

31/82

ON APPEAL
FROM THE COURT OF APPEAL OF BARBADOS

B E T W E E N :-

FAUZI ELIAS

Appellant

- AND -

GEORGE SAHELY & CO. (BARBADOS) LIMITED

Respondent

CASE FOR THE RESPONDENT

RECORD

10

1. This is an appeal from the judgment of the Court of Appeal of Barbados (Williams, Ag. C.J., Worrell, J., and Husbands, J.) dated 13th March, 1981, which allowed the Respondent's appeal against the judgment and order of the Chief Justice dated 23rd July, 1979 for specific performance, damages and costs in favour of the Appellant.

p. 40
p.35-6

2. The appeal is concerned with the sale of land in Barbados and the principal issues which arise are:

20

(1) whether a deposit paid by the "purchaser" to the Attorney at law for the "vendor" as stakeholder was a pre-contract deposit or not?

(2) whether a receipt given in his own name by an Attorney-at-law for the "vendor" in respect of a deposit paid to him as stakeholder can constitute a sufficient memorandum in writing for the purpose of S.2 of the Statute of Frauds (CAP.211);

(3) whether the terms of the receipt given by the Attorney constituted a sufficient memorandum in writing for the purposes of the said section;

30

(4) whether the receipt could properly be read with a letter from the "purchaser's" Attorney-at-law so that both documents could be treated as constituting the memorandum, and if so, whether the memorandum so constituted was a sufficient memorandum for the purposes of the said section.

RECORD

- p.3 1.22 3. By paragraph 3 of the Statement of Claim the Appellant alleged "an Agreement contained in or evidenced by a letter and a memorandum and/or note in writing both dated the 10th day of February, 1975, and made between the Plaintiff and the Defendant" whereby, "the Defendant agreed to sell and the Plaintiff to purchase the freehold property known as Everybody's Store, No.19 Swan Street and situate at the said city of Bridgetown at a price of \$390,000.00."
- p.3 1.30 4. By paragraph 4 of the Statement of Claim it was alleged that "in pursuance of the said agreement the Plaintiff paid a deposit of \$39,000.00 to the Defendant through its agent, R.G. Manderville & Co. in part payment of the said purchase price." 10
- p.9 5. By the Amended Defence the Respondent:
- (a) denied any agreement as alleged or at all,
 - (b) denied that the 2 documents constituted a contract;
 - (c) put in issue whether the 2 documents could or did constitute a memorandum in writing for the purposes of Section 2 of the Statute of Frauds (CAP.211); 20
 - (d) alternatively alleged that if they did constitute such a memorandum not all the terms were evidenced;
 - (e) pleaded that if there was 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 and no such agreement or contract was ever entered into.
- p.10 By way of Amended Reply the Plaintiff (inter alia) denied that no such agreement or contract was ever entered into.
- p.11 6. The case for the Plaintiff was opened and at all times was conducted upon the basis that the documents did not constitute the agreement but that an oral contract was relied upon, which was sufficiently evidenced by an appropriate memorandum in writing. The only oral evidence as to the making of the alleged oral contract was given by the Appellant to the effect that at 9 a.m. on 10th February, 1975 he was telephoned by Gloria Redman for the Respondent company and offered the property for \$390,000.00. He replied: "Mrs. Redman I will buy it. Please speak to your lawyers to call me." 30
- p.12 1.30-40 40
- p.12 1.36 About 10-15 minutes later the Respondent's Attorney rang the Appellant and the Appellant repeated that he would buy the property for \$390,000.00. The Attorney asked for a cheque for \$39,000.00 to be sent to him and informed the Appellant that Mrs. Redman had "told him she had sold the

RECORD

building for \$390,000.00"

In cross examination the Appellant referred to his offer to buy for \$390,000, and to the fact that "a list was to be prepared setting out the fixtures and fittings he was buying". Further in relation to the "Agreement for Sale" he stated that he did not know whether it was to have a schedule of fixtures and fittings or not. Indeed, although he stated that the agreement for sale was that he was to buy the building and "everything included" he said he did not know about the fixtures and fittings.

p.13 1.37

p.13 1.45/
p.14 1.11
p.13 1.34
p.14 1.3

10

7. The only other evidence as to whether and if so upon what terms a complete agreement had been reached orally between the parties is contained in the letter dated 10th February, 1975 from the Appellant's Attorney (and Mr. Forde's explanation thereof) and the receipt given by the Respondent's Attorney. It is submitted that the letter contains nothing which supports the allegation that a binding oral agreement had been reached. On the contrary it refers to an understanding in relation to the purchase price, and to new matters, not discussed by the parties, such as the payment of a deposit to the Attorney "to be held by you as stakeholder pending completion of the contract for sale", to "usual terms" applying and to an expectation on the part of the Appellant to the receipt of an Agreement for sale which was to be signed by the Appellant or his nominees. The receipt (to the contrary) referred to the deposit being on property "agreed to be sold".

