(Privy Council Appeal No. 2 of 1982)

Fauzi Elias – – – – – – – – *Appellant*

v.

George Sahely & Co. (Barbados) Limited – – – *Respondent*

FROM

THE COURT OF APPEAL OF BARBADOS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY 1982

Present at the Hearing:

LORD SCARMAN

LORD SIMON OF GLAISDALE

LORD EDMUND-DAVIES

LORD BRIDGE OF HARWICH

LORD BRANDON OF OAKBROOK

[*Delivered by* LORD SCARMAN]

This is an appeal from the Court of Appeal of Barbados. The appellant, Fauzi Elias, asserts that he entered into a binding and enforceable oral contract for the sale of land. His case is that he concluded it on 10th February 1975 in a telephone conversation with Mrs. Gloria Redman, a director of the respondent company, George Sahely & Co. (Barbados) Ltd. He claims, as purchaser, specific performance of the contract and ancillary relief, including damages. There is now no issue as to damages. The only question for their Lordships' consideration is whether he was entitled to specific performance. If he was, the parties are agreed as to the relief to be granted; and counsel have helpfully indicated in a draft of a possible order the terms which they accept as appropriate in the event of the appeal being allowed.

The case was tried at first instance by the learned Chief Justice, the Right Honourable Sir William Douglas. He found as a fact that there was concluded between the parties an oral contract for the sale of land. He held that two documents, to which it will be necessary to refer in detail, were, when read together, a sufficient note or memorandum in writing signed on behalf of the person to be charged within the meaning of Section 2 of the Statute of Frauds, Cap. 211. Accordingly, he ordered specific performance of the contract.

The respondent appealed. Allowing the appeal, the Court of Appeal accepted the finding of an oral " consensus " (their word) as to the terms under which the land was being sold. Nevertheless they held that no contract of sale had been completed, and expressed the opinion that there

could be no binding contract in the absence of writing. They further held that there was no memorandum in writing signed on behalf of the person to be charged; and, specifically, that the two documents upon which the learned Chief Justice based his judgment did not constitute a sufficient memorandum.

There are two issues outstanding in the appeal. The first is whether the appellant has established the existence of an oral contract of sale. The second is whether such contract, assuming it exists, is evidenced by a note or memorandum in writing signed on behalf of the respondent. The appellant did seek leave to raise before their Lordships a point not adumbrated in his pleading or raised in either of the courts below. Based on *Steadman v. Steadman* [1976] A.C. 536, it was to the effect that in the circumstances of this case payment of money under the contract constituted a sufficient part performance to entitle the appellant in equity to the relief he claims. Their Lordships refused leave. The Board's practice is well known: save in very exceptional circumstances, points not raised below will not be entertained.

The first issue is a question upon which in their Lordships' view there are concurrent findings of the decisive facts. The Chief Justice found that on 10th February 1975 the appellant agreed with Mrs. Gloria Redman, a director of the respondent company, to buy No. 19, Swan Street, Bridgetown for the price which she told him she and her sister, also a director, had decided to sell, namely $390,000. The appellant, as tenant of the Sahely family and their company, had carried on the business of " Everybody's Store " at the premises since July 1960. The sale was to include fixtures and fittings. The Chief Justice had no doubt that the parties there and then concluded a contract of sale. They knew perfectly well from their long association with the premises as landlord and tenant what were the fixtures and fittings: and there was no difficulty in an open contract upon the usual terms prevailing in Barbados. Nothing, he found, was left to further negotiation or agreement. The Court of Appeal also found that the parties " had reached consensus " and that there was " an oral understanding between the parties as to the terms under which the premises were being sold ". In the view, therefore, of both courts the parties had reached agreement.

