

31/82

ON APPEAL
FROM THE COURT OF APPEAL OF BARBADOS

B E T W E E N:

FAUZI ELIAS (PLAINTIFF)

APPELLANT

- AND -

GEORGE SAHELY & CO (BARBADOS) LTD (DEFENDANT)

RESPONDENT

RECORD OF PROCEEDINGS

OSMOND GAUNT & ROSE
FURNIVAL HOUSE
14/18 HIGH HOLBORN
LONDON WC1V 6BX

SOLICITORS FOR THE APPELLANT

INGLEDEW BROWN
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SOLICITORS FOR THE
RESPONDENT

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 & CO (BARBADOS) LTD (DEFENDANT)

RESPONDENT

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EXHIBITS

<u>Exhibit Mark</u>	<u>Description of Document</u>	<u>Date</u>	<u>Page</u>
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P2	Receipt from R.G. Mandeville & Co.	10th February 1975	52
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P4	Copy letter Mr H Forde to R.G. Mandeville & Co.	7th November 1975	54
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Documents transmitted to Privy Council but
not reproduced.

19 Dec. 1975 Entry of Appearance for Geo. Sahely & Co.
(Barbados) Limited

Affidavit of Mr H Forde sworn 19th February 1976

Summons dated 13th January 1979

Affidavit of E.O. Kentish sworn 26th January 1979

Order dated 9th February 1979.

Documents not transmitted to Privy Council

First page of Copy Letter Mr. H. Forde to R.G. Mandeville
& Co. 28th May 1975 (Exhibit P3).

ON APPEAL
FROM THE COURT OF APPEAL OF BARBADOS

B E T W E E N :-

FAUZI ELIAS (PLAINTIFF)

Appellant

- AND -

GEORGE SAHELY & CO (BARBADOS) LTD
(DEFENDANT)

Respondent

RECORD OF PROCEEDINGS

10

NO. 1

In the Supreme Court

WRIT OF SUMMONS

BARBADOS.

No.879 of 1975

No.1
Writ of Summons
8th December 1975

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

B E T W E E N :-

FAUZI ELIAS

Plaintiff

20

- and -

GEORGE SAHELY & COMPANY
(BARBADOS) LIMITED

Defendant

ELIZABETH THE SECOND by the Grace of God, Queen of Barbados and of Her other Realms and Territories, Head of the Commonwealth.

To: George Sahely & Company (Barbados) Limited, C/o Gloria Redman, its Secretary at its registered office at Swan Street, Bridgetown.

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WE command you that within ten days after the service of this Writ on you inclusive of the day of such service you do cause an appearance to be entered for you in an

In the Supreme
Court

action at the suit of FAUZI ELIAS and TAKE NOTICE that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

No.1
Writ of Summons
8th December 1975
(Contd.)

WITNESS The Honourable Sir William Randolph Douglas, Chief Justice of Barbados, the 8th day of December in the year of our Lord One thousand nine hundred and seventy five.

The Defendant may appear hereto by entering an appearance either personally or by Attorney-at-Law at the Registry at Bridgetown.

10

The Plaintiff claims against the Defendant:-

1. Specific performance of an agreement contained in or evidenced by a letter and a memorandum and/or note in writing dated the 10th day of February, 1975 for the sale and purchase of the freehold property known as Everybody's Store, No.19 Swan Street in the City of Bridgetown and Island of Barbados.

2. All necessary and consequential accounts, directions and inquiries.

3. Damages for breach of contract in addition to specific performance.

20

4. Further or other relief.

5. Costs.

This Writ was issued by Henry deB. Forde of Juris Chambers, Lucas Street in the City of Bridgetown, Attorney-at-Law for the Plaintiff who resides at 19 Highgate Gardens in the parish of Saint Michael and Island of Barbados.

H. DeB Frode

The Plaintiff hereby AUTHORISES the abovenamed Henry deB. Forde in association with Mr. Vernon O. Smith to act as the Plaintiff's Attorney-at-Law in this action.

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Fauzi Elias

This Writ was served by me at Palmetto Street, St. Michael on the Defendant or by leaving the same with c/o Gloria Redman on the 17th day of December One thousand nine hundred and seventy five at 12.33 p.m.

Dated this 31st day of December 1975.

MARSHAL.

STATEMENT OF CLAIM

BARBADOS.

No.879 of 1975

No.2
Statement of Claim
22nd December 1975

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

10

B E T W E E N :-

FAUZI ELIAS

Plaintiff

- and -

GEORGE SAHELY & COMPANY
(BARBADOS) LIMITED

Defendant

STATEMENT OF CLAIM

20

1. The Plaintiff resides at 19 Highgate Gardens in the parish of Saint Michael and Island of Barbados.

2. The Defendant is a limited liability company incorporated and registered under the provisions of the Companies Act Cap. 308 and having its registered office situate at Swan Street in the City of Bridgetown and Island aforesaid.

3. By 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, 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.

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4. On the said 10th day of February, 1975 in pursuance of the said agreement, the Plaintiff paid a deposit of \$39,000.00 to the Defendant through its agent, R.G. Mandeville & Co. in part payment of the said purchase price.

5. It was an implied term of the said agreement that the sale and purchase would have been completed in a reasonable time which in the circumstances would have been three months from the date of the payment of the said deposit.

40

6. The Defendant failed and neglected to complete the said agreement on the said three months and/or within any other reasonable time thereafter.

7. On the 28th day of May 1975 the Plaintiff by its Attorney-at-Law, Henry deB. Forde, served a notice in writing on the Defendant through its said agent requiring the Defendant to complete the said agreement on or before the 20th day of July 1975 which in the circumstances was a reasonable time.

8. By the said notice the Plaintiff made time of the essence of the said agreement.

9. Notwithstanding repeated requests by the Plaintiff the Defendant has wrongfully neglected and/or failed and/or refused to take any steps towards the completion of the said agreement for sale on or before the said 20th day of July 1975 or at all. 10

10. The Plaintiff has at all material times been and is still ready and willing to fulfill all his obligations under and to complete the said agreement.

And the Plaintiff claims:

(1) Specific performance of the agreement.

(2) All necessary and consequential accounts, directions and inquiries. 20

(3) Damages for breach of contract in addition to specific performance.

(4) Further or other relief.

(5) Costs.

H. deB Forde
Of Counsel for the Plaintiff.

Delivered this 22nd day of December 1975 by Henry deB. Forde and Vernon O. Smith of Juris Chambers, Lucas Street, Bridgetown, Attorneys-at-Law for the Plaintiff.

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DEFENCE

BARBADOS

No.879 of 1975

No.3
Defence 7th
January 1976

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

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B E T W E E N :-

FAUZI ELIAS

Plaintiff

- and -

GEORGE SAHELY & COMPANY
(BARBADOS) LIMITED

Defendant

D E F E N C E

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1. The Defendant admits paragraphs 1 and 2 of the Plaintiff's Statement of Claim.

2. The Defendant denies that any agreement as alleged in paragraph 3 or at all was ever made between the Plaintiff and the Defendant.

3. The Defendant denies that the documents referred to in paragraphs 3 and 4 of the Plaintiff's Statement of Claim constitute in law a Contract.

4. The Defendant will rely upon the provisions of Section 2 of the Statute of Frauds Cap.211, and if contrary to the Defendant's contention the documents mentioned in paragraphs 3 and 4 of the Statement of Claim contains or constitutes a memorandum of any of the terms of any contract or agreement between the Plaintiff and the Defendant, the Defendant will say that it does not contain the whole of such terms, and is in consequence not a sufficient memorandum.

5. The alleged loss and damage is not admitted.

6. Save as expressly admitted, the Defendant denies each and every allegation of fact contained in the Plaintiff's Statement of Claim, as if the same were specifically set out herein and so denied.

H. deB Forde

Attorney at Law for the Defendant

Delivered this day of January, 1976 by H.B. St. John, Q.C. and R.G. Mandeville & Co. Attorneys at Law, of and whose address for service is Chambers, James Street, Bridgetown, Attorneys at Law for the Defendant.

In the Supreme
Court

NO.4
Reply 8th
January 1976

NO. 4

REPLY

BARBADOS.

No.879 of 1975

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

B E T W E E N :-

FAUZI ELIAS

Plaintiff

10

- and -

GEORGE SAHELY & COMPANY
(BARBADOS) LIMITED

Defendant

R E P L Y

1. Save in so far as the Defence consists of admissions,
the Plaintiff joins issue with the Defendant on its Defence.

H. deB Forde
Of Counsel for the Plaintiff.

Delivered this 8th day of January, 1976 by Henry deB. Forde,
S.C., in association with Mr. Vernon O. Smith, of and
whose address for service is Juris Chambers, Lucas Street,
Bridgetown, Barbados, Attorneys-at-Law for the Plaintiff.

20

In the Supreme
Court

No.5
Order for
Further and
Better Particulars
of Defence 23rd
March 1976

NO. 5

ORDER FOR FURTHER AND BETTER PARTICULARS OF
DEFENCE 23RD MARCH 1976

BARBADOS.

No.879 of 1975.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

B E T W E E N :-

FAUZI ELIAS

Plaintiff

30

- and -

GEORGE SAHELY & COMPANY
(BARBADOS) LIMITED

Defendant

Before the Honourable Mr. Dudley F. Johnson, Acting Puisne Judge, in Chambers.
On the 23rd day of March, 1976.
Entered the 2nd day of April 1976.

In the Supreme Court

No.5
Order for Further and Better Particulars of Defence 23rd March 1976 (Contd.)

Upon the application of the Plaintiff by Summons dated the 18th day of February, 1976 coming on for hearing AND Upon Hearing Mr. H. DeB. Forde Attorney-at-Law for the Plaintiff and the Defendant not appearing IT IS ORDERED.

10

1. That the Defendant do within 14 days of the date of making of the Order herein serve on the Plaintiff in writing further and better particulars of the Defence, namely:-

| 1. Under paragraph 4

20

(a) Of the terms which it is alleged the agreement does not contain, specifying each such terms and whether the same is express or implied. ,

(b) If the said terms are express, giving the exact words or as near thereto used and the person using the same on behalf of the Defendant; if in writing, specifying the documents, if any, in which the same is contained. ,

(c) If the said terms are implied, giving the facts and or circumstances relied on as constituting such an implication. \

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2. That the Defendant do within 14 days of the date of the Order herein make and file an affidavit stating what documents or classes of documents, and in particular whether the Minute Books, Resolutions, Memorandum and Articles of Association of the Defendant, have been or have at any time been in the possession, custody or power of the Defendant or its Directors, or .. officers or servants or agents and, if the same having at any time been, be not now in its or their possession, custody or power, stating when it or they parted therewith or what has become thereof.

3. That the costs of this application be costs in the cause.

REGISTRAR.

