

42, 1936

No. 87 of 1935.

In the Privy Council.

APPELLANT'S CASE.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

IN THE MATTER of GEORGE FRIER GRAHAME a Barrister and
Solicitor of the Supreme Court of Fiji.

BETWEEN

GEORGE FRIER GRAHAME - - - - *Appellant.*

AND

10 THE ATTORNEY-GENERAL OF FIJI - - - *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal from an order of the Supreme Court of Fiji made on 27th November 1934 by His Honour Captain Sir Maxwell Hendry Maxwell-Anderson, C.B.E., K.C., R.N. (Retired), the Chief Justice and only Judge of such Court, whereby it was ordered that the Appellant be suspended from practice as a Barrister and Solicitor of the said Court until 1st July 1936, such suspension to take effect from 8th December 1934, and that the Appellant do pay the costs of the application upon which such order was made and the costs of the Public Trustee incidental thereto.

20 2. Prior to the date of the order the Appellant had practised for 17 years as a Barrister and Solicitor in Fiji and had, as stated by the Chief Justice, in giving his reasons for the order "been held in respect by his fellow citizens and occupied the highest place among them." p. 82, ll. 39 & 40. p. 93, ll. 6 & 7.

3. On 31st October 1934, His Majesty's Attorney-General for the Colony gave notice to the Registrar of the Supreme Court making application that the Appellant might be required to answer the allegations contained in the affidavits which accompanied the application, and that his name might be struck off the roll of Barristers and Solicitors of the Supreme Court, p. 3.

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UNIVERSITY OF LONDON

INSTITUTE OF ADVANCED
LEGAL STUDIES
17, RUSSELL SQUARE
LONDON, W.C.1
TEL 0207 635 6000



p. 4. or that he might be suspended from practice, on the ground that the facts stated in the said affidavits constituted professional misconduct on the part of the Appellant and on 1st November 1934 notice of the application was given to the Appellant by the Registrar. The affidavits which accompanied the application were (1) an affidavit of Samuel Howard Ellis (hereinafter referred to as "Ellis") sworn 22nd October 1934 (2) an affidavit of Bertie St. Julian Fisher, Public Trustee, sworn 25th October 1934 and (3) a further affidavit of the Public Trustee sworn 29th October 1934.

p. 44. 4. In answer to the application two affidavits were sworn by the Appellant on 15th November 1934. 10

5. The application was heard by the Chief Justice on 21st and 22nd November 1934; oral evidence was given on both sides. At the conclusion of the hearing the Chief Justice reserved judgment, and, at the same time, said "It is only right to say at once that I absolve Mr. Grahame of any charge of fraud; I am satisfied that his intentions were not fraudulent."

p. 88. 6. Judgment was delivered by the Chief Justice on 27th November 1934. He acquitted the Appellant of fraud but held that he had been guilty of grave forgetfulness amounting to misconduct and made the order for suspension mentioned in paragraph 1 of this petition. 20
p. 93.

7. The matters in respect of which the Chief Justice found that the Appellant had been guilty of professional misconduct are (1) the purchase by the Appellant from John Linn Hunt (hereinafter referred to as "Hunt") of an estate known as Vunivisi and (2) the lending by the Appellant to Hunt of £2,000 part of certain trust funds referred to as "the Vollmer trust funds" on the security of a mortgage of the Vunivisi estate carrying interest at the rate of $5\frac{1}{2}$ per cent. per annum.

pp. 55-57. 8. On 25th August 1923 Esther Rebecca Carr and Frederick Charles Clapcot, the Executors of the estate of Harry Granville Nicholas Carr deceased (hereinafter referred to as "the Carr executors") granted 30
p. 49, ll. 12-28. to Hunt a registered lease of a freehold piece of land of about 446 acres, known and hereinafter referred to as the Vunivisi estate, for the term of ten years from 1st May 1923 at the yearly rental of £200 per annum. The lease also gave to Hunt an option to purchase the freehold of the estate for £4,000 at any time during the term. At the date of the lease
p. 45, ll. 29-31. Ellis was, and he continued at all material times to be, the Attorney of the said Esther Rebecca Carr who resided in England and the lease was executed by Ellis in that capacity.
p. 67, ll. 12-14.

