

IN THE PRIVY COUNCIL

No. 24 of 1976

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O N A P P E A L  
FROM THE FIJI COURT OF APPEAL

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B E T W E E N :

GANGA RAM s/o Ram Sarup  
SHIU NATH s/o Ram Sarup  
CHOTELAL s/o Nanhu  
MANORAMA PILLAI d/o Norayan Appellants

- and -

10 GRAHAME & CO. (a firm) Respondents

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CASE FOR THE APPELLANTS

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RECORD

1. This is an Appeal from a part of the Judgment and Order of the Fiji Court of Appeal (Spring, J.A., and Gould, V.P.) dated the 26th day of November, 1975 which allowed the Appeal of the Appellants (Plaintiffs in the original action) from the decision of the Supreme Court of Fiji (Stuart, J.) dated the 12th day of May, 1975, whereby the Supreme Court ordered, inter alia, that the Respondents to this Appeal (one of the Defendants in the original action) do pay to each of the Appellants \$10 by way of general damages and one third of the Appellants' costs, for failing to advise the Appellants to lodge a caveat on certain land. Pp.85-107
- 20
2. The sole question raised by this Appeal relates to the Order made by the Court of Appeal that the amount paid by the Respondents to the Appellants be reduced by the amount which the Appellants had recovered in the original action from another Defendant therein. The Court of Appeal made the Order complained of because of an alleged admission or concession made at the hearing of the Appeal. Pp.105-107
- 30

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The Appellants respectfully deny that such concession or admission was made.

3. The facts in this matter, briefly outlined, are that in 1967 the Appellants purchased certain land from one Ram Mahesh pursuant to agreements whereby the purchase price was to be paid by instalments. In September and October, 1969, without giving notice to the Appellants, the said Ram Mahesh sold the said land to one Dhanpat d/o Mahabir and one Jagat Singh s/o Babu Singh, both of whom were Defendants in the original action. Apart from the Respondents herein, the other Defendant in the original action was The Public Trustee of Fiji, representing the estate of the said Ram Mahesh. The Respondents herein acted for both parties to the said agreements and admitted negligence in the Courts below in that they failed to enter a caveat on the said land. A fuller account of the material facts is contained in the Judgment of the Court of Appeal. 10
- Pp.85-104
4. The Appellants issued their writs, accompanied by a Statement of Claim in each case, in August 1970 and by consent the three actions were heard together. The Defendants joined issue with the Appellants on their claims on grounds which are not material to this Appeal. 20
- Pp.1-28
- Pp.31-54
5. In his Judgment, dated the 12th May, 1975, the learned Trial Judge after considering matters not relevant to this Appeal, turned to the position of the Respondents. The learned Judge interpreted the concession made by the Respondents - that they were negligent not to lodge a caveat on the said land - as meaning that the Respondents were negligent in failing to advise the Appellants to lodge the said caveat. Having come to this interpretation, and having reviewed the law, the learned Trial Judge, it is respectfully submitted wrongly, put the Appellants' case in this way: 30
- Pp.57-75
- P.71,L.17 -  
P.74, L.35
- "In this case the plaintiffs in effect say :
- 'We failed to take all reasonable steps to prevent Ram Mahesh from dealing with the land in his title without notice of an interest, because the third defendant did not advise us to lodge a caveat.'
- P.72,L1.20-32 40 50

It is of course, quite impossible at this stage to speculate as to whether if such advice had been tendered, it would have been accepted or whether the plaintiffs might have considered themselves sufficiently protected, as Ganga undoubtedly did, by the vendor's solicitors having custody of the instrument of title."

10 The learned Trial Judge concluded that the Respondents, in failing to advise the Plaintiffs to lodge the said caveat, had fallen short of the standard which the public expects of Solicitors. The learned Judge then turned to the question of the measure of damages to be awarded to the Appellants for the Respondents' admitted negligence: P.73,L1.4-10

20 "I pass, then, to the question of damages. Here I think it fair that it was third defendants' to register a caveat which made possible or at any rate facilitated the fraud by which the plaintiffs have lost their land. As Lord Haldane said in Nocton v. Lord Ashburton (1915) A.C. 932, 956: Pp.73,L.11-74 L.35

30 "The solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort for negligence in breach of a duty imposed on him."

To that the learned author of Clerk and Lindsell on Torts (13th Edition) at paragraph 955 adds:

40 'Nevertheless it has been repeatedly held that the duty owed by a solicitor is a contractual duty owed to his client alone.'

I think therefore that the measure of damages must be considered as arising in contract. It has been pointed out several times that by itself a breach by the solicitor of the implied terms of the contract between himself and his client entitles the client only to nominal damages. As Salmon L.J. says

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in Sykes v. Midland Bank Ex. Company  
(1970) 3 W.L.R. 273, 281:

' . . . in order to recover anything more the onus is on the plaintiffs to show that the breach caused substantial damage.'