In the Supreme
Court

NO. 6

FURTHER AND BETTER PARTICULARS OF DEFENCE 25TH
MAY 1976

No.6
Further and
Better Particulars
of Defence 25th
May 1976

H. deB. Forde, Esq., S.C.,
Juris Chambers,
Lucas Street,
Bridgetown.

25th May, 1976

10

Dear Sir,

Re: Supreme Court No.879 of 1975 -
Fauzi Elias vs. George Sahely &
Company (Barbados) Limited

The following are the answers to the Particulars
ordered by Order dated 23rd March, 1976 by Mr. Dudley F.
Johnson, Acting Puisne Judge.

1. Under Paragraph 4

(a) Express

(b) The terms of the Contract were used by the
Plaintiff's Attorney at Law Mr. H. deB. Forde
in the last two (2) lines of paragraph 1 of his
letter of the 10th February, 1975.

20

The receipt of the 10th February, 1975
constituting a memorandum alleged by the
Plaintiff to be a memorandum does not contain
the terms referred to by the said words.

Yours faithfully,

H.B. St. John, Q.C.

cc: The Registrar.

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In the Supreme
Court

NO. 7

AMENDED DEFENCE 9TH FEBRUARY 1979

No.7
Amended Defence
9th February 1979

BARBADOS

No.879 of 1975

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

B E T W E E N :-

FAUZI ELIAS

Plaintiff

In the Supreme
Court

- and -

GEORGE SAHELY & COMPANY
(BARBADOS) LIMITED

Defendant

No.7
Amended Defence
9th February 1979
(Contd.)

AMENDED DEFENCE

- 10 1. The Defendant admits paragraphs 1 and 2 of the Plaintiff's Statement of Claim.
2. The Defendant denies that any agreement as alleged in paragraph 3 or at all was ever made between the Plaintiff and the Defendant.
3. The Defendant denies that the documents referred to in paragraphs 3 and 4 of the Plaintiff's Statement of Claim constitute in law a Contract.
- 20 4. The Defendant will rely upon the provisions of Section 2 of the Statute of Frauds Cap.211 and if contrary to the Defendant's contentions the documents mentioned in paragraphs 3 and 4 of the Statement of Claim contain or constitutes a memorandum of any of the terms of any contract or agreement between the Plaintiff and the Defendant, the Defendant will say that it does not contain the whole of such terms, and is in consequence not a sufficient memorandum.
- 30 5. Further or in the alternative if, which the Defendant denies, the documents referred to in paragraphs 3 and 4 of the Statement of Claim constitute evidence of an agreement to sell the said property to the Plaintiff 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.
6. The alleged loss and damage is not admitted.
7. Save as expressly admitted, the Defendant denies each and every allegation of fact contained in the Plaintiff's Statement of Claim, as if the same were specifically set out herein and so denied.

R.G. Mandeville & Co.

[illegible]

Attorneys-at-Law for the Defendant

40 Delivered this 9th day of February 1979
by R.G. Mandeville & Co. Attorneys-at-Law of and whose
address for service is James Street, Bridgetown Attorneys-
at-Law for the Defendant.

No.8
Amended Reply
3rd May 1979

BARBADOS

No.879 of 1975

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

B E T W E E N :-

FAUZI ELIAS

Plaintiff

10

- and -

GEORGE SAHELY & COMPANY

(BARBADOS) LIMITED Defendant

AMENDED REPLY

1. The Plaintiff joins issue with the Defendant or its amended Defence save in so far as the same consists of admissions.

2. With regard to paragraph 5 of the Amended Defence the Plaintiff denies that the agreement to sell the property was expressed to be subject to an or any agreement or contract for sale being completed and signed by the parties and further it is denied that no such agreement or contract was ever entered into.

20

Vernon [illegible] Smith &
[illegible]

Attorney-at-Law for the Plaintiff

Dated the 3rd day of May, 1979

No.9
Opening of Case

No.879 of 1975

9th July, 1979

30

Fauzi Elias

Plaintiff

- and -

GEORGE SAHELY & CO.

(B'dos) LTD Defendant

Mr. David Simmons and Smith and Smith for the Plaintiff.

Mr. J.S.B. Dear, Q.C., and Miss Kentish for the Defendant. Judges Notes of
Plaintiffs
Evidence

Mr. Simmons opens:

Specific performance of oral contract evidenced by memo dated 10.2.75 in respect of sale of No.19 Swan Street - Everybody's store.

No.9
Opening Case
(Contd.)

Clause 4 of prayer - interest on £39,000 paid in 1975. Bundle of documents agreed. By consent marked Exhibits 1-5 inclusive. Facts.

10 Facts.

Plaintiff rented from 1960 under lease. Lease expired. Took another lease 1972-76. Now paying £1500 per month. In 1963-64 he had conversation with representative of defendant Co. Offered property for £150,000. He subsequently spoke to Mrs. Sahely. She said £200,000.

1969 - offered for £300,000 - offer raised to £325,000

1975 - Secretary of defendant Co. Gloria Redman

20 offer for £390,000 - 10.2.75. Plaintiff agreed - cheque for £39,000 sent to R.G. Mandeville.

Shoulder note
for Nos.9-12

Receipt for deposit - No contract for sale or conveyance provided by defendant.

28.5.75 - Mr. Forde wrote R.G. Mandeville & Co. - never received reply. 7.11.75 - wrote another letter to R.G. Mandeville & Co. Plaintiff paid interest £15,866.95 on loan of £39,000.00.

Defence: Sufficiency of memorandum - "subject to contract".

30 9 Halsbury 4 edition - sales of land
Ferrand - Contract and Conveyance. Apthorp
v. Niblock - "usual conditions and
Warranties"; "usual terms"

Law v. Jones [1973] 2 All E.R.437 Tiverton
Estates v. Wearwell Ltd. [1974] 1 All E.R.209

PLAINTIFFS EXAMINATION

No.10
Plaintiffs
Examination

Fauzi Elias S.S.:

I live at 19 Highgate Gardens, St. Michael. Business man. I run a business known as Everybody's store at 19 Swan Street. The store is a wall building. I also have another establishment in High Street. Citizen of Barbados since 1965. At present I am renting. I have been renting since July 1960 from Defendant Co.

10

When I first started to rent I was paying \$500, \$700. I had a lease beginning 1972 until 1976. Since lease expired I continued paying rent which is now \$1,500.

In 1963 or 1964 I wanted to buy the property. I spoke to Miss Gwen Sahely. She was connected to company. She wanted \$150,000 for the building. I agreed to buy for \$150,000. I got assistance from my uncle in Trinidad, Negeeb Elias, C.I.B.C. was going to assist me with financing.

20

She refused to sell. She wanted \$200,000 for it. I did not pay that. December 1969 or early 1970, I heard from Miss Sahely. She phoned from St. Kitts. She wanted \$300,000 for it. I was interested. I was willing to pay \$300,00.(sic) I went to St. Kitts. I saw Gwen Sahely and Gloria Redman who was formerly Sahely. I spent the night at their home. When I got there they said they wanted more money - \$335,000 I didn't agree to pay \$335,000. I came back to Barbados.

10.2.75 - Mrs. Gloria Redman rang me on the telephone she was in St. Kitts. She discussed the matter with her sister and they decided to sell for \$390,000. I tell her Yes I would buy it for \$390,000. That was 9 a.m. on the 10.2.75.

30

I tell her, 'Mrs. Redman, I will buy it. Please speak to your lawyers to call me'. About 10-15 minutes Mr. Clyde Turney rang me at the store. He asked me if I would buy the building No. 19 Swan Street. I tell him yes. He said for \$390,000. I told him yes. He said to get a cheque for \$39,000 and send it to him. He told me Mrs. Redman told him she had sold the building for \$390,000.

40

I had to go to the bank the same day. I arranged to borrow \$39,000. They gave me \$250,000 to be repaid in 7 years. Additional financing was to come from my family. It was a manager's cheque. Before I took it to Mr. Turney I took it to my lawyer, Mr. Henry Forde. I told him what happened and gave him the cheque. Mr. Forde spoke on the phone. He wrote a letter and put cheque into it and sent it to Mr. Clyde Turney.

I saw copy of letter of 10th February, 1975 [Exhibit 1]
I saw the receipt [Exhibit 2]. These are they. I
received nothing from R.G. Mandeville and Co. I
expected contract in a month. I saw copy of letter
date 23.5.75 [Exhibit 3].

Judges Notes of
Plaintiffs
Evidence

No.10
Plaintiffs
Examination
(Contd.)

10 On this date I was in a position to pay the money for
the building. I was paying interest on loan of \$39,000. I
received no contract. I was nervous - I wanted to close
everything. Money from bank - I had to provide security by
way of mortgage.

About a week after, Gwen Sahely rang me from St. Kitts
and said, "Fauzi, how you could put us in court; we are
friend and we have nothing between us". I said I wanted to
close the deal.

Gwen Sahely said she was coming to Barbados in two
weeks time to close up the deal. I never saw her over here
That was all that transpired. 7.11.75 I see a letter
written by Mr. Forde to Mr. Turney (Exhibit 4).

20 After that letter I did not receive agreement for sale.
I instructed Mr. Forde to issue a writ. Filed 8.12.75 I
was still willing to purchase building. I had the money.
Up to 23.11.78 I was still paying interest to C.I.B.C. as
in Exhibit 5.

30 I never received from R.G. Mandeville & Co., the
\$39,000 I had paid them in 1975. I nursed this business for
19 years. I improved business. At back was a yard. I built
an extension to the back as part of the stores. I paid for
it. When I paid my money on 10.2.75 I expected to have
documents in month's time. I claim specific performance,
Interest on \$39,000.

XXD Mr. Dear

I want to buy the building. I was buying a building
at 19 Swan Street. That is what I buy. I was buying every-
thing included. I buying building. I had already bought
fixtures and fittings when they closed Broad Street. Cross-
examination

In 1975 when I offered to buy for \$390,000 I had
already bought fixtures and fittings. When I took building
they left some counters for me, desk, mirror, etc.

40 We did not talk about fixtures and fittings. She told
me about the building.

[Exhibit 1 shown to witness]

I agreed to buy a building. A list was to be prepared
setting out the fixtures and fittings I was buying.
Agreement for sale - I don't know if it was to have a

Judges Notes of
Plaintiffs
Evidence

No.10
Plaintiffs
Examination
(Contd.)

schedule of fixtures and fittings. I expected sale in a month's time. Agreement for sale was - I buy the building and everything in the building. I don't know about fixtures and fittings. In letter of 10.2.75 - "usual terms will apply" I don't know what that means.

My company is a limited company. Elias Limited was buying it. That is company I incorporated. Shareholders were me and my wife. I did not tell Mr. Turney that Elias Ltd was buying. Wife is a Barbados citizen too.

10

Agreement made who was to pay Property Transfer Tax.