9. On 1st January 1926 the Appellant and Ellis entered into partnership as Solicitors and carried on business under the firm name of Ellis and Grahame until the partnership was dissolved on 30th April 1933. Prior to the Partnership the Appellant acted as Solicitor for Hunt (who was a client of the Appellant of about ten years' standing) and Ellis acted as Solicitor for the Carr executors. During the subsistence of the partnership the Appellant, except when he was away on business, attended to the legal affairs of Hunt, and Ellis, except when he was absent from business, attended to the legal affairs of the Carr executors. After the dissolution of the partnership Ellis alone acted as Solicitor for the Carr executors and the Appellant acted as Solicitor for Hunt.
10. In the month of September 1932 Hunt consulted the Appellant as to the exercise by Hunt of his option to purchase the Vunivisi estate and several interviews took place between them between September 1932 and 8th November 1932 at which Hunt suggested, and it was verbally agreed, that the option should be exercised and that the Appellant should purchase the estate from Hunt upon the terms which were subsequently reduced into writing and are set out in the agreement dated 8th November 1932 hereinafter mentioned.
- 20 11. On 2nd November 1932 Hunt exercised his option to purchase the Vunivisi estate and it was arranged between Hunt and the Carr executors that of the £4,000 purchase money £1,350 should be paid in cash and £2,650 the balance should be secured by a mortgage for that amount on the estate. The amounts to be paid in cash and left on the security of the Mortgage were the amounts suggested by Ellis on behalf of the Carr executors and submitted by him to, and approved of by the said Frederick Charles Clapcott at whose suggestion also the rate of interest on the mortgage was raised from 6 per cent. originally proposed to 6½ per cent.
- 30 12. On 8th November 1932 an agreement in writing was entered into between the Appellant and Hunt, whereby Hunt agreed to sell and the Appellant agreed to purchase, the Vunivisi estate for £4,000, £1,350 to be paid on the day of the signing of the transfer thereof by the Carr executors to Hunt, and £2,650 on the date when such sum should become payable by Hunt to the Carr executors under the mortgage by Hunt to the executors, with interest at the rate payable under the mortgage and on the dates thereby provided. It was by this agreement further provided that the Appellant should employ Hunt as agent to sub-divide and sell the estate in blocks at a remuneration consisting of a commission of ten per cent. on the purchase price of the blocks sold up to £7,000 and half of the purchase price over £7,000.
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p. 46, ll. 29-30.
p. 71, ll. 1-9 and
24-29.
p. 80, ll. 28-30.
p. 81, ll. 4 & 5.
p. 75, ll. 15-23.

13. The Appellant told Ellis on 3rd November 1932 that he was going to finance Hunt in connection with the purchase of the Vunivisi estate but did not inform Ellis or the Carr executors of the existence of the agreement of 8th November 1932 between him and Hunt. Hunt gave evidence at the hearing of the application of the Attorney-General against the Appellant and stated that, if the Appellant had not financed him in connection with the purchase, he could have obtained the finances elsewhere. Ellis in his evidence on the hearing of the application stated that he was not concerned as to the details of the financial arrangements between Hunt and the Appellant because "it was Grahame's matter."

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p. 71 ll. 6-9.

p. 48, ll. 3-7.
p. 6, ll. 31-39.

14. On 15th March 1933 the Vunivisi estate was conveyed by the Carr executors to Hunt in consideration of the sum of £4,000 of which £1,350 was paid in cash and on the same day Hunt mortgaged the estate to the Carr executors to secure £2,650 and interest at the rate of $6\frac{1}{2}$ per cent. per annum. Thus sum of £1,350 was paid to the Carr executors by a cheque of the Appellant.

pp. 12-18.

p. 47, ll. 12-17.

