

42, 1936

No. 87 of 1935.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF FIJI.

BETWEEN

GEORGE FRIER GRAHAME - - - - *Appellant*

AND

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

Case for the Respondent.

RECORD.

10 1. This is an Appeal by Special Leave from the Judgment and Order of the Supreme Court of Fiji, both dated the 27th November 1934, whereby the Appellant who was found guilty of professional misconduct was suspended from practice as a barrister and solicitor in that Court from the 8th December 1934 to the 1st July 1936.

p. 88.
p. 93.

20 2. On the 31st October 1934 an application was made by the Respondent to the Supreme Court that the Appellant should be required to answer certain allegations contained in affidavits which accompanied the application, and that his name should be struck off the roll of barristers and solicitors of the Supreme Court or that such other order might be made as the Court should think fit on the ground that the matters stated in the said affidavits constituted professional misconduct on the part of the Appellant.

p. 3.

3. The main allegations upon which the Respondent relied in support of the said applications were contained in an affidavit of Samuel Howard Ellis, Solicitor, sworn on the 22nd October 1934, and in two affidavits of Bertie St. Julian Fisher, Public Trustee, sworn on the 25th October 1934 and 29th October 1934 respectively together with the exhibits thereto.

p. 6.
p. 9.
p. 26.

RESPONDENT'S CASE.

They were to the following effect :—

p. 55. That from the 1st January 1926 the Appellant and the said Ellis were in partnership as solicitors under the firm name of Ellis & Grahame. Prior to the commencement of such partnership certain Trustees of the Will of Harry Granville Nicholas Carr deceased (hereinafter referred to as "the Carr Trustees") on the 25th August 1923 leased certain property known as Vunivesi, of approximately 446 acres in extent to one Hunt for 10 years from the 1st May 1923 at a rental of £200 per annum with an option to purchase the said property during the period of the lease for £4,000.

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Before the constitution of the said partnership of Ellis & Grahame, the said Ellis had acted as Solicitor to the Carr Trustees, and the Appellant as solicitor for the said Hunt, and after the said partnership was constituted the said partnership acted as solicitors to the Carr Trustees and to the said Hunt until the partnership was dissolved on the 30th April 1933 after which date the said Ellis alone acted as Solicitor to the Carr Trustees, and the Appellant for the said Hunt.

On the 2nd November 1932 the said Hunt gave notice of intention to exercise the option to purchase the Vunivesi property.

p. 12. On the 15th March 1933 the Carr Trustees transferred the Vunivesi property to the said Hunt for the sum of £4,000. The transaction was carried out by a payment of £1,350 ostensibly made by the said Hunt to the Carr Trustees and by his executing a mortgage on the Vunivesi property in their favour for the balance of £2,650. The mortgage provided for payment of interest at 6½ per cent. per annum, and gave the mortgagor the right to repay the whole or any part thereof being not less than £200 on giving three months' notice. The said firm of Ellis & Grahame acted as Solicitors to both the Carr Trustees and the said Hunt in regard to the above-mentioned transfer and mortgage.

p. 19. The Appellant acting apparently on behalf of the said Hunt paid to the Carr Trustees on the 24th August 1933 in reduction of the said mortgage the sum of £650 and on the 18th December 1933 he paid the balance of £2,000 then owing under the said mortgage and on the same day at the request of the Appellant the Carr Trustees transferred all their rights, powers, title and interest in the said mortgage to the Appellant as Managing Trustee of the estate of J. H. F. Vollmer deceased.

The Appellant at this time was the Managing Trustee of the estate of J. H. F. Vollmer deceased, and the said Fisher was the Custodian Trustee thereof both having been appointed as such by the Supreme Court on the 22nd December 1931.

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On the 18th December 1933 the Appellant withdrew £800 from the current account of the Vollmer estate and purported to advance that sum to the said Hunt and on the 8th March 1934 the Appellant withdrew from the Vollmer estate account at the Savings Bank £1,000 which he paid into the current account of the Vollmer estate at the Bank of New Zealand. He then purported to make a further advance to the said Hunt for £1,200 making a total of £2,000 the security for which was the mortgage transferred to the Appellant by the Transfer dated 18th December 1933.

p. 19.

10 On the 8th January 1934, by an agreement made between the said Hunt and the Appellant as Managing Trustee aforesaid the terms of the said Mortgage executed on the 15th March 1933 were varied by reducing the rate of interest from £6 10s. per centum per annum to £5 10s. per centum per annum, and by giving the said Hunt as mortgagor the right to pay off at any time without giving any prior notice to the Appellant as mortgagee of his intention so to do the whole of the principal sum or any part thereof not being less than £100.

p. 22.

In September 1934 the Carr Trustees having reason to believe that the Appellant and not the said Hunt was the actual purchaser from them of the said Vunivesi property called upon the Appellant to return the said property to them together with all the profits he had made out of the said purchase from them on the ground that at the time of his making the said purchase he being their solicitor had failed to disclose his action to them and that his purchase was accordingly a breach of his duty to them. On the 4th October 1934, the Appellant, and the said Hunt by a document (Exhibit A to Ellis' Affidavit of the 22nd October 1934) addressed to the Carr Trustees, in consideration of their refraining for a period of 14 days from issuing a Writ against the Appellant and Hunt in respect of the property known as Vunivesi agreed and undertook amongst other things to transfer the balance of the lands then unsold, and to take all steps necessary to transfer to the Carr Trustees the benefit of all agreements made in respect of the said property and the profits received by them in respect of it. On the 18th October 1934 the Appellant and the said Hunt duly carried out their agreements and undertaking under the said document.

p. 6.
p. 8.