p.51
p.15
1.13

20

p.52

8. The learned Chief Justice rejected the evidence of Mr. Turney (the "vendor's" Attorney) upon all points where it conflicted with Mr. Forde (the "purchaser's" Attorney) but at no time did he objectively consider the legal effect of the evidence which he did accept. While it is true that Mr. Turney stated that in his view the letter dated 10th February constituted an offer, the consequence of the rejection by the Chief Justice of that construction did not inevitably lead to the conclusion that there had been a binding oral contract. Equally nor were the other considerations, namely the unchallenged evidence that Miss Sahely (sic) told the Appellant that the Respondent had decided to sell for \$390,000.00 and that the Appellant asked her to tell her lawyer to call, really at the heart of the issue of law which the learned Chief Justice had at the outset to consider.

p.31 1.7

p.30 1.45

40

p.30 1.35-40

9. In dealing with the receipt and the letter the Chief Justice:

- (a) concluded that the letter was inextricably connected with the receipt, although gave no reasons for such a conclusion;

p.31 1.19

RECORD

p.31 1.21

and (b) relied upon the case of Timmins v Moreland Street Property Co. Ltd. 1958 Ch.110 which case held that the document signed by the party to be charged (if it does not contain all the necessary ingredients) must contain some reference express or implied to some other document if the documents are to be read together.

10. In dealing with the argument advanced to him that even if the documents constituted a memorandum not all the terms were evidenced the learned Chief Justice considered the following contentions:

10

- (a) that there had been no agreement as to fixtures and fittings;
- (b) that it was left open as to whether the Appellant or a nominee would make the purchase;
- (c) that a written agreement had been called for.

p.32 1.8
p.32 1.10

In fact such arguments were highly pertinent to the issue as to whether there was a binding oral contact. As to (a) the learned Chief Justice concluded "that it was perfectly clear what the Defendant was selling and what the Plaintiff was buying". As to (b) that it was simply a method of permitting the Plaintiff to have the conveyance drawn in the name of another person. As to (c) that the agreement reached by the parties was not "subject to contract", and did not contemplate either further negotiation or further agreement", and further that a standard form of agreement was to be prepared "solely for the purpose of providing the bank financing the sale with documentation in support of the loan they were giving the Plaintiff."

20

p.33 1.6

p.34 1.20-30

11. The learned Chief Justice referred to some of the "stakeholders cases" and to the fact that Mr. Turney held the deposit as stakeholder, but it is apparent that he considered them only in the context of the claim by the Appellant for damages. The Chief Justice posed the question he had to consider as follows:

30

"The question arises as to whether the Plaintiff can recover as general damages interest on his deposit which Mr. Turney was under a duty to return to him when, according to him, his client rejected the Plaintiff's offer."

p.35 1.10

He concluded that it would be unreasonable "if the parties did not have it in contemplation that the Plaintiff should receive interest on his deposit if that deposit were improperly retained and no conveyance executed", and held that the interest was recoverable as damages for breach of contract.

40

p.37-39

12. The Respondent appealed to the Court of Appeal on a number of grounds, including the following:

- (1) that the evidence did not establish that a concluded oral agreement had been reached;
- (2) that in relation to the sufficiency of the memorandum, the receipt was merely acknowledging receipt of the stake and could not be construed as serving any other purpose;
- (3) that there was no evidence that the receipt was written in pursuance of any authority given to Mr. Turney to sell the property on behalf of the Appellant;
- (4) that a proper construction of the letter dated 10th February 1975 was that an agreement was to be prepared and approved by the respective Attorneys and signed by the parties.

10

20

30

40

50

13. The Court of Appeal's judgment commenced (after the facts had been outlined) with a determination as to whether there was a binding contract in existence before the letter dated 10th February was written. The Court concluded that there was neither a binding nor an enforceable contract - not binding because although there was a consensus it was subject to the completion of a sale agreement, and not enforceable because if there was a complete agreement it was not sufficiently evidenced in writing.

p.44 1.10

p.44 1.30

14. Further the Court of Appeal concluded on what they described as "the crucial question" in the case, that Mr. Turney was not authorised to, nor did he, receive the deposit as agent of the vendor and in the circumstances could not be the agent of the vendor in the giving of the receipt, and there was therefore no memorandum signed on behalf of the party to be charged.

p.45 1.7-20

15. It is respectfully submitted that the learned Chief Justice did not adequately consider all the evidence on the issue as to whether there was a complete oral agreement. It is acknowledged that parties can and on rare occasions do make a binding oral agreement in relation to the sale and purchase of land, but almost invariably both parties envisage that lawyers will be involved and that there will be a contract which will fully deal with all the relevant factors, absence of agreement on which will terminate the transaction. Against such a background and particularly in a commercial transaction the evidence must disclose the clearest possible intention by the parties to be bound, and to deviate from the normal course. There was no such clear evidence in this instance, and indeed powerful evidence to the contrary. It is submitted that the Court of Appeal were right to treat the deposit paid in this case as a precontract deposit and on that ground alone the Appellant's claim must fail. Apart from the matters referred to by the Court of Appeal it is plain the parties

RECORD

did not orally agree that the usual terms should apply, and nor that the sale was "as is", these were only introduced by the lawyers "understanding" after the oral contract had been reached.

