IN THE PRIVY COUNCIL No.26 of 1983

30/84

O N A P P E A L

FROM THE FIJI COURT OF APPEAL

B E T W E E N:

KHURBUR RAM LATCHAN (Plaintiff) Appellant

- AND -

LESLIE REDVERS MARTIN (Defendant) Respondent

CASE FOR RESPONDENT

1. THE FACTS

The following is a summary of the facts found by the learned trial judge, as set out in his judgment delivered on 13th October 1982. The respondent submits that the facts were correctly found by his Lordship.

The defendant, who is now 83 years of age, was born in Brunswick, Victoria, Australia. At the conclusion of World War II he went to live in Fiji. Between 1946 and 1949, the defendant, who was an accountant, rendered financial and accounting advice and assistance to one Khurbur, a dairy farmer and father of the plaintiff. After Khurbur's death, the defendant continued to give financial assistance and advice to Khurbur's widow, Ram Kuar. The plaintiff, who is now 43, first met the defendant in about 1950 when his mother took him with her to see the defendant. 171

In about 1950 the defendant provided financial assistance to Ram Kuar to purchase a bus and operate a bus service. It appears that the income from the bus service was paid by Ram Kuar and later by the plaintiff to the defendant who banked the money in his own account and paid the business's outgoings. One reason for this was that there was no bank agency in Nausori where Ram Kuar conducted her bus service. 172

From 1962 the plaintiff managed the family's bus business which had grown with the financial assistance of and management by the defendant. In 1974 the plaintiff started his own bus service under the name Baulevu Bus Service and in June 1965 172

he registered the name K.R. Latchan Bus Service. The income from these businesses was paid to the defendant in the customary way. The defendant drew the cheques for payment of the business's accounts. He kept books of account at his office and rendered annual accounts to the plaintiff and his family. He also prepared their income tax returns which the plaintiff signed. He advised, counselled and assisted the family. His advice and assistance bore substantial fruit to the plaintiff and his family.

173-5 In 1970, the plaintiff decided to import bus chassis from Seddon Motors Ltd. in England. To do so he had to establish a letter of credit facility. In December 1970 he consulted the defendant for that purpose. On 25th January 1971, the defendant wrote to Seddon Motors Ltd. a letter commending the plaintiff to that company. The letter is set out at p.174 of the record. The letter of commendation bore fruit. After negotiations by the plaintiff and the defendant, a distributor's agreement bearing date 1st November 1972 was entered into by B. Ashworth & Co. (Overseas) Ltd. acting as sole export commissioners for Seddon Motors Ltd. and Brunswick Motors. Under that agreement Brunswick Motors was granted sole distributor's rights for Fiji, Samoa and Tonga.

176-7 On 7th December 1971 the plaintiff signed an application for registration of the name "Brunswick Motors". The application disclosed that the business commenced on 2nd February 1971, about the time the plaintiff ordered the first two bus chassis from Seddon Motors Ltd. On 28th December 1972, the plaintiff and the defendant signed a form under the Registration of Business Names Act (obtained by the plaintiff from the Registrar-General's office) which recorded, in the plaintiff's handwriting, that a partnership between the plaintiff and the defendant commenced on 17th February 1971. The choice of 17th February 1971 as the date of the commencement of the partnership was not explained, but the evidence indicated that the defendant was very much involved in the business from the time the plaintiff was first seeking advice and financial assistance to finance the purchase of the initial bus chassis.

175 On signing the agreement with Seddon Motors Ltd., the plaintiff committed himself to finding a lot of capital which he did not then have and had little prospect of finding unless the defendant or someone else was prepared to assist him. He was committed to purchasing 30 vehicles a year and to hold a stock of spare parts at all times. Payment was to be effected in cash or by

confirmed bankers credit payable in London or other terms agreed by the parties. The plaintiff said in evidence that the defendant advised him against seeking terms.

At all times the defendant arranged for the letters of credit and provided the finance necessary to purchase the chassis and spare parts. He also provided all operational costs as and when required if the firm's account was not in credit which was usually the case. The defendant also financed the construction of bodies that were built by the plaintiff on the chassis. After the bodies were constructed, the buses were sold for cash or the defendant would provide finance to the purchasers, by paying the firm the price of the bus and taking a bill of sale from the purchaser over the bus as security. 176

The first annual partnership accounts prepared by the defendant was for the period November 1971 to December 1972. No explanation was given why the partnership accounts did not start from 17th February 1971. 177

After the defendant was acknowledged as a partner, with the plaintiff's industry and the defendant's advice and financial assistance Brunswick Motors became a flourishing business. Some 74 bus chassis were imported by the firm between 1st January 1973 and 31st December 1977, all financed by the defendant. Until 31st December 1977 all moneys were paid to the defendant and banked in his name. 177

