1980/09/22

IN THE HIGH COURT OF)
THE NEW HEBRIDES)

Civil Case No. 72 of 1976

(CIVIL JURISDICTION)

IN THE MATTER of: VALESDIR LIMITED
Plaintiff

AND LEONARD ASHWORTH GULSON
Defendant

AND RICHARD SIDNEY SMITH
Third Party

Judgement

Prior to the year 1973 a friendship seemed to develop between the defendant and third party. The defendant was at that time and I think still is, a person dealing with the transfer of money throughout the world on a commission basis. He was also extremely interested in yachts. The third party about the year 1973 owned an hotel in Fiji called the Castaway Hotel. It was situated on an island and had a launch called the Stardust which conveyed persons to and from the island and indeed brought people on various cruises around the islands. It seems that in 1973 defendant and third party had discussions as to whether the Castaway Hotel should be sold and the money obtained invested elsewhere. The hotel was in fact sold together with the launch Stardust for 1,000,000 and 80,000 Fiji dollars respectively.

About this time it became known to the defendant that one Bela Csidei (hereinafter called 'Csidei') had an option to purchase a parcel of land on the island of Epi in the New Hebrides from one Arnold Daly (hereinafter called 'Daly') of Noumea, Attorney for the Naturel family. The defendant introduced the third party to Csidei and after many discussions and a visit to the estate, it was decided that defendant purchase 10% of the property and for such should pay 10% of the option price for a portion of the estate known as Votlo and that Valesdir a company to be incorporated buy

the remainder and pay A$90,000 to Csidei for the option he held and A$216,000 for property subject to a clear title to the estate being given to the company.

An agreement was drafted by Csidei's solicitor in Sydney and delivered to Mr. Applegate of Sly and Russell, Solicitors in Sydney for the third party and forwarded to their office in Vila. The parties, that is the defendant, Csidei and the third party then came to Vila and saw Miss Jean Matthews, a solicitor of Sly and Russell, Solicitors, Vila. The company Valesdir (hereinafter referred to as the Plaintiff) was incorporated on the 4th December, 1973 (Anglewood International Limited and Blackstone Nominees Limited were the directors whose representatives were Mr. Fitzsimmons and Miss Matthews of Sly and Russell, Solicitors). After the incorporation of the plaintiff, agreements were settled which are Exhibit 4 in the record. The agreement between plaintiff and Csidei was for the purchase of the option for A$100,000 which Csidei had over land in Epi. In that agreement the option particulars between Csidei and Daly are set out. Clause 1 of the agreement therein refers to the consideration by plaintiff to Csidei of A$100,000 whereby Csidei undertook to forward to the said Daly the exercise of his option which was set out in the document marked 'B' and (2) to forward to the said Daly the agreement marked 'C' for execution by the plaintiff and the said Daly. Clause 2 of the agreement provided for the payment to the Trust Account of Maitre de Preville of Vila, Solicitor for the said Daly the deposit of A$24,000.00 i.e. 10% of the purchase price of the land to be purchased by plaintiff. Clause 3 of the agreement stated that the consideration payable by plaintiff and referred to in Clause 1 was to be paid to the defendant to hold same as stakeholder and that the same shall only become due and payable to Csidei upon the plaintiff becoming registered as the proprietor of the lands referred to in the Schedule to the said Agreement, and a certificate to this effect from the solicitors for the plaintiff Messrs. Sly and Russell shall be conclusive evidence thereof and shall entitle the said defendant to pay the moneys held to Csidei. In the event of the plaintiff's not becoming registered as aforesaid for any reason whatsoever the said sum of one hundred tousand dollars shall be refunded to the company without deduction and neither party shall have any claim against the other hereunder. In fact the figure should be

A$90,000 as defendant was contributing 10% equal A$10,000. The annexure 'B' to that agreement Exhibit '4' was the exercise of the option by Csidei addressed to the said Daly. Paragraph 3 refers to land comprised in Title No. 309. Defendant was nominated by Csidei as his nominee for the purpose of entering into a contract with Daly for the purchase of that Lot Title 309. A contract in duplicate was enclosed signed by the defendant. Annexure 'C' to the agreement is the agreement for the purchase of the property by plaintiff from Daly, and annexure 'D' is the agreement between defendant and Daly for the purchase of Title No. 309 which was signed by the defendant. The main agreement Exhibit 4 and annexures seem to have been signed on the same day.

