

Judgment 22 of 1978

22/78

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 -

GRAHAME & CO.

Respondents

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RECORD OF PROCEEDINGS

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PHILIP CONWAY THOMAS & CO.,  
61 Catherine Place,  
Westminster SW1E 6HB.

Solicitors for the Appellants.

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FROM THE FIJI COURT OF APPEAL

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B E T W E E N :

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R E C O R D   O F   P R O C E E D I N G S

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C	Memorandum of Agreement	13th June 1967
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(v)

<u>Exhibit Mark</u>	<u>Description of Document</u>	<u>Date</u>
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1.

No. 24 of 1976

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FIJI COURT OF APPEAL

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 s/o Norayan

Appellants

- and -

GRAHAME & CO.

Respondent

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RECORD OF PROCEEDINGS

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No. 1

In the Supreme  
Court

WRIT OF SUMMONS, NO. 230 of 1970

No. 1

IN THE SUPREME COURT OF FIJI

No. 230 of 1970

Writ of  
Summons  
No.230 of  
1970

B E T W E E N :

CHOTELAL (son of Nanhu)

Plaintiff

27th August  
1970

- and -

1. RAM MAHESH (son of Ram Sarup)

2. JAGAT SINGH (son of Babu Singh)

3. GRAHAME & CO. (a firm)

Defendants

10

ELIZABETH II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.

In the Supreme Court

- TO: 1. Ram Mahesh (son of Ram Sarup) of Tamavua, Land-dealer
2. Jagat Singh (son of Babu Singh) of Nasinu, Farmer and Grahame & Co. (a firm) having its registered office at Suva in the Colony of Fiji, Solicitors and Barristers

No. 1

Writ of Summons No.230 of 1970

27th August 1970 (continued)

WE COMMAND YOU, that within eight days after the service of this Writ on you inclusive of the day of such service you do cause an appearance to be entered for you in an action at the suit of CHOTELAL (son of Nanhu) of Samabula, Labourer and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

10

WITNESS the Honourable Sir Clifford James Hammett Chief Justice of our Supreme Court, at Suva, this 27th day of August, 1970.

RAMRAKHAS

L.S.

Per:(Sgd): K.C. Ramrakha  
Solicitors for the Plaintiff

20

N.B. - This writ is to be served within twelve calendar months from the date hereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date and not afterwards.

The defendant may appear hereto by entering an appearance either personally or by Solicitor at the Supreme Court Registry at Suva.

GENERAL ENDORSEMENT OF CLAIM

The plaintiff's claim is against the first and second defendant for an order that a transfer made in respect of land comprised in Certificate of Title number 13105 be set aside and that the plaintiff's agreement to purchase the said land by agreement dated the 13th day of June, 1967 be enforced on the grounds that the said transfer is fraudulent

30

The plaintiff's further claims is for equitable relief against rescission of the said agreement

The plaintiff's further claim is against the third defendant for negligence

40

And the plaintiff claims damages and costs



STATEMENT OF CLAIM, NO.230 OF 1970

IN THE SUPREME COURT OF FIJI

CIVIL JURISDICTION

No. 230 of 1970

B E T W E E N :

CHOTELAL (son of Nanhu) Plaintiff

- and -

1. RAM MAHESH (Father's name Ram Sarup)

2. JAGAT SINGH (Father's name Babu Singh)

3. GRAHAME & CO. (a firm) Defendants

STATEMENT OF CLAIM

1. On or about the 13th day of June, 1967, the plaintiff and the first defendant entered into a written agreement whereby the first defendant agreed to sell to the plaintiff land comprising 2 acres 0 roods 03 perches being lot 3 on Deposited Plan number 3082 and comprised in Certificate of Title number 13105 (hereinafter called the land) for the total price of \$1200 (twelve hundred dollars) which said sum was payable by a deposit of \$300 (three hundred dollars) and the balance by equal monthly instalments of \$16 (sixteen dollars) commencing from 31st day of May, 1967, the balance of the said sum carrying interest at the rate of eight per centum per annum.

2. Clause 8 of the said agreement provided that in the event of any default the first defendant had the following remedies.

(a) to determine the agreement forthwith and to re-enter upon and take possession of the said land and all moneys paid under the agreement shall be forfeited to the first defendant as vendor

(b) to enforce the agreement forthwith and to exercise all rights under the Agreement whereupon

In the Supreme  
Court

—  
No. 2

Statement of  
Claim No.230  
of 1970  
(undated)  
(continued)

all unpaid moneys shall immediately become due and owing and shall be recoverable by action against the Purchaser forthwith without further demand;

(c) to re-enter upon and take possession of the said land and premises and to re-sell the same upon such terms and premises as the Vendor may think fit and any loss or deficiency occasioned by such sale and all costs and expenses incidental thereto shall be paid by the Purchaser and shall be recoverable by the Vendor as liquidated damages

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3. The plaintiff says that the said clause is a penal provision, and one in which a court of equity is entitled to give relief

4. Time was not made the essence of the said agreement.

5. The third defendant is a firm of solicitor in Suva, and acted for both the plaintiff and the first defendant in the matter of the said sale and purchase for a fee or reward paid or to be payable by the plaintiff and did not cease to so act until sometime in the latter half of the year 1969

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6. At all material times, one BINDESWARI GANGA PRASAD acted as the servant or agent of the third defendant and the plaintiff and the first defendant both dealt with him at all material times.

7. The plaintiff made payments from time to time to the first defendant at the office of the third defendant in Suva and by the 3rd day of April, 1969 had paid a total sum of \$572.00 (five hundred and seventy two dollars) after which time the first and the third defendant refused to accept any further payments under the agreement

30

8. The plaintiff did not lodge any caveat against the first defendant in order to protect his interest under the said agreement, nor did the third defendant advise or cause the plaintiff to lodge such a caveat.

40

9. In or about the month of September, 1969 by a transfer dated on or about the 29th day of

September, 1969 and registered on the 30th day of September, 1969 and numbered 110292 the first defendant purported to transfer all his right title and interest in the said land to and unto the second defendant for the price of \$800.00 (eight hundred dollars).

In the Supreme Court

—  
No. 2

Statement of Claim No.230 of 1970 (undated) (continued)

10. The plaintiff says that the first and second defendant acted fraudulently in making and registering the said transfer, particulars of fraud being as follows :-

(a) the land was transferred for a grossly low, and under-valued price

(b) the first and second defendants are related to each other and are good friends

(c) the transfer was not done by the first defendant's usual legal advisers, but was done privately and without legal advice and assistance

(d) no attempt was made to advertise the said land for sale or to obtain the best possible price therefor

(e) no notice of rescission or any other notice was given to the plaintiff, and the transfer was done secretly and even without the knowledge of the third defendant

(f) the second defendant knew of the existence of the said agreement, and purchased with knowledge thereof

(g) the transfer was made for the express purpose of defeating the plaintiff's agreement, and cheating him of all monies paid thereunder

(i) the first and second defendants did not make a true declaration of the position in the said transfer

11. The third defendant was negligent towards the plaintiff whereby the plaintiff has suffered damage particulars of negligence being as follows :-

A. The third defendant did not advise the plaintiff to lodge a caveat on the said land in respect of the agreement;

In the Supreme  
Court

—  
No. 2

Statement of  
Claim No. 230  
of 1970  
(undated)  
(continued)

B. The third defendant did not lodge any caveat on the said land for and on behalf of the plaintiff

C. The third defendant did not advise the plaintiff of his rights in the matter, nor did the third defendant do anything to protect the plaintiff's interests

D. The said agreement was one-sided and calculated to operate against the plaintiff

E. The third defendant did not give any notice to the plaintiff of refusal by the first defendant to accept payments as aforesaid, and did not advise the plaintiff what to do in the circumstances 10

Particulars of damage:

If the transfer is not set aside the plaintiff loses his land, and payment made thereunder since the first defendant is not in a position to pay any sum that may be awarded against him

12. The land is currently worth at least \$4000.00 (four thousand dollars) 20

13. The plaintiff did in or about the month of February, 1970 lodge a caveat on the said land and such caveat is numbered 111835

14. By a notice dated the 7th day of August 1970 and served on the plaintiff by registered post, the Registrar of titles has given notice to the plaintiff to withdraw the said caveat under the provisions of section 132, sub-section 1 of the land (Transfer and Registration) Ordinance Cap. 136 30

15. WHEREFORE the plaintiff claims

(a) that the said transfer be set aside

(b) Further and/or in the alternative, the first and/or the second defendant do refund to him all sums, and legal costs and disbursements paid for the agreement and pay to him the sum of \$4000.00 (four thousand dollars) being the value of the land by way of damages

(c) Further and/or in the alternative, the 40

plaintiff claims equitable relief on the basis of the true value of the said land, and for a declaration that the said clause 8 is penal in its nature.

In the Supreme Court

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No. 2

Statement of Claim No. 230 of 1970 (undated) (continued)

(d) Further and/or in the alternative, damages against the third defendant in negligence particulars whereof are as follows :-

To refund of legal costs paid                      \$ 39.80

To instalments paid under the agreement    572.00

To price of the said land                              4000.00

(e) An order that the time for the removal of the caveat be extended indefinitely

(f) Such further or other relief in the premises as to this Honourable Court shall seem meet;

(g) Costs

(h) The said agreement be specifically enforced.

RAMRAKHAS

Per: (Sgd): K.C. Ramrakha

This Statement of Claim is filed with the Writ of Summons, and is intended to be delivered therewith at the time of service

No. 3

AMENDMENTS TO STATEMENT OF CLAIM, NO. 230 OF 1970

SUPREME COURT ACTION NUMBER 230 OF 1970

BETWEEN : CHOTTELAL V. RAM MAHESH AND ORS

PARTICULARS OF AMENDMENT PROPOSED BY THE PLAINTIFF

No. 3

Amendments to Statement of Claim, No.230 of 1970 (undated)

In the Supreme Court

No. 3

Amendments to Statement of Claim, No. 230 of 1970 (undated) (continued)

1. The words and figures "₱572 (Five hundred and Seventy Two Dollars) to read "704.00 (Seven Hundred and Four Dollars) in paragraph 7 of the Statement of Claim.

2. The figure and words "₱4000.00 (Four thousand Dollars) to read "₱5000.00 (Five thousand Dollars) in clause 12 of the Statement of Claim.

3. By adding after Clause 14 the following.

15. The plaintiff was at all times ready, willing and able to perform his part of the bargain as contained in paragraph 1 hereof, and offers to perform his part thereunder by bringing into Court the sum of ₱700.00 (Seven Hundred Dollars) which sum he says is sufficient to satisfy the balance due under the said agreement at the date of the breach thereof, namely 29th day of September, 1969. The plaintiff says that the balance due under the said agreement at the said date was ₱648.89 10 20

4. The prayer to be amended to read as follows:-

1. That the transfer 110291 dated the 29th day of September, 1969 be set aside.

2. That the sale and purchase agreement contained in paragraph 1 be specifically enforced;

3. Further and/or in the alternative, the third defendant be ordered to pay special damages as follows : 30

To special damages being the value of the land lost ₱5000.00

Less instalments of purchase price due but unpaid as at 29th September, 1969 649.89

Total ₱4350.11

9.

4. Alternatively, the third defendant be ordered to pay such damages for negligence as shall be found by this Court.

In the Supreme Court

No. 3

Amendments to Statement of Claim, No.230 of 1970 (undated) (continued)

5. Further and/or in the alternative, the first and second defendants be ordered to pay special damages as follows :-

10

To special damages being the value of the land lost by the Plaintiff \$5000.00

Less instalments of purchase price due but unpaid as at 29th September, 1969 649.89

Total \$4350.11

6. Such further or other relief.

7. Costs.

sgd: K.C. RAMRAKHA.

Counsel for the Plaintiff

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No. 4

No. 4

ORDER EXTENDING CAVEAT, NO. 230 OF 1970

Order extending Caveat No.230 of 1970

IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

No. 230 of 1970

27th August 1970

BETWEEN: CHOTELAL (son of Nanhu) Plaintiff

- and -

1. RAM MAHESH (son of Ram Sarup)
2. JAGAT SINGH (son of Bahu Singh)
3. GRAHAME & CO. (a firm) Defendants

In the Supreme Court

No. 4

Order extending Caveat No.230 of 1970  
27th August 1970  
(continued)

Thursday, the 27th day of August, 1970

Before the Honourable Justice Knox-Mawer Puisne Judge in Chambers

UPON READING the Ex Parte Motion herein dated the 27th day of August, 1970 AND UPON HEARING Mr. Karam Chand Ramrakha of counsel for the plaintiff IT IS THIS DAY ORDERED that the time mentioned in an application in writing dated the 7th day of August, 1970 in respect of caveat number 111835 be extended until the 11th day of September, 1970 AND that the further hearing of this Summons be adjourned until Thursday, the 10th day of September, 1970 at 9.30 o'clock in the forenoon and that the costs of this application be costs in the cause.

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BY THE COURT  
signed  
DEPUTY REGISTRAR

No. 5

Writ of Summons No. 231 of 1970  
27th August 1970

No. 5

WRIT OF SUMMONS, NO. 231 of 1970

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No.231 of 1970.

IN THE SUPREME COURT OF FIJI

B E T W E E N :

- 1. GANGA RAM (son of Ram Sarup)
- 2. SHIU NATH (son of Ram Sarup)

Plaintiffs

- 1. RAM MAHESH (son of Ram Sarup)
- 2. DHANPAT (d/o Mahabir)
- 3. GRAHAME & CO. (a firm)

Defendants

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ELIZABTH II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.

In the Supreme Court

—  
No. 5

TO: 1. Ram Mahesh (son of Ram Sarup) of Tamavua, Farmer  
2. Dhanpat (d/o Mahabir) of Tamavua, Domestic Duties and  
3. Grahame & Co. (a firm) of Suva in the Colony of Fiji, Solicitors

Writ of Summons  
No. 231 of 1970

27th August 1970

10

WE COMMAND YOU, that within eight days after the service of this Writ on you inclusive of the day of such service you do cause an appearance to be entered for you in an action at the suit of GANGA RAM and SHIU NATH (sons of Ram Sarup) of Suva, Lorry Driver and Cultivator and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

20

WITNESS the Honourable Sir Clifford James Hammett Chief Justice of our Supreme Court, at Suva, this 27th day of August, 1970

RAMRAKHAS

Per:(Sgd): K.C. RAMRAKHA  
Solicitors for the Plaintiff.

N.B. - This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date and not afterwards.

30

The defendant may appear hereto by entering an appearance either personally or by Solicitor at the Supreme Court Registry at Suva.

GENERAL ENDORSEMENT OF CLAIM

The plaintiff's claim is against the first and second defendant for an order that a transfer made in respect of land comprised in Certificate of Title number 13113 be set aside and that plaintiff's agreement dated 21st day of April, 1967 be enforced on the grounds that the said transfer is fraudulent

40

In the Supreme Court

The plaintiff's further claim is for equitable relief against rescission of the said agreement.

No. 5

The plaintiff's further claim is against the third defendant for negligence

Writ of Summons No. 231 of 1970

And the plaintiff claims damages and costs

27th August, 1970 (continued)

No. 6

No. 6

Statement of Claim No. 231 of 1970 (undated)

STATEMENT OF CLAIM, NO. 231 of 1970

IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

No.231 of 1970

BETWEEN :

10

- 1. GANGA RAM (son of Ram Sarup) and
- 2. SHIU NATH (son of Ram Sarup)

Plaintiffs

- and -

- 1. RAM MAHESH (son of Ram Sarup)
- 2. DHANPAT (d/o Mahabir)
- 3. GRAHAME & CO. (a firm)

Defendants

STATEMENT OF CLAIM

1. On or about the 21st day of April, 1967 the plaintiffs and the first defendant entered into a written agreement whereby the first defendant agreed to sell to the plaintiff land comprising 2 acres 0 roods 04 perches being lot 4 on Deposited Plan number 3082 and now comprised in Certificate of Title number 13113 for the price

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of \$1100.00 (eleven hundred dollars) (which said land is hereinafter called the land) the said price being payable by a deposit of \$560.00 (five hundred and sixty dollars) and the balance by equal monthly instalments of \$20.00 (twenty dollars) and carrying interest thereon at the rate of eight per cent per annum.

In the Supreme Court

—  
No. 6

Statement of Claim No. 231 of 1970

(undated)

10 2. Clause 8 of the said agreement provided that in any event of any default the first defendant had the following remedies

(a) to determine the agreement forthwith and to re-enter upon and take possession of the said land and all moneys paid under the agreement shall be forfeited to the first defendant as vendor;

20 (b) to enforce the agreement forthwith and to exercise all rights under the agreement whereupon all unpaid moneys shall immediately become due and payable and shall be recoverable by action against the Purchaser forthwith without further demand ;

(c) to re-enter upon and take possession of the said land and premises and to re-sell the same upon such terms and conditions as the Vendor may think fit and any loss or deficiency occasioned by such sale and all costs and expenses incidental thereto shall be paid by the Purchaser and shall be recoverable by the Vendor as liquidated damages

30 3. The plaintiffs say that the said clause is a penal provision, and one in which a court of equity is entitled to give relief

4. Time was not made the essence of the said agreement

5. The third defendant is a firm of solicitors in Suva, and acted for both the plaintiffs and the first defendant in the matter of the said sale and purchase for a fee or reward paid or to be payable by the plaintiff and did not cease to so act until sometime in the latter half of the year 1969

40 6. At all material times, one BINDESWARI GANGA PRASAD acted as the servant or agent of the third defendant and the plaintiffs and the first defendant both dealt with him at all material times

7. The plaintiffs made payments from time to time

In the Supreme  
Court

—  
No. 6

Statement  
of Claim  
No. 231 of  
1970

(undated)  
(continued)

to the first defendant either to him personally or at the office of the third defendant in Suva and on the 19th day of July, 1969, the plaintiffs made one payment of \$10.00 (ten dollars) thereby making the total sum paid a grand total of \$1142.00 (eleven hundred and forty two dollars) after which time the first and the third defendants refused to accept any further payments under the agreement.

8. In or about the month of September, 1969 by a transfer dated on or about the 29th day of September 1969 and registered on or about the 30th day of September, 1969 and numbered 110292 the first defendant purported to transfer all his right title and interest in the said land to and unto the second defendant for the price of \$800.00 (eight hundred dollars)

10

9. The plaintiff did not lodge any caveat against the first defendant in order to protect his interest under the said agreement, nor did the third defendant advise or cause the plaintiff to lodge such a caveat.

20

10. The plaintiff says that the first and second defendants acted fraudulently in making and registering the said transfer, particulars of fraud being as follows :-

(a) the land was transferred for a grossly low, and under-valued price

(b) the first and second defendants are related to each other and are good friends

30

(c) the transfer was not done by the first defendant's usual legal advisers, but was done privately and without legal advice and assistance

(d) no attempt was made to advertise the said land for sale or to obtain the best possible price therefor

(e) no notice of rescission or any other notice was given to the plaintiff, and the transfer was done secretly and even without the knowledge of the third defendant

40

(f) the second defendant knew of the existence of the said agreement, and purchased with knowledge thereof

(g) the transfer was made for the express purpose of defeating the plaintiff's agreement, and cheating him of all monies paid thereunder

(h) the first and second defendants did not make a true declaration of the position in the said transfer.