16. Alternatively if contrary to the foregoing there was a complete oral agreement it is respectfully submitted that the receipt given was not signed by a person thereunto lawfully authorised by the party to be charged. The deposit was paid to the Attorney as stakeholder, accepted by him as stakeholder and the receipt was given in his own name. 10
Having not purported to act as the vendor's agent in the giving of the receipt and there being no evidence that he did so act, and the only evidence being that deposit was paid to him as stakeholder, it is submitted that a conclusion that the receipt was given as vendor's agent is untenable. The Statute of Frauds having been raised the burden was upon the Appellant to establish that the receipt was given by the vendor's agent. It is not within the scope of the authority of a solicitor instructed to prepare a draft contract to sign a contract or to sign a memorandum or note of the contract (see Smith v Webster 1876 3 Ch.D 49; John Griffiths Cycle Corporation v Humber & Co. 1899 2 W.B. 414). 20

17. It was incumbent upon the Appellant to show that the receipt constituted a sufficient memorandum, and in particular that it contained all the essential terms which had been agreed. The receipt manifestly did not. It made no reference to the price, and further since the hypothesis must be that the deposit was contractual (not pre-contractual) it made no reference to the terms upon which the deposit was paid, and further no reference to the "usual terms". 30

18. It is submitted that the correct approach to apply when a party seeks to justify the reading of documents together is that set out in Timmins v Moreland Street Property Co. Ltd. 1958 Ch.110. Applying that test the Appellant had to show that the receipt contained some reference, express or implied, to some other document or transaction, and "if by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed.. then the two can be read together." (1958 Ch.110 130). The test must be strictly applied and it is essential that the signed document does refer to the other. Proof of the existence of the other document cannot be supplied by oral evidence. It is submitted that in finding that the two documents were inextricably connected the learned Chief Justice must have been looking at the letter first (which requested a receipt) and then the receipt. In so doing he erred. It is submitted the underlying principle is that by the reference in the first document the person to be charged incorporates the other document. 40 50

The evidence to constitute such an intention to incorporate must be clear and unequivocal, and there was none in this case. In this respect it is noteworthy that by his letter dated May 25th, 1975 whereby the Appellant's Attorney sought to make time of the essence, the memorandum relied upon was the receipt alone.

p.42 l.2

10 19. Further it is submitted that if contrary to the foregoing it is legitimate to look at both the receipt and the letter as the memorandum the alleged agreement in relation to the sale of the building "as is" is not evidenced.

20 Further the letter dated 10th February expressly records what the Attorneys discussed on the telephone and not what the parties orally agreed. As such it is valuable evidence of matters which are to be tested against the Appellant's claim that a complete oral contract had been reached. If so tested against the oral evidence given, the letter raises at least three new and significant matters not covered by the oral agreement. Firstly it refers to the terms upon which the deposit was being paid. Secondly it refers to the usual terms applying. Both these matters are referred to as having been discussed on the telephone by the lawyers and there is no evidence the parties discussed them. Thirdly it refers to an Agreement for Sale.

30 It is submitted in the context of this issue ((4) in paragraph 2 above) and in relation to issue (1) in that paragraph, that the letter dated the 10th February, is powerful evidence that the parties oral understanding was incomplete, that all the essential terms had not been agreed and that if was not intended by either that the oral understanding was to be a binding contract.

20. It is respectfully submitted that this appeal should be dismissed for the following, among other

R E A S O N S

1. BECAUSE no complete oral agreement had been reached by the parties.
2. BECAUSE there was no memorandum in writing signed on behalf of the person to be charged on the contract.
- 40 3. BECAUSE neither the receipt on its own, nor the receipt and the letter taken together constituted a sufficient memorandum in writing.
4. BECAUSE the Court of Appeal Judgment is correct.

FENTON RAMSAHOYE

GEORGE NEWMAN, Q.C.

ON APPEAL
FROM THE COURT OF APPEAL OF BARBADOS

B E T W E E N :-

FAUZI ELIAS

Appellant

- AND -

GEORGE SAHELY & CO. (BARBADOS) LTD.

...

...

Respondent

CASE FOR THE RESPONDENT

INGLEDEW, BROWN, BENNISON & GARRETT
International House,
26 Creechurch Lane,
London EC3A 5AL

Solicitors for the Respondent