On the same day ninety thousand Australian dollars was given to the defendant as stakeholder by the third party on behalf of the plaintiff. The defendant acknowledged the said sum by a letter dated the 4th December, 1973 (Exhibit 5) to the plaintiff and the third party. In that letter the defendant confirmed that the said sum of ninety thousand dollars would be held by him as stakeholder, pending the registration of plaintiff as proprietor of the land.

A contract for the sale of the land to plaintiff was executed by Daly for the Vendors and also between Daly and the defendant for his part of the property title No. 309. The title in respect of the land to the defendant seemed clear but Daly would only complete the both transactions together. The defendant was held up in the purchase of his property as titles to the main portion of the property to plaintiff were delayed, the vendor being unable to obtain or give good title to the plaintiff.

Due to failure of the vendor Daly to give good title to the plaintiff having been given Notice to do so by the plaintiff on the 21st November, 1975. The plaintiff on the 22nd December, 1975, rescinded the agreement.

On 23rd February, 1976, Solicitors, Wilshire Webb Son and Doyle wrote to the defendant demanding the repayment of the stakemoney of ninety thousand Australian dollars explaining to the defendant the condition under which he held the stakemoney (Letter Exhibit 16). The stakemoney was never repaid. The plaintiff sued the defendant for the return of the money together with interest from

the date of demand i.e. 21st November, 1975 and costs. The defendant in his defence contested that he was authorised by the third party to release the sum claimed to Csidei which he did. The defendant then applied to the Court to issue and serve on the third party, notice claiming to be indemnified against the plaintiffs claim and the costs of the action. This was allowed and the defendant in his statement of claim against the third party intimated that about May 1974 the third party occupied or represented that he occupied the position of a director of the plaintiff and had or represented that he had, authority to permit the release by the defendant to Csidei of the money claimed by the plaintiff i.e. the ninety thousand australian dollars and that the defendant paid the said money to Csidei in reliance upon such facts or representation. The third party denied all the allegations of the defendant. He, the third party, in his amended statement of defence stated "that about November, 1973 he was trustee for a company to be incorporated, entered into an oral agreement with the defendant and Csidei for the proposed company to purchase an option for the consideration of A$100,000 from Csidei for land in Epi. That it was further agreed that the defendant would be stakeholder for the sum of A$100,000 (insofar as the defendant was concerned this would be A$90,000 as the defendant was paying 10% of the option for a piece of the land) that the defendant would be autorised by the third party on behalf of the company to be incorporated to make payment therefrom in the sum of A$50,000 to Csidei upon the exchange of contracts relating to the said lands BUT that this authorisation would be payable for the specific and limited purpose of applying the same to the purchase by Csidei of a yacht known as 'Aries' then believed to be berthed at Athens, Greece. It was further agreed that in the event of the 'Aries' not being so purchased within a reasonable time the sum of A$50,000 would be returned immediately to the defendant who would continue to hold the same as stakeholder AND that in any event, the defendant would remain liable for the amount of the stakeholding if the plaintiff failed to become registered proprietor of the said land. That a draft agreement was prepared substantially reflecting the aforementioned oral agreement. Finally, that the draft agreement was superceded by the contract (i.e. Exhibit 4 of the Court record). But at all times the defendant and Csidei (who were present at the execution of the Contract) were fully aware of the basis upon which the sum of A$50,000 would be released by the defendant to Csidei."

The case came on for hearing before me on the 3rd June, 1980 Mr. C. Darvall Q. C. with Mr. P. Coombe of Turner Hopkins Coombe and Partners and T. De Martin of Wilshire Webb Son and Doyle (NH) appearing for the plaintiff and the third party respectfully, Mr. White with Mr. Hudson of Hudson and Company, appeared for the defendant.