10 11. The third defendant was negligent towards the plaintiff whereby the plaintiff has suffered damage particulars of negligence being as follows:-

A. The third defendant did not advise the plaintiff to lodge a caveat on the said land in respect of the agreement;

B. The third defendant did not lodge any caveat on the said land for and on behalf of the plaintiff

C. The third defendant did not advise the plaintiff of his rights in the matter, nor did the third defendant do anything to protect the plaintiff's interests

20 D. The said agreement was one-sided and calculated to operate against the plaintiff

E. The third defendant did not give any notice to the plaintiff of refusal by the first defendants to accept payments as aforesaid, and did not advise the plaintiff what to do in the circumstances

Particulars of damage :

30 If the transfer is not set aside, the plaintiff loses his land, and payments made thereunder since the first defendant is not in a position to pay any sum that may be awarded against him

12. The land is currently worth at least \$4000.00 (Four thousand dollars)

13. The plaintiff did in or about the month of February, 1970 lodge a caveat on the said land and such caveat is numbered 111835

40 14. By a notice dated the 7th day of August, 1970 and served on the plaintiff by registered post, the Registrar of Titles has given notice to the plaintiff to withdraw the said caveat under the provisions of section 132, sub-section 1 of the Land (Transfer and Registration) Ordinance Cap 136

In the Supreme Court

—  
No. 6

Statement of Claim No. 231 of 1970

(undated)  
(continued)

In the Supreme Court

No. 6

Statement of Claim No. 231 of 1970 (undated) (continued)

15. WHEREFORE the plaintiff claims

(a) that the said transfer be set aside ;

(b) Further and/or in the alternative, the first and/or the second defendant do refund to him all sums, and legal costs and disbursements paid for the agreement and pay to him the sum of \$4000 (four thousand dollars) being the value of the land by way of damages

(c) Further and/or in the alternative, the plaintiff claims equitable relief on the basis of the true value of the said land, and for a declaration that the said clause 8 is penal in its nature 10

(d) Further and/or in the alternative, damages against the third defendant in negligence particulars whereof are as follows

To refund of legal costs paid	\$38.00	
To instalments paid under the agreement		
To price of the said land	\$4000.00	20

(e) An order that the time for the removal of the caveat be extended indefinitely

(f) Such further or other relief in the premises as to this Honourable Court shall seem meet

(g) An order that the said agreement be enforced upon such terms as may be just

(h) Costs

RAMRAKHAS

Per: K.C. RAMRAKHA

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This Statement of Claim is filed with the Writ of Summons, and is intended to be delivered therewith at the time of service

\_\_\_\_\_

AMENDMENTS TO STATEMENT OF CLAIM, NO.231 OF 1970

SUPREME COURT ACTION 231 of 1970

GANGA RAM AND SHIU NATH v. RAM MAHESH AND ORS

PARTICULARS OF AMENDMENT PROPOSED BY PLAINTIFFS

10 1. The figure "₹1142" and words "eleven hundred and forty two dollars" to read "₹885.00 (eight hundred and eighty five dollars) in Clause 7 of the Statement of Claim

2. The figure "₹4000." and words "four thousand dollars" to read "₹6000.00 (six thousand dollars)" in Clause 12 thereof

3. The prayer to be amended to read as follows :-

1. That the transfer dated the 29th day of September, 1969 be set aside;

2. That the sale and purchase agreement contained in paragraph 1 of the Statement of Claim be specifically enforced;

20 3. Further and/or in the alternative, the third defendant be ordered to pay special and general damages as follows :-

To special damages being value of the land lost by the plaintiff ₹6000.00

Less instalments of purchase price due but unpaid as at the 29th September, 1969 350.52

₹5649.48

30 4. Alternatively, the third defendant be ordered to pay such damages for negligence as shall be found by this Honourable Court

5. Further, and/or in the alternative, the first defendant and the second defendant be ordered to pay special and general damages as follows :-

<p>In the Supreme Court</p> <p style="text-align: center;">—</p> <p style="text-align: center;">No. 7</p> <p>Amendments to Statement of Claim No. 231 of 1970 (undated) (continued)</p>	<p>To special damages being value of the land lost by the plaintiff Less instalments of purchase price due but unpaid as at the 29th September, 1969</p> <p>6. Such further or other relief</p> <p>7. Costs</p>	<p>₹6000.00</p> <p style="text-align: center;">350.52</p> <hr style="width: 100%;"/> <p>₹5649.48</p> <hr style="width: 100%;"/>
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signed : K.C. RAMRAKHA

Counsel for the Plaintiffs

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No. 8

Amendments to Statement of Claim, No. 231 of 1970  
(undated)  
(continued)

No. 8

AMENDMENTS TO STATEMENT OF CLAIM,  
NO. 231 of 1970

SUPREME COURT ACTION 231 of 1970

GANGA RAM AND SHIU NATH v. RAM MAHESH AND ORS.

PARTICULARS OF AMENDMENT PROPOSED BY PLAINTIFFS

1. The figure and words ₹1142.00 "Eleven hundred and forty two Dollars" to read "₹885.00 (eight hundred and eighty five Dollars) in Clause 7 of the Statement of Claim. 20

2. The figure "₹4000" and words "Four thousand Dollars" to read "₹6000.00 (Six Thousand Dollars)" in Clause 12 thereof.

3. By adding after clause 14 the following :

15. The plaintiffs was at all times ready, willing and able to perform their part of the bargain as contained in paragraph 1 hereof, and offers to perform their part thereunder by bringing into Court the sum

30



of \$400.00 (Four Hundred Dollars) which sum he says is sufficient to satisfy the balance due under the said agreement at the date of the breach thereof, namely the 29th day of October, 1969. The plaintiffs say that the balance due under the said agreement at the said date was \$350.52 (Three Hundred and Fifty Dollars Fifty Two Cents).

In the Supreme Court

No. 8

Amendments to Statement of Claim No. 231 of 1970

(undated)  
(continued)

10 4. The prayer to be amended to read as follows :-

1. That the transfer 110411 dated the 10th day of October, 1969 be set aside;
2. That the sale and purchase agreement contained in paragraph 1 of the Statement of Claim be specifically enforced;
3. Further and/or in the alternative, the third defendant be ordered to pay special damages as follows :-

20 To special damages being value of the land lost by the Plaintiffs \$6000.00  
 Less instalments of purchase price due but unpaid as at the 29th September, 1969 350.52  
\$5649.48

4. Alternatively, the third defendant be ordered to pay such damages for negligence as shall be found by this Honourable Court.

30 5. Further, and/or in the alternative, the first defendant and the second defendant be ordered to pay special damages as follows :-

To special damages being value of the land lost by the Plaintiff \$6000.00  
 Less instalments of purchase price due but unpaid as at the 29th September 1969 350.52  
\$5649.48

6. Such further or other relief, including, if necessary, refund of instalments.

7. Costs.

40 sgd: K.C. RAMRAKHA  
COUNSEL FOR THE PLAINTIFFS

In the Supreme Court

No. 9

ORDER EXTENDING CAVEAT, NO.231 of 1970

No. 9

Order extending Caveat No. 231 of 1970

27th August, 1970

IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

No. 231 of 1970

BETWEEN :

GANGA RAM (son of Ram Sarup)  
SHIU NATH (son of Ram Sarup)

Plaintiffs

- and -

1. RAM MAHESH (son of Ram Sarup)
2. DHANPAT (daughter of Mahabir)
3. GRAHAME & CO. (a firm)

10

Defendants

Thursday, the 27th day of August, 1970  
Before the Honourable Justice Knox-Mawer Puisne  
Judge in Chambers

UPON READING the Ex Parte Motion herein dated the 27th day of August, 1970 AND UPON HEARING Mr. Karam Chand Ramrakha of counsel for the plaintiff IT IS THIS DAY ORDERED that the time mentioned in an application in writing dated the 7th day of August, 1970 in respect of caveat number 111836 be extended until the 11th day of September, 1970 AND that the further hearing of this Summons be adjourned until Thursday, the 10th day of September, 1970 at 9.30 o'clock in the forenoon and that the costs of this application be costs in the cause.

20

BY THE COURT

signed

DEPUTY REGISTRAR.

30

21.

No. 10

WRIT OF SUMMONS, NO. 233 OF 1970

In the Supreme  
Court

          
No. 10

IN THE SUPREME COURT OF FIJI

No. 233 of 1970

Writ of  
Summons

28th August,  
1970

BETWEEN :

MANORAMA PILLAI (d/o Narayan Swamy Pillai)

Plaintiff

- and -

1. RAM MAHESH (son of Ram Sarup)
2. DHANPAT (d/o Mahabir)
3. GRAHAME & CO. (a firm)

Defendants

ELIZABETH II, by the Grace of God of the  
United Kingdom of Great Britain and Northern  
Ireland and of Her other Realms and Territories  
Queen, Head of the Commonwealth, Defender of the  
Faith.

- TO: 1. RAM MAHESH (s/o Ram Sarup) of Tamavua,  
Domestic Duties
2. DHANPAT (d/o Mahabir) of Tamavua, Domestic  
Duties
3. GRAHAME & CO. (a firm) of Suva whose  
registered office is at Suva

WE COMMAND YOU, that within eight days after  
the service of this Writ on you inclusive of the  
day of such service you do cause an appearance to  
be entered for you in an action at the suit of  
MANORAMA PILLAI (d/o Narayan Swamy Pillai) of 30  
Kings Road, Samabula, Salesgirl and take notice that  
in default of your so doing the plaintiff may  
proceed therein, and judgment may be given in your  
absence.

WITNESS the Honourable SIR CLIFFORD JAMES  
HAMMETT Chief Justice of our Supreme Court, at

In the Supreme Court

Suva, this 28th day of August, 1970.

RAMRAKHAS

L.S.

No. 10

Writ of Summons

Per: (sgd): K.C. Ramrakha  
Solicitors for the Paintiff

28th August, 1970  
(continued)

N.B. - This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date and not afterwards.

The defendant may appear hereto by entering an appearance either personally or by Solicitor at the Supreme Court Registry at Suva.

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GENERAL ENDORSEMENT OF CLAIM

The plaintiff's claim is against the first and second defendants for fraud

The plaintiff's further claim against the third defendant jointly and severally is for negligence

The plaintiff says that the first and second defendants wrongly caused a transfer to be made of land comprised in Certificate of Title number 13106 for an undervalue with intent to defeat a sale and purchase agreement in respect of the same land with the plaintiff

20

The plaintiff says that the third defendant was negligent in that the third defendants failed to guard the plaintiff's interests and to lodge a caveat in respect of the said sale and purchase agreement.

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STATEMENT OF CLAIM, NO. 233 of 1970

In the Supreme Court

IN THE SUPREME COURT OF FIJI

No. 11

CIVIL JURISDICTION

Statement of Claim  
No. 233 of 1970  
(undated)

No. 233 of 1970

B E T W E E N : MANORAMA PILLAI father's name  
Narayan Swamy Pillai of 30  
Kings Road, Suva, Salesgirl

Plaintiff

- and -

- 10                   1.     RAM MAHESH (son of Ram Sarup)
- 2.     DHANPAT (daughter of Mahabir)
- 3.     GRAHAME & CO. (a firm)

Defendants

STATEMENT OF CLAIM

1. On or about the 23rd day of May, 1968 the plaintiff and the first defendant entered into a written agreement whereby the first defendant agreed to sell to the plaintiff land comprising 2 acres 0 roods 0.7 perches being lot 4 on Deposited Plan number 3082 and now comprised in Certificate of Title number 13106 for the price of \$1200 (twelve hundred dollars) which said price was payable by one initial deposit in the sum of \$300.00 (three hundred dollars) and thereafter by equal monthly instalments of \$20.00 (twenty dollars) the first of which payments was to be made on the 31st day of December, 1967, together with interest thereon.

2. Clause 8 of the said agreement provided that in the event of any default the first defendant had the following remedies

- (a) to determine the agreement forthwith and to re-enter upon and take possession of the said land and all moneys paid under the agreement shall be forfeited to the first defendant as vendor;

In the Supreme  
Court

—  
No. 11

Statement of  
Claim

No. 233 of  
1970

(undated)  
(continued)

(b) to enforce the agreement forthwith and to exercise all rights under the agreement whereupon all unpaid moneys shall immediately become due and payable and shall be recoverable by action against the Purchaser forthwith without further demand;

(c) to re-enter upon and take possession of the said land and premises and to re-sell the same upon such terms and conditions as the Vendor may think fit and any loss or deficiency occasioned by such sale and all costs and expenses incidental thereto shall be paid by the Vendor and shall be recoverable by the first defendant as Vendor as liquidated damages. 10

3. The plaintiff say that the said clause is a penal provision, and one in which a court of equity is entitled to give relief.

4. Time was not made the essence of the said agreement

5. The third defendant is a firm of solicitors in Suva, and acted for both the plaintiffs and the first defendant in the matter of the said sale and purchase for a fee or reward paid or to be payable by the plaintiff and did not cease to so act until sometimes in the later half of the year 1969. 20

6. At all material times, one BINDESHWARI GANGA PRASAD acted as the servant or agent of the third defendant and the plaintiffs and the first defendant both dealt with him at all material times. 30

7. The plaintiff made payments from time to time to the first defendant at the office of the third defendant in Suva and by the 2nd day of June, 1969 had paid a total of \$980.00 after which time the first and the third defendants refused to accept any further payments under the agreement.

8. The plaintiff did not lodge any caveat against the first defendant in order to protect her interest under the said agreement, nor did the third defendant advise or cause the plaintiff to lodge a caveat. 40

9. In or about the month of September, 1969

by a transfer dated the 29th day of September, 1969 and registered on the 30th day of September, 1969 and numbered 110292 registration number, the first defendant purported to transfer all his right title and interest in the said land to and unto the second defendant for the price of \$800.00 (eight hundred dollars).

In the Supreme  
Court

—  
No. 11

Statement of  
Claim  
No. 233 of  
1970  
(undated)  
(continued)

10 The plaintiff say that the first and second defendants acted fraudulently in making and registering the said transfer, particulars of fraud being as follows :-

- (a) the land was transferred for a grossly low, and under-valued price
- (b) the first and second defendants are related to each other and are good friends
- (c) no transfer was not done by the first defendant's usual legal advisers, but was done privately and without legal advice and assistance
- 20 (d) no attempt was made to advertise the said land for sale or to obtain the best possible price therefor
- (e) no notice of rescission or any other notice was given to the plaintiff, and the transfer was done secretly and even without the knowledge of the third defendant
- (f) the second defendant knew of the existence of the said agreement, and purchased with knowledge thereof
- 30 (g) the transfer was made for the express purpose of defeating the plaintiff's agreement, and cheating him of all monies paid thereunder
- (i) the first and second defendants did not make a true declaration of the position in the said transfer

11. The third defendant was negligent towards the plaintiff whereby the plaintiff has suffered damage particulars of negligence being as follows :-

40 A. The third defendant did not advise the plaintiff to lodge a caveat on the said land in respect of the agreement;

B. The third defendant did not lodge any caveat on

In the Supreme Court

No. 11

Statement of Claim  
No.233 of 1970  
(undated)  
(continued)

the land for and on behalf of the plaintiff.

C. The third defendant did not advise the plaintiff of his rights in the matter, nor did the third defendant do anything to protect the plaintiff's interest

D. The said agreement was one-sided and calculated to operate against the plaintiff

E. The third defendant did not give any notice to the plaintiff of refusal by the first defendant to accept payments as aforesaid, and did not advise the plaintiff what to do in the circumstances

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Particulars of damage:

If the transfer is not set aside, the plaintiff loses her land, and payments made thereunder since the first defendant is not in a position to pay any sum that may be awarded against him

12. The land is currently worth at least \$4000.00 (Four thousand Dollars)

13. The second named did on or about the 3rd day of November, 1965 by virtue of a transfer dated the 3rd day of November, 1965 transfer the said land to Bijay Prasad and Tikaram (sons of Ram Shankar) for the price of \$1600.00 (sixteen hundred Dollars).

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14. WHEREFORE the plaintiff claims

Damages against the first and second defendants for fraud as follows :-

(a) To price of land lost	\$4000.00
(b) Refund of monies paid	980.00

Further and/or in the alternative, the plaintiff claims equitable relief on the basis of the true value of the said land, and for a declaration that the said clause 8 is penal in its nature

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Further and/or in the alternative, the plaintiff claims against the third defendant damages in negligence as follows

To refund of legal costs paid	41.95
To refund of monies paid	980.00
To price of land lost	4000.00

General damages

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Such further or other relief in the premises as to this honourable Court shall seem just

In the Supreme Court

Costs

No. 11

RAMRAKHAS

Statement of Claim  
No. 233 of 1970  
(undated)  
(continued)

Per:(sgd): K.C. Ramrakha

This Statement of Claim is filed with the Writ of Summons and is intended to be delivered therewith at the time of service.

No. 12

No. 12

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AMENDMENTS TO STATEMENT OF CLAIM, NO.233 OF 1970

Amendments to Statement of Claim  
No. 233 of 1970  
(undated)

PARTICULARS OF AMENDMENT PROPOSED IN MANORAMA PILLAI V. RAM MAHESH & ORS - SUPREME COURT ACTION 233 OF 1970

1. By amending the words and figures "₹980" in clause 7 of the Statement of Claim to read "660.00 (six hundred and sixty dollars)

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2. By amending the words and figures "₹4000 (Four thousand Dollars) to read "₹5000.00 (five thousand dollars)

3. By deleting the prayer to read as follows

1. Damages against the first and second defendant for fraud

(a) To value of land lost                      ₹5000.00

Deduct instalments due but unpaid    623.04

\_\_\_\_\_

4376.96

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(b) Alternatively, damages against the first defendant for breach of contract in the sum of ₹4376.96 as aforesaid

In the Supreme Court

No. 12

Amendments to Statement of Claim No. 233 of 1970 (undated) (continued)

(c) Alternatively, or by way of further relief, damages against the third defendant in negligence in the sum of \$4376.96 as aforesaid

(d) Such further or other relief

(e) Costs

K.C. RAMRAKHAS

Counsel for the Plaintiff.

No. 13

Order extending Caveat No.231 of 1970 10th September 1970

No. 13

ORDER EXTENDING CAVEAT, NO.231 OF 1970

IN THE SUPREME COURT OF FIJI CIVIL JURISDICTION

No. 231 of 1970

B E T W E E N : GANGA RAM f/n Ram Sarup  
SHIU NATH f/n Ram Sarup  
- and - Plaintiffs

1. RAM MAHESH son of Ram Sarup
2. DHANPAT d/o Mahabir
3. GRAHAME & COMPANY (a firm)

Defendants

Thursday, the 10th day of September, 1970

Before the Honourable Sir Clifford James Hammett  
Chief Justice of our Supreme Court of Fiji in  
Chambers

UPON READING the Motion herein dated the 27th day of August, 1970 and the Order made herein on the 27th day of August, 1970 AND UPON HEARING Mr. Karam Chand Ramrakha of Counsel

for the plaintiffs the defendants not having appeared IT IS THIS DAY ORDERED that subject to the filing of affidavits of service on the defendants, and the consent of the second defendant or his solicitor if called upon the time mentioned in an application for removal of caveat dated the 7th day of August, 1970 be extended in respect of caveat number 111836 until the 16th day of October, 1970 and that the hearing of this summons be adjourned until Thursday, the 15th day of October, 1970 at the hour of 9.30 o'clock in the forenoon AND that liberty be reserved to either or any of the parties to apply and the costs of this application be reserved.

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In the Supreme Court

No. 13

Order extending Caveat No.231 of 1970 10th September 1970 (continued)

BY THE COURT

signed

DEPUTY REGISTRAR.