Gwen Sahely called me from St. Kitts after I put her in Court. I told her I would pay the Property Transfer Tax. That was before Christmas, 1975. I don't know the time. She said she would come in two weeks and close up the deal. I would pay the property Transfer Tax for her.

My lawyer, Mr. Forde, was to prepare the document and it was to come to my lawyer. I agreed to pay the bank at 8% per annum. They took it off every month. Miss Sahely in 1962 never said \$200,000. I have not worked out interest to end of June.

20

Rexd

Re-examination

I have two separate companies. Elias Ltd and Everybody's Store Ltd. When I paid \$39,000. On 10.2.75 I knew what was going into document. I didn't know about details. Rate fluctuates.

Mr. Dear

Will have to prove interest and rate. Mr. Dear not in position to lead evidence now.

10th July, 1979.

30

Appearances as before.

No.11
Evidence of Mr.
Henry Forde
Examination

NO. 11

EVIDENCE OF MR. HENRY FORDE

Henry Forde S.S.:

I have been a Barrister since 1959. In 1975 I was in private practice in Juris Chambers, Coleridge Street. Mr. Fauzi Elias has been a client of mine for several years. He ran a business in Swan Street. Prior to 1969 he had a lease agreement with Defendants. I perused lease. It was drawn up by Mr. Turney and I perused the signature of Mr. Elias.

40

10th February 1975 I saw Mr. Elias in my Chambers. I had a conversation with him. As a result I spoke to Mr. Turney at R.G. Mandeville & Co. I said to Mr. Turney on the telephone that I had my client Fauzi Elias with me and that he told me Mr. Turney was acting for George Sahely & Co. Ltd. and that he had bought the premises at 19 Swan Street from George Sahely & Co. Mr. Turney confirmed that he was acting for George Sahely & Co. Ltd. and that he had already spoken to Mr. Elias himself. I told him I had a Manager's cheque for \$39,000 from C.I.B.C. and that the understanding was that the price was \$390,000. I told him I would be sending over the cheque with a covering note.

Judges Notes of
Plaintiffs
Evidence //

No.11
Evidence of Mr.
Henry Forde
Examination
(Contd.)

I sent over the cheque and a letter. I told him I would want a receipt. I got a receipt. This is the letter (Exhibit 1) This is the receipt (Exhibit 2).

When Mr. Turney and I spoke I said that it was my understanding that the usual terms would apply. He confirmed that was so and we discussed specifically that his client would bear $\frac{1}{2}$ stamp duty, Transfer Tax would be paid by his client, marketable title would be given. He said that was his understanding.

Mr. Turney raised with me, he recalled to my memory, the fixtures in the premises that did not belong to Mr. Elias. He said it was his understanding that they were selling the premises 'as is'. He went on to discuss how soon the matter could be completed. He said it would take some time. I told him that my client was borrowing the money from C.I.B.C. and I needed some evidence to send to them. They were pressing for the title deeds. I told him I would send a copy of my letter and a copy of the receipt to the C.I.B.C.

I said that until all the conveyancing work was done it would be useful to send one of his standard form agreements which I would have signed and send to the C.I.B.C. in addition to the other two documents I was sending. I never received one of Mr. Turney's standard form agreements. I wrote letter (exhibit 3). I wrote it because I understood the parties were hesitating - that is Geo Sahaley & Co. I wrote that as notice for completion. After that letter I received no agreement from Mr. Turney. 18th July, 1978 - letter to George Sahely & Co. Photostat sent to me. This was received by me. That is my office stamp. I said I understood that his client and my client had a further conversation and in order to get the matter settled as the parties were friends, my client had indicated that he would bear the transfer tax. I pointed out that this is without prejudice to existing or future rights of action. In that case, Turney's client would bear the stamp duty. I recall telling Mr. Turney, write your client and let me know what was happening.

(Letter admitted as Exhibit 6)

Judges Notes of Plaintiffs Evidence That was first bit of correspondence from R.G. Mandeville & Co. Since 10.2.75. I wrote Exhibit 4 on 7.11.75. I still had no standard form contract from Mr. Turney. 8.12.75 I issued a writ on behalf of my client.

No.11
Evidence of Mr. Henry Forde Examination (Contd.) XXD Mr. Dear:

I was called to the Bar in 1959. I practised as a Barrister. There was separation, Fusion came on 1.4.73. Usual on sale of real estate, not the rule in every case, to have a formal contract for sale. In my practise I have seen many cases in which there is no formal. I asked for formal contract because the bank was pressing for title deeds. I expected to receive from Mr. Turney the standard form of contract. I understood that when the parties came to me there had been an agreement. 10

Money held by stakeholder has to be held until completion of contract. I did not have a large conveyancing practice. There are usual terms of sale of real property. I have advised on conveyancing matters from the time I started practice. Usual terms are that vendor pays share of Transfer Tax, pays $\frac{1}{2}$ stamp duty and gives marketable title and when necessary points out line marks. He pro-rates land tax up to date of completion. 20

[Para 2 of letter of 18.7.75]

Mr. Turney never told me he would have to receive instructions from his client. He never said that at any time Mr. Turney and I were never negotiating terms of agreement that Mr. Turney was to prepare. The fixtures were not listed. In the lease drawn up by Mr. Turney there was a list of the fixtures and fittings. I do not agree that fixtures had to set out in a schedule, once the parties knew what they are buying and selling. The lease showed them. 30

"Usual terms". I can only give you my memory of the conversation. I would not have included that in my letter if I had not discussed them with him.

No usual terms in Barbados.

I have always understood from distinguished Barbadian conveyancers like Mr. Rex Gill that there are usual terms. 40

I kept asking Mr. Turney about contract. I was being pressed by the bank. I was not making Mr. Turney an offer on the 10.2.75 on behalf of Elias. When I phoned Mr. Turney he told me he already had instructions from his client. No formal agreement for sale was forthcoming.

Mr. Turney said he would draw the agreement, he said he would prepare the conveyance and seek to get the matter settled as quickly as possible. My client offered to pay

the transfer tax to get the matter settled. Mr. Turney's client didn't want to go on with the arrangement. Mr. Elias wanted to get the matter finalised.

Judges Notes of
Plaintiffs
Evidence

Mr. Turney has never told me his client agreed to that. I understood that Mr. Elias spoke to one of the Directors of George Sahely & Co. He said he would pay the Transfer Tax. I was not present.

No.11
Evidence of Mr.
Henry Forde
Examination
(Contd.)

10 Mr. Turney told me his client was reneging on the agreement. I asked for completion.

Parties not negotiating up to November. Mr. Elias said he was willing to waive his rights on a particular point.

Rexd - None

NO. 12

EVIDENCE OF MR. PAUL BEST

No.12
Evidence of Mr.
Paul Best
Examination

Paul Best S.S.:

20 Senior Assistant Manager of C.I.B.C. Broad Street. I know Mr. Fauzi Elias. He is a customer of the bank.

In February, 1975 he had a loan of \$39,000 from the bank. Arrangement was that interest had to be paid on a monthly basis at a rate of 2% above bank's base lending rate. I have dealt with account. Up to yesterday total interest paid on loan is \$18,436.14.

XXD

No questions.

Case

30 Defence

NO.13

EVIDENCE OF MR. G.C. TURNEY

Defendants
Evidence

No. 13
Evidence of Mr.
G.C. Turney
Examination

Gittens Clyde Turney S.S.:

Attorney at law since 1957. Practice principally that of a solicitor. Now of firm of R.G. Mandeville & Co.

40 In 1975 Geo Sahely were clients of mine. Directors were Gloria Redman and Gwen Sahely. I know of Mr. Fauzi Elias. I know he was a lessee of property owned by company in Swan Street. Lease was drawn up by R.G.

Shoulder note for
No.13 only

Judges Notes of
Defendants
Evidence

No.13
Evidence of Mr.
G.C. TURNEY
Examination

Mandeville a former partner of my firm who is now dead.

In 1975 I was contacted by Mr. Henry Forde in January or February. He said a client of his was purchasing Everybody's Store from Sahely's. I told him I had no instructions on that point and that I would have to refer the matter to my clients. One is resident in St. Kitts. The other is resident in Barbados. I referred the matter.

Nothing else said as I remember. I don't recall the price being mentioned. Terms and conditions of sale not discussed at all. As far as I recall Mr. Forde did not mention usual terms and conditions. No question of any standard form of contract was mentioned. 10

(Exhibit 1) this was on occasion of another title conversation I had with Mr. Forde as a result of certain instructions received by me. That letter is dated 10.2.75.

It was a telephone conversation. I informed him that if his client wanted to make an offer to purchase he should do so in writing. He mentioned the figure his client was prepared to pay - \$390,000. I did not indicate if that sum was agreeable to my client. 20

No discussion on terms and conditions.

There was mention of fixtures and fittings. At end of second conversation no understanding as to where we had reached.

I received letter and a cheque. Receipt issued from my firm. I communicated with my clients.

If terms were acceptable my next step would have been to prepare a contract for sale and send it along with title deeds to Mr. Forde. "Usual terms". In Barbados there are usual terms. They vary considerably. The basic one is that the vendor would produce a marketable title free from encumbrances, apportionment of land tax, forfeiture clause in the event of non-completion. Usually a clause that stamp duty is borne half and half and that property transfer tax will be borne as the law imposes. 30

No agreement for sale was ever prepared by me. The offer was not acceptable to my client. Mr. Forde and I had further talks about deal. Mr. Forde's client offered to assume transfer tax and asked that Sahely pay the entirety of the stamp duty. My clients would not accept. 40

No agreement ever prepared by me. Early in year I never called Mr. Elias to the best of my recollection. Up to the time Mr. Forde called I received no instructions from my client.

No list of fixtures and fittings was ever made. I had no discussion with Mr. Forde as to what have to go in list of fixtures and fittings. I know of no standard form of agreement. There is no printed form. We frequently use cyclostyled forms, in building developments etc. On issuing of receipt I did not consider a contract in existence.

Judges Notes of
Defendants
Evidence

No.13
Evidence of Mr.
G.C. Turney
Examination (Contd)

XXD Mr. Simmons

10 I do not know if fixtures and fittings consisted of angle irons and wooden shelves. I probably gave instructions for receipt, Exhibit 2, to be sent to Mr. Forde. Cross-examination

I can't recall what I did. "Agreed to be sold" I may have given instructions to my secretary.

Conversation, letter and receipt, I don't recall were on one day. It was on one day. I had conversation day or so before. I only had one conversation on the 10th February.

20 As far as I can recollect Mr. Forde did not discuss usual terms. Mr. Forde may have said usual terms would apply. By usual terms I mean things I mentioned in evidence. And also question of insurance.

In relation to usual terms, I never got instructions because my clients did not accept the offer. I told my clients what was implied by usual terms. I told them that orally.