4. On the 15th November 1934 the Appellant put in, in answer to the affidavits relied on by the Respondent in support of the application, two affidavits both sworn by himself on the 15th of November 1934, the one setting out his account of the Vunivesi matter, more particularly as concerned the Carr Trustees, and exhibiting an Agreement made between him and the said Hunt dated the 8th November 1932, and the other setting out his account of the transactions more particularly concerned with the estate of J. H. F. Vollmer deceased.

p. 64.
p. 45.
p. 63.

p. 63.

5. By the said agreement of the 8th November 1932, the said Hunt agreed to sell and the Appellant agreed to purchase the Vunivesi property for the sum of £4,000 payable as follows :—

£1,350 to be paid on the day on which the transfer of the said property to the said Hunt by the Carr Trustees was signed.

£2,650 to be paid on the date on which that sum became payable by the said Hunt to the Carr Trustees in terms of the Mortgage for that amount which the said Hunt was giving to the Carr Trustees with interest at the rate payable by the said Hunt to the said Trustees on the said £2,650 payable on the dates 10 provided for in the said Mortgage.

The agreement further provided inter alia that the Appellant should employ the said Hunt as his agent to sub-divide and sell the said land in blocks, areas and prices to be subject to the Appellant's approval, at a remuneration being a commission of £10 per centum on the purchase price of the blocks sold up to £7,000 and half the amount of the purchase price in excess of £7,000.

It further appeared from the Appellant's affidavits that at no time did the said Hunt provide any part of the £4,000 paid for the said transfer of the said property. 20

In his affidavits the Appellant took up the position that he did not regard himself as the purchaser of the Vunivesi property, but as one holding an agreement to purchase in the future when accounts could be settled between himself and the said Hunt.

p. 12.

p. 22.

6. In his said affidavits the Appellant nowhere denied the facts deposed to by the said Fisher that the Appellant did not at any time disclose to him as Custodian Trustee of the Vollmer estate that the Vunivesi property which was the subject of the Mortgage executed on the 15th March 1933 and the subject of the said Variation of Mortgage was in fact his own property, and that he, the said Fisher, was unaware that the Appellant had advanced the Vollmer Trust moneys to himself, and that he was the person who was to benefit by the said Variation of Mortgage. 30

p. 39.

p. 39.

7. Prior to the putting in of his said affidavits the Appellant on the 8th November 1934 gave Notice of Motion and put in an affidavit sworn by himself on the same date, asking that the hearing of the Application might be adjourned until the Judgment of the Court had been given in an action the Writ in which had been issued that day by him and the said

Hunt as Plaintiffs against the said Carr Trustees, claiming to have set aside the settlement contained in the document given to the said Trustees by the Appellant and the said Hunt on the 4th October 1934. p. 8.

This motion was dismissed with costs. p. 44, l. 4.

8. The Respondent's Application came before His Honour Captain Maxwell Hendry Maxwell-Anderson Chief Justice on the 21st and 22nd November 1934 when the Appellant and the Public Trustee appeared by Counsel and the Respondent in person.

10 The affidavit evidence was read and oral evidence was given by Frederick Charles Clapcott, one of the Carr Trustees, by the said Hunt, and by the said Ellis and the Appellant. p. 67.
p. 73, p. 69,
p. 75.

9. On the 27th November 1934 the Chief Justice delivered Judgment. p. 88.

20 He found that the Appellant did in fact purchase from the Carr Trustees the Vunivesi property without disclosing to those Trustees that he was the purchaser, and that at a time when he was a member of the firm of Ellis and Grahame who were the solicitors to the Carr Trustees. He further held that the Appellant knew full well that it would be to the benefit of the Carr Trustees that Hunt's option should lapse, and that the Trustees should reap the benefit of the enhanced value of the property. p. 88, l. 21.
p. 89, l. 3.

He found that the true effect of the agreement entered into between the Appellant and Hunt was that the Appellant in fact became the purchaser of the property ; that Grahame's own view of this transaction was that the whole business must be kept so secret that even his own staff could not be admitted to have any knowledge thereof, and that the Appellant seeing an opportunity to make personal profit out of a transaction so far forgot his duty to his clients the Carr Trustees as to place himself in a position which was wholly wrong from a professional point of view. p. 89, l. 13.
p. 89, l. 30.
p. 91, l. 4.

30 In respect of the Appellant's dealings with the Vollmer estate His Honour the Chief Justice held that as he had found on the evidence that the Appellant was the real purchaser of the Vunivesi property it followed that his dealings with the Vollmer Trust funds were for his own account, and that the Variation of Mortgage was made for his own personal benefit and to the detriment of the cestui que trust. p. 91, l. 12.

Finally, while acquitting the Appellant of fraud, His Honour the Chief Justice held that he had been guilty of very serious and very grave p. 91, ll. 44
et seq.

p. 93, l. 1.

forgetfulness of the duty which he owed to his clients, namely, the Carr Trustees, and the Vollmer beneficiaries, as also of the duty he owed to his partner Ellis, and that therefore the Appellant had been guilty of professional misconduct. He ordered that the Appellant be suspended from practice as a Barrister and Solicitor of that Court until the 1st July 1936, such suspension to take effect from the 8th December 1934 and further ordered that the Appellant pay the costs of the Application and the cost of the Public Trustee incidental thereto.

10. It is humbly submitted that the Judgment and Order appealed from are right and should be confirmed for the following amongst other 10

REASONS.

BECAUSE the Chief Justice was right in finding on the evidence before him that the Appellant had been guilty of professional misconduct as a barrister and solicitor and as a solicitor acting as a trustee.

F. P. M. SCHILLER.

KENELM PREEDY.

In the Privy Council.

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AND

THE ATTORNEY-GENERAL

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Case for the Respondent.

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