The defendant gave evidence and explained his association with the third party prior to the purchase of the option from Csidei to buy land at Epi. He held himself out as a meticulous person in the manner in which he negotiated business. It was clear from his evidence that he was well adversed in the business of a financial adviser and of moving money for clients throughout the world which necessitated holding substantial sums of clients money. That he met Csidei in 1968 and became his financial adviser. That he was requested by Csidei to make enquiries regarding the purchase of a yacht for him and that in the course of his travels he did seek such a yacht and eventually saw one for sale in Greece called the 'Aries'. In the course of one of his conversations with Csidei the defendant was shown an option by him for the purchase of land at Epi. There was a discussion with the third party about the option, its price, the price of the land and that Csidei wanted to sell his option in order to buy a yacht in Greece. Mr. Applegate of Sly and Russell, Solicitors, Sydney, was contacted and as a result the parties were directed to the firm of Sly and Russell, Vila to draw up legal documents. The defendant as a result of the discussion agreed to purchase Votlo Plantation Title No. 309 which was included in Csidei's option for 10% of the purchase price A$240,000 for the whole land and pay 1/10th of the option price. At the office of Sly and Russell, Solicitors, documents were drawn up by Miss Matthews, a solicitor. The defendant in answer to a question by me said he only read one of the documents which formed Exhibit 4. Considering the witness's business acumen and the manner in which he gave his answer relating to the documents I formed the opinion that he was not telling the truth. I just did not believe this answer that he did not read all the documents. There was an undertaking by the defendant in Exhibit 4 and annexures thereto which in my opinion no business person would agree to unless having sight of same. Further in this evidence the defendant said he did not know that his agreement to purchase Votlo was dependant upon completion of agreement between the plaintiff and Daly. I find this difficult to believe. He said he

instructed Miss Matthews to make sure it was separate from all the rest. If defendant had instructed Miss Matthews to do so when the agreements were signed in December, 1973 it seems remarkable that no letter was written by Miss Matthews until the 5th May, 1975, Exhibit 18, 19 and 19A. In my opinion the general tone of the letters suggest that no such request for separate completion was made until the letter Exhibit 18 was written and then only I think, reasonable to infer, because defendant realised difficulties were being experienced in giving title to the plaintiff. The defendant then relates that he received the A$90,000 stakemoney and that he signed Exhibit 5 which clearly states that he held the A$90,000 as a stakeholder, pending registration of plaintiff as proprietor of the land. This letter Exhibit 5 was written to the third party and the plaintiff. Defendant was asked by his counsel Mr. White "At the time or at any time before you signed that document (Exhibit 5) was there any discussion between you and the third party about you holding the sum of A$90,000 pending registration of plaintiff as proprietor of the land. Defendant reply to that, I found difficult to accept- he said "There was as I said previously a discussion with Mr. Applegate in Sydney and again with Miss Matthews in Vila that the money was to be moved to Greece". I did not have either Mr. Applegate or Miss Matthews before me to confirm or deny this but I ask myself why should the stakemoney be moved to Greece, certainly not until the titles to the properties were cleared and only then if Csidei was in Greece and he wanted it there. Again the actual stakemoney was not moved as it had already been used by the defendant shortly after he received the cheque from the third party on behalf of the plaintiff. He clearly stated he used part of it and the rest he lodged in his own account. Later he used some to pay for solicitors fees and the balance for the payment of some land. It could well be, of course, that he thought title to the lands would be easy to obtain and that his inten tion in moving the stakemoney or money to Greece was to give it to Csidei on a clearance of title being made known to him and further the plaintiff being registered as proprietor. I was not impressed with the answers of the defendant. If the defendant was a meticulous person as he alleged he was, I would have expected him to retain the stakemoney until it was quite clear that a good title to the land was given and the plaintiff registered as proprietor, an undertaking which he gave in Exhibit 5. The defendant next gave evidence of a loan being given by the