15. Ellis left the Colony for Sydney on 4th November 1932 and did not return until 23rd December 1932. On 31st December 1932 the Appellant left for Sydney and did not return to the Colony until 7th April 1933. On 30th April 1933 the partnership between Ellis and the Appellant was dissolved.

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p. 48, ll. 16 & 17.

p. 9, ll. 24-28.

16. The facts relating to the other matter of complaint against the Appellant were as follows :—

The Appellant was the managing trustee of the estate of one J. H. F. Vollmer deceased and the Public Trustee (Bertie St. Julian Fisher) was the custodian trustee of that estate.

p. 49, ll. 33-41.

17. On 26th September 1933 the Appellant as such Managing trustee received notice that a mortgage for £1,300 on which part of the Vollmer trust funds was invested, would be repaid on 31st December 1933.

p. 49, l. 33 to
p. 50, l. 13.

18. Shortly before 18th December 1933 the Appellant agreed with Hunt to advance to him out of the Vollmer trust funds the sum of £2,000 on the security of a first mortgage of the Vunivisi estate such advance to bear interest at $5\frac{1}{2}$ per cent. per annum and this agreement was later reduced into writing. At that time the amount owing by Hunt to the Carr executors on the mortgage of the Vunivisi estate had been reduced from £2,650 to £2,000 bearing interest at $6\frac{1}{2}$ per cent. per annum. At the same time a sum of £820, a further part of the Vollmer trust funds was standing, pending investment, to the credit of the Vollmer estate on a current account at the Bank of New Zealand not bearing interest, and £1,000 a further part of such trust funds was, pending investment, deposited in the Savings

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p. 7, ll. 5-7.
p. 87, ll. 33-46.

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Bank at interest at the rate of $2\frac{3}{4}$ per cent. per annum. The Appellant proposed to make the advance of £2,000 out of the aforesaid sums of £820 and £1,300.

19. On 18th December 1933 the Appellant advanced to Hunt the sum of £2,000 whereof £800 consisted of Vollmer trust funds and £1,200 was advanced by the Appellant personally pending the repayment to the Vollmer trust funds of the said mortgage for £1,300. On the same day the said sum of £2,000 was paid to the Carr executors and the Mortgage on the Vunivisi estate in favour of the Carr executors was transferred to the Appellant as trustee of the Vollmer estate. On 8th January 1934 a deed was entered into between Hunt and the Appellant as managing trustee of the Vollmer estate, whereby the mortgage so transferred was varied as from 18th December 1933 by reducing the rate of interest from $6\frac{1}{2}$ per cent. per annum to $5\frac{1}{2}$ per cent. per annum, and by giving Hunt the right to pay off at any time without prior notice the whole of the principal moneys secured or any part thereof not being less than £100. The whole of the moneys owing on the transferred mortgage were paid off and the mortgage was cancelled by discharge on 11th October 1934.

p. 49, l. 26 to
p. 50, l. 23.

p. 10, ll. 20-30.
p. 7, ll. 8-14.

pp. 19-21.
pp. 22 & 23.

p. 13.

20. The mortgage constituted a first class security for the Vollmer trust moneys advanced upon it and there was no suggestion that the advance in that respect constituted a breach of trust. At the time of the advance the property of which Hunt was the legal owner belonged in equity to the Appellant and Hunt according to their respective interests therein. With regard to the reduction in the rate of interest a general reduction in interest rates had taken place. It was not suggested that the reduced rate was in any way improper having regard to the rate of interest obtainable at the time on trustee securities although (what in the Appellant's submission is irrelevant) other portions of the Vollmer estate previously invested were earning a higher rate of interest. The Appellant has always considered (and it is submitted quite correctly) that although the interest on the £2,000 was as between the Vollmer trust and Hunt reduced from $6\frac{1}{2}$ per cent. to $5\frac{1}{2}$ per cent. the Appellant on the proper construction of the agreement of 8th November 1932 between him and Hunt still remained liable to pay to Hunt interest at the rate of $6\frac{1}{2}$ per cent. On more than one occasion in the course of his evidence the Appellant asserted most positively that he never intended or expected that any benefit would enure to him personally from the reduction of interest.

p. 50, l. 42 to
p. 51, l. 5.
p. 65, ll. 18-22.
p. 65, l. 34 to
p. 66, l. 2.

p. 81, l. 37 to
p. 82, l. 14.
p. 85, ll. 16-36.

