

The question that next arises has to do with standard of proof. In *Re Bramblevale* [1970] 1 Ch. 128 at 137 Lord Denning, M.R. had this to say —

“A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt.”

Again in *Knight v. Clifton* [1971] 2 All E.R. 378 at 381 where the Court of Appeal refused to interfere with a decision of a High Court Judge that contempt had not been established, Russell, L.J. said —

“Contempt of Court, even of the type that consists in the breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent.”

In the matter before me there are conflicting affidavits. The plaintiffs' sole joint affidavit in support of the motion is met by the defendant's opposing affidavit in which no admissions are made. The material allegations are all denied and left in issue. In addition the defendant deposes that he was fully alive to the terms of the order and his obligations thereunder and describes his efforts to comply therewith. These averments remain uncontradicted.

As O'Connor J. said in *P.A. Thomas & Co. v. Mould* [1968] 2 Q.B. 913 —

“where parties seek the power of the Court to commit people to prison and deprive them of their liberty there has got to be clear certainty about it.”

In the light of the evidence disclosed in the contrasting affidavits I am not satisfied beyond reasonable doubt that the defendant has acted in breach of the terms of the restraining order. The application is refused and the motion dismissed.

ELIAS v. GEORGE SAHELY & CO. (BARBADOS) LTD.

[SUPREME COURT — HIGH COURT — CIVIL SUIT NO. 879 OF 1975
(Douglas, C. J.), July 23, 1979]

Land — Sale of land — Contract for sale of land — Contract not in writing — Receipt for plaintiff's deposit sent by firm of solicitors acting for defendant — Whether contract enforceable — Whether sufficient memorandum of agreement within s. 2 of Statute of Frauds, Cap. 211.

Land — Sale of land — Oral contract for sale of land — Parties stating that agreement subject to formal agreement being completed and signed by parties — Whether concluded oral agreement — Whether agreement “subject to contract” contemplating further negotiation — Whether agreement only subject to formal document being prepared.

Land — Sale of land — Direction that deposit to be held by defendant's solicitors as “stakeholder” — Status and incidents of being “stakeholder” explained — Whether “stakeholder” entitled to interest on deposit after breach.

Facts: The plaintiff carried on a business in Bridgetown. The defendant company owned the building where the business was housed. The plaintiff decided to buy the building and spoke to G. S. who was connected to the company. She asked \$150,000. He agreed, but the sale did not go through. Subsequently G. S. telephoned from St. Kitts, saying she wanted \$300,000 for the property. The plaintiff went to St. Kitts where he saw G. S. and G. R. (G. S.'s sister). They asked \$335,000. He refused to buy at that price and returned to Barbados.

On February 10, 1975, G. R. telephoned the plaintiff from St. Kitts and told him that she and her sister had decided to sell for \$390,000. The plaintiff agreed to that figure and told her to get her lawyers to call him. The plaintiff testified that the defendant's lawyer, C. T., telephoned him that same day and asked him if he wanted to buy the property, and if the price was \$390,000. The plaintiff answered yes to both questions. C. T. then asked the plaintiff to send a cheque for \$39,000.

The plaintiff went to the bank, raised a loan of \$39,000 and arranged to borrow \$250,000. The plaintiff then took the manager's cheque for \$39,000 to his lawyer, H. F., who spoke to C. T. on the telephone and then wrote him a letter enclosing the cheque “payable to you as stakeholder” and “a deposit to be held by you as stakeholder pending completion of the contract of sale..... The usual terms will apply”. H. F. requested acknowledgment of the receipt and asked “your receipt for \$39,000”. C. T. never acknowledged in writing the receipt of the letter, but sent his firm's receipt for the money.

On May 28, 1975 H. F. wrote to C. T. giving him notice that the purchaser was ready and willing and offered to complete the sale and purchase, and advising that if the matter was not completed by July 20, 1975 the purchaser would seek specific performance. This produced no reply from C. T. As a result, H. F. wrote a letter to C. T. on November 7, 1975 threatening legal action if no reply to his letter was forthcoming by November 15, 1975.

The plaintiff filed his writ on December 8, 1975, claiming specific performance, damages for breach of contract and costs. The defendant denied agreement for sale of the property; pleaded s. 2 of the *Statute of Frauds*, Cap. 211 and pleaded that there was no sufficient memorandum, since it did not contain all the terms; and finally, pleaded that such agreement as there was expressed to be subject to a contract of sale being completed and signed by the parties.

Held: (i) there was a concluded oral agreement for the sale of the premises.