The Court of Appeal, however, were not prepared to hold that the existence of a " consensus " constituted a contract. They gave two reasons. First, they held in the absence of writing there could be no binding or enforceable contract of sale. This was an error of law. If there is no note or memorandum, a contract may be unenforceable, but it is not void: *Steadman v. Steadman, supra,* Lord Reid, at page 540G, and Lord Simon of Glaisdale, at page 558F. And, in the absence of any writing, it will be enforceable if there be a sufficient part performance. Secondly, they held the consensus or understanding to be " subject to contract ", i.e. not intended to be binding until incorporated into a written contract of sale. This view arose from their construction of a letter of 10th February 1975 written by Mr. Forde, the appellant's lawyer, confirming the contract. It will be necessary later to consider the detailed terms of the letter, as it is one of the two documents upon which the appellant relies as constituting a sufficient memorandum in writing of the contract. Suffice it to say at this stage that the Chief Justice did not so construe the letter: and, for reasons which will appear later, their Lordships agree with him. The appellant, therefore, succeeds on the first issue. He has established the existence of an oral contract of sale concluded on 10th February 1975.

The second issue is more difficult. The memorandum in writing of the contract upon which the appellant seeks to rely consists of two documents—the letter written by his lawyer on 10th February 1975

and a receipt given the same day by the respondent's lawyers for the deposit paid pursuant to the agreement for sale. The circumstances in which these documents came into existence were as follows. After his conversation with Mrs. Redman the appellant was telephoned by the respondent's lawyer, Mr. Turney. Nothing was said by Mr. Turney to raise any doubt in the appellant's mind that he had concluded a contract with Mrs. Redman; on the contrary Mr. Turney appeared to accept that this was so and asked him to send him a cheque for $39,000. The appellant made arrangements for a loan from his bank and then went to see his own lawyer, Mr. Forde, taking with him the bank manager's cheque for $39,000. Mr. Forde then wrote to Mr. Turney as follows:—

" 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

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.

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."

Mr. Turney received the letter, but did not acknowledge it. He did, however, send his firm's receipt for the money. It was in these terms:

" $39,000·00 BARBADOS 10-2-1975

Received from Fauzi Elias the sum of Thirty nine thousand Dollars and . . . Cents 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."

The appellant's case is that, read together, the letter and the receipt constitute a note or memorandum in writing of the contract signed on behalf of the person to be charged. The respondent's case is that it is inadmissible to read the two documents together because the receipt, upon its proper construction, does not expressly or by necessary implication refer to another written transaction or document.

Before dealing with this, the basic point in the appeal, it will be convenient to dispose of two further submissions by the respondent on the two documents. First, it is said that the respondent's lawyer, Mr. Turney (or his firm), had no authority to sign a memorandum of contract—the " agency point ". Secondly, it is said that the letter of 10th February 1975 upon its proper construction refers only to an agreement " subject to contract "—the " point of construction ".

First, the agency point. The Chief Justice found, or, perhaps more accurately, assumed that Mr. Turney had authority to sign. It is doubtful whether at first instance the respondent was contending otherwise: and

the point, if raised at all in the pleadings, was certainly not raised with the clarity necessary to prevent the other party from being taken by surprise. But, be that as it may, the Chief Justice was fully justified in his finding (or assumption). Neither Mrs. Redman nor her sister, who were the two directors of the respondent company concerned, gave evidence, though they were available. Mr. Turney did: but the Chief Justice preferred the evidence of Mr. Forde, accepting it on all points of conflict.

The Court of Appeal, however, added a new twist to the agency point. Because Mr. Turney received the deposit not as agent for the vendor but as stakeholder, they inferred that he (or his firm) could not be said to sign the receipt as " the vendor's agent for the purpose of the Statute of Frauds ". Their inference was based on a logical fallacy. It does not follow that because a person accepts a deposit as stakeholder he is not authorised to sign a note or memorandum evidencing the existence of a contract. Indeed, as the Court of Appeal recognised, quoting some words of Lord Edmund-Davies in an unreported case to which he referred in *Sorrell v. Finch* [1976] 2 All E.R. 371, at page 376, " the essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into ". It is possible that the Court of Appeal were led into their fallacy by their erroneous view that there can be no binding contract for the sale of land in the absence of writing. Be that as it may, their Lordships accept the Chief Justice's finding that Mr. Turney's firm had authority to sign a note or memorandum of the sale. It was a reasonable inference in the circumstances.