21. The mortgage for £1,300 belonging to the Vollmer estate was not repaid on 31st December 1933 and on 8th March 1934 the Appellant reimbursed himself the sum of £1,200 out of moneys of the Vollmer estate which were then awaiting investment.

p. 50, ll. 17-35.
p. 10, ll. 34-37.

p. 7, ll. 20-33.

22. In September 1934 the agreement of 8th November 1932 between the Appellant and Hunt referred to in paragraph 12 hereof came to the knowledge of the Carr trustees and Ellis on their behalf demanded that the Appellant should return to them the part of the Vunivisi estate which remained unsold, and all profits made by the sale of parts thereof, on the ground that it was the duty of the Appellant to disclose to them the terms of the agreement, and that entering into the agreement was a breach of duty on the part of the Appellant and threatened proceedings against the Appellant on that footing.

pp. 8 & 9.
p. 51, ll. 24-27.
p. 7, ll. 34-36.
p. 84, ll. 28 & 29.

23. Ellis refused to allow the Appellant time to enable him to put the matter fully before Counsel for advice. Accordingly on 4th October 1934 the Appellant (having been advised on cabled instructions by Counsel in Sydney to settle the claims of the Carr executors) entered into an agreement with them under which he agreed to procure Hunt to transfer the unsold part of the estate to the executors and the benefit of all agreements for sale and purchase ; to account for all moneys received by the Appellant or Hunt in respect of sales of parts of the estate, interest on purchase moneys and rent ; to pay to the executors the whole of these moneys after deducting the £4,000 purchase price already paid to them by Hunt and interest thereon and £45 money expended in making drains ; and to pay 150 guineas for their solicitors' costs. 10

p. 7, ll. 37-39.
p. 72, l. 16 to
p. 73, l. 2.
p. 84, ll. 12-44.

24. The Appellant and Hunt had fully performed all the terms of the agreement by 18th October 1934. The Appellant humbly submits that at the hearing his case was seriously and unfairly prejudiced by the fact that he made this agreement.

p. 5, No. 4.
p. 7, ll. 40-42.

25. On 23rd October 1934 Ellis on behalf of the Carr executors applied to the Court for and obtained an order directing that the conduct of the Appellant should be inquired into and made, in support of the application, his affidavit sworn on 22nd October 1934 mentioned in paragraph 3 of this case. 30

pp. 11 & 12.
Exhibit A.

26. On 22nd October 1934 Ellis wrote a letter to the Public Trustee as custodian trustee of the Vollmer estate alleging that, from information in the possession of the Carr executors, it appeared that the Appellant had borrowed £2,000 from the Vollmer estate trust funds, viz., £800 on 18th December 1933 and £1,200 on 8th March 1934 and offering to give further information relative to the matter.

p. 26, No. 7.

27. On 23rd October 1934 the Public Trustee applied to the Supreme Court for and obtained an order that he be permitted to engage the services of solicitor and counsel to investigate the trust funds of the Vollmer estate in the hands of the Appellant and to take such proceedings as might 40

be necessary. In support of this application he filed the affidavit sworn by him on 22nd October 1934 referred to in paragraph 3 of this case. His complaint as stated by him in his affidavit was that the Appellant did not at any time disclose to him that the Vunivisi property was in fact the property of the Appellant and that he (the Public Trustee) was unaware that the Appellant had advanced trust moneys to himself and that the Appellant was the person who was to benefit by the variation of the mortgage. p. 10, ll. 14-19.