No. 14

ORDER EXTENDING CAVEAT, NO. 230 OF 1970

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IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

No. 230 of 1970.

No. 14

Order extending Caveat, No. 23 of 1970 10th October, 1970

B E T W E E N :

CHOTELAL (son of Nanhu) Plaintiff

- and -

1. RAM MAHESH (son of Ram Sarup)
2. JAGAT SINGH (son of Babu Singh)
3. GRAHAME & CO. (a firm)

Defendants

Thursday, the 15th day of October, 1970

In the Supreme Court

Before the Honourable Sir Clifford James Hammett  
Chief Justice of our Supreme Court of Fiji in  
Chambers

No. 14

Order extend-  
ing Caveat,  
No. 23 of  
1970  
10th October,  
1970  
(continued)

UPON READING the Ex Parte Motion herein dated  
the 27th day of August, 1970 and the Order made  
herein on the 27th day of August, 1970 AND UPON  
HEARING Mr. Vijaya Parmanandam of Counsel for  
the plaintiffs, and Mr. K. Parshotam for the  
second defendant and Mr. C.L. Jannadas for the  
third defendant, the first defendant not having  
appeared IT IS THIS DAY ORDERED by consent that  
the time mentioned in an application for removal  
of caveat Number 111835 until the 23rd day of  
April, 1971.

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BY THE COURT

signed

CHIEF REGISTRAR

No. 15

No. 15

Statement of  
Defence of  
1st Defendant,  
No. 233 of  
1970  
27th October  
1970

STATEMENT OF DEFENCE OF 1ST DEFENDANT,  
NO. 233 of 1970

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IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

No.233 of 1970

B E T W E E N :

MANORAMA PILLAI Father's Name Narayan Swamy  
Pillai of 30 King's Road, Suva, Salesgirl

Plaintiff

- and -

1. RAM MAHESH (son of Ram Sarup)
2. DHANPAT (daughter of Mahabir)
3. GRAHAME & CO. (a firm)

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Defendants

STATEMENT OF DEFENCEIn the Supreme  
Court

No. 15

Statement of  
Defence of  
1st Defendant,  
No. 233 of  
1970  
27th October,  
1970  
(continued)

1. The first defendant admits entering into a written agreement which, inter alia, provided for the Sale and Purchase of C.T. 13106 by the 1st Defendant to the Plaintiff on certain terms and conditions. Except as otherwise admitted hereabove the first defendant denies each and every allegation contained in paragraph 1 of the Statement of Claim.
- 10 2. The first defendant admits paragraph 2 of the Statement of Claim.
3. The first defendant denies each and every allegation contained in paragraph three of the Statement of Claim.
4. In reply to paragraph 4 of the Statement of Claim the first defendant says that no provision was made in the written agreement above-mentioned that time was of the essence thereof.
- 20 5. The first defendant admits that the third defendant were the Solicitors acting for both the plaintiff and the first defendant in the matter of the said sale and purchase of the said C.T. 13106; except as admitted hereabove the first defendant does not know and therefore cannot admit the contents of paragraph 5 of the Statement of Claim.
6. The first defendant admits paragraph 6 of the Statement of Claim.
- 30 7. The first defendant denies paragraph 7 and every part thereof of the Statement of Claim, except that the first defendant did receive the total sum of only \$440.00 from the 3rd Defendants on account of the payments made by the plaintiff.
8. The first defendant admits that the plaintiff did not lodge a caveat on C.T. 13106. Except as admitted hereabove the 1st defendant does not admit the contents of paragraph 8 or any part thereof of the Statement of Claim.
- 40 9. The 1st defendant admits paragraph 9 of the Statement of Claim.
10. The first defendant denies the contents of

In the Supreme  
Court

paragraph 10 and every part thereof of the  
Statement of Claim. In further reply to said  
paragraph 10 the first defendant says as follows:-

No. 15  
Statement of  
Defence of  
1st Defendant,  
No. 233 of  
1970  
27th October,  
1970  
(continued)

- (a) The price of the sale of C.T. 13106 to the  
2nd defendant was a fair and reasonable
- (b) The 1st defendant admits paragraph 10(b) and  
says that any suggestion that that influenced  
the transaction between the first and second  
defendant is emphatically denied.
- (c) The first defendant admits, as far as it is  
relevant, the contents of paragraph 10(c). 10
- (d) The first defendant denies the contents of  
paragraph 10(d) and every part thereof of  
the Statement of Claim.
- (e) The first defendant gave to the plaintiff a  
Notice dated 8th October, 1963 and also one  
on the 21st January, 1969 demanding compliance  
with the said written agreement and warning  
the plaintiff that upon a failure whereof the  
said agreement would be rescinded. 20
- (f) That the sale of C.T. 13106 by the first  
defendant to the second defendant was made at  
a fair and reasonable price, in all good  
faith, and after proper demands and notices  
were made and given to the plaintiff.
- (g) The first defendant denies paragraphs 10(g)  
and 10(i) and every part thereof of the  
Statement of Claim.
11. The first defendant denies the paragraph  
(unnumbered) headed "Particulars of Damage" 30
12. The first defendant denies paragraph 12  
of the Statement of Claim.
13. WHEREFORE the first defendant prays that  
the plaintiff's claim be dismissed and costs.

DATED this 27th day of October, 1970.

SHERANI & CO.

Per: (Sgd): F.M.K.Sherani  
Solicitors for the first-named Defendant

STATEMENT OF DEFENCE OF 1ST DEFENDANT,  
NO. 230 OF 1970

In the Supreme  
Court

—  
No. 16

IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

No. 230 of 1970

B E T W E E N :

CHOTELAL son of Nanhu

Statement of  
Defence of  
1st Defendant,  
No. 230 of  
1970  
28th October  
1970

Plaintiff

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- and -

- 1. RAM MAHESH (son of Ram Sarup)
- 2. JAGAT SINGH (Father's name Babu Singh)
- 3. GRAHAME & CO. (a firm)

Defendants

STATEMENT OF DEFENCE

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1. The first defendant admits entering into a written agreement which, inter alia, provided for the sale and purchase of C.T. 13105 by the 1st Defendant to the plaintiff on certain terms and conditions. Except as otherwise admitted here-  
above the first defendant denies each and every allegation contained in paragraph 1 of the Statement of Claim.

2. The first defendant admits paragraph 2 of the Statement of Claim.

3. The first defendant denies each and every allegation contained in paragraph three of the Statement of Claim.

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4. In reply to paragraph 4 of the Statement of Claim the first defendant says that no provision was made in the written agreement abovementioned that time was of the essence thereof.

5. The first defendant admits that the third defendants were the Solicitors acting for both the plaintiff and the first defendant in the matter of the said sale and purchase of the said C.T. 13105:

In the Supreme Court

No. 16

Statement of Defence of 1st Defendant, No. 230 of 1970 28th October 1970 (continued)

except as admitted hereabove the first defendant does not know and therefore cannot admit the contents of paragraph 5 of the Statement of Claim.

6. The first defendant admits paragraph 6 of the Statement of Claim.

7. The first defendant denies paragraph 7 and every part thereof of the Statement of Claim, except that the first defendant did receive the total sum of only \$352.00 from the 3rd Defendant on account of the payments made by the plaintiff.

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8. The first defendant admits that the plaintiff did not lodge a caveat on C.T. 13106. Except as admitted hereabove the 1st defendant does not admit the contents of paragraph 8 or any part thereof of the Statement of Claim.

9. The 1st defendant admits paragraph 9 of the Statement of Claim.

10. The first defendant denies the contents of paragraph 10 and every part thereof of the Statement of Claim. In further reply to said paragraph 10 the first defendant says as follows :-

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(a) The price for the sale C.T. 13105 to the 2nd defendant was fair and reasonable

(b) The 1st defendant denies paragraph 10 (b) and, in any event, emphatically denies any suggestion that influenced the transaction between the first and second defendant.

(c) The first defendant admits, as far as it is relevant, the contents of paragraph 10 (c)

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(d) The first defendant denies the contents of paragraph 10 (d) and 10 (e) and every part thereof the Statement of Claim

(e) The first defendant gave to the plaintiff a Notice dated 4th January, 1968 and also one dated 21st January 1969 demanding compliance with the said written agreement and warning the plaintiff that upon a failure whereof the said agreement would be rescinded.

(f) That the sale of C.T. 13105 by the first defendant to the second defendant was made at

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a fair and reasonable price, in all good faith, and after proper demands and notices were made and given to the plaintiff.

In the Supreme Court

(g) The first defendant denies paragraphs 10 (g) and 10 (i) and every part thereof of the Statement of Claim.

No. 16

Statement of Defence of 1st Defendant, No. 230 of 1970 28th October 1970 (continued)

11. The first defendant denies the paragraph (unnumbered) headed "Particulars of Damage".

10

12. The first defendant denies paragraph 12 of the Statement of Claim.

13. WHEREFORE the first defendant prays that the plaintiff's claim be dismissed and costs.

DATED this 28th day of October, 1970.

SHERANI & CO.

Per (sgd) F.M.K. Sherani  
Solicitors for the first named defendant.

No. 17

STATEMENT OF DEFENCE OF 1ST DEFENDANT,  
NO. 231 OF 1970

No. 17

Statement of Defence of 1st Defendant No. 231 of 1970 28th October 1970

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IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

No. 231 of 1970

B E T W E E N :

1. GANGA RAM (son of Ram Sarup) and  
2. SHIU NATH (son of Ram Sarup) Plaintiffs

- and -

1. RAM MAHESH (son of Ram Sarup)  
2. DHANPAT (daughter of Mahabir)  
3. GRAHAME & CO. (a firm) Defendants

In the Supreme  
Court

STATEMENT OF DEFENCE

—  
No. 17  
Statement of  
Defence of  
1st Defendant  
No. 231 of  
1970  
28th October  
1970  
(continued)

1. The first defendant admits entering into a written agreement which, inter alia, provided for the Sale and Purchase of C.T. 13113 by the 1st Defendants to the plaintiffs on certain terms and conditions. Except as ~~otherwise~~ admitted hereabove the first defendant denies each and every allegation contained in paragraph 1 of the Statement of Claim.
2. The first defendant admits paragraph 2 of the Statement of Claim. 10
3. The first defendant denies each and every allegation contained in paragraph three of the Statement of Claim.
4. In reply to paragraph 4 of the Statement of Claim the first defendant says that no provision was made in the written agreement abovementioned that time was of the essence thereof.
5. The first defendant admits that the third defendants were the Solicitors acting for both the plaintiffs and the first defendant in the matter of the said sale and purchase of the said C.T. 13106; except as admitted hereabove the first defendant does not know and therefore cannot admit the contents of paragraph 5 of the Statement of Claim. 20
6. The first defendant admits paragraph 6 of the Statement of Claim.
7. The first defendant denies paragraph 7 and every part thereof of the Statement of Claim, except that the first defendant did receive the total sum of only \$756.00 from the 3rd Defendants on account of the payments made by the plaintiffs. 30
8. The first defendant admits that the plaintiffs did not lodge a caveat on C.T. 13113. Except as admitted hereabove the 1st defendant does not admit the contents of paragraph 8 or any part thereof of the Statement of Claim.
9. The 1st defendant admits paragraph 9 of the Statement of Claim.
10. The first defendant denies the contents of paragraph 10 and every part thereof of the Statement of Claim. In further reply to said 40

paragraph 10 the first defendant says as follows :-

In the Supreme Court

—  
No. 17

Statement of  
Defence of  
1st Defendant  
No. 231 of  
1970  
28th October  
1970  
(continued)

- 10 (a) The price for the sale of C.T. 13113 to the 2nd Defendant was fair and reasonable.
- (b) The 1st defendant denies paragraph 10(b) and, in any event, denies any suggestion that that influenced the transaction between the first and second defendant.
- (c) The first defendant admits, as far as it is relevant, the contents of paragraph 10(c).
- (d) The first defendant denies the contents of paragraph 10(d) and 10(e) and every part thereof of the Statement of Claim.
- (e) The first defendant gave to the plaintiff a Notice dated 12th March 1969 and also one dated 4th August 1969 demanding compliance with the said written agreement and warning the plaintiffs that upon a failure whereof the said agreement would be rescinded.
- 20 (f) That the sale of C.T. 13113 by the first defendant to the second defendant was made at a fair and reasonable price, in all good faith, and after proper demands and notices were made and given to the plaintiffs.
- (g) The first defendant denies paragraphs 10(g) and 10(h) and every part thereof of the Statement of Claim.
11. The first defendant denies the paragraph (unnumbered) headed "Particulars of Damage".
- 30 12. The first defendant denies paragraph 12 of the Statement of Claim.
13. WHEREFORE the first defendant prays that the plaintiff's claim be dismissed and costs.

DATED this 28th day of October, 1970.

SHERANI & CO.

Per:

signed

Solicitors for the first-named defendant.

In the Supreme Court

No. 18

ORDER EXTENDING CAVEAT NO. 230 OF 1970

No. 18

Order extending Caveat No. 230 of 1970 22nd April 1971

IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

No. 230 of 1970.

B E T W E E N :

CHOTELAL (son of Nanhu)

Plaintiff

- and -

- 1. RAM MAHESH (son of Ram Sarup)
- 2. JAGAT SINGH (son of Babu Singh)
- 3. GRAHAME & CO. (a firm)

10

Defendants

Before the Honourable Mr. Justice Nair in Chambers Thursday the 22nd day of April, 1971.

UPON READING the Motion to Extend Order extending Caveat herein dated the 22nd day of April, 1971

AND UPON HEARING MR. KARAM CHAND RAMRAKHA of counsel for the plaintiff the second defendant herein having by his Solicitors signed his consent in making of this Order and not appearing IT IS THIS DAY ORDERED that the time mentioned in an order dated the 15th day of October 1970 for the removal of Caveat mentioned therein be extended up till the hearing and determination of this action.

20

BY ORDER

signed

CHIEF REGISTRAR.



ORDER EXTENDING CAVEAT NO. 231 OF 1970

No. 19

IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

Order extending  
Caveat  
No. 231 of  
1970  
22nd April,  
1971

No. 231 of 1970

B E T W E E N :

GANGA RAM f/n Ram Sarup

SHIU NATH f/n Ram Sarup

Plaintiffs

- and -

- 10        1. RAM MAHESH son of Ram Sarup
- 2. DHANPAT d/o Mahabir
- 3. GRAHAME & COMPANY (a firm)

Defendants

Before the Honourable Mr. Justice Nair in Chambers  
Thursday the 22nd day of April, 1971.

UPON READING the Motion to Extend Order Extending  
Caveat herein dated the 22nd day of April, 1971.

20        AND UPON HEARING MR. KARAM CHAND RAMRAKHA of  
          counsel for the plaintiff the second defendant  
          herein having by her Solicitors signed her consent  
          in making of this order and not appearing

IT IS THIS DAY ORDERED that the time mentioned in  
an order dated the 15th day of October 1970 for  
the removal of Caveat mentioned therein be  
extended up till the hearing and determination  
of this action.

BY ORDER

signed

CHIEF REGISTRAR



In the Supreme Court

No. 20

DEFENCE OF 2ND DEFENDANT, NO.233 OF 1970

No. 20

Defence of  
2nd Defendant  
No. 233 of  
1970  
28th July, 1971

IN THE SUPREME COURT OF FIJI

No. 233 of 1970

B E T W E E N :

MANORAMA PILLAI (d/o Narayan Swamy  
Pillai) Plaintiff

- and -

- 1. RAM MAHESH (son of Ram Sarup)
- 2. DHANPAT (d/o Mahabir)
- 3. GRAHAME & CO. (a firm)

10

Defendants

D E F E N C E

1. THE second named defendant neither denies nor admits the contents of paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the statement of claim and says that such matters as are alleged therein are beyond her knowledge;

2. THE second named defendant admits the allegations contained in paragraph 9 of the statement of claim;

20

3. THE second named defendant denies the allegation contained in paragraph 10 of the statement of claim that she acted fraudulently and says that she was a bona fide purchaser for value and saving the allegation contained in sub paragraph (b) denies each and every allegations contained in the other sub paragraphs of paragraph 10, alternatively says that such matters are beyond her knowledge;

30

4. THE second named defendant neither admits nor denies the allegations contained in paragraph 11 and the sub paragraphs thereto and says that such matters are beyond her knowledge;

5. THE second named defendant admits the allegations contained in paragraph 13 of the statement of claim;

6. THE second named defendant says that the purchase of C.T. No. 13106 was a bona fide purchase by her for value and says that she at no time had any notice of the plaintiff's interest in the said certificate of Title;

In the Supreme Court

No. 20

Defence of  
2nd Defendant  
No. 233 of  
1970  
28th July, 1971  
(continued)

WHEREFORE the second named defendant claims that as against her :-

- (1) That the plaintiff's claim be dismissed;
- (2) That she be awarded the costs of this action;
- (3) Such further and other relief as may seem just.

10

DELIVERED this 28th day of July, 1971.

MARQUARDT-GRAY & CO.

Per: (sgd): H.A.L.M. Gray

Solicitors for the second-named Defendant

TO: The above named Plaintiff and/or to her Solicitors Messrs. Ramrakhas of 77 Marks Street, Suva.

20

No. 21

DEFENCE OF 2ND DEFENDANT, NO. 231 of 1970

No. 21

Statement of  
Defence of  
2nd Defendant  
No. 231 of  
1970  
29th July 1971

IN THE SUPREME COURT OF FIJI

CIVIL JURISDICTION

No. 231 of 1970.

B E T W E E N :

- 1. GANGA RAM (son of Ram Sarup) and
- 2. SHIU NATH (son of Ram Sarup) Plaintiffs

30

- and -

- 1. RAM MAHESH (son of Ram Sarup)
- 2. DHANPAT (d/o Mahabir)
- 3. GRAHAME & CO. (a firm) Defendants

In the Supreme  
Court

DEFENCE

—  
No. 21  
Statement of  
Defence of  
2nd Defendant  
No. 231 of  
1970  
29th July 1971  
(continued)

1. THE second named defendant neither denies nor admits the contents of paragraphs 1,2,3,4,5,6 and 7 of the statement of claim and says that such matters as are alleged therein are beyond her knowledge.
2. THE second named defendant admits the allegations contained in paragraph 8 of the statement of claim.
3. THE second named defendant neither denies nor admits the allegations contained in paragraph 9 of the statement of claim and says that such matters are beyond her knowledge. 10
4. THE second named defendant denies the allegation contained in paragraph 10 of the statement of claim that she acted fraudulently and says that she was a bona fide purchaser for value and saving the allegation contained in sub paragraph (b) denies each and every allegations contained in the other sub paragraphs of paragraph 10, alternatively says that such matters are beyond her knowledge. 20
5. THE second named defendant neither denies nor admits the allegations contained in paragraph 11 of the statement of claim and says that such matters are beyond her knowledge and says in particular to the ultimate paragraph therein that she was a bona fide purchaser for value and saving the allegation contained in sub-paragraph (b) denies each and every allegations contained in the other sub paragraphs of paragraph 11, alternatively says that such matters are beyond her knowledge. 30
6. THE second named defendant admits the allegations contained in paragraphs 13 and 14 of the statement of claim.
7. THE second named defendant repeats paragraphs 1 - 6 of the within defence and says that her title is indefensible and as such falls within the provisions of section 14 of the Land (Transfer and Registration) Ordinance Cap. 136. 40

WHEREFORE the second named defendant claims that as against her :-



- (1) That the plaintiff's claim be dismissed;
- (2) That she be awarded the costs of this action;
- (3) Such further and other relief as may seem just.