30 According to my understanding, there never was a concluded contract for purchase and sale of property.
Para 1 of letter of 18.7.75

18.7.75 was 2 days before date of completion mentioned in letter of 28 May, 1975. Mr. Forde was pressing me about completing the matter. Details of discussion are a bit hazy. I can be positive about most of it.

Between February and July I wrote two letters to my client.

40 I never communicated to Mr. Forde in writing. I did not regard it as necessary. I told Mr. Forde that any time his client wanted back his deposit he could have it. I never replied to letter about commencing proceedings. I did not deem it necessary and proper to reply to Mr. Forde.

I am familiar with phrase "Subject to contract". That is used - not necessarily in relation to acceptances.

Judges Notes of
Defendants
Evidence

No. 13
Evidence of
Mr. G.C. Turney
Examination
(Contd.)
Cross-examination

When Mr. Forde made offer, I did not consider my client bound by offer. Terms would have to be agreed. Inventory would have to be taken. All these things would have to be reduced to writing.

It is only an offer. At no time did I say it was subject to contract. I received an offer which was put to my client. They said they were not accepting.

I had a Manager's cheque for \$39,000. I don't know it was a Manager's cheque. Whatever it was it was credited to my client's account as a stakeholder. He has not received back his \$39,000.

10

Letter of 10.2.75 - Exhibit 1. This is a stake holder's clause. Import is that client is to have no access to funds until conveyance is completed or if it is called off, it is to be returned.

On morning of 10.2.75 I had no conversation with Mr. Elias to the best of my recollection. I never, to the best of my recollection told him that Mrs. Redman had told me that he had bought the building for \$390,000.

20

I never told him to make out a cheque for \$39,000 and bring it to me.

Mr Forde may have said he had his client Mr. Elias in his office. Mr Forde I do not recall that []
].

The purchase price was mentioned. I now say that the amount of the offer was mentioned. The proposed purchase price was mentioned. I told Mr. Forde to submit his client's offer in writing.

30

My view was that the letter of the 10th February was an offer in writing. On morning of 10th of February there was no concluded agreement for sale and purchase of 19 Swan Street for \$390,000. In my office I have varying types of contracts of sale. They can be used if terms acceptable to other Attorney. I have documents containing basic terms. They are not standard forms. During conversation with Mr. Forde, clear understanding that I would send a form of contract for sale provided my client accepted the offer. It would have been my responsibility to prepare agreement for submission.

40

I do not agree that my recollection is hazy.

Judges Notes of
Defendants
Evidence

Rexd - None

Case for the Defendants.

No. 13
Evidence of Mr.
G.C. Turney
(Continued)

Cross-
examination

10

No. 14

SUBMISSIONS ON BEHALF OF DEFENDANT

No. 14
Submissions on
behalf of
Defendant 10th
July 1979

Mr. Dear, Q.C. addressed

1. Interest on deposit

Position of Stakeholder

Burt v. Cousins & Co. Ltd. [1971] 2 All E.R. 611 at page
615

not pleaded as special damages.

20

Words and Phrases Judicially Defined

2. Apthrop v. Ninlock

Winn v. Bull [1877] 7 Ch. D. 29

Von Hatzfeldt v. Alexander [1912] 1 Ch. 284 at
288

Eccles v. Bryant [1948] Ch - 93

Cheshire on Real Property - 6th ed. - 603

9 Halsbury 4th edition - para. 265

Winn v. Bull - Pages 29 - 32.

Judges Notes of
Defendants
Evidence

No.14
Submissions on
behalf of
Defendant 10th
July 1979 (Contd)

3. All the terms have to be settled.

Halsbury - Para. 268
fixtures etc not a subsidiary part.
Letter of 10.2.75

"or his nominee"

Mr. Forde calling for written agreement for sale. Letter
of 28.5.75 - asking for completion of sale.

10

Cheshire and Fifoot - 9th ed. Pages 34, 35.
Sorrell v. Finch [1976] - 2 All E.R. 371.

No.15
Submissions on
behalf of
Plaintiff 10th
July 1979

NO. 15

SUBMISSIONS ON BEHALF OF PLAINTIFF

Mr. Simmons addressed

8 issues.

Law v. Jones [1973] 2 All E.R.

(1) Was there a concluded oral agreement for sale of
premises.

20

- Para 2 of amended Defence
- Plaintiff a tenant for 15 years
- Knew premises - had extended and improved

Receipt - 'agreed to be sold'

(2) Whether oral agreement induced by note or memorandum

- receipt.
- letter.

Hoyle v. Hoyle [1893] 1 Ch. 84

(3) Davies v. Sweet [1962] 2 Q.B. 300

30

- not expressed as 'subject to contract' at page
308 - essential provisions.

(4) Whether an essential provision of a note or memorandum.

- three basic - parties, property, price.
Smith v Mansi [1962] 3 All E.R. 857
Timmins v. Moulded [1958] ch. 110
submits - sufficient note or memorandum.

(5) Whether other terms to be implied in the memorandum. Judges Notes of Defendants Evidence

- fixtures and fittings.

- Mr. Turney - discussion about fixtures and fittings Farrand on Contract and Conveyancing.

- re date of completion - reasonable time.

No.15
Submissions on behalf of Plaintiff 10th July 1979 (Contd.)

(6) Whether receipt is good enough.

10 letter of 18.7.75.

(7) Letter of 18.7.75

Defendants estopped from relying on ambiguity as to conditions of sale in Barbados.

(8) Whether oral agreement subject to contract

- hallowed in legal usage

- if Turney intended transaction to be subject to contract, he would have said so.

Law v. Jones - Buckley L.J.

20 - Completed contract on 10.2.75 document had to be executed embodying its terms.

Question - Did parties agree that there should be no binding contract until contract drawn up, or did they intend that document should recite that they had already agreed.

Mr. Dear conceding that he is not relying on words "completion of contract for Sale".

Rossiter v. Miller (1878)

Must be read in context of Stake holder's clause "the contract for sale"

30 (i) Stakeholder's clause common in conveyancing,

(ii) Must be read with rest of sentence.

(iii) Nothing to show acceptance had not been concluded.

Branca v. Cobarro [1947] K.B. 854/12 E + E Digest.

Particulars of terms and conditions

Mr. Dear Q.C.

Branca v. Cobarro - exceptional

Judges Notes of
Defendants
Evidence

CAV. Adjourned to 23rd July, 1979 for Judgment

23rd July, 1979.

No.15

Submissions on be-Appearances as before except Mr. Dear who is absent.
half of Plaintiff

10th July 1979 Written Judgment delivered.
(Contd.)

Miss Kentish:

Stay of Execution for 6 weeks.

10

No.16
Judgment 23rd
July 1979

NO. 16

JUDGMENT

No.879 of 1975

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

BETWEEN

FAUZI ELIAS

Plaintiff

and

GEORGE SAHELY & CO. (BARBADOS) LTD
Defendant

20

Before the Right Honourable Sir William Douglas, Chief
Justice. 1979, July 23rd.

Mr. David Simmons and Mrs. B. Waldron for Plaintiff.

Mr. J.S.B. Dear Q.C. and Miss Kentish for Defendant.

J U D G M E N T

The Plaintiff carries on a business in Swan Street,
Bridgetown, known as Everybody's Store. The defedant
company owns the building where his business is housed.
The Plaintiff has been renting this building since July,
1960.

30

In either 1963 or 1964 the Plaintiff decided he would
like to buy the building. He spoke to Miss Gwen Sahely,
who is connected with the company. She asked \$150,000.00.
He agreed but the sale did not go through. Then \$200,000
was asked and he refused to buy at that price.

Again in 1969 or early 1970 Miss Sahely telephoned from St. Kitts, she said wanted \$300,000 for the property. The Plaintiff went to St. Kitts where he saw Miss Gwen Sahely and Mrs. Gloria Redman, who was formerly Gloria Sahely. He spent the night at their home. He says that when he got there they wanted \$335,000. He refused to buy at that figure and returned to Barbados.

No. 16
Judgment 23rd
July 1979
(Contd)

10 On the 10th of February, 1975 Mrs. Gloria Redman telephoned the Plaintiff from St. Kitts and told him that she had discussed the matter with her sister and that they decided to sell for \$390,000. The Plaintiff said he would buy at that figure and asked her to tell her lawyers to call him.

20 The Plaintiff's evidence is that Mr. Clyde Turney, the Defendant company's lawyer, telephoned him that same day and asked him if he was buying the building at 19 Swan Street. The Plaintiff informed her that he was. Mr. Turney asked if it was for \$390,000 and the Plaintiff said Yes it was. Mr. Turney then, according to the Plaintiff, asked him to send a cheque for \$39,000.

The Plaintiff, that same day, went to the bank, raised a loan of \$39,000 and arranged to borrow \$250,000 to be repaid in seven years. The Plaintiff then took the manager's cheque for \$39,000 which he had obtained from the bank to his lawyer, Mr. Henry Forde. Mr. Forde spoke to Mr. Turney on the telephone and then wrote him the following letter -

"Dear Sirs,

30 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

40 Further to our conversations 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 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 terms will apply.

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.

No. 16
Judgment 23rd
July 1979
(Contd)

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

Mr. Turney never acknowledged in writing the receipt of the letter but he did send his firm's receipt for the money.

The receipt reads -

"\$39,000.00 BARBADOS 10-2-1975

Received from Fauzi Elias the sum of Thirty nine thousand dollars andcents being deposit on Property at Swan Street B'town agreed to be sold by George Sahely & Co. B'dos Ltd to Fauzi Elias and/or his nominees.

10

R.G. Mandeville & Co.
Per E. Clarke"

Mr. Forde describes the background to the letter as follows -

"10 Feb. 1975 I saw Mr. Elias in my chambers. I had a conversation with him. As a result I spoke to Mr. Turney at R.G. Mandeville & Co.

20

I said to Mr. Turney on the telephone that I had my client Fauzi Elias with me and that he told me that Mr. Turney was acting for George Sahely and Co. Ltd. and that he had bought the premises at 19 Swan Street from George Sahely and Co.

Mr. Turney confirmed that he was acting for George Sahely & Co. Ltd. He said he had already spoken to Mr. Elias himself. I told him I had a Manager's cheque for \$39,000 from the Canadian Imperial Bank of Commerce and that the understanding was the price was \$390,000. I told him I would be sending over the cheque with a covering note.

30

I sent over the cheque and a letter. I told him I would want a receipt.....

When Mr. Turney and I spoke, I said that it is my understanding that the usual terms would apply. He confirmed that was so and we discussed specifically that his client would bear $\frac{1}{2}$ stamp duty, transfer Tax would be paid by his client, marketable title would be given.

40

He said that that was his understanding.

Mr. Turney raised with me, he recalled to my memory, the fixtures in the premises that did not belong to Mr. Elias. He said it was his understanding

that they were selling the premises 'as is'.