third party to Csidei - defendant asked the third party whether he would like to lend Csidei some money and that the third party's reply was "Yes, Leonard if I get sufficient interest and the ownership of the yacht is in your or my name until it is repaid". The loan was supposed to be for A$100,000 and that the third party would send it to Greece. Defendant then gave evidence that he went to Greece with Csidei and stayed at the Grand Britannia Hotel in Athens. This was about March, 1974. That the third party told him that he would apply to the Exchange Control in Fiji using the reason that he wished the foreign funds to purchase the boat to replace the Stardust which he sold. That the third party said he would remit the money as soon as he returned to Fiji to a bank in Athens. Here defendant said he could not recall the name of the bank although he went to the bank two or three times a day for several days to see whether the money had arrived. I find this difficult to believe particularly as he had a definite purpose in going to the bank. One might accept it if he went to the bank once or twice but two or three times a day for several days, I cannot accept such evidence when one considers that defendant was a business man depending to a large extent on money movement from country to country. When the funds did not arrive defendant called Mr. Laurie Rolls' house in Suva. This call is most important to this case as I have to decide whose evidence I believe, that of the defendant, or the third party and Mr. Rolls, as it is largely as a result of this phone call that the defendant contends he was authorised to pay the stakemoney to Csidei and indeed a main issue in these proceedings. The defendant first spoke to Mr. Rolls and then spoke to the third party. Defendant alleged that the third party said "Len, as you have heard Laurie say (Mr. Rolls) I have been unable to get Exchange Control approval to send the money to you so as we have exercised the option and we owe him the money anyway if it will help him you can release my A$90,000 and your A$10,000 if you feel so inclined, as I feel we have let him down. Defendant said I said OK Dick, I will do that," Dick being the third party. That was the only conversation according to the defendant. I will deal with the evidence of the third party and Mr. Rolls as to their version of the conversation later.

Analysing the conversation can I really believe that the third party would state "We owe him the money anyway when in fact no money was due to Csidei until the plaintiff had received good title to the land and had been registered as proprietor thereof, a fact which

was quite clear to the defendant the stakeholder and the third party. For the third party allegedly to say such would amount to him giving A$90,000 to Csidei without any guarantee of title of the lands to the plaintiff. Considering the attitude adopted by the third party regarding the loan of the A$100,000 to Csidei, and the interest he wanted and the security of having the boat in his and the defendants name until the loan was required, I find it difficult to accept and do not accept that the third party over the phone would authorise the release of A$90,000 without the necessary precaution of title to the land being given to the plaintiff which was the condition known to both. The defendant produced a notebook which was as he said the book he carried in his pocket at the time of making notes of addresses, details of some yachts and cars and amounts of money and addresses of owners of yachts including the Aries. If this is the method used by the defendant for trasactions carried out by him and this was the only book produced, I entertain a grave doubt that he was as meticulous as he stated - entries in the book were so disconnected that it is difficult to understand what they related to. I do not attach much weight to the book (Exhibit 20) or its contents, all the inks therein are different, dates have been changed, the contents could have been written at any time. The defendant further gave evidence that he did keep accounting records but that he did not keep any records in respect of his dealings with Csidei. Later he said he did not keep formal accounting records. He said he swore in an interrogatory that he kept proper accounting records at the time but that he no longer had them. He ended by saying that he did not keep records because he did not keep formal records In my opinion the defendant was quite evasive in his answer to a simple question - either he kept records or he did not - what the records were and what they related to could so easily be explained. Again I thought defendant was evasive when asked in cross examination about the title to the property. Mr. Darvall asked "So far as plaintiff land was concerned you knew, did you not, that titles which were unobtainable over this long period were in the water frontage maritime zone."

A "I thought that was only one of the difficulties. It was a minor difficulty, or no difficulty at all really."

Q "Were they or not?"

A "They were not a difficulty as to the valuation or purchase of the plantation."

Q "The vendor was unable to give title to all of the Maritime zone area, that is so?"

A "I don't understand it to be so."

Q "The vendor did not have any title. The title had remained vested in the French Government?"

A "Yes Sir, I know that."