(ii) the oral agreement of the parties was evidenced by a note or memorandum in writing within the meaning of the *Statute of Frauds*, Cap. 211. The law did not require any special form of writing and the question was not one of intention of the party who signed the document, but simply one of evidence against him. In the instant case, H. F.'s letter of February 10, 1975 was inextricably connected with the receipt of even date, and the law was that so long as there was a document signed by the party to be charged which, while not containing all the necessary ingredients of the required memorandum, contained some reference, express or implied, to some other document or transaction, then the two documents could be read together.

(iii) the defendant's argument that the memorandum did not contain all the terms could not stand. As far as the fixtures and fittings were concerned, the plaintiff had been the defendant's tenant for about 15 years, and he and the defendant's directors were friends. The fixtures were listed in his lease, and the agreement was to sell the property "as is" with "freehold premises, fixtures and fittings". In these circumstances, it was perfectly clear what the defendant was selling, and what the plaintiff was buying.

(iv) it was well settled by the authorities that if a document relied on as constituting a contract contemplated the execution of a further contract, it was a question of construction whether the execution of a further contract was a condition of the bargain or whether it was a mere expression of the desire of the parties as to the manner in which the transaction already agreed to would in fact go through. In the circumstances, it was clear that the agreement reached by the parties was not "subject to contract" and did not contemplate either further negotiation or further agreement.

(v) it was clear from the authorities that a stakeholder was entitled to retain the interest on a deposit so long as he lawfully retained it in his hands for the purpose for which it was entrusted to him. But here the plaintiff was not seeking to recover from the stakeholder who was not a party to the proceedings. He was seeking damages for breach of contract, and the issue therefore was whether the plaintiff could recover as general damages interest on his deposit which C. T. was under a duty to return to him when C. T.'s client rejected the plaintiff's "offer". It would be unreasonable if the parties did not have it in contemplation that the plaintiff should receive interest on his deposit if that deposit were improperly retained and no conveyance executed. The interest was therefore recoverable as damages for breach of contract.

Cases referred to:

- (1) *Re Hoyle* [1893] 1 Ch. 84
- (2) *Auerbach v. Nelson* [1919] 2 Ch. 383
- (3) *Timmins v. Moreland Street Property Co. Ltd.* [1958] Ch. 110
- (4) *Aphorp et al v. Niblock et al* (1976) 11 Barb. L.R. 49
- (5) *Winn v. Bull* (1877) 7 Ch.D. 29
- (6) *Von. Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284
- (7) *Sorrell v. Finch* [1976] 2 All E. R. 371
- (8) *Burt v. Claude Cousins & Co. Ltd.* [1971] 2 All E. R. 611
- (9) *Skinner v. Trustee of Property of Reed* [1967] 2 All E. R. 1286
- (10) *Harington v. Hoggart* [1824—34] All E. R. Rep. 471
- (11) *Orme v. Broughton* (1854) 10 Bing. 533
- (12) *Keen v. Mear* [1920] 2 Ch. 574
- (13) *Lloyd v. Stanbury* [1971] 2 All E. R. 267
- (14) *Wallington v. Townsend* [1939] 2 All E. R. 225.

Mr. D. A. Simmons and *Mrs. B. Walrond* for the plaintiff.

Mr. J. S. B. Dear, Q. C., and *Miss Kentish* for the defendant.

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

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 she 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.

On February 10, 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.

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,

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 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 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.

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.

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.

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 ½ stamp duty, transfer tax would be paid by his client, marketable title would be given.

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'.

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 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 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 February 10, 1975 and the receipt issued by his firm is entirely different. In his evidence Mr. Turney says —

"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.

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 1] 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.

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 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.

.....No agreement for sale was ever 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 May 28, 1975, Mr. Forde wrote to Mr. Turney in these terms —

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 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 Sahely & Co. (Barbados) Limited of Bridgetown, Barbados of freehold property comprising the store 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.

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."

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."

Mr. Turney wrote his client on July 18, 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.

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.

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 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.

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.

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 December 8, 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 February 20, 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.

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.

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 February

10, 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 to this matter prior to February 10, 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.

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 one of evidence against him [see *Re: Hoyle* [1893] 1 Ch. 84] 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 February 10, 1975 is inextricably 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 —

"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."

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.

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.

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.

The authorities on the question were discussed in *Apthorp et al v. Niblock et al* (1976) 11 Barb. L. R. 49. 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".

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 or 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 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."

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.

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 this state of the evidence it seems to me that the term "the usual terms" is precise and does not require further negotiation.

Attention is drawn to the fact that Mr. Forde directed that the deposit be held by Mr. Turney's firm "as stakeholder." This is 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....."

Mr. Dear cites the case of *Burt 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."

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 July 9, 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) 10 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 —

"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 Russell, J. in *Keen v. Mear* [1920] 2 Ch. 574]

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 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."

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.

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 February 10, 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 July 20, 1975 until the property is conveyed to the plaintiff.

And the plaintiff will have costs certified for two counsel.