In the Supreme Court

—  
No. 21

Statement of  
Defence of  
2nd Defendant  
No. 231 of  
1970  
29th July 1971  
(continued)

DELIVERED this 29th day of July, 1971.

MARQUARDT-GRAY & CO.

Per: (signed)

Solicitors for the Second named  
Defendant

10

TO: The above named Plaintiffs and/or to their  
Solicitors Messrs. Ramrakhas of 77 Marks Street,  
Suva.

No. 22

STATEMENT OF DEFENCE OF 2ND DEFENDANT  
NO. 230 OF 1970

IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

No. 22

Statement of  
Defence of 2nd  
Defendant  
No. 230 of  
1970  
26th June 1972

No. 230 of 1970

20 B E T W E E N :

CHOTELAL son of Nanhu Plaintiff

- and -

- 1. RAM MAHESH (son of Ram Sarup)
- 2. JAGAT SINGH (son of Babu Singh)
- 3. GRAHAME & CO. (a firm)

Defendants

STATEMENT OF DEFENCE

The second-named defendant in answer to the

In the Supreme  
Court

—  
No. 22

Statement of  
Defence of 2nd  
Defendant  
No. 230 of  
1970  
26th June 1972  
(continued)

plaintiff's claim says :-

1. The second defendant does not know the contents of paragraphs 1 - 8 inclusive of the Statement of Claim and therefore cannot admit or deny the same.

2. The second defendant admits paragraph 9 of the Statement of Claim.

3. The second defendant denies the contents of paragraph 10 of the Statement of Claim and every part of it and further says as follows :-

10

(a) The consideration for which the said land contained and described in Certificate of Title 13105 was purchased was a fair market price.

(b) The second defendant denies the contents of paragraph 10 (b) and says that normal business relationships have existed between the parties.

(c) The second defendant admits that the transfer was not done by his usual legal advisers as it was upon the first defendant's suggestion that the transfer was prepared privately.

20

(d) The second defendant does not know the contents of paragraph 10 (d) and (e) and therefore cannot admit or deny the same.

(e) The second defendant denies the contents of paragraph 10 (f) (g) (i) of the Statement of Claim.

4. The second defendant does not know the contents of paragraph 11 of the Statement of Claim and therefore cannot admit or deny the same.

30

5. The second defendant denies paragraph 12 of the Statement of Claim.

6. The second defendant admits the contents of paragraph 13 and 14 of the Statement of Claim.

7. In answer to the whole of the Plaintiff's claim, the second defendant says that he purchased the said land in good faith and for true and proper consideration and without any fraud.

40

WHEREFORE the second defendant prays that the Plaintiff's claim be dismissed with costs.

DATED 26th day of June, 1972.

PARSHOTAM & CO.

Per:

Solicitors for the second-named Defendant.

In the Supreme Court

—  
No. 22

Statement of  
Defence of 2nd  
Defendant  
No. 230 of  
1970  
26th June 1972  
(continued)

No. 23

DEFENCE OF 3RD DEFENDANT, NO. 230 OF  
1970

10

IN THE SUPREME COURT OF FIJI

No. 230 of 1970

B E T W E E N :

CHOTELAL (son of Nanhu) Plaintiff

- and -

1. RAM MAHESH (son of Ram Sarup)
2. JAGAT SINGH (son of Babu Singh)
3. GRAHAME & CO. (a firm)

Defendants

20

DEFENCE OF THIRD DEFENDANT

1. The third defendant admits the allegations contained in paragraph 1 of the Statement of Claim.

2. The third defendant admits the allegations contained in paragraph 2 of the Statement of Claim.

In the Supreme  
Court

—  
No. 23

Defence of  
3rd Defendant,  
No. 230 of  
1970  
22nd August,  
1972  
(continued)

3. The third defendant admits the allegations contained in paragraph 3 of the Statement of Claim.

4. The third defendant admits the allegations contained in paragraph 4 of the Statement of Claim.

5. The third defendant admits the allegations contained in paragraph 5 of the Statement of Claim but says that it ceased to act for the plaintiff and the first defendant soon after the execution and stamping of the written agreement between the plaintiff and the first defendant referred to in paragraph 1 of the Statement of Claim. 10

6. The third defendant admits the allegations contained in paragraph 6 of the Statement of Claim but says that at such times when the said Bindeshwari Ganga Prasad collected moneys from the plaintiff and issued receipts for and on behalf of the first defendant was only as the agent of the first defendant and not as the servant and/or agent of the third defendant. 20

7. As to paragraph 7 of the Statement of Claim the third defendant says :

(i) That at the time of the sale of the said lot 3 to the plaintiff and referred to in paragraph 1 of the Statement of Claim the land comprised in Certificate of Title No. 13105 was under mortgage to J.P. Bayly Ltd. a duly incorporated Company having its registered office at Suva under Mortgage Registration No. 95829. The first defendant later paid off the Mortgage and obtained a discharge, and without consulting the third defendant and without the knowledge of the third defendant purported to transfer the said lot 3 to the second defendant as alleged by the plaintiff. 30

(ii) Save as herein expressly admitted the third defendant denies each and every the allegations contained in paragraph 7 of the Statement of Claim. 40

8. The third defendant admits the allegations

contained in paragraph 8 of the statement of Claim.

In the Supreme Court

9. The third defendant admits the allegations contained in paragraph 9 of the Statement of Claim.

No. 23

Defence of  
3rd Defendant,  
No. 230 of  
1970  
22nd August,  
1972  
(continued)

10. As to paragraph 10 of the Statement of Claim the third defendant says that it has no knowledge of the allegations contained therein and therefore it does not admit the same but says that the transfer from the first defendant to the second defendant was done without its knowledge.

11. The third defendant denies each and every the allegations contained in paragraph 11 of the Statement of Claim.

12. The third defendant denies each and every the allegations contained in paragraph 12 of the Statement of Claim.

20. As to paragraph 13 of the Statement of Claim the third defendant says that it has no knowledge of the allegations contained therein and therefore it does not admit the same.

14. The third defendant has no knowledge of the allegations contained in paragraph 14 of the Statement of Claim and therefore it does not admit the same.

15. As to paragraph 15 of the Statement of Claim the third defendant denies that it is liable to the plaintiff as claimed or in any way at all.

30 DELIVERED the 22nd day of August, 1972.

(sgd): Noel McFarlane

GRAHAME & CO.

This Defence of Third Defendant is filed and delivered by Messrs. Grahame & Co., Solicitors of Mansfield Chambers, Victoria Parade, Suva.

To the plaintiff and/or his Solicitors, Messrs. Ramrakhas of Marks Street, Suva and

40 To the first defendant and/or his Solicitors Messrs. Sherani & Co., of Victoria Parade, Suva and

In the Supreme Court

To the second defendant and/or his Solicitors Messrs. Parshotam, Chauhan & Co. of Suva.

No. 23

Defence of 3rd Defendant, No. 230 of 1970 22nd August, 1972 (continued)

No. 24

Defence of 3rd Defendant, No. 231 of 1971 22nd August, 1972

No. 24

DEFENCE OF 3RD DEFENDANT, NO.231 OF 1970

IN THE SUPREME COURT OF FIJI

No. 231 of 1970.

B E T W E E N :

- 1. GANGA RAM (son of Ram Sarup)
- 2. SHIU NATH (son of Ram Sarup)

Plaintiffs

10

- and -

- 1. RAM MAHESH (son of Ram Sarup)
- 2. DHANPATI (d/o Mahabir)
- 3. GRAHAME & CO. (a firm)

Defendants

DEFENCE OF THIRD DEFENDANT

1. The third defendant admits the allegations contained in paragraph 1 of the Statement of Claim.

2. The third defendant admits the allegations contained in paragraph 2 of the Statement of Claim.

20

3. The third defendant admits the allegations contained in paragraph 3 of the Statement of Claim.

In the Supreme Court

4. The third defendant admits the allegations contained in paragraph 4 of the Statement of Claim.

—  
No. 24

Defence of  
3rd Defendant,  
No. 231 of  
1971  
22nd August,  
1972  
(continued)

10 5. The third defendant admits the allegations contained in paragraph 5 of the Statement of Claim but says that it ceased to act for the plaintiffs and the first defendant soon after the execution and stamping of the written agreement between the plaintiffs and the first defendant referred to in paragraph 1 of the Statement of Claim.

20 6. The third defendant admits the allegations contained in paragraph 6 of the Statement of Claim but says that at such times when the said Bindeshwari Ganga Prasad collected moneys from the plaintiffs and issued receipts for and on behalf of the first defendant was only as the agent of the first defendant and not as the servant and/or agent of the third defendant.

7. As to paragraph 7 of the Statement of Claim the third defendant says :

30 (i) That at the time of the sale of the said lot 4 to the plaintiffs and referred to in paragraph 1 of the Statement of Claim the land comprised in Certificate of Title No. 13105 was under mortgage to J.P. Bayly Ltd. a duly incorporated Company having its registered office at Suva under Mortgage Registration No. 95829. The first defendant later paid off the Mortgage and obtained a discharge, and without consulting the third defendant and without the knowledge of the third defendant purported to transfer the said lot 4 to the second defendant as alleged by the plaintiff.

40 (ii) Save as herein expressly admitted the third defendant denies each and every the allegations contained in paragraph 7 of the Statement of Claim.

8. The third defendant admits the allegations contained in paragraph 8 of the Statement of Claim.

In the Supreme  
Court

—  
No. 24

Defence of  
3rd Defendant,  
No. 231 of  
1971  
22nd August,  
1972  
(continued)

9. The third defendant admits the allegations contained in paragraph 9 of the Statement of Claim.

10. As to paragraph 10 of the Statement of Claim the third defendant says that it has no knowledge of the allegations contained therein and therefore it does not admit the same but says that the transfer from the first defendant to the second defendant was done without its knowledge.

10

11. The third defendant denies each and every the allegations contained in paragraph 11 of the Statement of Claim.

12. The third defendant denies each and every the allegations contained in paragraph 12 of the Statement of Claim.

13. As to paragraph 13 of the Statement of Claim the third defendant says that it has no knowledge of the allegations contained therein and therefore it does not admit the same.

20

14. The third defendant has no knowledge of the allegations contained in paragraph 14 of the Statement of Claim and therefore it does not admit the same.

15. As to paragraph 15 of the Statement of Claim the third defendant denies that it is liable to the plaintiffs as claimed or in any way at all.

DELIVERED the 22nd day of August, 1972.

signed

GRAHAME & CO.

30

This Defence of Third Defendant is filed and delivered by Messrs. Grahame & Co., Solicitors of Mansfield Chambers, Victoria Parade, Suva.

To the plaintiffs and/or their Solicitors Messrs. Ramrakhas of Marks Street, Suva and

To the first defendant and/or his Solicitors Messrs. Sherani & Co., of Marks Street, Suva and



To the second defendant and/or her Solicitors  
Messrs. Marquardt-Gray & Co., of Waimanu Road,  
Suva.

In the Supreme  
Court

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No. 24

Defence of  
3rd Defendant,  
No. 231 of  
1971  
22nd August,  
1972  
(continued)

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No. 25

AMENDMENT TO DEFENCE OF 3RD DEFENDANT,  
NO. 231 of 1970

Amendment to Pleadings

Amendment para 3 of 3rd defendant's defence

10 3 The third defendant admits that clause 8(a)  
is in the nature of a penalty but except as  
admitted herein denies each and every other  
allegation in para 2.

sgd: R.G. KERMODE

Counsel for the Third defendant

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No. 25

Amendment to  
Defence of  
3rd Defendant,  
No. 231 of  
1970  
(undated)

In the Supreme  
Court

No. 26

          
No. 26

DEFENCE OF 3RD DEFENDANT, NO.233 OF  
1970

Defence of 3rd  
Defendant, No.  
233 of 1970  
22nd August,  
1972

IN THE SUPREME COURT OF FIJI

No. 233 of 1970

B E T W E E N :

MANORAMA PILLAI (d/o Narayan Swamy  
Pillai)

Plaintiff

- and -

10

1. RAM MAHESH (son of Ram Sarup)
2. DHANPATI (d/o Mahabir)
3. GRAHAME & CO. (a firm)

Defendants

DEFENCE OF THIRD DEFENDANT

1. The third defendant admits the allegations contained in paragraph 1 of the Statement of Claim.

2. The third defendant admits the allegations contained in paragraph 2 of the Statement of Claim. 20

3. The third defendant admits the allegations contained in paragraph 3 of the Statement of Claim.

4. The third defendant admits the allegations contained in paragraph 4 of the Statement of Claim.

5. The third defendant admits the allegations contained in paragraph 5 of the Statement of Claim but says that it ceased to act for the plaintiff and the first defendant soon after the execution and stamping of the written 30

agreement between the plaintiff and the first defendant referred to in paragraph 1 of the Statement of Claim.

In the Supreme Court

—  
No. 26

Defence of 3rd Defendant,  
No. 233 of  
1970  
22nd August,  
1972  
(continued)

10 6. The third defendant admits the allegations contained in paragraph 6 of the Statement of Claim but says that at such times when the said Bindeshwari Ganga Prasad collected moneys from the plaintiff and issued receipts for and on behalf of the first defendant was only as the agent of the first defendant and not as the servant and/or agent of the third defendant.

7. As to paragraph 7 of the Statement of Claim the third defendant says :

20 (i) That at the time of the sale of the said lot 4 to the plaintiff and referred to in paragraph 1 of the Statement of Claim the land comprised in Certificate of Title No. 13105 was under mortgage to J.P. Bayly Ltd. a duly incorporated Company having its registered office at Suva under Mortgage Registration No. 95829. The first defendant later paid off the Mortgage and obtained a discharge, and without consulting the third defendant and without the knowledge of the third defendant purported to transfer the said lot 4 to the second defendant as alleged by the plaintiff.

30 (ii) Save as herein expressly admitted the third defendant denies each and every the allegations contained in paragraph 7 of the Statement of Claim.

8. The third defendant admits the allegations contained in paragraph 8 of the Statement of Claim.

9. The third defendant admits the allegations contained in paragraph 9 of the Statement of Claim.

40 10. As to paragraph 10 of the Statement of Claim the third defendant says that it has no knowledge of the allegations contained therein and therefore it does not admit the same but says that the transfer from the first defendant to the second defendant was done without its knowledge.

11. The third defendant denies each and every the

In the Supreme  
Court

\_\_\_\_\_  
No. 26  
Defence of 3rd  
Defendant,  
No. 233 of  
1970  
22nd August,  
1972  
(continued)

allegations contained in paragraph 11 of the  
Statement of Claim.

12. The third defendant denies each and every  
the allegations contained in paragraph 12 of  
the Statement of Claim.

13. The third defendant has no knowledge of  
the allegations contained in paragraph 13 of  
the Statement of Claim and therefore it does  
not admit the same.

14. As to paragraph 14 of the Statement of  
Claim the third defendant denies that it is liable  
to the plaintiff as claimed or in any way at all.

10

DELIVERED the 22nd day of August, 1972.

(Sgd): Noel McFarlane

GRAHAME & CO.

This Defence of Third Defendant is filed and  
delivered by Messrs. Grahame & Co., Solicitors  
of Mansfield Chambers, Victoria Parade, Suva.

To the plaintiff and/or her Solicitors Messrs.  
Ramrakhas of Marks Street, Suva and

20

To the first defendant and/or his Solicitors  
Messrs. Sherani & Co., of Victoria Parade, Suva  
and

To the second defendant and/or her solicitors  
Messrs. Marquardt-Gray & Co., of Waimanu Road,  
Suva.

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No. 27

ORDER JOINING THE PUBLIC TRUSTEE  
NO. 230 OF 1970

In the Supreme  
Court

No. 27

Order joining  
The Public  
Trustee  
No.230 of  
1970

24th April  
1973

IN THE SUPREME COURT OF FIJI No. 230 of 1970

BETWEEN: CHOTELAL (Son of Nanhu) PLAINTIFF

A N D : 1. RAM MAHESH (son of Ram Sarup)

2. JAGAT SINGH (son of  
Babu Singh)

3. GRAHAME & CO. (a firm) DEFENDANTS

BEFORE THE HONOURABLE MR. JUSTICE TIMOCI TUIVAGA IN  
CHAMBERS

10 FRIDAY THE 24TH DAY OF APRIL, 1973

UPON READING the Summons to Appoint Legal Repre-  
sentative of Deceased Defendant dated the 28th day  
of March, 1973 and filed herein

AND UPON HEARING Mr. H.M. Patel of Counsel for the  
Plaintiff, Mr. R.I. Kapadia of Counsel for the first  
and third defendants, Mr. K. Chauhan of Counsel for  
the second Defendant and Mr. R. Kurup for the Public  
Trustee

20 IT IS ORDERED by consent that the Public Trustee be  
joined in this action as representative of the  
Estate of Ram Mahesh s/o Ram Sarup the first  
defendant herein, he having died, AND THAT the  
Pleadings and other process in this action do  
otherwise stand AND THAT this action do proceed to  
trial.

AND in the meantime the second defendant be restrained  
from disposing or otherwise dealing with the land the  
subject of this action.

BY THE COURT

Signed

DEPUTY REGISTRAR

In the Supreme Court

No. 28

ORDER JOINING THE PUBLIC TRUSTEE,  
NO. 233 OF 1970

No. 28

Order joining  
The Public  
Trustee,  
No.233 of  
1970

IN THE SUPREME COURT OF FIJI

No. 233 of 1970

BETWEEN: MANORAMA PILLAI  
(d/o Narayan Swamy  
Pillai)

PLAINTIFF

24th April  
1973

A N D : 1.RAM MAHESH (son of Ram  
Sarup)

2.DHANPAT (d/o Mahabir)

10

3.GRAHAME & CO. (a firm)

DEFENDANTS

BEFORE THE HONOURABLE MR. JUSTICE TIMOCI TUIVAGA IN  
CHAMBERS

FRIDAY THE 24TH DAY OF APRIL, 1973

UPON READING the Summons to Appoint Legal Representative  
of Deceased Defendant dated the 28th day of March,  
1973 and filed herein

AND UPON READING Mr. H.M. Patel of Counsel for the  
Plaintiff, Mr. R.I. Kapadia of Counsel for the first  
and third defendants, Mr. K. Chauhan of Counsel for  
the second Defendant and Mr. R. Kurup for the Public  
Trustee

20

IT IS ORDERED by consent that the Public Trustee be  
joined in this action as representative of the Estate  
of Ram Mahesh s/o Ram Sarup the first Defendant herein,  
he having died, AND THAT the Pleadings and other process  
in this action do otherwise stand AND THAT this action  
do proceed to trial

AND in the meantime the second defendant is restrained  
from disposing or otherwise dealing with the land the  
subject of this action.

30

BY THE COURT

Signed.