The defendant knew that the maritime zones area were vested in the French Government yet there had to be many questions before he admitted it. Another matter raised by Mr. Darvall which also made me view with caution the evidence of the defendat. It related to Exhibits I2 and I3 sent by the defendant and Csidei to the third party and Syand Russell, Solicitors, Vila acknowledging the payment of A$90,000 to Csidei allegedly in pursuance of an authorisation given by the third party to defendant in a phone conversation between Athens and Fiji. In both letters the option price for both plaintiff and defendant is wrongly stated at A$90,000 and not A$IOO,000. The defendants explanation at page 8I states - "I remember the two letters I gave evidence on yesterday, being Exhibits I2, I2A, I3 and I3A, about dictating a letter in Csidei's office (the witness is shown the Exhibit and he reads the letter from himself to third party) that is correct, (the witness reads it again), yes, it is correct. I am eaying that I had accounted to Csidei for A$90,000 for consideration of the sale of Valesdir, that is mathematicallyincorrect, to that extent, but it is addressed to Mr. Smith, the third party. I withdraw that statement reading that it is correct. I now understand why it is typed like this. I did dictate it and did not dictate Csidei's letter. It is difficult to answer the question because I wrote the letter with the intention......... It is badly written to the extent that the words "and myself" there makes it misleading. The amount is right because Mr. Smith, the third party, only authorised A$90,000, I authorised A$IO,000. As I previously said, to make it perfectly clear, "myself" should not be there without further words. As the letter is read it is not correct, the consideration for the sales of the Epi option was A$IOO,000 to both of us. I said in evidence yesterday Csidei called in his secretary and dictated her a letter and I dictated her a letter. Csidei had called the secretary into the presence of myself and himself. I was in his presence when he dictated his letter."

Mr. Darvall reads from his notes to the defendant - "We called in Elvia and Csidei dictated to her a letter and I didated her a

letter, Csidei signed his letter and I signed my letter and they were put in envelopes." The defendant then said I remember saying that yesterday. I now say that we were both not present when Csidei dictated his letter, I was sitting in his office with the secretary. That is the same girl, then she and I went into the other room etc...."

The evidence of the defendant with regard to the writing of the letter is most suspect, so much so that I find such evidence to be unacceptable. The same error in both letters - the phraseology of the letters are very similar and I am led to the conclusion they were dictated by the same person. I have to ask myself - why were those letters written by the defendant and Csidei from thesame office and on the same date. Could it be that the motive was to establish some authorisation of the release of the money i.e. A$90,000 to Csidei by the third party. In my opinion I can reasonably draw that inference. The evidence is too suspect in my opinion and I reject it.

Lastly in the defendant's evidence he mentioned that Csidei was extremely annoyed and upset when told as a result of the phone conversation with Fiji that the loan was not forthcoming. It seems strange that Csidei should be upset when in fact if one believes the defendants evidence A$90,000 was released by the third party and given by the defendant to Csidei. On the other hand, in my opinion it can be inferred that Csidei was really annoyed and upset because no money was forthcoming at all as a result of the phone call to Fiji and defendants evidence that he did receive authorisation to release the money was not true. There were times when the defendant was giving evidence that he gave one answer then I noticed he looked at the body of the Court and changed his answer. I was not satisfied that the defendant was all the time telling the truth.

The third party then gave evidence. He impressed me in giving evidence, he was subjected to severe cross examination not always relevant to the matters in issue but I considered such should be allowed to test his veracity. Indeed he was asked the same questio again and again in different form and seemed to carefully consider