28. In pursuance of the leave given by the order mentioned in the last preceding paragraph hereof the Public Trustee appointed Mr. Robert Crompton K.C. (hereinafter referred to as "Crompton") to represent him and investigate the trust funds of the Vollmer estate and on the 25th October 1934 Crompton made a report to the Public Trustee. This report is largely based on statements made by Ellis and contains opinions expressed by Crompton that the purchase by the Appellant from Hunt of the Vunivisi estate was wrongful, and that the Appellant had purchased the estate in the name of Hunt, and that the loan of £2,000 to Hunt on the security of the Vunivisi estate was a fraud on the Vollmer estate. p. 27, ll. 1-3.
pp. 27-31.
Exhibit A.

29. Crompton's report was not made on oath or in any legal proceedings, and Crompton appeared as Counsel, and was heard in support of the application made by the Attorney-General against the Appellant and cross-examined the Appellant on his affidavits. The admission of the report in evidence was objected to by Counsel for the Appellant but the objection was overruled by the Chief Justice. p. 75, l. 40.
p. 93, ll. 25 & 26.

30. The reasons given by the Chief Justice for his judgment are set out in the Record. pp. 88-93.

It is respectfully submitted that the judgment was based on the following erroneous assumptions of law or fact :—

30 (A) That the Appellant secretly bought the Vunivisi estate from the Carr Trustees.

(B) That the Appellant was under some duty to the Carr Trustees not to purchase the property without disclosing his interest, although they never consulted him in connection with the sale.

(c) That the Appellant was under some duty to the Carr Trustees not to facilitate the exercise of the option on the Vunivisi estate.

(D) That the variation of the £2,000 mortgage was made for the Appellant's own personal benefit and to the detriment of his cestui que trustent.

(E) That the reduction of the rate of interest from $6\frac{1}{2}$ per cent. to $5\frac{1}{2}$ per cent. did in fact enure to the Appellant's benefit.

pp. 94-96.

31. By an order made by His Majesty in Council on the 20th day of December 1935 special leave was granted to the Appellant to appeal to His Majesty in Council from the said order of the Chief Justice.

32. The Appellant humbly submits that this appeal ought to be allowed for the following among other 10

REASONS.

- (1) BECAUSE the Appellant was not nor were the firm of Ellis & Grahame employed by the Carr executors as solicitors for the purpose of the sale of the Vunivisi estate, but only came into the matter in connection with the transfer.
- (2) BECAUSE the Chief Justice was wrong in finding that the Appellant purchased the estate from the Carr executors; such estate was in fact purchased by the Appellant from Hunt who exercised his option to purchase. 20
- (3) BECAUSE the Chief Justice was wrong in thinking that it was the duty of the Appellant to disclose to the Carr executors that he had through Hunt acquired an interest in the estate.
- (4) BECAUSE if any such disclosure was necessary it was made by the Appellant, informing Ellis, the attorney of one of the Carr executors, that the Appellant was financing Hunt in connection with the purchase.
- (5) BECAUSE the Appellant owed no duty to the Carr 30 executors not to assist Hunt financially in connection with the purchase of the estate by Hunt.
- (6) BECAUSE even if the Appellant had refused to finance the purchase by Hunt no benefit would have accrued to the Carr executors.

- (7) BECAUSE, although the Appellant now realises that he ought not to have lent £2,000 of the Vollmer trust funds to Hunt on the security of an estate in which the Appellant was interested, such loan was no more than an honest error of judgment made with a view to, and which had the result of, securing a good investment for the persons beneficially interested in such trust funds.
- (8) BECAUSE the variation of the mortgage did not in fact and in any event was not intended by the Appellant to confer any personal benefit upon himself.
- (9) BECAUSE the Appellant has not done anything which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency.

CYRIL RADCLIFFE.

W. E. VERNON.

No. 87 of 1935.

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ON APPEAL

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AND

THE ATTORNEY-GENERAL

OF FIJI - - - - Respondent.

Case for the Appellant.

KIMBERS, WILLIAMS, SWEETLAND & STINSON,

34 Nicholas Lane,

Lombard Street, E.C.4,

Solicitors for the Appellant.