DEPUTY REGISTRAR

JUDGMENT

IN THE SUPREME COURT OF FIJI

Judgment

12th May 1975

CIVIL JURISDICTION

Action No. 231 of 1970Action No. 230 of 1970Action No. 233 of 1970

BETWEEN: 1. GANGA RAM s/o Ram Sarup  
2. SHIU NATH s/o Ram Sarup Plaintiffs  
- and -

1. THE PUBLIC TRUSTEE OF FIJI  
as representative of the  
estate of RAM MAHESH s/o  
Ram Sarup  
2. DHANPAT d/o Mahabir  
3. GRAHAME & CO. Defendants

BETWEEN: CHOTELAL s/o Nanhu Plaintiff  
- and -

1. THE PUBLIC TRUSTEE OF FIJI  
2. JAGAT SINGH s/o Babu Singh  
3. GRAHAME & CO. Defendants

BETWEEN: MANORAMA PILLAI d/o Narayan  
Swamy Pillai Plaintiff  
- and -

1. THE PUBLIC TRUSTEE OF FIJI  
2. RAM MAHESH s/o Ram Sarup  
3. DHANPAT d/o Mahabir  
4. GRAHAME & CO. Defendants

Mr. K.C. Ramrakha, Counsel for the Plaintiffs  
Mr. R. Nair, Counsel for the 1st Defendant  
Mr. H.A.L. Marquardt-Gray, Counsel for Dhanpat  
Mr. K. Parshotam, Counsel for Jagat Singh  
Mr. R.G.A. Kermode, Counsel for 3rd Defendant

Dates of Hearing: 28th, 29th & 30th August 1975.

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These three actions were by consent heard together and it was agreed by counsel that the evidence in each case would, so far as it affected any other case, be considered as applying to that other case. The plaintiffs in each action allege that they arranged to buy freehold land at Wailoku, Suva from a man named Ram Mahesh, who was the first defendant, that after the arrangements were made in each case, agreements for sale and purchase were prepared on their behalf by the third defendants, a firm of solicitors practising in Suva, that sometime after the agreements were made, the plaintiffs in each case having paid a considerable amount of the purchase price, Ram Mahesh without giving notice to the plaintiffs, transferred the land to third parties, those third parties being in each case the second defendants in the action. The plaintiffs issued their writs in August 1970, and in each case a Statement of Claim accompanied the writ. They charge fraud against Ram Mahesh and his purchasers, and negligence against the third defendants. They aver that the default clause in the agreement which, inter alia, provides for forfeiture of all moneys paid on default, was a penal provision and ask for equitable relief, they allege eight specifications of fraud in Ram Mahesh and his transferees, and four specifications of negligence against the solicitors, the third defendants. Each of the defendants defended separately, but none of the defences are notable for clarity, or for saying anything but the least possible without being utterly misleading, and the defence of the first defendant, in view of the evidence placed before the Court can only be described as woefully inadequate. I should perhaps say that the fault there was not that of counsel who appeared for the Public Trustee. After Ram Mahesh died, his solicitors withdrew from the action. Each of the defendants in effect put the plaintiffs to the proof. The third defendants did however admit that they did not advise the plaintiffs to lodge caveats and that the plaintiffs did not lodge caveats. In March 1973 the Public Trustee was by consent of the parties appointed to represent Ram Mahesh who had apparently died, although no facts were place on record to show when he died, whether he left a will, or otherwise to support the plaintiffs' application. The plaintiffs in each case gave evidence and they also produced evidence of a valuer. I was not impressed by any of the plaintiffs. Their object in giving evidence appeared to be to tell as little as possible.

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They learned of Ram Mahesh's transfer of the land in or about October 1969. They did not explain what they did between October 1969 and August 1970 when the writs were issued although Gangaram and Shiunath and Chotelal lodged caveats by their solicitors in identical terms. They did not seek to ascertain whether Ram Mahesh had indeed got money from his transferees and they made no attempt whatever to prove any of their specifications of fraud against the second defendants in each action. The result of course is that whatever fraud may have taken place, the plaintiffs have effectively precluded themselves from recovering their land. On top of that I formed the view that their evidence was unreliable. It will be convenient to discuss the evidence of each of the plaintiffs in turn.

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1. Gangaram and Shiunath.

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By consent Ram Mahesh's title, the agreement between him and the plaintiffs dated 21st April, 1967, the transfer from him to Dhanpat daughter of Mahabir who was admitted to be the mother-in-law of Ram Mahesh and the new title issued to her, a plan of subdivision of the land prepared for Ram Mahesh, and receipts for payments made by plaintiffs were admitted in evidence, as also was a caveat lodged by plaintiffs in February 1970. Both plaintiffs gave evidence. Only one of the plaintiffs, Shiunath, is living on the land the plaintiffs bought, and he appears to have been undisturbed by Ram Mahesh's mother-in-law, when she took a transfer. He has a small house on the land.

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Ganga Ram is a bus driver, and he left everything to his brother. Apparently after he heard of the sale of the land he went to see Ram Mahesh but obtained no satisfaction from him. He also said that his only dealings with the third defendants were when the agreement was drawn. He was very vague about the whole thing, but he did say that he received no notice from Ram Mahesh. He was obviously helping his brother to buy a piece of land. In cross-examination he admitted that he paid his deposit in June 1965 and he brought his brother into the picture when the agreement was drawn in 1967. Shiunath the brother of Gangaram gave evidence and he said that after he signed the agreement to purchase the land at £550 or \$1100 he

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paid money to Ram Mahesh from time to time and that sometimes he paid money without getting a receipt. He lived on the land, and started off with a thatched house, but now has a two roomed house. He denied knowing what was in the agreement and said it had not been read over to him. Notwithstanding this, he was prepared to claim under that agreement. His evidence also was extremely vague but it seems quite clear that he made payments to Ram Mahesh. He said that he did not know he had to pay £10 a month, but I do not believe that. £328.10.0. or \$657 appears to have been paid before the agreement was drawn, and yet only £280 or \$560 is accounted for as deposit. The instructions signed on 2nd February 1967 indicate that only \$440 had been originally paid, although the receipt given by Ram Mahesh to Gangaram gives the amount at \$500. Instalments were paid irregularly but neither plaintiff seemed at all concerned about this and counsel for the plaintiffs made no attempt to obtain an explanation as to why when \$657 was paid the agreement showed only \$560, nor as to why payments were made so irregularly. Gangaram said that he only found out about the transfer a month before he issued his writ in August 1970. I find it hard to believe that the caveat lodged in February 1970 - albeit that the document itself bears the date 9th February 1969 - was signed by his solicitor without his knowledge or authority. Shiunath said he found out about the transfer by Ram Mahesh about a month after it happened while Ram Mahesh was away in Canada. He also said that he went to see the second defendant but she said that she knew nothing about the matter - she had merely bought the land. I am surprised that he should have accepted such an answer as satisfactory but he appears to have made no further inquiry, and even when the case came to court, he has offered no evidence against Dhanpat other than this conversation. So much was left unexplained in the evidence of Gangaram and Shiunath that I do not feel disposed to place very much reliance on it at all. Still less am I sufficiently satisfied of its truth to allow it to be used to found allegations of fraud, except in so far as it is corroborated by other evidence.

However, I am quite certain that all the receipts produced by the plaintiffs are for payments made on account of the purchase of the land sold by Ram Mahesh to the plaintiffs. They total \$885. According to the agreement dated 21st April 1967, the purchase price of the land was \$1100, \$560 had been paid as deposit and the balance, which is therefore \$540, was

to be paid at ₹20 a month on the last day of each month so that instalments of principal should have been fully paid by June 1969. In fact only ₹325 was paid. However, a payment of ₹10 was made on 19th July 1969 and accepted by Ram Mahesh himself so that no suggestion can be made that the plaintiffs had repudiated their contract. The purchase price was also to bear interest at 8% computed with monthly rests and payable on the last day of each month. Although I have not been given the benefit of any calculations by the plaintiff, my own arithmetic shows that interest amounting to ₹65.18 was due on 10th October, 1969, the date of the transfer. So that at the time Ram Mahesh transferred the land to Dhanpat, Ganga Ram and Shiunath were in arrears with their payments to the tune of ₹215 plus interest, a total of ₹280.18.

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2. Chotelal.

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In the case of Chotelal, the transaction would appear to have been comparatively straightforward. ₹100 was paid by way of deposit on 19th April 1967, and a further ₹200 the following day. Instructions for an agreement were given on 21st April 1967 for a sale at ₹1200 and the agreement is dated 13th June 1967. He did not at any time occupy the land. Instalments of ₹16 a month were to begin on 31st May 1967. Chotelal says he paid all moneys at the office of the third defendants.

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It seems probable that this is correct, for all his receipts appear to have been signed by Ganga Prasad, the clerk employed by the third defendants, although he signed them, not as agent of the third defendants, but as agent for Ram Mahesh, except in May, June and July 1969 when receipts are issued by J.P. Bayly Ltd. who were Ram Mahesh's mortgagees. The last payment was made and accepted in July 1969 so that it may be said here again that at that stage the purchaser had not repudiated the contract nor is there any evidence that Ram Mahesh considered that the purchaser had done so. Plaintiff also said that after he heard of the transfer of the land he spoke to Ram Mahesh and he said he knew nothing about it, and referred witness to his solicitors the third defendants. If that statement is correct, then Ram Mahesh was clearly dishonest, because he did know a great deal about the matter. Plaintiff also said that when speaking to Ram Mahesh he had offered to make up the payments from which I inferred

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that there had been some complaint by Ram Mahesh about the arrears. Plaintiff says that he tried to pay to the third defendants but Ganga was away and no one would accept his money. He should have paid \$448 by way of instalments up to the date of the transfer 29th September 1969, plus interest amounting, according to my calculations to \$85.54, and he had paid \$404, so that he was well in arrears with his payments. It may be that the true inference to be drawn from all this is that Ram Mahesh threatened to sell the land which would explain plaintiffs' attempts to pay. However in the absence of evidence from Ram Mahesh I do not think it possible to draw any inference from the evidence. The plaintiff appears to have been credulous in the highest degree, for he seems to have accepted Ram Mahesh's statement that he knew nothing about the transfer, and I waited in vain to hear some evidence of action taken by him, even if there were only letters to Ram Mahesh or the third defendant but there was nothing. In February 1970 Mr. Ramrakha lodged a caveat on behalf of Chotelal, in which he deposed that Chotelal claimed by virtue of "a sale and purchase agreement dated 13th June 1967 between the former proprietor Ram Mahesh son of Ramsarup who has colluded with the "caveatee" (that is Jagat Singh the second defendant) "by arranging a sale at an undervalue and in fraud "with a view to defeating the rights under the "agreement." Apart from that, there is no evidence that Chotelal did anything until August 1970 when he issued his writ. He seems to have made no contact whatever with Jagat Singh. In the light of this caveat I find it quite inexplicable that Chotela (and for that matter Gangaram and Shiunath also) made no attempt whatever to prove the allegations made by their solicitor in his caveat. I find the gaps in the plaintiff's evidence so incomprehensible that I feel that I can place little reliance upon it. I think that he has told the Court some of the truth but by no means the whole truth.

3. Manorama Pillai.

This plaintiff is the daughter of a man called Narayansami Pillai, who appears to have made an arrangement in 1966 to buy land from Ram Mahesh, for in August of that year he paid to the third defendants sums amounting to \$160 and again in September he paid a further \$20 to the third defendants. On 5th August 1966 he and Ram Mahesh gave signed instructions to the third defendants for a sale and purchase agreement for \$1200 with a deposit of \$300 and instalments at

10    ₹20 from 30th November 1966, but for some un-  
 explained reason that agreement was not signed  
 until May 1968. The receipts are expressed to  
 be 'on account purchase lot 4C/T 8995'.  
 Nothing further was paid until August 1967 when  
 ₹240 was paid, and this time the receipt appears  
 to have been made out by Ganga but as agent for  
 Ram Mahesh. A further payment was made by  
 Narayansami Pillai in October 1967 and in  
 10    November 1967 the plaintiff appears on the scene  
 for the first time and pays money to Ram Mahesh  
 for which she obtains a receipt which would  
 appear to be signed by Ganga. From that time  
 forward all payments are made by the plaintiff.  
 The agreement states that a deposit of ₹300 had  
 been paid, although to the knowledge of Ganga  
 if I am right about his signature on the receipts,  
 ₹580 had by that time been paid. Instalments  
 20    were to start from 31st December 1967 and not  
 from 30th November 1966 as previously agreed, so  
 that by 29th September 1969 when Ram Mahesh  
 transferred the land to Dhanpat, ₹420 was due  
 under the agreement by way of instalments  
 whereas ₹600 had in fact been paid including in  
 that amount the excess of ₹280 overpaid at the  
 date of the agreement, so that Manorama Pillai  
 was not in arrears at all when Ram Mahesh trans-  
 30    ferred her land to Dhanpat, although she still  
 owed ₹300 on the purchase. She gives in the  
 final version of her statement of claim the figure  
 of ₹980 as moneys paid to Ram Mahesh of which she  
 asks for a refund. I am satisfied that the  
 correct figure is ₹900. In addition she paid ₹40  
 as legal costs, but she does not ask for this as  
 special damages, although if she had done so, she  
 would have been entitled to recover it.

40    Here again, I am not entirely happy about the  
 plaintiff's evidence. It cannot be true that she  
 asked Ganga Prasad for her title, for she must have  
 known quite well that she had not paid the whole of  
 her purchase money. She appeared to me an  
 intelligent woman, and I cannot understand why she  
 appeared quite unconcerned about the sale of her  
 land by Ram Mahesh. One would have expected her  
 to get her father to intervene, or to have taken  
 some action immediately. It is also true that  
 owing to Ganga Prasad failing to draw the sale and  
 purchase agreement in compliance with his written  
 50    instructions, she was allowed to start her instal-  
 ments in December 1967 instead of November 1966, but

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In the Supreme Court she must be accounted as entitled to benefit from that error. She stated that the land remained vacant after she purchased it.

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Ram Mahesh, as has been above-stated, was dead when the actions came on for hearing, and the Public Trustee who was joined in his place, did not either give or obtain discovery, nor did he give a notice to produce. When he called Budhram, therefore, he was at a disadvantage, for Budhram who had been subpoenaed and had not turned up, and eventually was brought in custody to give evidence, appeared determined to say as little as possible consonant with his own safety. He did, however, say that on one occasion he gave each of the defendants certain papers at the instructions of Ram Mahesh. I believe that evidence, so far as it goes, and believing it, I do not believe any of the plaintiffs when they say they did not know Budhram, and did not receive any papers at all from Ram Mahesh. Unfortunately for the Public Trustee, however, he was able to produce no evidence as to what the papers delivered by Budhram were about.

The first defendants also called Ganga Prasad, the clerk to the third defendants, who prepared the three sale agreements and whom I have previously referred to as Ganga. He admitted that he did not advise the purchasers to lodge caveats to protect their agreements, although he defended that omission by explaining that the third defendants acted as solicitors for Ram Mahesh's mortgagee, and held the title, and therefore he thought there was little danger. It is perhaps not unfair to say that if he had not been on holiday when Ram Mahesh decided to repay his mortgage, there probably would have been little danger. But that is not what happened. He appeared to have known Ram Mahesh well, and acted as his agent in receiving payments under the agreement, independently of his employers, a situation which was not explained during his evidence.

I shall first of all, discuss the question of Ram Mahesh's rights under the agreements by which the plaintiffs had purchased land from him. In my view it is quite clear that Manorama Pillai was not in arrears with her payments, and I find it difficult to see any ground upon which Ram Mahesh's action in her case can be defended. I think that Mr. Kermode is incorrect when he submits that all plaintiffs were in arrears. As to the other plaintiffs, both of them were in arrears under their agreements and it must now

be considered whether the vendor had duly exercised his rights under the agreements. For that purpose I must have recourse to the agreements. The clause which bears upon this matter is Clause 8 in each agreement. It is as follows :

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10           "8. If the purchasers shall make default in payment of the purchase money due hereunder of the interest thereon or any part thereof and/or if the purchasers shall fail to comply with and observe and fulfil all or any of the conditions herein contained expressed or implied then the Vendor shall have the right in his discretion :-

- 20           (a) To determine this agreement forthwith and to re-enter upon and take possession of the said land and all moneys paid hereunder shall be forfeited to the Vendor;
- (b) To enforce this agreement forthwith and to exercise his rights under this agreement whereupon all unpaid moneys shall immediately become due and owing and shall be recoverable by action against the purchasers forthwith without further demand, or
- 30           (c) To re-enter upon and take possession of the said land and premises and to re-sell the same upon such terms and in such manner as the Vendor may think fit and any loss or deficiency occasioned by such sale and all costs and expenses incidental thereto shall be paid by the purchasers and shall be recoverable by the vendor as liquidated damages. "

The word 'of' in the second line of the clause should obviously be 'or'.

40           It will be noticed that as the clause reads subclauses (a) and (b) would appear to be conjunctive, while subclauses (b) and (c) are clearly expressed to be disjunctive. However subclauses (a) and (b) are also mutually exclusive in that under (a) there is a rescission while under (b) there is an affirmation of the contract. I am of

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the view that on a true interpretation of clause 8 each sub-clause should be treated disjunctively as if the word 'or' were interpolated at the end of sub-clause (a). Looking then at the three sub-clauses in that light, on default by the purchaser the vendor is given three options. First he can determine the agreement, and if he does that, he will have to give some sort of notice - see the judgment of Richmond J.A. in the Fiji Court of Appeal in *Lakshmijit v. Sherani* (1971) Fiji cyclostyled judgments 345 at p.353, 10 and he will then be entitled to re-enter upon the land. In other words he is given a right of foreclosure, in which case, of course, he would be able to oust the purchaser from possession of the land. In this event all moneys paid by the purchaser are forfeited to the vendor. Secondly if he acts under clause 8(b) he is entitled to sue for the balance of the purchase price, which would then become wholly due and payable. In this case the agreement would remain in force, but under varied terms, and the purchaser would remain in possession. 20  
Thirdly, he could act under clause 8(c) which permits him to re-enter and to re-sell the land in which case any deficiency on sale can be recovered from the purchaser as liquidated damages. Presumably if there were a surplus on resale the vendor would have to account for it. I should perhaps observe that here the agreement is different from that in *Lakshmijit v. Sherani* in that there the vendor had two options only, that of rescission and that of affirmation, and if he rescinded, all moneys became immediately due, and he could then re-enter and take possession and also re-sell, so that before any other right could be exercised the agreement had to be rescinded. 30  
The plaintiffs pleaded that clause 8 was a penalty, and their statements of claim purport to set out the clause in paragraph 2, thereof, but incorrectly, in that the disjunctive 'or' at the end of 8(b) is omitted. At no time was it suggested that the penalty was limited to any particular part of the clause. 40  
Certainly there can be no question of either subclauses (b) or (c) constituting a penalty, and if, as Mr. Nair submits, Ram Mahesh acted under clause 8(c) no question of penalty would appear to arise, and indeed it may well be that in such a case the vendor might have to refund the whole of the money which he had received. It was not suggested in argument that Ram Mahesh had acted otherwise than under clause 8(c) and I therefore accept Mr. Nair's submission and reject the plaintiffs' claim that Clause 8 of the 50  
agreement constitutes a penalty. When pressed by the



Court, Mr. Nair also made two concessions, namely that there should have been a notice of some sort, even under Clause 8(c), and secondly that the transfer was probably wrongful. I have considered this matter with some care, and I have come to the conclusion that Mr. Nair was right in making these concessions. I have already referred to *Lakshmijit v. Sherani* in the Fiji Court of Appeal. That case went to the Privy Council (1973) 3 A.E.R. 737 and there at page 744 Lord Cross of Chelsea, delivering judgment, said of the agreement there under consideration :

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"If one regards the terms of the sale agreements apart from the clauses in question the position of the parties would be as follows. The purchasers would be under an obligation to pay the purchase price by instalments spread over a long period with interest on moneys unpaid as from the dates of any defaults. The vendor on his side would have a right to sue for any instalments which were not paid when they fell due and interest thereon for any period for which payment was delayed and would also acquire a lien on the land, which he held as constructive trustee for the purchaser, in respect of each unpaid instalment and the interest thereon. Alternatively if the purchasers committed breaches of their obligations which amounted to a repudiation of the agreement - which a mere failure to pay a single instalment on the due date would not do - the vendor would be able if he so elected to accept the repudiation as rescinding the sale agreement and sue for damages for breach of contract and recovery of the possession of the land. An election by the vendor to exercise a remedy of rescission alters the rights and obligations of both parties to the sale agreement, since it puts an end to the purchaser's right to possession of the land and prevents any further instalment of the purchase price becoming due. For this reason the election must, their Lordships think, be communicated by the vendor to the purchaser if it is to give him a right to recover possession of the land. No particular form of communication is needed. It is sufficient if the vendor makes it unequivocally clear to the purchaser that he is treating the

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Here I think, the onus of proof is on Ram Mahesh and his representative and that burden of proof has not been discharged. There is no evidence that Ram Mahesh communicated his decision to resell the land to the purchasers - indeed all the evidence is that the plaintiffs came to know about the transfers after Ram Mahesh had gone to Canada. I think that amidst much that is unclear and uncertain, it is quite clear that Ram Mahesh made these transfers without saying a word about them to the plaintiffs, although he may very well have asked them to pay the balances respectively owing by them. If, then, it be necessary that his decision to resell should have been communicated to the purchasers, I think it follows that the transfers were wrongful. Mr. Kermode suggests that Ram Mahesh's actions in refusing to accept payment from Chotelal are indicative of an intention to rescind. But there is no evidence that the intention to rescind, if there were one, was converted into actual rescission. Nor is there a rescission following repudiation by the plaintiffs. Although they were most irregular in their payments there is evidence that payments were made and accepted in July 1969 in each case. That was certainly followed by defaults on the last day of July and the last day of August, but I think that something more than mere non-payment would have been required to show repudiation on the part of the plaintiffs, and even then, as Lord Cross of Chelsea states in the passage above set out, the vendor must make an election to accept that repudiation and rescind and must give notice of that election in some way to the plaintiffs. That notice must make it unequivocally clear to the purchaser that the agreement is at an end. It seems to me that this is exactly what Ram Mahesh failed to do. Lord Dilhorne's dissenting judgment was also referred to, but even here, although he did not construe the contract as requiring a notice of rescission, he did require a demand for payment, and a demand to take possession of the land. It may be that such a demand could in Lord Dilhorne's view, accompany the act of take possession, but there is nothing to suggest that the demand to take possession or the actual taking of possession could be fulfilled by a transfer of the land to a third person, without notice of any kind. Even an oral notice, had it been proved, may well have been sufficient.