The beginning of 1978 saw the beginning of the break up of the partnership. The reasons the plaintiff gave for his desire to break up the partnership were stated by him as follows: 177-8

> "In 1977 when I entered Parliament and got some courage I broke up partnership. I had learned and had trusted the defendant. I had no bank account. I did know Brunswick Motors was making a lot of money towards the end of 1977. I did not bother about what money firm had at the time. I did want to do business the way I wanted to. It was difficult with defendant an old man as a partner. He was a nuisance and I had to get rid of him. It did take me 10 months to write letter dissolving partnership. I did send in Peat Marwick & Mitchell to check books. I thought defendant would cheat me. I did not know what was going on. I did sent in auditors before giving notice."

On 2nd October 1978 the plaintiff wrote to the defendant confirming his prior verbal notification that he wanted to dissolve the partnership with effect from 30th September 1978. 178

2. THE PLAINTIFF'S CLAIM

At the trial the plaintiff made various claims which may be grouped under four main headings:

(a) That the plaintiff was induced to take the defendant as a partner in the business by reason of false misrepresentations.

(b) That by the exercise of undue influence over the plaintiff the defendant obtained for himself a half share in the partnership business.

(c) That the plaintiff had misused the firm's funds for which the defendant was liable in damages.

(d) That in settling the partnership accounts between the plaintiff and the defendant certain items should be included or excluded from the accounts.

3. THE CLAIM IN MISREPRESENTATION

180-1 In paragraph 11 of his statement of claim the plaintiff alleged that the following representations were made by the defendant:-

> "(a) that the defendant in the month of December 1972 at Suva made representations to the plaintiff to the effect that the plaintiff's late father had asked the defendant to guide and assist the plaintiff in his business affairs after the death of the plaintiff's father;
>
> (b) that the defendant when making the representations aforesaid also made false representations to the plaintiff to the effect that the plaintiff was heavily indebted to the defendant."

181 The statement of claim went on to allege that the representations were false and that at least representation (b) was made with the knowledge that it was false.

178 Consequent upon these alleged misrepresentations the plaintiff sought the following declarations:-

> "(a) A Declaration that the Plaintiff formed a Firm known as "BRUNSWICK MOTORS" on the 9th December, 1971

and registered the same under the registration of Business Name Act Cap. 218 under Certificate of Registration No. 9197 at the office of the Administrator General, that at all material times he was the sole proprietor of the said firm that he is entitled to all the income and profits of the said firm from its inception to the date hereof.

(b) A Declaration that all material time there existed a confidential and fiduciary relationship between the Plaintiff and the Defendant, that the Defendant became the Plaintiff's Trustees in all matters concerning the Plaintiff's Business, that the Defendant acted as the Plaintiff's sole Business Advisor, his Accountant and his Financier and because of such confidential and fiduciary relationship, the defendant had access to and acquired the Plaintiff's business secrets and methods employed him in relation to his business and therefore was in a position of influence over the Plaintiff. Furthermore, by reason of such confidential and fiduciary relationship and by reason of the false representation aforesaid, the Defendant influenced the Plaintiff and induced him to accept the Defendant as Partner of the said firm, enter a change of particulars as to the composition and caused the same to be registered at the office of the Administrator General under Registration No. 9979 whereby the Defendant was shown as a Partner in the said firm;

(c) A Declaration that the Defendant exercised undue influence over the Plaintiff to bring about a change in the composition of the said firm and the Defendant obtained for himself one half share in the firm without contributing any monies to the firm or without paying any premium to the plaintiff to become a partner therein."

The learned trial judge found that there was "an overwhelming amount of evidence to show that [the plaintiff] was not 'the sole proprietor' of the said firm 'at all material times' and entitled 'to all the income and profits of the said firm'". The business known as "Brunswick Motors" was formed by the plaintiff on 2nd February 1971 at the latest and he took the defendant as his partner in the business on 17th February 1971. The plaintiff was therefore not entitled to the first

declaration sought. The Court of Appeal
253 thought that the partnership commenced in November 1971. To adopt a commencement date in November 1971 rather than in February 1971 did not affect the financial relationship between the parties.

181 The learned trial judge found that representation (a), if made, was made as early as 1962 and again nine years later. It was not made in December 1972 as alleged by the plaintiff. The representation, if made, was not found by the learned trial judge to be false. Having regard to the relationship of the defendant to the plaintiff's parents, it may be inferred that the representation was true. The learned trial judge was "unable to understand how representation (a), if false, could possibly have acted on the plaintiff's mind as a threat or duress likely to cause financial or economic loss. Indeed I would go further and say the same about the alleged bare representation (b)." This statement indicates that his Lordship was satisfied on the evidence that the plaintiff was not induced by the alleged misrepresentations to take the defendant into partnership or to act to his detriment in any relevant sense.