No. 16
Judgment 23rd
July 1979
(Contd)

10 We went on to discuss how soon the matter could be completed. He said it would take some time. I told him that my client was borrowing money from the Canadian Imperial Bank of Commerce and I needed some evidence to sent to them. They were pressing for the title deeds. I told him I would send a copy of my letter and a copy of the receipt to the Canadian Imperial Bank of Commerce.

I said that until all the conveyancing work was done it would be useful to send one of his standard form agreements which I would have signed and sent to the Canadian Imperial Bank of Commerce in addition to the other two documents I was sending."

Mr. Turney's recollection of the events leading up to the letter of the 10th of February 1975, and the receipt issued by his firm is entirely difficult. In his evidence Mr. Turney says -

20 "In 1975 I was contacted by Mr. Henry Forde - January or February. He said a client of his was purchasing Everybody's Store from Sahely's.

I told him I had no instructions on that point and that I would have to refer the matter to my clients. One is resident in St. Kitts. The other is resident in Barbados. I referred the matter.

Nothing else said as I remember. I don't recall the price being mentioned.

30 Terms and conditions of sale not discussed at all. As far as I recall, Mr. Forde did not mention usual terms and conditions. No question of any standard form of contract was mentioned.

Exhibit 17 This was on occasion of another conversation I had with Mr. Forde as a result of certain instructions received by me that letter is dated 10.2.75.

It was a telephone conversation.

40 I informed him that if his client wanted to make an offer to purchase he should do so in writing. He mentioned the figure his client was prepared to pay - \$390,000. I did not indicate if that sum was agreeable to my client.

No discussion on terms and conditions.

There was no mention of fixtures and fittings.

At end of second conversation no understanding as to where we had reached.

I received letter and a cheque. Receipt issued from any firm.

I communicated with my clients.

If terms were acceptable my next step would have been to prepare a contract for sale and send it along with title deeds to Mr. Forde.

10

.....No agreement for sale was every prepared by me. The offer was not acceptable to my client."

From the evidence it would appear that although, according to Mr. Turney, the offer was not acceptable to his client, he did not so inform Mr. Forde in writing and he did not return the Plaintiff's deposit.

On the 28th of May 1975, Mr. Forde wrote to Mr. Turney in these terms -

Dear Sirs,

20

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

I write with reference to the contract evidenced by a memorandum in writing as contained in a receipt dated the 10th day of February 1975 for the purchase by my client, Fauzi Elias and/or his nominees, of No. 19 Swan Street, Bridgetown, from your client, George Shaley & Co. (Barbados) Limited of Bridgetown, Barbados of freehold property comprising the store No.19 Swan Street, Bridgetown.

30

As Attorney-at-Law and agent for the purchaser, I hereby give you as Attorneys-at-Law and agents for the vendor, notice that the purchaser is ready and willing and hereby offers to complete the sale and purchase, to pay the balance of purchase money and to do or procure to be done all such acts deeds and things as may be reasonably required to complete the sale and purchase of the said property upon the vendor executing all necessary assurances and doing and procuring to be done all such acts deeds and things as may be reasonably required to be done and as provided by the said contract.

40

As Attorney-at-Law and agent as aforesaid, I hereby give you, as Attorneys-at-Law and agents as aforesaid, further notice that if this matter is not

completed by the vendor on or before the 20th day of July, 1975 (as to which time is hereby made of the essence) the purchaser will seek specific performance of the contract and will proceed to enforce his rights against the vendor as the purchaser may be advised."

No. 16
Judgment 23rd
July 1979
(Contd)

10 This letter produced no reply from Mr. Turney nor any other result, although there appears to have been some further discussion between the parties. Mr. Forde's evidence is -

"I said I understood that his client and my client had had a further conversation and in order to get the matter settled as the parties were friends, my client had indicated that he would bear the transfer tax. I pointed out that this is without prejudice to existing or future rights of action. In that case, Turney's client would bear the stamp duty.

I recall telling Mr. Turney, "Write your client and let me know what was happening." "

20 Mr. Turney wrote his client on the 18th of July, 1975 and sent a carbon copy to Mr. Forde for his information. The letter reads as follows:-

"Dear Sirs:

We have been contacted by Mr. Henry Forde the Attorney-at-Law acting for Mr. Elias in connection with the sale of the property at Swan Street, Bridgetown from yourselves to Mr. Elias.

30 Without prejudice to any existing or future rights of action which his client might have against yourselves he has informed us that his client is willing to assume and pay the Vendor's transfer tax on the purchase price of \$390,000.00 Bds. which amounts to \$9,125.00 Bds. Mr. Forde also informs us that his client in those circumstances would expect you to bear the entirety of the stamp duty on the Conveyance calculated on the same consideration which would amount to \$2,340.00 Bds.

40 Under the usual conditions for sale applicable in Barbados the Vendor bears its share of the transfer tax and one-half of the stamp duty.

We would be obliged if you would let us have your views and instructions on this offer within seven (7) days from the date hereof."

After the receipt by Mr. Forde of this copy of Mr. Turney's letter to his clients, there was no further letter from Mr. Turney addressed to Mr. Forde. As a result Mr. Forde wrote the following letter to Mr. Turney on the 7th November, 1975 -

"Dear Sirs,

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

I refer to my letter dated 28th May, 1975. I
have not had a formal reply or acknowledgement to my
letter, nor has your client indicated when, if at all,
it proposed to complete its contract with my client.

10

I am now instructed to let you know that unless a
reply to my letter is forthcoming by 15th November,
1975 my client will commence legal proceedings
against your client to enforce the contract. It must
be clearly understood that in the meantime my client
does not waive any of its rights nor does it in any way
seek to modify the notice given in my letter of 28th
May, 1975."

The Plaintiff filed his writ on the 8th of December,
1975 claiming specific performance, all necessary and
consequential accounts, directions and inquiries, damages
for breach of contract and costs. By its amended defence
the defendant company denies any agreement for the sale and
purchase of the property in Swan Street. The defendant
pleads Section 2 of the Statute of Frauds, Cap.211 and pleads
that if the documents dated the 20th February 1975
constitute a memorandum of any of the terms of any contract,
it is not a sufficient memorandum in that it does not
contain the whole of such terms. Alternatively, the
defendant pleads that if the documents constitute 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.

20

30

The first issue raised in the pleadings is whether
there was a concluded oral agreement for the sale of the
premises. It is to be noted that the Plaintiff's evidence
in regard to Miss Sahely telling him that they had decided
to sell for \$390,000 and his telling her to ask her lawyer
to call him is unchallenged.

40

It must also be remembered that the Plaintiff was a
tenant of the premises under a lease which among other
things set out the fixtures pertaining to the property
demised. The wording of the receipt - "agreed to be sold" -
is strong evidence of an agreement for sale and seems
inconsistent with a mere offer which the Defendant's
Attorneys were acknowledging. As to the conflicting
evidence given by Mr. Forde and by Mr. Turney as to how
the letter of the 10th of February came to be written, it
must be recalled that it was never at any stage suggested
to Mr. Forde that there had been a conversation in regard

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to this matter prior to the 10th of February 1975. It is also to be observed that Mr. Turney's evidence is punctuated by phrases such as "as I remember", "as far as I recall", "I may have given instructions" the result, no doubt, of the absence of written documentation on his side of the matter. In the circumstances I prefer the evidence of Mr. Forde to that of Mr. Turney, and on all points of conflict I accept that of Mr. Forde.

10 The second issue is whether the oral agreement of the parties is evidenced by a note or memorandum in writing within the meaning of the Statute of Frauds, Cap.211. The law does not require any special form of writing and the question is not one of intention of the party who signs the document, but simply of evidence against him [see Re Hoyle [1893] 1 Ch. 847] Thus, in Auerbach v. Nelson [1919] 2 Ch. 383 a receipt for a deposit on account of purchase money was held to be a sufficient memorandum of the verbal contract between the parties. In the instant case, Mr. Forde's letter of the 10th February, 1975 is inextricably
20 connected with the receipt of even date. In regard to the letter, the statement of the law in Timmins v. Moreland Street Property Co. Ltd. [1958] Ch. 110 is helpful. Jenkins L.J. said at page 130 -

30 "It is still indispensably necessary in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged, which, while not containing in itself all the necessary ingredients of the required memorandum does contain some reference, express or implied, to some other document or transaction 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 by the party to be charged then the two documents can be read together."

40 It is submitted on behalf of the Defendant that if the documents mentioned above constitute a memorandum of any of the terms of any agreement between the parties, they do not cover all the terms. It is contended that there was no agreement as to fixtures and fittings and it is pointed out that Mr. Forde's letter mentioned "or his nominee" and called for a written agreement for sale.

50 In regard to fixtures and fittings, the Plaintiff's evidence is that he was buying a building "everything included". He says he had already bought fixtures and fittings, and that when he took the building they left some counters for him, a desk, mirror, etc. and that after he took over the building he made additions to it at the back. He says that a list was to be prepared setting out the fixtures and fittings he was buying. I think that regard must be had to the background of the transaction. The Plaintiff had been the defendant's tenant for about 15

years. He and the directors of the defendant's company were friends to the extent that when he visited St. Kitts to negotiate for the purchase of the premises the Plaintiff stayed at their home. Further the fixtures were listed in his lease. And in addition, Mr. Turney said, according to Mr. Forde, that they were selling the premises "as is". Thus when Mr. Forde mentioned "freehold premises, fixtures and fittings" it was perfectly clear what the Defendant was selling and what the Plaintiff was buying.

It is suggested that the inclusion of the words "or his nominee" in Mr. Forde's letter and in the receipt means that the parties had to negotiate further as to the identity of the purchaser. The short explanation seems to be that this was only a method of permitting the Plaintiff, if he wished to, to have the conveyance drawn in the name of another person e.g. a Company.

10

It is also said that Mr. Forde's letter envisaged a formal agreement for sale and therefore the oral agreement was really "subject to contract". It is conceded that the words "subject to contract" do not appear in the correspondence but it is argued that they are implied.

20

The authorities on the question were discussed in Aphorp v. Coconut Court Ltd. etal [Civil Appeal No.9 of 1975] The rule is stated by Sir George Jessel. M.R. in Winn v. Bull (1877) 7 Ch.D.29 in these terms -

"It comes therefore to this, that when you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail".

30

The rule was further discussed by Parker J. in Von Hatzfeldt - Wildenburg v. Alexander /1912/1 Ch. 284 where he stated at page 288 -

"It appears to be well settled by the authorities that if the documents or letter relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of a further contract is a condition of term of bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not

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recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

No. 16
Judgment 23rd
July 1979
(Contd)

10 Applying that test to the circumstances of this case, I am satisfied that the agreement reached by the parties was not "subject to contract", and did not contemplate either further negotiation or further agreement. In my view, the request that a standard form of agreement be prepared by Mr. Turney was solely for the purpose of providing the bank financing the sale with documentation in support of the loan they were giving the Plaintiff. .