I pass on to consider the result of Ram Mahesh's failure to give notice to the plaintiffs rescinding the

contract. Mr. Ramrakha puts it very simply. He says if there was no rescission, then there was fraud. He points out that Ram Mahesh in his defence given to each plaintiff pleaded two notices either in 1968 or 1969 but the Public Trustee did not prove them. I do not think that his failure so to do entitles me to presume fraud against Ram Mahesh, particularly when the plaintiffs offered no evidence against either of the second defendants, who if a fraud had been committed, must have been almost equally culpable with Ram Mahesh. I cannot overlook the fact that Dhanpat was able to transfer the block claimed by Manorama Pillai for double the price she is said to have paid for it, nor can I overlook the fact that although the land sold to Chotelal and to Gangaram and Shiunath still remains in the names of Jagat Singh and Dhanpat respectively, no evidence was adduced about the alleged fraud by which they had benefited. I am not at all satisfied in the circumstances of this case that the transfers by Ram Mahesh were fraudulent. They may have been, but there are far too many loose ends to be unravelled for me to hold against him even on a balance of probabilities. The dictum of Denning L.J. in *Bater v Bater* (1951) P.35, 37, which has been cited with approval several times since, is pertinent -

"The degree (of probability) depends upon the subject matter. A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established."

The result is that the plaintiffs all succeed against the Public Trustee representing Ram Mahesh on the basis of breach of contract, and they all fail on the basis of tort. They fail against the second defendants altogether.

The next question is that of the remedies to which the plaintiffs are entitled. They ask first of all for the transfer - and by that I presume they mean the transfer to the second defendant in each action - to be set aside. Since they have led no evidence against the second defendants they cannot have that. They then ask for damages against the first and second defendants in each case stating the measure of damages against those defendants to be (a) the legal costs and disbursements they paid to the

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third defednants, (b) all moneys paid to the first defendant and (c) the sum of ₹4000 being the present value of the land. They also ask for equitable relief against the first and second defendants and a declaration that clause 8 is penal in its nature. Against the third defendants they ask for

(a) refund of their legal costs  
(b) refund of instalments paid under their agreements  
(c) the present value of the land ₹4000. Since they have failed against the second defendants they cannot have damages or, indeed any other remedy, against them. 10

As against the first defendants they are entitled by way of special damages to a refund of the legal fees paid by them to the third defendants, because by the action of the first defendants those moneys have been entirely lost. Then they are entitled in each case to a refund of the moneys paid by them to Ram Mahesh. The measure of damages at common law was stated by Baron Parke as long ago as 1848 in *Robinson v. Harman* (1848) 154 E.R. 363, 365 where he said :

"The rule of the common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

Here the Public Trustee cannot reduce his damages by reference to *Bain v. Fothergill* (1874) L.R. 71 H.L. 158 because his vendor has created this situation. Hence the plaintiffs will be entitled to damages for loss of bargain. The date at which that loss falls to be estimated will be the date at which Ram Mahesh breached the contract by transferring the land. 30

The land which he had previously sold to Manorama Pillai for ₹1200 he transferred to Dhanpat for ₹800 on 29th September 1969. On the same day he transferred to Jagat Singh for ₹800 the land he had previously sold to Chotelal for ₹1200, and on 10th October 1969 he transferred to Dhanpat for ₹800 the land he had sold to Gangaram and Shiunath for ₹1100. 40

It is not for me to speculate as to the meaning of these three transactions but they are transactions which cry out for explanation. Dhanpat in November of that same year sold the land she had obtained a month before - the land originally sold by Ram Mahesh to Manorama Pillai - for ₹1600 and I regard that sum as the market value of the land, and the difference between the market value and the contract price as the loss which Manorama Pillai suffered. I

think that the land of each of the plaintiffs must be looked at in this light. *Diamond v. Campbell-Jones* (1960) 1 A.E.R. 583 shows that damages are still to be assessed at the date of the breach: see also *Re Daniell* (1917) 2 Ch. 405 and *Ridley v. De Geerts* (1945) 2 A.E.R. 654 and I would award each plaintiff a sum of ~~₹~~₪400 for loss of bargain. Moreover, if the criterion is to be damages as at the date of judgment I do not regard the value of the land as having been shown to be beyond ~~₹~~₪3000 accepting the valuer's figure of appreciation at 10% per annum, for although he stated in evidence that he was guided to his valuation by comparable sales, he referred to none. Each of the plaintiffs will, of course be entitled to get back the money paid to Ram Mahesh.

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I turn now to the position as regards the third defendants. I think that the evidence given by Gangaram fairly sums up the position of the plaintiffs. "No one advised me to lodge a caveat. I did not know it was necessary." Mr. Kermode concedes that it was negligence in the third defendants not to lodge a caveat - I think he means not to advise the plaintiffs to lodge a caveat - and Mr. Ramrakha has referred me to *Calder v. Holdsworth* (1935) G.L.R. 215 which was a New Zealand case of an action for negligence against a solicitor. However the question of lodging of a caveat was not in issue there and the only mention of a caveat occurs in one sentence of the judgment of Blair J. where the learned judge said at p.222:

"... and I think, too, that a natural precaution for Mr. Holdsworth to take would have been to lodge a caveat to protect the plaintiffs' interest".

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There is no case that I have been able to find which lays it down that a solicitor who fails to advise his client to lodge a caveat is guilty of negligence, although in two Australian cases, the absence of a caveat was held to operate against the person who might have protected himself by lodging a caveat but had failed to do so. In *Butler v. Fairclough* (1917) 23 C.L.R. 78 Griffith C.J. said at p. 91:

"A person who has an equitable charge upon the land may protect it by lodging a caveat, which in my opinion operates as notice to all the world

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Judgment

12th May 1975  
(continued)

that the registered proprietor's title is subject to the equitable interest alleged in the caveat."

Again at p. 92 he said :

"The question then seems to be: Had the plaintiff when the defendant acquired his equitable gith taken or failed to take all reasonable steps to prevent the registered proprietor from dealing with the land without notice of plaintiffs' title".

10

That was a case where two equities were in conflict, but the question is equally pertinent in this case. In *Abigail v. Lapin* (1934) A.C. 491, the latter had transferred his interest in land to one Heavener, ostensibly absolutely but in reality by way of mortgage only, but had done nothing to protect his equity of redemption by lodging a caveat. When Heavener mortgaged the land to Abigail and the latter registered his mortgage, his interest was held to prevail over that of Lapin, of which Abigail had no notice. In this case the plaintiffs in effect say :

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"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."

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.

30

The standard by which a solicitor's liability for negligence is measured has been discussed in *Simmons v. Pennington* (1955) 1 A.E.R. 240, 245 where Hodson L.J. in the English Court of Appeal approved a direction given in the court of first instance by Harman J. in the following words :

"I do not think I need deal at any great length with the question of a solicitor's liability for negligence. It is the same as anybody else's liability. Having regard to the degree of skill held out to the public by solicitors, does the conduct of the

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solicitor fall short of the standard which the public has been led to expect of the solicitor?".

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Judgment

12th May 1975  
(continued)

The question here is whether the omission of the third defendants to advise plaintiffs to lodge a caveat against Ram Mahesh's title to protect this agreement for sale and purchase fell short of the standard which the public expects of solicitors. I think the answer must be, as Mr. Kermode has conceded, in the affirmative.

10

I pass, then, to the question of damages. Here I think it fair to say that it was third defendants' omission 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 :

"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."

20

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

"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 term of the contract between himself and his client entitles the client only to nominal damages. As Salmon L.J. says in *Sykes v. Midland Bank Ex. Company* (1970) 3 W.L.R. 273, 281 :

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

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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

In the Supreme Court  
                      
 No. 29  
 Judgment  
 12th May 1975  
 (continued)

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.

The result is that Gangaram and Shiunath will have judgment against the first defendant for special damages amounting to \$919, being their legal costs and the refund of moneys paid to Ramesh, and \$400 general damages, in all \$1319. Their action against the second defendants is dismissed, and against the third defendants they recover \$10 general damages.

Chotelal will have judgment against the first defendant for special damages amounting to \$743.80 being his legal costs and the refund of moneys paid to Ram Mahesh, and \$400 general damages a total of \$1143.80. His action against the second defendant will be dismissed, and he will have judgment against the third defendants for \$10 general damages.



Manorama Pillai will have judgment against the first defendant for \$900 being the refund of moneys paid to Ram Mahesh. She did not ask for her legal costs, but she is entitled to \$400 for general damages, a total of \$1300. Her action against the second defendant is dismissed, and she will have judgment against the third defendants for \$10.00.

In the Supreme  
Court

          
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Judgment

12th May 1975  
(continued)

10 As to costs. The plaintiffs have failed in each case against the second defendants and must pay their costs. They have succeeded against the first and third defendants and would normally be entitled to their costs. However, I think that I should have regard to the fact, as regards the first defendant, that fraud was alleged against Ram Mahesh, whom the Public Trustee represents, and only the flimsiest of evidence produced to support that allegation of fraud. Fraud is not lightly to be pleaded, nor having been pleaded, is the plea to be lightly discarded. If indeed there were fraud, then the second defendants were equally concerned with Ram Mahesh, and no attempt whatever was made to prove against them the allegations of fraud. Indeed, I am left with a suspicion that the truth of this matter may have been that Ram Mahesh needed money to go to Canada, and that he borrowed it from the second defendants, and transferred the land by way of mortgage, but on his return, either could not or did not obtain a reconveyance of the land. Whether that be the case or not, it seems to me that the plaintiffs have not seriously attempted to prove fraud against Ram Mahesh and are not entitled to their costs against the Public Trustee, and there will be no order as to costs. As against the third defendants there has been a finding of negligence against them, and although I do not think that the plaintiffs have told the whole truth I do not know that this affects their case against the third defendants and I see no reason why they should not pay costs. An order is made that in each case the third defendants pay one-third of the plaintiffs' costs.

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Signed.

(K.A. Stuart)

JUDGE

SUVA,  
12th May, 1975.

In the Supreme Court

NO. 30

No. 30

ORDER

Order

12th May 1975

IN THE SUPREME COURT OF FIJI  
CIVIL JURISDICTION

Action No. 231 of 1970  
Action No. 230 of 1970  
Action No. 233 of 1970

BETWEEN: 1. GANGA RAM s/o Ram Sarup  
2. SHIU NATH s/o Ram Sarup PLAINTIFFS

- and -

10

1. THE PUBLIC TRUSTEE OF FIJI  
as representative of the  
Estate of RAM MAHESH s/o  
Ram Sarup  
2. DHANPAT d/o Mahabir  
3. GRAHAME & CO. DEFENDANTS

BETWEEN: CHOTELAL s/o Nanhu PLAINTIFF

- and -

1. THE PUBLIC TRUSTEE OF FIJI  
2. JAGAT SINGH s/o Babu Singh  
3. GRAHAME & CO. DEFENDANTS

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BETWEEN: MANORAMA PILLAI d/o Narayan  
Swamy Pillai PLAINTIFF

- and -

1. THE PUBLIC TRUSTEE OF FIJI  
2. RAM MAHESH s/o Ram Sarup  
3. DHANPAT d/o Mahabir  
4. GRAHAME & CO. DEFENDANTS

MONDAY THE 12TH DAY OF MAY, 1975

BEFORE THE HONOURABLE MR. JUSTICE K.A. STUART

30

ACTIONS CONSOLIDATED BY ORDER DATED THE 26TH DAY OF  
AUGUST, 1974

THIS CONSOLIDATED ACTION coming on the 28th, 29th and 30th days of August, 1974 before this Court in the presence of Counsel for the respective Plaintiffs and the defendants

In the Supreme Court

                      
No. 30

AND UPON READING the Pleadings and upon hearing the evidence and what was alleged by Counsel for the respective Plaintiffs and the Defendants

Order

12th May 1975  
(continued)

10 The Court did order that the actions stand for Judgment and this action standing for Judgment on the 12th day of May, 1975 and the said Mr. Justice K. A. Stuart having ordered that the Judgment be entered for the Plaintiffs as hereinafter provided

20 IT IS ADJUDGED that the 1st named Defendant, namely THE PUBLIC TRUSTEE OF FIJI as representative of the Estate of RAM MAHESH son of Ram Sarup to pay the Plaintiffs GANGA RAM and SHIU NATH sons of Ram Sarup the sums of \$919.00 (NINE HUNDRED AND NINETEEN DOLLARS) by way of special damages, and the sum of \$400.00 (FOUR HUNDRED DOLLARS) by way of general damages making a total of \$1,319.00 (THIRTEEN HUNDRED AND NINETEEN DOLLARS)

30 AND IT IS FURTHER ADJUDGED that the first named Defendant, namely THE PUBLIC TRUSTEE OF FIJI as representative of the Estate of RAM MAHESH son of Ram Sarup to pay to the Plaintiff CHOTELAL son of Nanhu the sum of \$743.80 (SEVEN HUNDRED AND FORTY THREE DOLLARS EIGHTY CENTS) by way of special damages, and the sum of \$400.00 (FOUR HUNDRED DOLLARS) by way of general damages making a total of \$1,143.80 (ELEVEN HUNDRED AND FORTY THREE DOLLARS AND EIGHTY CENTS)

40 AND IT IS FURTHER ADJUDGED that the said first named defendant, namely THE PUBLIC TRUSTEE OF FIJI as representative of the Estate of RAM MAHESH son of Ram Sarup to pay the plaintiff MANORAMA PILLAI daughter of Naravan Swamy Pillai \$900.00 (NINE HUNDRED DOLLARS) by way of special damages, and the sum of \$400.00 (FOUR HUNDRED DOLLARS) by way of general damages making a total of \$1,300.00 (THIRTEEN HUNDRED DOLLARS)

AND IT IS FURTHER ADJUDGED that this action do stand dismissed against the defendants DHANPAT daughter of Mahabir and JAGAT SINGH son of Babu Singh with costs to be paid by the Plaintiffs to the said

In the Supreme Court

defendants DHANPAT daughter of Mahabir and JAGAT SINGH son of Babu Singh

No. 30

AND IT IS FURTHER ADJUDGED that the third Defendant, namely GRAHAME & CO. do pay to each of the Plaintiffs the sum of \$10.00 (TEN DOLLARS) by way of general damages

Order

12th May 1975  
(continued)

AND IT IS FURTHER ORDERED that the said third defendant namely GRAHAME & CO. to pay to the Plaintiffs one third of the costs of the plaintiffs' costs of this action.

BY ORDER

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Signed.

DEPUTY REGISTRAR

In the Court of Appeal

NO. 31

NOTICE OF APPEAL

No. 31

IN THE FIJI COURT OF APPEAL

Notice of Appeal

CIVIL JURISDICTION

20th May 1975

No. 238 of 1975

On Appeal from the Supreme Court of Fiji sitting at Suva in Civil Actions No. 231, 230 and 233 of 1970

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BETWEEN:

1. GANGA RAM s/o Ram Sarup
2. SHIU NATH s/o Ram Sarup
3. CHOTELAL s/o Nanhu
4. MANORAMA PILLAI d/o Narayan Swamy Pillai

APPELLANTS  
(ORIGINAL PLAINTIFFS)

AND:

GRAHAME & CO.

RESPONDENTS  
(ORIGINAL DEFENDANTS)

TAKE NOTICE that the Fiji Court of Appeal will be moved at the expiration of fourteen days from the service

30

upon you of this Notice of Appeal, or so soon thereafter as Counsel can be heard, by Counsel for the abovenamed Appellants for an order that the Judgment herein of the Honourable Mr. Justice K. A. Stuart given on the 12th day of May, 1975 whereby it was ordered that plaintiffs do each recover from the abovenamed Respondents GRAHAME & COMPANY the sum of \$10.00 (TEN DOLLARS) each by way of general damages, and one third of their costs be wholly set aside, and an order be made that the said defendant GRAHAME & COMPANY do pay to the Plaintiffs their full damages as assessed in the said actions or such further or other order as to damages be made as to this Honourable Court shall seem meet and for an order that the costs of this appeal be paid by the Respondents to the Appellants or such further or other order be made as to this Honourable Court shall seem meet

In the Court  
of Appeal

                      
No. 31

Notice of  
Appeal

20th May 1975  
(continued)

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AND FURTHER TAKE NOTICE that the grounds of appeal are as follows:-

1. Having found that the Respondents firm was in fact guilty of negligence, the learned trial Judge erred in law and in fact in speculating whether or not any advice that a caveat should have been lodged might or might not have been followed by the Plaintiffs, and thereby there was a miscarriage of justice.
- 30 2. The learned trial Judge erred in law and in fact in not holding that once the Respondents had been guilty of negligence in not advising the plaintiffs to lodge a caveat on the properties purchased by them, the Respondents thereby became wholly liable for the consequences that followed, namely the sale of the land by the Vendor of a third party without the knowledge of the Plaintiffs.
- 40 3. Having regard to the pleadings, and to the failure of the Respondents to allege that the Plaintiffs would not have followed their advice, if advice had been given to the Plaintiffs to lodge a caveat, the learned trial Judge erred in law and in fact in holding that plaintiffs should have given evidence on this point.
4. Having regard to the fact that the Respondents firm acted for both the Vendors and the plaintiffs

In the Court  
of Appeal

            
No. 31

Notice of  
Appeal

20th May 1975  
(continued)

as Purchasers and the latter left the matter of the Sale and Purchase Agreement, and the subsequent transfer to the Respondent, the learned trial Judge erred in law and in fact in not holding that the Respondents failure to advise the Plaintiffs was a direct cause of the Plaintiffs' not lodging a caveat, and further erred in not considering that the Respondents could have lodged a caveat themselves if they had so wished as Solicitors for the parties.