Next, the construction point. This point impressed the Court of Appeal, but not the Chief Justice who rejected it. In his letter Mr. Forde stipulated that the deposit was to be held " pending completion of the contract for sale " and requested that there be forwarded to him an agreement for sale to be signed by his client. The Chief Justice, noting that the words " subject to contract " do not appear in the letter, refused to construe its terms as revealing that the parties did not intend to be bound until a formal contract was brought into existence. He relied on a passage in the judgment of Sir George Jessel M.R. in *Winn v. Bull* (1877) 7 Ch. D. 29, 32 where the learned Master of the Rolls said: —

> " 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."

Applying this test, he expressed himself as satisfied that the agreement reached was not " subject to contract ".

Their Lordships have no doubt that upon the findings of fact reached by the Chief Justice and accepted by the Court of Appeal it is not possible to read Mr. Forde's letter as indicating that there was no binding agreement prior to a formal contract drawn up and signed. Accordingly, they reject the respondent's point upon the construction of the letter and accept the Chief Justice's view that the letter sets out the terms of a concluded bargain between the parties.

The critical question is, therefore, whether it is admissible to read the letter and the receipt together. If they are so read, they constitute a sufficient memorandum provided, of course, that the respondent's points on agency and construction are rejected. The respondent's counsel submits that it is not permissible to place the two documents side by side and so to construct a memorandum of the terms of the contract. He makes two points: first that the receipt neither expressly nor by necessary implication refers to the letter, and secondly that to constitute a sufficient

memorandum the receipt must refer either to a written transaction or to a document which by acceptance becomes an integral part of the transaction.

The first stage in the respondent's argument is that the receipt itself does not contain the terms of the contract. It can be relied on only if it refers expressly or by necessary implication to another document which was, or to a transaction which is itself, in writing. The words of reference are " deposit on property at Swan Street, Bridgetown agreed to be sold ". This is a reference, counsel submits, not to Mr. Forde's letter but to the oral agreement. And, even if it could be read with the aid of parol evidence as referring to the letter, parol evidence for that purpose is inadmissible: the reference to a written transaction or document must arise by necessary implication, if not expressly, from the terms of the receipt itself: and the receipt does not identify Mr. Forde's letter as the document to which it refers.

To accept this submission would, in their Lordships' view, be to take the law back to what it was in the middle of the 19th century when *Peirce v. Corf* was decided: (1874) L.R.9 Q.B.210.

Counsel's submission is, in essence, a repetition of the principle laid down by Lord Denman C.J. in *Dobell v. Hutchinson* (1835) 3 Ad. & E. 355, 371, and followed in *Peirce v. Corf*, where, at page 217, Quain J. put it in one sentence: —

> " Therefore on the document itself there must be some reference from the one to the other, leaving nothing to be supplied by parol evidence."

Counsel correctly observes that it is not possible to link the receipt with Mr. Forde's letter in the absence of parol evidence. If, therefore, the principle stated in *Peirce v. Corf* remains good law, the submission succeeds.

The law has, however, developed since *Peirce v. Corf*. The watershed decision is *Long v. Millar* (1879) 4 C.P.D. 450. The plaintiff signed a document whereby he agreed to purchase three plots of land for £310 and to pay as a deposit and in part payment of the price the sum of £31. The defendant signed a receipt for the £31 as a deposit on the purchase of the three plots of land. The Court of Appeal allowed parol evidence to be given linking the agreement signed by the plaintiff with the receipt signed by the defendant. The linking word in the receipt was " purchase ": and oral evidence was allowed to identify the written document or transaction to which it referred. In *Long v. Millar*, once the identification was made and the two documents placed side by side, there was an agreement of sale in writing, and not merely, as in the present case, a memorandum in writing of an oral contract. Counsel submits that this is the distinguishing feature of *Long v. Millar*: but neither the language of the judges in that case nor the subsequent case law treats as important the distinction which counsel seeks to draw.