20 During the course of the trial, the question arose as to what are the usual terms on the sale of real estate in Barbados. Mr. Forde states that they are as follows - the vendor pays his share of transfer tax, and one-half the stamp duty, he gives a marketable title and when necessary points out the line marks. He also pro-rates land tax up to the date of completion. Mr. Turney on the other hand, says that the basic term is that the vendor would produce a marketable title free from encumbrances, apportion land taxes, include a forfeiture clause that stamp duty should be borne equally by the parties and that transfer tax be borne as the law imposes it. In his state of the evidence it seems to me that the term "the usual terms" is precise and does not require further negotiation.

30 Attention is drawn to the fact that Mr. Forde directed that the deposit be held by Mr. Turney's firm "as stakeholder." This is a well-recognized practice in conveyancing. In Sorrell v. Finch /1976/ 2 All E.R. 371 Lord Edmund-Davies referred to his own judgment in Maloney v. Hardy and Moorshead (unreported) where he said -

"The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into, and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding their deposit may part with it to neither contracting party without the consent of the other, and if competing demands arise he can interplead"

40 Mr. Dear cites the case of Birt v Claude Cousins & Co. Ltd. /1971/ 2 All E.R. 611 where Lord Denning said of stakeholders at page 615 -

"If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event; see Skinner v. Trustee of Property of Reed /1967/ 2

All E.R. 1286 per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it: see Harington v. Hoggart /1824-34/ All E.R. Rep. 471."

In this latter case, Parke J. said at page 473

"He receives a sum of money which is to be paid in one event to the vendor, that is, provided the purchase is completed; and in the other, if it is not completed, to the vendee: he holds the money in the meantime as stakeholder; and he is bound to keep it and pay it over upon either of those events immediately." 10

It is clear from these authorities that the stakeholder is entitled to retain the interest on a deposit so long as he lawfully retains it in his hands for the purpose for which it was entrusted to him. But here the plaintiff is not seeking to recover from the stakeholder who is not a party to these proceedings. He is seeking damages for breach of contract. He has led evidence that the interest he had had to pay on the \$39,000 he borrowed from the bank came to \$18,436.14 up to the 9th of July, 1979. But he had made no specific claim for this amount, nor has he included it as an item of special damage. 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". In Orme v. Broughton (1854) Bing. 533 where the vendor omitted to make out a good title within the stipulated time and the purchaser subsequently died, Vaughan j. said at page 540 - 20

"Here there was a contract with the intestate to furnish an abstract by a given day; a breach of that contract; and in consequence of that breach, the loss of the use of the intestate's deposit, and of rents from the time of the contract. After a loss of this kind, he or his representative is entitled to recover the whole amount of the damage sustained"

See also per Russel J. in Keen v. Mear /1920/ 2 Ch. 574/ 40

In Lloyd v. Stanbury /1971/ 2 All E.R. 267, Brightman J. said at page 275 -

"It appears to me that this decision Wallington v. Townsend /1939/ 2 All E.R. 225/ is at least some authority that a disappointed buyer suing for damages because the vendor is not willing to implement the bargain is not limited to compensation for expenditure incurred strictly after the execution of the contract. In my judgment the damages which he is entitled to 50

recover include expenditure incurred prior to the contract representing (1) Legal costs of approving and executing of the contract and (2) costs of performing an act required to be done by the contract notwithstanding that the act is performed in anticipation of the execution of the contract. In addition the buyer is entitled on general principles to damages for any other loss which ought to be regarded as within the contemplation of the parties."

No. 16
Judgment 23rd
July 1979
(Contd)

10 It would be unreasonable in my view, 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. In my opinion, this is recoverable as general damages for breach of contract.

20 In the result there will be a judgment for the Plaintiff. There will be an order for specific performance of the agreement evidenced by a letter and a memorandum in writing dated the 10th of February, 1975 for the sale and purchase of the freehold property known as Everybody's Store, No.19 Swan Street, Bridgetown.

The Plaintiff will have damages for breach of contract calculated at 8% of \$39,000.00 from the 20th of July, 1975 until the property is conveyed to the Plaintiff.

And the Plaintiff will have costs certified for two Counsel.

W.R. DOUGLAS
Chief Justice.

NO. 17

No.17
Order of 23rd
July 1979
4th October 1979

30

ORDER OF 23RD JULY 1979

BARBADOS

No.879 of 1975

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT - CIVIL JURISDICTION

B E T W E E N

FAUZI ELIAS

Plaintiff

- and -

GEORGE SAHELY & COMPANY
(BARBADOS) LIMITED

Defendant

No. 17
Order of 23rd
July 1979
4th October 1979
(Contd)

Before the Right Honourable William Randolph Douglas,
Knight Bachelor, Chief Justice in Open Court.

On the 23rd day of July 1979.

Entered the 4th day of October 1979.

This action having come on for hearing on the []
in the presence of the attorneys-at-law for the plaintiff 10
and for the defendant.

And the Judge having read the pleadings and heard the
evidence and what was alleged by Counsel for the parties;

And the Judge having this day ordered that judgment as
hereinafter provided be entered for the plaintiff but that
execution be stayed for the period hereinafter mentioned.

THIS COURT DOTH DECLARE that the agreement mentioned
in paragraph 3 of the Statement of Claim ought to be
specifically performed and carried into execution provided 20
that a good title can be made to the property therein
mentioned AND DOTH ORDER AND ADJUDGE accordingly;

AND IT IS ADJUDGED that the Plaintiff recover from the
defendant, by way of damages, interest on the deposit of
\$39,000.00 calculated at 8 per cent per annum from the 20th
July 1975 until the property is conveyed to the plaintiff;

AND IT IS ORDERED that the defendant pay to the
plaintiff his taxed costs of the action, such costs being
hereby certified for two attorneys-at-law;

AND IT IS FURTHER ORDERED that execution be stayed for
a period of 6 weeks. 30

REGISTRAR

NOTICE OF APPEAL 31st AUGUST 1979

No.18
Notice of Appeal
31st August 1979

BARBADOS .

No.879 of 1975

IN THE SUPREME COURT OF JUDICATURE .

COURT OF APPEAL .

APPELLATE JURISDICTION .

10

B E T W E E N

GEORGE SAHELY & CO.
BARBADOS LIMITED

Defendant/Appellant

-- and --

FAUZI ELIAS

Plaintiff/Respondent

20

1. TAKE NOTICE that the Defendant/Appellant being dissatisfied with the whole decision more particularly stated in paragraph 3 hereto of the High Court of Barbados contained in the judgment of the Right Honourable Sir William Douglas, Chief Justice dated the 23rd day of July, 1979 doth hereby appeal to the Court of Appeal upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4.

The Appellant further states that the names and addresses of the persons directly affected by the appeal are as therein set out in paragraph 5.

30

2. The Defendant/Appellant complains of:

- (1) The finding of fact by the learned trial judge that there was sufficient evidence to hold that there was an adequate note or memorandum in writing to satisfy the statute or frauds.

3. Grounds of Appeal

40

- (1) That the judgement is against the weight of the evidence.
- (2) That the learned trial judge erred in law in holding that there was an adequate note or memorandum in writing sufficient to satisfy the requirements of the statute of frauds.
- (3) That the learned trial judge erred in holding that there was a contract in law and that any agreement so made was "subject to contract".

In the Court of
Appeal

(4) That the learned trial judge misdirected himself
in law.

No.18
Notice of Appeal
31st August 1979
(Contd)

4. That the said judgment and order of the Court may be reversed and that judgment be entered in the said action for the appellant and in any event that the Respondent pay to the Appellant the taxed costs of the defence and for an Order that the costs of this appeal be paid by the Respondent to the Appellant and for such further or other orders as the Court of Appeal may deem fit.

5. Persons directly affected by this Appeal: 10

<u>Name</u>	<u>Address</u>
(1) Vernon O. Smith (Attorney-at-Law)	"Mottley House" Coleridge Street, Bridgetown.
(2) Fauzi Elias	Higate Gardens, St. Michael.

Dated this 31st day of August, 1979.

P.K.H. Cheltenham
Attorney-at-Law for the Defendant/Appellant

No.19
Further Grounds
of Appeal
18th January 1980

NO. 19

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FURTHER GROUNDS OF APPEAL

Richard L. Cheltenham Ph.D.
ATTORNEY-AT-LAW
Telephone 60052

Chambers,
Pinfold Street,
Bridgetown,
Barbados, W.I.

1980-01-18

The Registrar,
The Registry,
The Law Courts,
Bridgetown.

30

Dear Sir,

Re: Civil Appeal No.5 of 1979 - George Sahely & Co.
(Defendant/Appellant) vs Fauzi Elias (Plaintiff/Respondent)

I here give notice of my intention to seek the leave of the Court of Appeal to add the undermentioned grounds of appeal.

1. That the evidence did not establish that a concluded

oral agreement was reached between the Respondent and the Appellant on or before the 10th February, 1975, and the Learned Trial Judge erred in law in so holding.

In the Court of
Appeal

2. That the learned Trial Judge erred in law in holding that there was a concluded contract for the sale of property which was evidenced by a note or memorandum sufficient to satisfy the Statute of Frauds.

No.19
Further Grounds of
Appeal 18th
January 1980
(Contd.)

PARTICULARS

- 10 a) The letter written by Mr. Henry Forde on the 10th February, 1975, was preparatory to the conclusion of an agreement.
- b) The receipt issued by Messrs. Mandeville & Co. was merely for acknowledging receipt of the stake in the sum of \$39,000.00 and could not properly be construed as serving any further purpose.
- 20 c) There was no evidence that the said receipt was written in pursuance of any authority given Mr. Clyde Turney to sell the property on behalf of the Defendant/Appellant.
- d) The letter written by Mr. Henry Forde on behalf of the Respondent/Plaintiff could not properly be construed as binding the said Respondent/Plaintiff to a contract of sale without the preparation of the further agreement contemplated by its terms which agreement was to be prepared and approved by the respective Attorneys of the parties and duly signed for that purpose.
- 30 e) The letter written by Mr. Henry Forde constituted no more than an offer to purchase on terms to be agreed in writing including a term that the purchase price was to be \$390,000.00. and no concluded agreement was ever reached thereafter.

3. The Learned Trial Judge erred in receiving and acting upon oral evidence concerning the alleged memorandum in writing which memorandum was required to be sufficient to satisfy the statute of Frauds.

40 4. The Learned Trial Judge erred in law in awarding against the Appellant/Defendant as damages interest on the sum of \$39,000.00 held by Messrs. R.G. Mandeville & Co as stakeholder.

Yours faithfully,

R.L. Cheltenham, Ph.D.