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5. The Plaintiffs were not lawyers, or expected to know the law, and the learned trial Judge erred in law and in fact in holding that they might not have accepted advice not to lodge a caveat since such advice could not protect their purchase.

DATED this 20th day of May, 1975.

RAMRAKHAS

Per        Signed

Solicitors for the Appellants

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This Notice of Appeal is filed by Messrs. Ramrakhas of K.W. March Limited's Building, 77 Marks Street, Suva, Fiji.

To the abovenamed Respondents of Mansfield Chambers, Suva, Fiji, and/or its Solicitors Messrs. Munro, Leys, Kermode & Company of Suva, Fiji.

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NO. 32

PROCEEDINGSIN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 231 of 1970  
 Action No. 230 of 1970  
Action No. 233 of 1970

In the Supreme  
CourtNo. 32

Proceedings

3rd June 1975

IN CHAMBERS

Before the Hon. Mr. Justice Mishra, Judge

10 Tuesday the 3rd day of June, 1975 at 2.15 p.m.

Between: 1. GANGA RAM s/o  
 Ram Sarup  
 2. SHIU NATH s/o  
 Ram Sarup PLAINTIFFS

- and -

1. THE PUBLIC TRUSTEE  
OF FIJI as  
 representative of the  
 Estate of RAM MAHESH  
 s/o Ram Sarup  
 2. DHANPAT d/o Mahabir  
 3. GRAHAME & CO. DEFENDANTS

20

Between: CHOTELAL s/o Nanhu PLAINTIFF

- and -

1. THE PUBLIC TRUSTEE  
OF FIJI  
 2. JAGAT SINGH s/o Babu  
 Singh  
 3. GRAHAME & CO. DEFENDANTS

30

Between: MANORAMA PILLAI  
 d/o Narayan Swamy  
 Pillai PLAINTIFF

- and -

1. THE PUBLIC TRUSTEE  
OF FIJI  
 2. RAM MAHESH s/o Ram  
 Sarup  
 3. DHANPAT d/o Mahabir  
 4. GRAHAME & CO. DEFENDANTS

In the Supreme  
Court

No. 32

Proceedings

3rd June 1975  
(continued)

Mr. Ramrakha for the Plaintiff  
Mr. Sherani and Mr. Jammadas for Grahame & Co.

Mr. Ramrakha:

I am appealing only against Grahame & Co. I have given notice of appeal to other defendants as a matter of courtesy. Rule 40 should be rule 14 in the application. We have ~~₹~~700 and ~~₹~~400 in court as purchase price in case of specific performance. We did not get specific performance. So we want the money to be paid out to our clients.

10

Security for costs is the other part of the application.

Mr. Sherani:

The appellant has the right of appeal. There should be some security for costs. We will accept ~~₹~~200 cash. I have no objection to money deposited being paid out.

Mr. Ramrakha:

I consent to that figure.

Court:

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- (i) Security for costs ~~₹~~200 cash to be deposited within 45 days as the matter is not likely to be heard next sittings of the Court of Appeal.
- (ii) The sums of ~~₹~~700 and ~~₹~~400 deposited in Court to be paid out to the parties depositing it.

(Sgd.) G. Mishra

JUDGE

3.6.1975.

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NO. 33

In the Supreme  
CourtORDERNo. 33IN THE SUPREME COURT OF FIJI

Order

CIVIL JURISDICTION

3rd June 1975

Action No. 231 of 1970

Action No. 230 of 1970

Action No. 233 of 1970

BETWEEN: 1. GANGA RAM s/o Ram Sarup  
2. SHIU NATH s/o Ram Sarup PLAINTIFFS

- and -

1. THE PUBLIC TRUSTEE OF FIJI  
as representative of the  
Estate of RAM MAHESH s/o  
Ram Sarup  
2. DHANPAT d/o Mahabir  
3. GRAHAME & CO. DEFENDANTS

BETWEEN: CHOTELAL s/o Nanhu PLAINTIFF

- and -

1. THE PUBLIC TRUSTEE OF FIJI  
2. JAGAT SINGH s/o BaBu Singh  
3. GRAHAME & CO. DEFENDANTS

BETWEEN: MANORAMA PILLAI d/o Narayan  
Swamy Pillai PLAINTIFF

- and -

1. THE PUBLIC TRUSTEE OF FIJI  
2. RAM MAHESH s/o Ram Sarup  
3. DHANPAT d/o Mahabit  
4. GRAHAME & CO. DEFENDANTS

TUESDAY THE 3RD DAY OF JUNE 1975BEFORE THE HONOURABLE MR. JUSTICE G. MISHRA IN  
CHAMBERS

UPON READING the Summons for Order to Fix Security  
for Appeal and for Payment Out herein dated the  
3rd day of June, 1975

In the Supreme Court

No. 33

Order

3rd June 1975  
(continued)

AND UPON HEARING MESSRS. KARAM CHAND RAMRAKHA and ANU SHIVABHAI PATEL of Counsel for the Plaintiffs and MR. FAIZ MOHAMMED KHAN SHERANI of Counsel for the Defendant Grahame & Company

IT IS THIS DAY ORDERED that the Plaintiffs do give security for the prosecution of this appeal in the sum of \$200.00 in cash to be deposited in Court within 45 days of the date hereof

AND IT IS FURTHER ORDERED that the sum of \$700.00 paid by the plaintiff Chotelal on the 4th day of September 1974 be paid out to him, and the sum of \$400.00 paid by the plaintiffs Ganga Ram and Shiu Nath sons of Ram Sarup on the 4th day of September 1974 be paid out to them

10

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs of this cause.

BY ORDER

Sgd. Illegible

REGISTRAR

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No. 34

JUDGMENT OF SPRING, J.A.IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 23 of 1975

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  
 Narayan Swamy Pillai

Appellants

-- and --

GRAHAME &amp; CO

Respondents

H.M. Patel for the appellants  
 F.M.K. Sherani for the respondents

Date of Hearing : 6th November 1975Delivery of Judgment : 26th November 1975JUDGMENT OF SPRING, J.A.

20 This is an appeal from a judgment of the Supreme Court given at Lautoka on 12th May, 1975 in respect of an award of damages made in favour of the appellants against the respondents. The facts briefly are as follows. The appellants purchased sections of land at Wailoku, Suva, from one Ram Mahesh and agreements for sale and purchase in respect thereof were prepared by the respondents, a firm of solicitors practising at Suva, who acted for both the vendor and purchasers.

30 By agreement dated 21st April, 1967 lot 7 on Deposited Plan No. 3082 was sold to two brothers Ganga Ram and Shiu Nath jointly for £550 (\$1100).

By agreement dated 13th June, 1967 lot 3 on Deposited Plan No. 3082 was sold to Chotelal for £600 (\$1200).

In the Court  
of AppealNo.34Judgment of  
Spring, J.A.26th  
November  
1975

In the Court  
of Appeal

          
No. 34

Judgment of  
Spring, J.A.

26th  
November  
1975

(continued)

By agreement dated 23rd May, 1968 lot 4 on Deposited Plan No. 3089 was sold to Manorama Pillai for £600 (\$1200).

Pursuant to the terms of each agreement the purchase price was payable by a substantial deposit (which was either paid when the agreement was signed or had been paid earlier) followed by monthly instalments over a period of years; the unpaid balance to bear interest at £8 per centum per annum. Payments under the agreements were made by the appellants either to the vendor Ram Mahesh or the respondents. In September and October 1969 Ram Mahesh without notice to the appellants sold and transferred the same 3 sections which he had previously sold to the appellants, to third parties; (one of the third parties being the mother-in-law of Ram Mahesh).

10

Proceedings were issued by the appellants out of the Supreme Court of Fiji on 27th August 1970 against the Public Trustee of Fiji (as representative of Ram Mahesh who had died after the sale to the third parties) as first defendant; the third parties who had purchased the sections as second defendants and the respondent as third defendants. The claim against the respondents was for negligence while acting as solicitors for the appellants.

20

The allegations of negligence against the respondents are that the appellants, all of whom were illiterate, had each entrusted to the respondents the conveyancing work involved in the purchase of the sections, and had paid fees to the respondents in respect thereof. They alleged in their Statement of Claim (inter alia) that the respondents had failed (a) to advise the appellants to lodge caveats against the land; (b) to lodge caveats against the titles to the land of Ram Mahesh with the Registrar of Titles to protect the interests of the appellants under the agreements for sale and (c) to advise them of their rights under the agreements; and generally had failed to discharge the duty they owed as their solicitors.

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The learned trial judge gave judgment for the appellants against the first defendant; dismissed the actions against the second defendants and awarded nominal general damages

of \$10 in favour of each appellant against the respondents. The appellants have appealed to this Court against the award of nominal damages and seek to have the award set aside and substantial damages awarded in lieu thereof. The grounds of appeal are :

In the Court  
of Appeal

            
No.34

Judgment of  
Spring, J.A.

26th  
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1975

(continued)

- 10       "1. Having found that the Respondents' firm was in fact guilty of negligence, the learned trial judge erred in law and in fact in speculating whether or not any advice that a caveat should have been lodged might or might not have been followed by the plaintiffs and thereby there was a miscarriage of justice.
- 20       2. The learned trial judge erred in law and in fact in not holding that once the Respondents had been guilty of negligence in not advising the plaintiffs to lodge a caveat on the property purchased by them, the Respondents thereby became wholly liable for the consequences that followed, namely the sale of the land by the Vendor to a third party without the knowledge of the Plaintiffs.
- 30       3. Having regard to the pleadings, and to the failure of the Respondents to allege that the Plaintiffs would not have followed their advice, if advice had been given to the plaintiffs to lodge a caveat, the learned trial judge erred in law and in fact in holding that Plaintiffs should have given evidence on this point.
- 40       4. Having regard to the fact that the Respondents firm acted for both the Vendors and the Plaintiffs as Purchasers and the latter left the matter of the Sale and Purchase Agreement, and the subsequent transfer to the Respondent, the learned trial Judge erred in law and in fact in not holding that the Respondents' failure to advise the Plaintiffs was a direct cause of the Plaintiffs' not lodging a caveat, and further erred in not considering that the Respondents could have lodged a caveat themselves if they had so wished as Solicitors for the parties.
5. The Plaintiffs were not lawyers, or expected

In the Court  
of Appeal

          
No.34

Judgment of  
Spring, J.A.

26th

November

1975

(continued)

to know the law, and the learned trial judge erred in law and in fact in holding that they might not have accepted advice not to lodge a caveat since such advice could not protect their purchase"

At the outset it should be emphasised that in considering a claim for negligence against solicitors the facts vary from one case to another, and it is not always possible to lay down general rules. However, the guiding principle is that a solicitor's duty is to use reasonable care and skill in dealing with his client's affairs as the circumstances of the particular case demand. It is an implied term of a contract between a solicitor and his client that the solicitor should exercise reasonable care and skill in the discharge of his duty. A breach of this implied term, by itself entitled the client to no more than nominal damages. In order to recover anything more than nominal damages the onus is upon the client to prove that the breach caused substantial damage. 10 20

In his judgment the learned trial judge found the respondents negligent and he awarded nominal damages only. The judge held that the negligence of the respondents consisted in their failing to advise the appellants to lodge a caveat against Ram Mahesh's title to protect the agreements for sale and purchase; further the learned trial judge stated that before the appellants could succeed it was necessary for them to prove that failure to give the advice was probably the cause of the appellants' failure to lodge a caveat. In coming to this conclusion the learned judge placed reliance on the fact that the appellants had not been asked any questions as to what steps they would have taken had they received advice from the respondents. The judge then asked himself the question - if the respondents had given the advice to the appellants to lodge a caveat would they, the appellants, have accepted the advice and acted as they were advised. The learned judge answered his hypothetical question by saying, "that the appellants might have said we will take "a chance and save our money." Accordingly on the premise that the appellants had not discharged the onus of proof the learned judge awarded nominal damages only. Counsel for the appellants urged upon the Court that the learned judge had 30 40

misdirected himself on this matter and that he should have awarded substantial damages.

In the Court  
of Appeal

No.34

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Spring, J.A.

26th  
November  
1975

(continued)

Counsel for the respondents sought to support the judgment and argued that the appellants had failed to prove that the failure by the respondents to give the advice probably caused the appellants to fail to lodge a caveat.

10 It is necessary to analyse the judgment in the light of the submissions made by both counsel, but before so doing it must be emphasised that at the conclusion of the trial counsel for the respondent addressing the learned trial judge on the question of negligence said :

"Negligence :

Admitted no caveat. No evidence that they acted after making agreement. I concede that "it was negligence in 3rd defendants not to enter a caveat. I can find find no excuse for so doing."

20 The learned judge referred to this admission by counsel in this way:

"Mr. Kennedy concedes that it was negligence in the third defendants not to lodge a caveat - I think he means not to advise the plaintiffs to lodge a caveat ....."

30 From this point on in the judgment the learned trial judge treats the respondents' negligence as being one of failure to advise the appellants to lodge a caveat, despite the admission made by their counsel that the respondents were negligent in failing to enter a caveat. On the premise adopted by the learned trial judge that the negligence of the respondents consisted merely in failing to advise the appellants to lodge a caveat it is correct in law, as he stated, that it then became incumbent upon the appellants to prove that the failure to give such advice was the probable cause of them failing to lodge a caveat.

40 Sykes v. Midland Bank Executor Co. [1970] 3 W.L.R. 273 was an appeal against a decision awarding substantial damages to the plaintiffs for the negligence of their solicitor. The plaintiffs were well educated and experienced businessmen who held other leasehold

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premises which contained clauses similar to the lease in respect of which the action was brought; the solicitor was held to be negligent for omitting to draw the attention of, and explain to, his clients certain unusual clauses therein. The Court of Appeal found that even if the solicitor had given the proper advice the evidence did not show that the plaintiffs would probably have acted in any way different from the manner in which they did. The Court held that the burden of proof was upon the plaintiffs to establish that on the balance of probabilities any damage suffered by them flowed from the negligence of the solicitor in failing to advise them on the unusual clauses in the lease. The Court of Appeal held that the plaintiffs had failed to discharge the onus of proof and accordingly set aside the award of damages and gave nominal damages in lieu thereof. In the instant case the appellants said (inter alia). I quote from the record.

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Ganga Ram, a bus driver said :

"no one advised me to lodge a caveat. I  
"did not know it was necessary. It came  
"as a surprise to me to know that land  
"sold. I relied on my solicitors."

In cross-examination, he said :

"I had not purchased land prior to this....  
"I had never heard of lodging a caveat.....  
"I was taken to Grahame & Co. by Mahesh  
"because they were his solicitors. I was  
"not told that land under mortgage."

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Shiu Nath, a carpenter said :

"Grahame & Co. acted for me.....No  
"one advised me in Grahame & Co. to put  
"a caveat on the land."

In answer to the Court he said :

"I do not speak English."

Chotelal, a gardener says:

"I entered into sale and purchase agreement  
"with Ram Mahesh drawn up by Grahame & Co.  
"I paid them fees and I expected them to do  
"my work properly. Nobody advised me to  
"lodge a caveat."

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Manorama Pillai, a salesgirl said :

"I was not advised to lodge a caveat and  
"did not do so."

The learned trial judge says in his judgment :

"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  
defendants did not advise us to lodge a  
"caveat."

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With the greatest of respect to the learned judge I cannot find in the evidence support for this interpretation. Further, how could it be said that the appellants had failed to take all reasonable steps when they were illiterate persons, unversed in land transactions and would not have the slightest idea what steps to take to prevent Ram Mahesh from dealing with his land, nor would they know what a caveat was, or what steps should be taken to lodge one. The learned judge in his judgment said :

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"The plaintiffs cannot succeed unless they  
"can prove that the third defendants  
"negligence was probably a cause of their  
"omitting to lodge a caveat. The plaintiffs  
"themselves were not asked any questions on  
"this subject."

In my view the learned judge fell into error here as he had apparently overlooked the unequivocal admission of negligence made by counsel for the respondents - that the respondents were negligent in failing to enter a caveat. Had the judge accepted this admission of negligence, (as, in my view, he should have done) the question of burden of proof that the appellants would have acted on the advice of the respondents to lodge a caveat would never have arisen because it was conceded by the respondents that they had failed in their duty to lodge a caveat. Further, in view of the admission of negligence made by counsel for the respondents it would have been pointless for respondents' counsel to have embarked on a cross-examination of the appellants as to what steps they could have taken had Ganga Prasad given them the advice to lodge a caveat. No doubt this was the reason, no

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such cross examination was undertaken by respondents' counsel. There is ample authority for the proposition that an admission made by counsel at the trial of an action is binding on the client. See Vol.3 Halsbury's Laws of England 4th Edition p.652 para 1184 where the learned author says :

"The statements of counsel, if made on the trial of an action.....and not repudiated at the time, bind the client and may be used as evidence against him."

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In fairness to the respondents it is true to say that they have never resiled from the admission of negligence made by their counsel; nor was there any cross appeal before the Court; the admission of liability for negligence has not been challenged by the respondents in any way.

Further, it is to be noted the respondents called no evidence at the trial; Ganga Prasad their Chief Clerk was called by the appellants. The learned trial Judge, in my view, had no justification upon the evidence, and having regard to how the case was "run" by the respondents before the Court below, for importing into his judgment the proposition that the negligence of the respondents consisted merely in their failure to advise the appellants to lodge a caveat to protect the agreements; in so doing I believe he became confused over the matter of burden of proof when he said :

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"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."

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This statement as to the acts of negligence of the respondents conflicts in my view with the following statement in the judge where he says :

"I think it fair to say that it was third defendants omission to register a caveat which made possible, or at any rate facilitated the fraud by which the plaintiffs have lost their land."

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It is obvious that the judge distracted by the question of burden of proof and other matters failed to acknowledge that the respondents admitted

liability for failing to enter caveats against Ram Mahesh's title.

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Further, the learned judge in his judgment states :

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"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."

However, having stated the impossibility of speculating whether Ganga Prasad's advice if it had been given would have been accepted the learned judge then proceeds to do precisely that when he says :

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"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.'"

In my view the judge was wrong to concern himself with such hypothetical matters as in so doing he overlooked the real point - namely that the respondents had conceded negligence.

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It was stated by counsel for the appellants that the respondents were acting for the vendor Ram Mahesh as well as for the appellants and in so doing had failed in their duty to take all proper steps to safeguard the interests of the appellants, Ganga Prasad, the chief clerk of the respondents said:

"Grahame & Co. did act as solicitors for both parties when agreement prepared in April 1967. Parties were not advised to lodge a caveat and in fact none lodged."

He also said :

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"When all payments were complete we would have made a transfer."