In *Long v. Millar* both Bramwell L.J. and Baggallay L.J. stated the principle broadly, the latter saying (at page 455) that " the true principle is that there must exist a writing to which the document signed by the party to be charged *can* (emphasis supplied) refer, but that this writing may be identified by verbal evidence ". And Thesiger L.J. (at page 456) found the explanation for the rule as being a particular application of the doctrine as to latent ambiguity. He added that to enable parol evidence to be given it must be clear that the words of the signed document will extend to the document sought to be identified.

The next case of importance was the decision of Russell J. in *Stokes v. Whicher* [1920] 1 Ch.411. Mr. Clauson, of Counsel, as he then was,

argued in that case that, even if you do not get any reference, inferential or otherwise, in the signed document to the document which contains the terms of the parties' oral contract, the authorities show that, if by placing the two documents side by side they can be seen to be part and parcel of one transaction, they can be read together. Russell J. refused to hold that the law had gone so far. He analysed (page 418) *Long v. Millar* as deciding that

> " if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if that other transaction contains all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together."

In *Timmins v. Moreland Street Property Co. Ltd.* [1958] 1 Ch.110 the Court of Appeal accepted Russell J's view of *Long v. Millar*, but took the law a step further. Jenkins L.J., with whose judgment Romer and Sellers L.JJ. agreed, said, at page 130:—

> ". . . . 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. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. 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."

Their Lordships accept this passage as a correct statement of the modern law. The first inquiry must, therefore, be whether the document signed by or on behalf of the person to be charged on the contract contains some reference to some other document or transaction. The receipt in this case clearly did refer to some other transaction, namely an agreement to sell the property in Swan Street. Parol evidence can, therefore, be given to explain the transaction, and to identify any document relating to it. Such evidence was led in the present case: it brought to light a document, namely Mr. Forde's letter of 10th February 1975, which does contain in writing all the terms of the bargain. It is a writing which evidences the transaction, though not itself the transaction. This distinction is, however, not material, whether the rule be as formulated in *Long v. Millar* or as in *Timmins v. Moreland*. Moreover, it would be contrary to the intendment of the Statute of Frauds to limit the rule to cases in which the reference in the signed document must be to a writing intended to have contractual force. The Statute of Frauds is concerned to suppress not evidence but fraud. In seeking a sufficient memorandum it is not necessary to shoulder the further burden of searching for a written contract. Evidence in writing is what the statute requires. For, as *Steadman v. Steadman* (*supra*) emphasised, an oral contract for the sale of land is not void but only, in the absence of evidence in writing or part performance, unenforceable. If therefore, a document signed by the party to be charged refers to a transaction of sale, parol evidence is admissible both to explain the reference and to identify any document relating to it. Once identified, the document may be placed alongside the signed document. If the two contain all the terms of a concluded contract, the statute is satisfied.

Accordingly, their Lordships are of the opinion that the learned Chief Justice was right to admit the oral evidence of Mr. Forde to explain the transaction to which the receipt referred and to identify as a document relating to it his letter of 10th February 1975. Their Lordships also agree with the Chief Justice that the letter contained all the terms of a concluded contract of sale of land.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed with costs to the appellant in the High Court and the Court of Appeal and a decree of specific performance made (provided that a good title can be made to the property). The respondent must also pay the costs of this appeal. Their Lordships will further advise that the case be remitted to the Court of Appeal for appropriate directions to be given to the High Court so that that Court may make such orders or give such directions as may be necessary in the absence of agreement between the parties to provide for (1) an Inquiry whether a good title can be made to the property (2) computation of interest at the appropriate rate on the sum of $351,000 being the balance of the purchase price from 10th May 1975 (3) certification of the amount due to the respondent being the balance of the purchase price plus interest but less the amount of rent paid and the taxed costs of these proceedings in the High Court, the Court of Appeal and before this Board and (4) completion of the transaction within a reasonable time.

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In the Privy Council

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v.

GEORGE SAHELY & CO. (BARBADOS) LIMITED

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Printed by HER MAJESTY'S STATIONERY OFFICE
1982