That the failure of the plaintiffs to lodge a caveat has caused them substantial damage I accept. But the plaintiffs cannot succeed unless they can prove that third defendant's negligence was probably a cause of their omitting to lodge a caveat. The plaintiffs themselves were not asked any questions on this subject. It was, as I think, assumed that when the third defendants omitted to give advice, their omission caused the plaintiffs to fail to protect themselves. I am not prepared to make that assumption. There is no evidence that if Ganga had advised plaintiffs to lodge a caveat, they would have accepted the advice, and in this connection it must be borne in mind that the negligence of the third defendants is, not that they failed to lodge a caveat but that they failed to advise the plaintiffs to lodge a caveat. I suspect that if Ganga had said to the plaintiffs 'You should lodge a caveat to protect yourselves here, but we are holding the title and will probably be quite safe, and of course you will have to pay additional costs if you do', that plaintiffs might have said 'We will take a chance and save our money'. I have considered whether it should not be said that since the plaintiffs were brought to the third defendants by Ram Mahesh, and were illiterate, the third defendants might have had a higher duty, but I think that the onus of showing anything of this kind was on the plaintiffs. In the result the plaintiffs are entitled to no more than nominal damages against the third Defendants which I fix at \$10.00. Their legal costs were lost not as a result of the third defendants' negligence, but by reason of Ram Mahesh's breach of contract. I think that perhaps I should add that if I had found the plaintiffs entitled to more than nominal damages against the third defendants I

should have awarded them a sum equal to the amount paid by each to Ram Mahesh and \$400 in each case, those sums in each case being what they lost through their not lodging a caveat."

6. The learned Trial Judge ordered that the actions against the third parties be dismissed, but allowed the Appellants' claim against the Public Trustee of Fiji. Pp.76-78
- 10 7. The Appellants appealed against the Respondents to the Court of Appeal upon the grounds set out in the Judgment of the Court of Appeal. The Appellants did not pursue their Appeal against the third parties or the Public Trustee of Fiji. Pp.78-80  
Pp.87 L.7-88 L.5  
Pp.81-82
- 20 8. The Judgment of the Court of Appeal was delivered on the 26th November, 1975. Having reviewed the evidence, Spring J.A. ruled that the learned Trial Judge was in error in that he "apparently overlooked the unequivocal admission of negligence" made by the Respondents. Gould V.P., concurring, did not consider that the position was altered in a material way even if the learned Trial Judge was correct in his interpretation of the said admission. Accordingly the Court, it is respectfully submitted rightly, set aside the award of nominal damages and substituted an award of general damages on the basis that the learned Trial Judge indicated that he would have adopted in the passage from his Judgment set out in paragraph 5 above. Pp.85-104  
P.91,L1.28-32  
P.103,L1.16-19  
Pp.105-107
- 30 9. It is respectfully submitted that the Court of Appeal wrongly reduced the amount of the damages which they awarded the Appellants as set out in paragraph 8 above by deducting therefrom the amount for which judgment was given against the Public Trustee of Fiji by the trial Judge. It is submitted that :
- 40 (1) No concession was made by Counsel as is stated by the Court of Appeal. The most that Counsel conceded was that the Appellants would proceed to recover the judgment debt first from the Public Trustee and then give credit to the Respondents for any sum recovered.

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(2) It appears from the Judgment of Gould V.P. that the Court of Appeal assumed, wrongly, that the Public Trustee of Fiji had funds to meet the award of damages made against him. Gould V.P. stated :

P.104 Ll.16-21

"Had the judgments obtained by the Appellants against the Public Trustee been against men of straw and therefore, uncollectable, the Respondents' liability would probably have been greater, but nothing of this kind has been urged."

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It is submitted that it was clear that the whole purpose of the Appeal to the Fiji Court of Appeal was to obtain Judgment against the Solicitor Respondents in circumstances when the Public Trustee was not in a position to meet the Judgment awarded against him. Otherwise, the Appeal against the Solicitor Respondents would have been nugatory.

Pp.108-109

10. An Order granting the Appellants Leave to Appeal to Her Majesty in Council was made by the Fiji Court of Appeal on the 10th December 1975.

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11. The appellants herein respectfully submit that this Appeal should be allowed with costs and the Court of Appeal Judgment and Order be varied so that Judgment be given against the Respondents without any deductions with costs of the Appeal to the Court of Appeal and of the trial for the following

R E A S O N

BECAUSE the Court of Appeal, having rightly awarded substantial damages against the Respondents, wrongly ordered that the said award be reduced by the amount for which Judgment was given against the Public Trustee for the reasons given in paragraph 9 above.

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EUGENE COTRAN

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