RLC/eg

c.c: Mr. David Simmons
Messrs. Smith & Smith

JUDGMENT

No.20
Judgment 13th
March 1981

BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

CIVIL JURISDICTION

No. 5 of 1979;

B E T W E E N

GEORGE SAHELY & CO. (B^oDOS) LTD.
Appellant

10

- and -

FAUZI ELIAS

Respondent

Before the Honourable Mr. Justice D.A. Williams, Chief Justice
(acting), the Honourable Mr. Justice C.S. Husbands and the
Honourable Mr. Justice L.I. Worrell, Puisne Judges.

1981. March 13th.

Dr. F. Ramsahoye, Q.C. and Dr. R. Cheltenham for the
Appellant Mr. D. Simmons and Smith & Smith for the
Respondent.

20

DECISION

The plaintiff-respondent carries on a business in Swan
Street, Bridgetown, in a building owned by the defendant-
appellant. He has been renting this building from the
appellant since July, 1960 and in the sixties he decided he
would like to purchase it. Negotiations for this purpose
were conducted but the matter never reached finality.

Then on February 10, 1975 Mrs. Redman a major share-
holder in the appellant company spoke to the respondent
from St. Kitts and told him that she had discussed the
matter with her sister and that they had decided to sell
for \$390,000. The plaintiff told Mrs. Redman that he would
buy at that figure and asked her to tell her lawyers to
call him.

30

Later that day Mr. Turney, the appellant's lawyer,
telephoned the respondent and asked him if he was buying
the building at 19 Swan Street. The respondent told him
that he was. Mr. Turney asked if it was for \$390,000. The
respondent replied in the affirmative. Mr. Turney then
asked the respondent to send him a cheque for \$39,000.

40

Thereupon the respondent went to the bank, raised a loan
for \$39,000 and arranged to borrow \$250,000 to be repaid in

seven years. He took the manager's cheque for \$39,000 to his lawyer, Mr. Forde. Mr. Forde spoke to Mr. Turney on the telephone and then wrote him the following letter -

In the Court of
Appeal

No.20
Judgment 13th
March 1981
(Contd)

"Dear Sirs,

10

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.

20

Further to our conversation of this morning, I now enclose a cheque for \$39,000 drawn on Canadian Imperial Bank of Commerce by Fauzi Elias trading as Everybody's Store and payable to you as stakeholder in respect of 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 of sale. As I have discussed over the telephone, the usual terms will apply.

I should be pleased if you would forward the Agreement of 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."

30

Mr. Turney did not acknowledge receipt of the letter but he sent his firm's receipt for the money. It reads -

"\$39,000.00

Barbados 10-2-1975

Received from Fauzi Elias the sum of Thirty nine thousand dollars andcents being deposit on Property at Swan Street, B'town 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."

40

On May 28, 1975 Mr. Forde wrote the following letter to Mr. Turney -

"Dear Sirs,

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

I write with reference to the contract evidenced by a memorandum in writing as contained in a receipt dated 10th day of February, 1975 for the purchase by my client, Fauzi Elias and/or his nominees of No.19 Swan Street, Bridgetown, from your client, George Sahely & Co. (Barbados) Limited of Bridgetown, Barbados of freehold property comprising the store at No.19 Swan Street, Bridgetown.

As Attorney-at-Law and agent for the purchaser, I hereby give you as Attorneys-at-Law and agents for the vendor, notice that the purchaser is ready and willing and hereby offers to complete the sale and purchase, to pay the balance of purchase money and to do or procure to be done all such acts deeds and things as may be reasonably required to complete the sale and purchase of the said property upon the vendor executing all necessary assurances and doing and procuring to be done all such acts deeds and things as may be reasonably required to be done and as provided by the said contract.

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20

As Attorney-at-Law and agent as aforesaid, I hereby give you, as Attorneys-at-Law and agents as aforesaid, further notice that if this matter is not completed by the vendor on or before the 20th day of July, 1975 (as to which time is hereby made of the essence) the purchaser will seek specific performance of the contract and will proceed to enforce his rights against the vendor as the purchaser may be advised."

Mr. Turney did not reply to this letter. On July 18, 1975 he wrote to his client and sent a carbon copy of the letter to Mr. Forde for his information. The letter was as follows -

30

"Dear Sirs,

We have been contacted by Mr. Henry Forde the Attorney-at-Law acting for Mr. Elias in connection with the sale of the property at Swan Street, Bridgetown from yourselves to Mr. Elias.

Without prejudice to any existing or future rights of action which his client might have against yourselves he has informed us that his client is willing to assume and pay the Vendor's transfer tax on the purchase price of \$390,000 Barbados which amounts to \$9,125.00 Bds.

40

Mr. Forde also informs us that his client in those circumstances would expect you to bear the entirety of the stamp duty on the Conveyance calculated on the same consideration which would amount to \$2,340.00 Bds.

Under the usual conditions for sale applicable in Barbados the Vendor bears its share of the transfer tax and one-half of the stamp duty. In the Court of Appeal

We would be obliged if you would let us have your views and instructions on this offer within seven (7) days from the date hereof."

No.20
Judgment 13th
March 1981 (contd)

10 Mr. Forde waited for a further communication from Mr. Turney and when none came, he wrote the following letter to Mr. Turney on November, 7, 1975 -

"Dear Sirs,

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

20 I refer to my letter dated 28th May, 1975. I have not had a formal reply or acknowledgment to my letter, nor has your client indicated when, if at all, it proposed to complete its contract with my client. I am now instructed to let you know that unless a reply to my letter is forthcoming by 15th November, 1975 my client will commence legal proceedings against your client to enforce the contract. It must be clearly understood that in the meantime my client does not waive any of its rights nor does it in any way seek to modify the notice given in my letter of 28th May, 1975."

30 The plaintiff-respondent filed his writ on December 8, 1975 seeking, inter alia, specific performance and damages. In its defence the appellant denied any agreement for the sale and purchase of the premises. The appellant pleaded section 2 of the Statute of Frauds Cap. 211 and that if the documents of February, 10 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 whole of such terms. Alternatively the appellant pleaded that if the documents constituted evidence of an agreement to sell the premises, such agreement was expressed to be subject to an agreement or contract for sale being completed and signed by the parties.

40 The matter came on before the learned Chief Justice who held -

- (1) that there was a concluded oral agreement for the sale of the premises;
- (2) that the agreement was evidenced by a note or memorandum in writing within the meaning of the Statute of Frauds Cap. 211, Mr. Forde's letter

of February 10, 1975 being inextricably connected with the receipt of the same date;

- (3) that in the circumstances the agreement covered all the material terms and did not contemplate either further negotiation or further agreement; and
- (4) that the respondent was entitled to recover from the appellant as general damages interest which he would have earned on the deposit.

It is convenient to begin consideration of the appeal with a reference to a quotation from the speech of Lord Edmund Davies in Maloney v. Hardy and Moorshead (unreported) (See Sorrell v. Finch /1976/ 2 All E.R. 371). In it the learned judge stated the nature of stakeholding in the typical vendor and purchaser case. He said /1976/2 All E.R. at p.376 -

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"The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into, and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding their deposit may part with it to neither contracting party without the consent of the other and if competing demands arise he can interplead."

20

On this note we turn to the facts of the case on appeal. When on February 10 Mr. Forde wrote to Mr. Turney concerning the sale of the Swan Street premises, there was no binding contract in existence. There had been negotiations and, according to the facts as found, the parties had reached consensus. But there was at the time no binding or enforceable contract of sale for the reason that no written contract for sale had been executed nor was there in existence any memorandum or note in writing. Consequently on February 10 even though there had been an oral understanding between the parties as to the terms under which the premises were being sold, either party was free to change his mind and call a halt to any further advancement of the discussions.

30

There can be no doubt that this was the legal position when the letter was written. And this indeed was acknowledged by the terms of the letter itself which spoke of "pending completion of the contract of sale" and "I should be pleased if you would forward the Agreement for sale to be signed by my client". The letter was looking to a formalisation of the oral understanding or consensus which had been reached earlier in the day. For all the oral discussions had taken place earlier that day.

40

It can therefore be seen that this is not the type of case which Lord Edmund Davies had in mind when he spoke of

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"the essence of stakeholding in vendor and purchaser cases." It is untypical in that no binding contract of sale had been entered into when the intending purchaser made Mr. Turney a stakeholder.

In the Court of
Appeal

No.20
Judgment 13th
March 1981
(Contd)

10 This brings us to what is really the crucial question in this case. In the context of all the surrounding circumstances, and in particular, having regard to the terms of the letter, can the receipt given by Mr. Turney's firm be used for the purpose of being placed with Mr. Forde's letter of the same date in order to constitute a memorandum or note in writing for the purpose of section 2 of the Statute of Frauds? Or, more succinctly, can the signature of Mr. Turney's firm be anything more than an acknowledgment of receipt of the deposit on the respondent's behalf? There was no binding contract or agreement by which Mr. Turney was to be paid money as a stakeholder. Mr. Forde in his letter asked Mr. Turney to let him have his receipt of \$39,000.00 as a stakeholder. And a receipt was so given. In such circumstances can it be said that Mr. Turney's firm was acting as an agent of the appellant in issuing the receipt?

20

30 Lord Denning, M.R., gave a dissenting judgment in Burt v. Claude Cousins & Co. Ltd. /1971/ 2 All E.R.611 which received the approval of the House of Lords in Sorrell v. Finch, above cited. He spoke first of the case where an estate agent or a solicitor, being duly authorised to do so, receives a deposit as agent of the vendor. He said that in such a case it is considered in law to be just as if it was paid at the very instant to the vendor himself and the vendor is entitled to have it paid over to him on demand, together with interest from the moment when the estate agent or solicitor received it. If the purchaser should become entitled to the return of the deposit, he must sue the vendor for it and cannot sue the estate agent or solicitor for it even though he still has it in his hands. Lord Denning continued (at p.615) -

"3. *As Stakeholder*

40 If an estate agent or solicitor, being duly authorised in that behalf receives a deposit *as stakeholder*, he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event until the event is known, it is his duty to keep it in his hands, or put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it....If the purchaser shall become entitled to the return of his deposit, he must sue the estate agent or solicitor for it. He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.

50

4. When nothing is said -

If an estate agent, before any binding contract is made asks for and receives a deposit, giving the receipt in his own name without more, the question arises: in what capacity does he receive it? As agent for the vendor? or as stakeholder? I cannot believe that he receives it as agent for the Vendor, for, if that were so, the estate agent will be bound to pay it over to the vendor forthwith, and the vendor alone will be answerable for its return. That cannot be right. Seeing that no contract has been made, the vendor is not entitled to a penny piece.

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If the estate agent should pay it over to the vendor he does wrong; and if the vendor goes bankrupt, the estate agent is answerable for it

Seeing that the estate agent must not, before a contract is made, hand the deposit over to the vendor, what is he to do with it? Clearly he must keep it in his own hands until a contract is made, or the purchaser asks for it back. And what is he then but a "stakeholder". It is the very essence of a stakeholder that he is to hold a sum in medio until the event is known. If no contract is made the estate agent must return the deposit to the purchaser and can be sued if he does not.....If the purchaser asks for his money back, as he is entitled to do, at any time, the estate agent must give it to him.....

