findings of the Chief Justice and in any event, the Court of Appeal ought to have held that the words "pending --- completion of the contract" did not mean "subject to contract".

14. The Appellant respectfully submits that the judgment of the Chief Justice was right and that the judgment of the Court of Appeal was wrong and ought to be reversed and that the appeal ought to be allowed with costs for the following (amongst other)

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R E A S O N S

(1) BECAUSE the oral agreement was at all times

binding upon the Respondent;

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- (2) BECAUSE the letter and receipt constitute or evidence a binding agreement;
- (3) BECAUSE the agreement has on the part of the Appellant been partly performed.

GAVIN LIGHTMAN Q.C.

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Appellant

- and -

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Respondent

CASE FOR THE APPELLANT

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01-349-0321

Ref 7/527/81

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