the questions asked and if not sure of what was being referred to asked for clarification. His evidence of the phone conversation between himself and the defendant was - "The defendant asked me had I managed to obtain Exchange Control approval forthe purchase of the 'Aries' and I said I was unable to obtain it. He then said "Was there anything I could do about it" I said "No". He then said "Could he use the money he was holding for Valesdir (Plaintiff)" and I said "No, that I was unable to authorise that." Mr. Rolls at whose house the third party was at the time of the phone conversation gave evidence and said "The phone rang and I answered it and it was the London exchange; I then spoke with Mr. Gulson (defendant) I remember I did not have a conversation with him apart from the passing of pleasantries. Mr. Smith (third party) came to the phone and took over the conversation and I saw him speaking into the telephone. I heard him saying - my best recollection I have of the conversation I heard; the words of the third party on that occasion, I cannot remember specific words, but I can recall the tenor of the conversation which was largely repeated no's. There is nothing I can recall having heard. I recallthat it was a conversation of several minutes. The no's were interspersed throughout minutes and that is the full extent of my recollection. I did not hear the words to the effect of the following "Len, as you have heard me say, I have been unable to get exchange control approval to get the money to you, so as we have exercised the option and owe him the money anyway, if it will help him you can release my A$90,000 and your A$10,000 if you are so inclined, as I feel we have let him down." I can say that it was contrary to my understanding of the conversation. I cannot recollect hearing those words". This witness states clearly that the word "no" was used quite a few times. If the conversation was as defendant said it was, then the word 'no' would not have been used. This witness answered all questions put to him without hesitation. He seemed to me an intelligent man and in view of the fact that he heard continuous no's by the third party in his conversation on the phone with defendant and the fact that he did not recollect hearing the conversation which defendant alleges was made by third party, in my opinion I can accept that the conversation on the phone was as stated by the third party and not as stated by the defendant. The alleged conversation on the phone is completely contrary to what was permitted. Defendant was a stakeholder for the A$90,000 until titles were cleared and the plaintiff was registered as owner of the property. The third party did not

seem to me, from hearing him as a witness and his demeanour in the witness box under searching cross-examination to be a person who would release A$90,000 knowing full well that the conditions attaching to the stakemoney were not complied with. I believed the third party.

Regarding Exhibits I2 and I3 which the third party admitted receiving I find his reactions to the letters quite understandable. He gave instructions to Miss Matthews, Solicitor of Sly and Russell to reply to them, as they were all wrong. She was his solicitor so he naturally trusted her to reply as instructed. He did not do anything other than that, as he said he knew the defendant was a rich man and could pay the stakemoney when called upon so to do if he had paid it to Csidei. His letter to the defendant of the 9th October, I974, (Exhibit I4) is so frank in expression regarding the difficulty for obtaining titles to the land as a result he gave notice to the defendant requiring the return of the A$90,000 plus interest that I find it difficult, having seen and listened to the third party giving evidence for three days, to believe that he was a person who allegedly gave authority to the defendant to release the money to Csidei, when the conditions attaching to the stakemoney were not fulfilled.

Mr. Darvall who appeared for the plaintiff and the third party in his written submission has stated that the issues in the case are:-

I. Was the defendant authorised to appropriate and disburse the stakemoney?

2. If so, what were the terms of the authority?

3. Was payment made by the defendant to Csidei?

4. If so, was it made in accordance with authority?

In my opinion this correctly sets out the issues which have to be resolved.

Mr. White who appeared for the defendant has made lengthy submissions regarding the pre-contractual negotiations between the defendant

and the third party. Even though reference is made to such in the pleadings of the third party it is clearly stated they were superceded by the Contract Exhibit 4. In my opinion such are not relevant to the case, as per the principles laid down by Erle C. J. in Kelner -v- Baxter L.R.C.P'2 p.183 1866 Vol. II who said "The cases referred to in the course of the argument fully bear out the proposition that, unless a contract is signed by one who professes to be signing 'as agent' but who has no principal existing at the time, and the contract would be altogethe inoperative unless binding upon the person who signed it, he is bound thereby, and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights and obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed; but that notion was manifestly contrary to the principles upon which the law of contract is found. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made. Wilkes J. Byles J and Keating J all were of the same opinion. I therefore reject all submissions and evidence relating to the pre-contractual negotiations.

Mr. White wishes me to accept that the stakemoney was paid to Csidei. I am afaid I have no proof of that. There is the letter Exhibit 12 signed by Csidei that he received A$90,000 from the defendant allegedly on the authorisation of the third party. I have expressed my opinion on Exhibit 12A written by the defendant. To fully prove the receipt of the money Csidei should have been called and given evidence, thus making less difficult the issues that have to be resolved, in this case. Just a letter signed by Csidei is not in my opinion sufficient to accept that money was paid to him. I reject Exhibit 12 as being too suspect to accept and hold that defendant is accountable to the plaintiff for the A$90,000. I have already expressed an opinion, that viewing all the circumstances I did not believe the defendant when he said he received authorisation from the third party to release the money to Csidei.