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If the estate agent makes off with the money, and is brought before the criminal courts, the proper charge is that he fraudulently converted the money of the purchaser and not the money of the vendor.....

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In all those cases judges of great authority spoke of the estate agent as 'a stakeholder.' To my mind, they fully support the proposition that when an estate agent receives a deposit, subject to contract, and gives a receipt for it in his own name, the proper inference is that he receives the money as stakeholder and not as agent of the vendor....."

We have underlined certain words in the passage above which in our opinion are of vital importance to this case. Lord Denning was speaking in relation to the position of an estate agent but the position would be the same in relation to a solicitor where one party chooses to make the other party's solicitor a stakeholder without any binding contract having been concluded.

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The facts of the case on the point are crystal clear. Mr. Turney was not authorised to, nor did he, receive the deposit as agent of the vendor. There was no binding agreement under which the deposit was to be paid to Mr. Turney as stakeholder. All the evidence points to his receipt of the deposit as stakeholder on the request of the

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purchaser and before any binding contract was made. And in such circumstances he cannot be said to have received the deposit in any respect as agent for the vendor. He held it pending completion of the contract for sale. There was no binding agreement on either side to complete so that at any time the purchaser could have requested Mr. Turney to return the deposit and Mr. Turney would have been obliged to do so. Mr. Turney would have had no authority to pay the deposit over to the vendor until the contract of sale was completed, depending on the terms of the contract.

In the Court of
Appeal

No.20
Judgment 13th
March 1981
(Contd)

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If Mr. Turney then did not receive or hold the deposit as agent of the vendor, how can it be said that his firm's signature to the receipt is that of the vendor's agent for the purpose of section 2 of the Statute of Frauds? On the authorities that cannot be so. If he was not the agent of the vendor in receiving the stake, how could he be the agent of the vendor in giving a receipt for the stake? It must follow that there is no memorandum or note signed by or on behalf of the party sought to be made liable on the contract.

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Indeed to make the appellant liable by virtue of the receipt is contradictory of the terms of Mr. Forde's letter. The deposit was to be held by Mr. Turney "pending completion of the contract of sale" - these are the terms of the letter. But, according to the contention, as soon as the receipt is sent later in the day a memorandum sufficient to satisfy section 2 of the Statute comes into existence by a combination of the letter and the receipt. However, such a memorandum being in existence, a formal contract of sale is no longer necessary and the bargain can be enforced against the appellant.

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Moreover, whereas Mr. Turney was, according to the letter, to hold the deposit as stakeholder pending the outcome of a future event, the future event was no longer of any significance since, according to the contention, the receipt had the effect of binding the appellant to the bargain. A contract of sale was no longer necessary and the respondent could at any time ask for the return of his deposit. Further, Mr. Forde requested an acknowledgment of his letter and a receipt for the deposit. No acknowledgment was forthcoming but a receipt was sent which, according to the contention, more than made up for the lack of acknowledgment.

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In this case Mr. Turney received the deposit, subject to contract, and gave a receipt for it in the name of his firm. He was constituted a stakeholder by the act of the respondent but that act could not in the circumstances bind the appellant by making Mr. Turney his agent. The unilateral act of the respondent could not have that effect.

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In the Court of
Appeal

No.20
Judgment 13th
March 1981
(Contd.)

In our judgment therefore the true legal position is that Mr. Turney held, and still holds, the deposit as stakeholder, no contract for sale having been completed. It was and remains his duty to keep the money until a contract of sale was completed or until the respondent asked for it back. There being no binding contract the respondent was and is entitled to ask for his money back at any time. There being no memorandum or note sufficient to satisfy section 2 of the Statute of Frauds, there can be no enforcement against the appellant of the oral agreement which, according to the facts found, had been concluded. In the result the appeal is allowed the order of the Chief Justice for specific performance is discharged and his award of damages is set aside. The appellant is to have its costs of the appeal and in the court below with a certificate for two counsel.

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Chief Justice (Ag.)

Puisne Judge

Puisne Judge.

No.21
Order 13th March
1981

NO. 21

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ORDER 13TH MARCH 1981

BARBADOS

CIVIL APPEAL no.5 of 1979

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

B E T W E E N

GEORGE SAHELY & COMPANY BARBADOS
LIMITED

Defendant/Appellant

- and -

FAUZI ELIAS

Plaintiff/Respondent

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BEFORE THE HONOURABLE DENYS WILLIAMS, Acting Chief Justice and THE HONOURABLE CLIFFORD S. HUSBANDS and LINDSAY WORRELL, Puisne Judges in the Court of Appeal on the 13th day of March, 1981.

Entered on the day of ,1981.

UPON MOTION by way of Appeal from the Judgment of the High Court dated the 23rd day of July, 1979, made unto this Court by Counsel for the Defendant/Appellant

AND UPON HEARING Counsel for the Defendant and for the Plaintiff. In the Court of Appeal

AND UPON READING the said Judgment dated the 23rd day of July, 1979.

No.21
Order 13th March
1981 (Contd.)

THIS COURT DID ORDER that the said Appeal should stand for Judgment.

10 AND THE SAID APPEAL standing this day for Judgment in the presence of Counsel for the Defendant and for the Plaintiff

THIS COURT DOTH ORDER:-

- (i) That the Appeal be allowed.
- (ii) That the Order of the Chief Justice for specific performance and awards of damages in the Court below be set aside.
- (iii) That the Appellant be allowed the costs of and occasioned by the said Appeal together with its costs in the Court below certified fit for two Counsels.

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REGISTRAR

NO. 22

ORDER GRANTING LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

In the Privy Council

No.22
Order Granting
Leave to Appeal
to Her Majesty
in Council

AT THE COURT AT BUCKINGHAM PALACE

The 28th day of October 1981

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PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board a Report of the Judicial Committee of the Privy Council dated the 15th day of October 1981 in the words following viz:-

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"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Fauzi Elias in the matter of an Appeal from the Court of Appeal of Barbados between the Petitioner and George Sahely and Company (Barbados)

In the Privy
Council

No.22
Order Granting
leave to Appeal
to Her Majesty
in Council
(Contd)

Limited Respondent setting forth that the Petitioner prays for special leave to appeal from the Judgment of the Court of Appeal of Barbados dated 13th March 1981 which allowed an Appeal by the Respondent against the Order of the High Court dated 23rd July 1979 for specific performance and an award of damages: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the Judgment of the Court of Appeal of Barbados dated 13th March 1981:

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"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Court of Appeal of Barbados dated 13th March 1981 upon depositing in the Registry of the Privy Council the sum of £3,000 as security for costs:

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"AND Their Lordships do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed and obeyed and carried into execution.

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WHEREOF the Governor-General or Officer administering the Government of Barbados for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

EXHIBITS

P1

LETTER MR. H. FORDE to R.G. MANDEVILLE & CO.
10TH FEBRUARY 1975

P1
Letter Mr. H.
Forde to R.G.
Mandeville & Co.
10th February 1975

February, 10th, 1975

10 R.G. Mandeville & Co.,
James Street,
Bridgetown.

Attention: Mr. Clyde Turney

Dear Sirs,

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

20 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 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 terms will
apply.

30 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.

Yours faithfully,

Henry deB. Forde.

HdeBF/rw
cc:Mr. F. Elias
Canadian Imperial Bank of Commerce

P2
Receipt from
R.G. Mandeville
& Co. 10th
February 1975

P2
RECEIPT FROM R.G. MANDEVILLE & CO. 10TH FEBRUARY
1975

BARBADOS 10-2-1975

RECEIVED From Fauzi Elias the sum of Thirty nine
thousand Dollars andCents being deposit on
Property at Swan Street B'town agreed to be sold by George
Sahely & Co. B'dos Ltd. to Fauzi Elias and/or his nominees.

No.6949

R.G. MANDEVILLE & CO.
Per E. Clarke

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EXTRACT FROM LETTER MR. H. FORDE TO R.G.
MANDEVILLE & CO. 28th MAY 1975

Extract from
Letter Mr. H.
Forde to R.G.
Mandeville & Co.
28th May 1975

R.G. MANDEVILLE & CO.,
Page 2,
May 28th, 1975.

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to which time is hereby made of the essence the purchaser will seek specific performance of the contract and will proceed to enforce his rights against the vendor as the purchaser may be advised.

Yours faithfully;

Henry deB. Forde:

HdeBF/rw

cc: Fauzi Elias

George Sahely & Co. (Barbados) Limited

P4

Letter Mr. H.
Forde to R.G.
Mandeville & Co.
7th November 1975

P4

LETTER MR. H. FORDE TO R.G. MANDEVILLE & CO.
7TH NOVEMBER 1975

R.G. MANDEVILLE & CO.,
James Street,
Bridgetown.

7th November, 1975

Attention: Mr. G.C. Turney

Dear Sirs,

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

I refer to my letter dated 28th May, 1975. I have
not had a formal reply or acknowledgement to my letter,
nor has your client indicated when, if at all, if proposed
to complete its contract with my client.

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I am now instructed to let you know that unless a
reply to my letter is forthcoming by 15th November, 1975 my
client will commence legal proceedings against your client
to enforce the contract. It must be clearly understood
that in the meantime my client does not waive any of its
rights nor does it in any way seek to modify the notice
given in my letter of 28th May, 1975.

Yours faithfully,

Henry deB. Forde.

HdeBF/lc

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cc: Mr. Fauzi Elias
George Sahely & Co. (Barbados) Limited

P5

LETTER CANADIAN IMPERIAL BANK OF COMMERCE to
Plaintiff 14th December 1978

P5

LETTER CANADIAN
IMPERIAL BANK OF
COMMERCE to
Plaintiff 14th
December 1978

CANADIAN IMPERIAL
BANK OF COMMERCE

December 14, 1978

10 Mr. Fauzi Elias,
Elias Limited,
High Street,
Bridgetown.

Dear Mr. Elias:

20 This letter will confirm to you that you have paid
this Bank \$15,866.95 in interest between February 12, 1975
and November 23, 1978. This interest was paid on a
\$39,000, loan which we granted to you to assist with the
down payment on the property at Swan Street which you
presently occupy.

Yours truly,

G.I. McGregor.
Manager.

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 & CO (BARBADOS) LTD (DEFENDANT)

RESPONDENT

RECORD OF PROCEEDINGS

OSMOND GAUNT & ROSE
FURNIVAL HOUSE
14/18 HIGH HOLBORN
LONDON WC1V 6BX

SOLICITORS FOR THE APPELLANT

INGLEDEW BROWN
BENNISON & GARRETT
INTERNATIONAL HOUSE
26 CREECHURCH LANE
LONDON EC3A 5AL.

SOLICITORS FOR THE
RESPONDENT