In fact, the respondents were acting not only for the

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vendor and purchasers but also for the mortgagee, J.P. Bayley Ltd. I would hasten to point out that there is always an inherent danger in a solicitor acting for all parties in circumstances such as the present one discloses and I respectfully endorse the remarks of Scrutton L.J. in : Moody v. Cox & Hatt (1) [1917] 2 Ch. 71 at page 91 when he said :

"It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been that of a solicitor acting for vendor and purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and who, if he does not disclose the flaw in the title, may be liable to an action by the purchaser for not doing his duty as solicitor for him. It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them."

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It would well be that the respondents considered that as they were holding the title deeds to the property in question there was no necessity to lodge caveats to protect the interests of the purchasers. In my view this was an assumption fraught with danger.

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Therefore for the reasons given the appellants had on the evidence, coupled with the admission of negligence by the respondents, shown that the respondents' negligence in failing to register a caveat had made a difference to them - in that they had lost their land; and the loss suffered by them flowed directly from the negligence of the respondents. In coming to this conclusion I am mindful of the learned trial judge's finding that the evidence of the appellants was unreliable but "at the end of the day" the judge concludes -

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"although I do not think the plaintiffs have told the whole truth I do not know that this affects their case against the third defendants."

Accordingly, I would conclude that the appellants are entitled to an award of substantial damages against the respondents. I would therefore set aside the award of nominal damages only.

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I turn now to a consideration of the amount of damages which should be awarded. The cause of action against the solicitors is onw for breach of contract. It is clear from what was said in Groom v. Crocker [1938] 2 All E.R. 394 that although the term "negligence" is used to describe the nature of the appellants' claim, that claim is, in effect, a claim for damages for breach of contract. The measure of damages is compensation for the consequences which follow as a natural and probable consequence of the breach; or in other words which could reasonably be foreseen. The measure of damages for breach of contract was discussed in Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 1 All E.R. 997 where Asquith L.J. said at page 1002 :

"What propositions applicable to the present case emerge from the authorities as whole, including those analysed above? We think they include the following (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed : Wertheim v. Chicoutimi Pulp Co. [1911] AC 301. This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence, (2): In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach (3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or, at all events, by the party who later commits the breach."

I agree with the learned judge in the Court below when he said in the course of his judgment :

" I think it fair to say that it was the third defendants omission to register a caveat which made possible or at any rate facilitated the fraud by which the plaintiffs have lost their land."

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Further the learned judge states in his judgment:

" They (the appellants) learned of Ram Mahesh's transfer of the land in or about October, 1969."

Accordingly, the damages are to be assessed as at the date when the breach occurred and the contract was broken. It is clear that the appellants were under a responsibility to mitigate any loss or damage sustained by the professional default of their solicitors, and to take all reasonable steps to mitigate such loss. This duty arises as soon as the loss arises, and they must act as best they can, not only in the best interests of themselves as claimants, but also in the interests of the respondents. The burden of proof is on the respondents. Vol.II Halsbury's Laws of England 3rd Edition page 289 and 290 paras. 476 and 477.

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The classic statement of the doctrine is that of Viscount Haldane L.C. in British Westinghouse Electric & Manufacturing Co.Ltd. v. Underground Electric Rys. Co. of London Ltd. [1912] A.C. 673 at page 688.

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" The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity. Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first

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principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James, L.J. in Dunkirk Colliery Co. v. Lever [1878] (9 Ch. D. 25), "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business".

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The principles are clear; each case necessarily turns upon its own facts. The appellants in this case being under a responsibility to mitigate the loss sustained, issued proceedings against the vendor Ram Mahesh and the third parties, to whom, the learned judge found, Ram Mahesh had wrongfully sold the sections; the proceedings against Ram Mahesh and the third parties were consolidated with the instant action and heard together. Judgment was given against the Public Trustee of Fiji (as representative of Ram Mahesh dec'd) in favour of each appellant for the amounts of moneys paid by them, together with \$400 general damages in each case for loss of bargain. The claim against the second defendants, who were the third parties to whom the sections were sold, was dismissed.

Counsel for appellant urged upon this Court that the amount of general damages that should be awarded in the event of this Court setting aside the award of nominal damages should be for loss of bargain based on the value of the land, which the appellants had lost, valued as at the date of judgment together with (a) the amount paid to the vendor Ram Mahesh under the agreements for sale and purchase, (b) the amount of the appellants solicitor and client costs in bringing the actions against the first and second defendants and (c) the amount of the party and party costs which the appellants have been ordered to pay to the second defendant in the Court below. Counsel for the appellants admitted before this Court that if substantial damages were to be awarded against the respondents then the amount thereof should be diminished by the amount for which

In the Court of Appeal judgment was given against the Public Trustee of Fiji in favour of the appellants

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The respondents submitted that if substantial damages were to be awarded against them the amount thereof should (a) in the case of Ganga Ram, Shin Nath and Chotelal comprise only the amounts paid by these appellants to the vendor Ram Mahesh since they were in default under the agreements for sale and purchase; and had the vendor exercised his rights under the said agreements they would in all probability have lost the moneys paid whether or not the respondents had entered a caveat against the title (b) In the case of Manorama Pillai the damages awarded should consist of general damages for loss of her bargain plus the amounts paid by her to the vendor. Further it was submitted that in the case of each appellant the amount of the damages awarded should be diminished by the amount for which judgment was given against the Public Trustee of Fiji.

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The learned trial judge found that the market value of each section of land was \$1600 at the date of the breach of the contract which he stated was in September or October, 1969; he did not assess damages as at the date of judgment but as at the date of the breach of contract. It is true to say that even if the respondents had lodged caveats against the title those appellants whom the judge found were in default under their respective agreements for sale and purchase may have lost the moneys paid by them in the event of the vendor giving the appropriate notices and exercising his rights under the agreements for sale and purchase. This is a contingency which may have happened, but, as events turned out, did not happen. As was stated in Hall v. Meyrick [1957] 1 All E.R.209 at page 218 Ashworth, J. says :

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"On the other hand, the contingencies must be fairly assessed, and, if there was a reasonable prospect of their being satisfied in a manner favourable to the plaintiff, the amount by which the full claim falls to be discounted is correspondingly reduced."

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In my view we have to consider the matter upon the facts that obtained at the date of the



breach of contract. The learned trial judge found that the appellants Ganga Ram, Shiu Nath and Chotelal were in arrears in respect of payments due under their respective agreements but he stated that there was evidence that payments were made and accepted in July, 1969, in each case. As to mitigation it was incumbent upon the appellants to attempt to recover from the Estate of Ram Mahesh the moneys paid under their respective agreements, and to bring proceedings against the Public Trustee of Fiji in an endeavour to mitigate the loss caused through the neglect or omission on the part of the respondents.

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This being an action against the respondents for breach of contract at Common Law the appellants are entitled to such damages as will put them in the same position as if the contract of retainer had been properly performed. The contract of retainer was broken when the respondents failed to lodge caveats to protect the agreements; this was in 1967 and it was a continuing breach until the loss occurred in September or October, 1969 when the sections were sold. The section sold to Manorama Pillai by Ram Mahesh was re-sold to a subsequent purchaser in November, on the open market for \$1600 and I respectfully agree with the statement of the learned judge when he says:

"Dhanpat in November of that same year (1969) sold the land she had obtained a month before - the land originally sold by Ram Mahesh to Manorama Pillai - for \$1600 and I regard that sum as the market value of the land, and the difference between the market value and the contract price as the loss which Manorama Pillai suffered. I think that the land of each of the plaintiffs must be looked at in this light."

Had the respondents lodged a caveat against the land and the vendor given the appropriate notices and exercised his rights under the contracts against the defaulting purchasers, they may well have lost their moneys, but it was not established that the vendor gave any such notices or took any steps to rescind the agreements.

On this appeal the appellants did not challenge in any way the amount of the damages awarded to them by the Supreme Court against the Public Trustee of Fiji, or claim that the general damages as awarded should have

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been assessed on any different basis than that adopted by the learned trial judge.

Before this Court counsel for the appellants urged that the general damages for loss of bargain should be assessed as at the date of judgment. However, having regard to the fact that the assessment of general damages against the first defendants (Ram Mahesh's estate) has not been challenged, and to all the other relevant factors, I cannot see any justification on this occasion for departing from the general rule that in cases of breach of contract, at common law, for the sale of land, damages are to be assessed by reference to the difference between the purchase price and the market value at the date of the breach of contract. Therefore I would adopt the course which the learned judge in the Court below said he would take if substantial damages were to be had by the appellants when he stated:

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"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."

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Accordingly I would award damages to each of the appellants against the respondents for sums equal to the amounts found by the learned trial judge as having been paid by each appellant to Ram Mahesh (together with such legal fees as the judge found had been paid to the respondents by the appellants) together with \$400 general damages in each case; the total sum so awarded to each appellant to be diminished by the amount of the judgment given in the Supreme Court on 12th May, 1975 in favour of each appellant against the Public Trustee of Fiji.

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As to costs, I am of the view that the solicitor and client costs of the appellants in the action against the Public Trustee of Fiji should be included in the damages as a natural and probable consequence which flowed from the breach of duty owed by the respondents to the appellants. I would refuse to include the appellants' solicitor and client costs in

the action against the second defendants; and the party and party costs which the appellants have been ordered to pay the second defendants. In doing I am conscious of the words of the learned judge when he said, - "plaintiffs offered no evidence against the second defendants who if a fraud had been committed must have been almost equally culpable with Ram Mahesh." Further in concluding that no costs be allowed to the appellants in the Supreme Court the judge said :

"They the plaintiffs did not seek to ascertain whether Ram Mahesh had indeed got money from his transferees and they made no attempt whatever to prove any of their specifications of fraud against the second defendants in each action."

Accordingly, I would set aside the judgment for nominal damages in the Supreme Court and direct that judgment be entered against the respondents in favour of (1) Gange Ram and Shiu Nath for :

- (a) the sum of \$919.00 by way of special damages.
- (b) the sum of \$400.00 by way of general damages.
- (c) the amount of their solicitor and client costs and disbursements in the action against the Public Trustee of Fiji (as representative of the Estate of Ram Mahesh dec'd) as taxed by the Registrar.

Less the amount of the judgment given in favour of Gange Ram and Shiu Nath against the Public Trustee of Fiji dated 12th May, 1975.  
(II) Chotelal for

- (a) the sum of \$743.80 by way of special damages.
- (b) the sum of \$400 by way of general damages.
- (c) the amount of his solicitor and client costs and disbursements in the action against the Public Trustee of Fiji (as representative of the Estate of Ram Mahesh dec'd), as taxed by the Registrar.

Less: the amount of the judgment given in favour of Chotelal against the Public Trustee of Fiji dated 12th May, 1975.  
(III) Manorama Pillai for

- (a) the sum of \$900 by way of special damages.
- (b) the sum of \$400 by way of general damages.
- (c) the amount of her solicitor and client costs and disbursements in the action against the Public

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Trustee of Fiji (as representative of the  
Estate of Ram Mahesh dec'd), as taxed by the  
Registrar.

Less: the amount of the judgment given in favour of  
Manorama Pillai against the Public Trustee of Fiji  
dated 12th May, 1975.

I would allow the appellants their costs in  
this Court as taxed by the Registrar. The order as  
to costs in the Court below in favour of the  
appellants against the respondents I would allow to  
remain.

Signed B.C. SPRING  
Judge of Appeal

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JUDGMENT OF GOULD, V.P.

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

CIVIL APPEAL NO. 23 of 1975

B E T W E E N : 1. GANGA RAM s/o Ram Sarups  
2. SHIU NATH s/o Ram Sarup  
3. CHOTELAL s/o Nanhu  
4. MANORAMA PILLAI d/o  
Narayan Swamy Pillai

Appellants

- and -

GRAHAME & CO.

Respondents

H.M. Patel for the Appellants  
F.M.K. Sherani for the Respondent

Date of Hearing : 6th November, 1975  
Delivery of Judgment : 26th November, 1975

JUDGMENT OF GOULD V.P.

The facts of this case and the law applicable  
have been fully set out in the careful judgment  
of my learned brother Spring J.A.

The main question in the appeal, that is whether the learned judge was correct in awarding only nominal damages against the respondents, is one which I think presents no real difficulty. With all respect to his very painstaking judgment I think he was, in this particular respect, in error. When counsel for the respondents admitted in the Supreme Court that it was negligence in the respondents not to have entered a caveat, he was admitting that the circumstances and the nature of the agreements were such that this precaution was called for. If counsel meant by his admission that the respondents should have lodged a caveat by virtue of their retainer without advising or consulting the clients the matter is clear. If counsel meant, as the learned judge took him to mean, that the negligence lay in failure to advise the clients to lodge a caveat, I think the position is not altered in a material way. The learned judge held that it was upon the appellants to show that, if such advice had been given, they would have taken it. I do not think the effect of the case of *Sykes v. Midland Bank Executor Company* [1970] 3 W.L.R.273, which as discussed by Spring, J.A. in his judgment, can be strained to this extent.

In the first place the learned judge has imagined words of advice which are, with respect, couched in terms likely to deter their acceptance. I would not describe that as advising the appellants to lodge a caveat. Secondly, as so often happens in the context of Fiji, the appellants were illiterate people completely ignorant of the law concerning land transactions and the purpose or existence of caveats. When matters were explained to them after the loss occurred a year or two later how could they give evidence of what their decision would have been if advised to caveat at the time of the agreement? What could they possibly say except "Of course we would have accepted the advice if given". At least in the circumstances of this case I think the only approach to this problem is to say - the respondents failed in their duty to advise the appellants to put caveats on the titles; they thereby deprived the appellants of any opportunity to consider whether they would have accepted such advice if given; therefore the respondents cannot be allowed to rely on what must remain a speculation, the possibility that the advice might not have been accepted. I would add that if probabilities are being considered, I do not myself see that any weight should be attached to the suggestion

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that clients such as these, relying in all matters upon their solicitors, might be expected to reject their advice, properly given, in this one important particular. I think also that considerations applying to advice by a solicitor to a client to take a certain course of action, are not the same as those applying to the failure by the solicitor to ascertain and communicate a certain fact (as in the Sykes case) upon which the clients might base a decision. Subject to these brief remarks I am entirely in agreement with all that Spring J.A. has said on this question.

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I agree also with the proposed award of damages and orders as to costs. In the result the judgments against the respondents will be equal only to certain costs they have incurred. 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. The appellants' effort to mitigate their loss having succeeded, the respondents are entitled to the benefit of that success.

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The learned President of this Court has directed that this appeal might be heard by two judges, and as my brother Spring J.A. and I are in agreement, the appeal is allowed and the orders will be those proposed in the judgment of Spring J.A.

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(Signed) SIR TREVOR GOULD

Vice President

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IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 23 of 1975

10 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 Narayan  
Swamy Pillai

Appellants

- and -

GRAHAME & CO. Respondents

WEDNESDAY THE 26TH DAY OF NOVEMBER, 1975

UPON MOTION by Way of Appeal from the Judgment dated the 12th day of May, 1975 made unto this Court by Counsel for the Appellants (Original Plaintiffs)

20 AND UPON HEARING MR. HARILAL MANILAL PATEL of Counsel for the Appellants and MR. PAIZ MOHAMMED KHAN SHERANI of Counsel for the Respondents

AND UPON READING the said Judgment

AND MATURE deliberation thereupon had

IT IS THIS DAY ORDERED that the Judgment of the Honourable Mr. Justice K.A. Stuart in the Supreme Court of Fiji dated the 12th day of May, 1975, be set aside

AND IT IS FURTHER ORDERED that the Respondents do pay to the Plaintiffs GANGA RAM and SHIU NATH

(a) The sum of \$919.00 (NINE HUNDRED AND NINETEEN Dollars) by way of special Damages

30 (b) The sum of \$400.00 (FOUR HUNDRED dollars) by way of general damages

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1975  
(continued)

- (c) The amount of their solicitor and clients costs and disbursements in the action against the Public Trustee of Fiji (as representative of the Estate of Ram Mahesh deceased) as taxed by the Registrar

Less the sum of \$1,319.00 (ONE THOUSAND THREE HUNDRED AND NINETEEN DOLLARS) being the amount of the Judgment given in favour of the Appellants GANGA RAM and SHIU NATH against the Public Trustee of Fiji dated the 12th day of May, 1973

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AND IT IS FURTHER ORDERED that the Appellant CHOTELAL do recover from the Respondents

- (a) The sum of \$743.80 (SEVEN HUNDRED AND FORTY THREE DOLLARS EIGHTY CENTS) by way of special damages
- (b) The sum of \$400.00 (FOUR HUNDRED DOLLARS) by way of general damages
- (c) The amount of his Solicitor and client costs and disbursements in the action against the Public Trustee of Fiji (as representatives of the Estate of RAM MAHESHI deceased) as taxed by the Registrar

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Less the sum of \$1,143.80 (ONE THOUSAND ONE HUNDRED AND FORTY THREE DOLLARS EIGHTY CENTS) being the amount of the judgment given in favour of the Appellant CHOTELAL against the Public Trustee of Fiji dated the 12th day of May, 1975.

AND IT IS FURTHER ORDERED that the Appellant MANORAMA PILLAI do recover against the Respondents

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- (a) The sum of \$900.00 (NINE HUNDRED DOLLARS) by way of special damages
- (b) The sum of \$400.00 (FOUR HUNDRED DOLLARS) by way of general damages
- (c) That amount of her solicitor and client costs and disbursements in the action against the Public Trustee of Fiji (as representative of the Estate of RAM MAHESHI deceased) as taxed by the Registrar

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107.

Less the amount of \$1,300.00 (THIRTEEN HUNDRED dollars) being the amount of Judgment given in favour of the Appellant MANORAMA PILLAI against the Public Trustee of Fiji dated the 12th day of May, 1975.

AND IT IS FURTHER ORDERED that the Respondents do pay to the Appellants their costs of this appeal as taxed by the Registrar.

In the Court  
of Appeal

          
No.36

Order  
26th  
November  
1975  
(continued)

BY ORDER

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L.S.

(Signed) K.P. Sharma

for REGISTRAR Fiji  
Court of Appeal

108.

In the Court  
of Appeal

No.37

NO. 37

ORDER GRANTING LEAVE TO APPEAL  
TO HER MAJESTY IN COUNCIL

Order granting  
leave to Appeal  
to Her Majesty  
in Council

10th December  
1975

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO.23 of 1975

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  
Marayan Swamy Pillai  
Appellants

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- and -

GRAHAME & CO.

Respondents

BEFORE THE HONOURABLE MR. JUSTICE MARSARIK

JUDGE OF APPEAL IN CHAMBERS

WEDNESDAY THE 10TH DAY OF DECEMBER 1975

UPON READING the Notice of Motion for Leave  
to Appeal to Her Majesty in Council herein  
dated the 8th day of December, 1975

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AND UPON HEARING MR. H.M. PATEL of Counsel  
for the Appellants and MR. M. BENEFIELD of  
Counsel for the Respondents

IT IS THIS DAY ORDERED that the Appellants  
be granted leave to appeal to Her Majesty in  
Council on the following terms :-

1. Appellants to deposit in Court the sum  
of \$600.00 (SIX HUNDRED DOLLARS) as  
security for costs within two (2)  
calendar months

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109.

2. Appeal to be prosecuted with all due diligence

In the Court  
of Appeal

            
No.37

BY ORDER

Order granting  
leave to Appeal  
to Her Majesty  
in Council

REGISTRAR

10th December  
1975

FIJI COURT OF APPEAL

(continued)

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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 -

GRAHAME & CO.

Respondents

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RECORD OF PROCEEDINGS

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PHILIP CONWAY THOMAS & CO.,  
61 Catherine Place,  
Westminster SW1E 6HB.

Solicitors for the Appellants.