I believed the third party not the defendant.

One of the later arguements of Mr. White was that the plaintiffs was in any event undoubtedly financially unable to complete. It had no assets whatsoever. This question did not arise. The Vendors were specifically given notice to complete on the 2Ist November, I975, i.e. two years after the contract of sale was executed. This in my opinion was an adequate period of time for any vendor to give clear title. He failed to do so and the contrac was rescinded in the terms set out. I consider the vendor had adequate time to complete. The question whether the plaintiff was financially sound is a matter upon which some consideration should be given should it be found that something other than title were being used to rescind the contract. Apart from this, the third party said there would have been no difficulty, in completing as funds were available. He maintained the figure A$3,000,000 was available. I therefore do not hold with Mr. White's view that the third party's denial that he authorised the defendant to release the stake was a fabrication.

On the issues before the Court I hold:

I. That the defendant was not authorised to appropriate and disburse the stakemoney, and

2. That I have no proof before me that the money was paid to Csidei other than the letter Exhibit I2 which is suspect and the evidence of the defendant which I do not believe. In my opinion this justifies me in rejecting it and holding that the money was not paid to Csidei.

Now I turn to the position of the defendant as stakeholder. In Chitty on the Law of Contract 24th Edition p. 902 it is stated that a stakeholder is an agent who is entitled, during the continuance of his authority from a party to some arrangement, to make payment, in accordance with that authority, of the money lodged with him by that party.

The legal position of a stakeholder is dealt with by Lord Tenterden C.J. in the case of Harrington -v- Hoggart (I824-34) A.E.R. p.472 which related to whether the defendant who was an auctioneer and in that character having received a deposit of £2000 for the

estate sold by the plaintiff to Mr. Secretan, is liable to pay interest to the vendor of the estate for any part of the time during which the money was in his hands before the purchase was complete. He did pay into Court interest for the subsequent period The Chief Justice stated "Here the defendant is not a mere agent, but a stakeholder. A stakeholder does not receive the money for either party, he receives it for both; and until the event is known, it is his duty to keep it in his hands. If he thinks fit to employ it and make interest of it, by laying it out in the funds or otherwise, and any loss accrued, he must be answerable for that loss; and if he is to answer for that loss, it seems to me he has a right to any intermediate advantage which may arise". I agree with the views expressed by Lord Tenterden C.J. that no interest is payable by a stakeholder during any period he holds as such but the question I have to consider here is whether the defendant stakeholder is liable for interest in the money from the date a demand was made to him to return the money and he did not do so. In the above case referred to the auctioneer was not liable to pay interest for any part of the time during which the money was in his hands before the purchase was completed but the auctioneer did pay into Court interest for any subsequent period. In my opinion the same should apply in this case. I have held that defendant was not authorised or had he any right to release the stakemoney, accordingly interest is payable by him on that money from the date it was demanded i.e. 23rd February, 1976. I had further to consider whether interest should be payable for the full period between the date of demand and the time of trial. It has taken four and a half years for this case to be heard. I consider the case could have easily been disposed of within a period of two years and accordingly I will allow two years interest only from the date of demand. I have held that the defendant did not in fact release any money to Csidei and such being the case the defendant has had use of the money. Under the circumstances I do not consider 10% interest too high and I accordingly award 10% interest for a period of two years on the A$90,000 from the date of demand. I also award the plaintiff his full costs in the case against the defendant.

I have given lengthy consideration as to whether the third party should be given his costs in view of the submission by Mr. White

on behalf of the defendant that under no circumstances should he be given his costs. Admittedly, it was the third party who gave the loan of the A$90,000 to the plaintiff and it was he who did most of the negotiating with the defendant and Csidei but I have held that the third party did not authorise the defendant to release the money to Csidei and I therefore see no reason why I should withold from him his costs. I allow the third party his costs against the defendant subject however to the deduction therefrom of the sum of A$5000 which I consider is the approximate sum wasted by the third party in his denial of authority.

Frederick G. Cooke

Frederick G. Cooke
Chief Justice
22 September, 1980.