243 The Court of Appeal held that the statement alleged in paragraph (a) did not involve any representation at all, and it appears that before the Court of Appeal counsel for the plaintiff abandoned this part of the claim.

182-4 The learned trial judge found that representation (b), if made, was true. The defendant was in fact heavily indebted to the plaintiff. He owed the plaintiff $32,501.92 or $47,765.49 - substantial sums. As at 31st December 1972, the total assets of the plaintiff (including his interest in Brunswick Motors) amounted to $89,507.09. A debt of $47,765.49 was a heavy debt in all the circumstances. "Had the defendant asked for repayment of the money owed to him the plaintiff could have been in serious financial trouble unless he could have refinanced." His Lordship continued: "On the evidence before me I am in no doubt and find as a fact that the plaintiff was heavily indebted to the defendant on the 28th December 1972 and the statement alleged to have been made by the defendant was factual." It is submitted that this finding was amply supported by the evidence and should not be disturbed.

243 The Court of Appeal held that the learned

trial judge was entitled to find that the plaintiff was heavily indebted to the defendant. "The sum is a large one and the plaintiff's business at that time was a modest one."

4. THE CLAIM OF UNDUE INFLUENCE

The Court of Appeal correctly observed that "this allegation was based on the proposition that the defendant had taken an unfair advantage of the plaintiff." 244

The learned trial judge found that there was no special relationship between the plaintiff and the defendants to call into operation the rules relating to undue influence. The evidence revealed "the plaintiff's independence and strength of will to resist the defendant's request for a partnership". The defendant said in evidence that he had been raising the question of his admission to the partnership for a period of over two years, but the defendant successfully fobbed him off. The learned trial judge accepted the defendant's evidence. Despite persistent denials by the plaintiff that the defendant had raised the question of partnership with the plaintiff prior to December 1982, "in cross-examination the plaintiff was reluctantly forced to admit that the defendant had on other occasions raised the question of partnership. At this stage of his cross-examination he presented a sorry figure. He was quite obviously not telling the truth." (p.186) 184-7

The learned trial judge considered that the evidence did not support the plaintiff's allegation that there was a fiduciary or special relationship between the plaintiff and the defendant. The fact that the defendant was aware of the plaintiff's business and the state of his finances and had given him advice on these matters was insufficient to create a fiduciary or a special relationship between them. His Lordship observed, at p.186: 185-6

> "My assessment of the situation on the evidence before me is that the plaintiff an ambitious man fully realised the defendant was a fairly wealthy man - an elderly gentleman who was "a soft touch". It was no feeling of filial piety or any quasi-parental domination which induced him to call the defendant "father" and to show him respect. Such treatment is consistent with either genuine respect or recognition that it would pay to show respect to the man who was to furnish finance. I find it strange that the defendant an

accountant should have advanced such large sums to the plaintiff, an inexperienced business man and his family without any security other than the dubious security of having all moneys paid to his account."

187 His Lordship found that as at December 1972, the plaintiff, a man of 31, was independent and possessed strong will; he had been managing the family's business for some years without interference from the defendant; he had quite independently of the defendant and without his prior advice decided to import and build bus chassis and to commit himself to heavy capital expenditure; he had been consulting a number of solicitors for some years, although he did not seek legal advice about admitting the defendant as a partner. "The defendant appears to have done little more than receive and pay out moneys, keep accounts, prepare tax returns and when asked give advice and make funds available." In these circumstances his Lordship was quite justified in finding that there was no special relationship between the plaintiff and the defendant.

187 The learned trial judge found no evidence of undue influence exerted by the defendant on the plaintiff to procure a partnership. Although the business flourished, it could have foundered and if that happened the defendant would have been the big loser. The plaintiff was not compelled to take the defendant as a partner. There was no evidence that the defendant threatened to demand the money owing to him or to sue for the money. He had never issued a writ to enforce a debt. There was no evidence that the defendant was in a position to ruin the plaintiff financially or that he threatened to do so. The plaintiff was given what can only be considered as sound financial advice. He had many options other than to take the defendant into partnership.

189-190 The learned trial judge made the following pertinent findings:-

"The plaintiff had been enjoying and reaping the benefits of the defendant's participation in the business from its virtual inception. He was a benefactor who had provided all the funds the plaintiff required at a cheap or reasonable rate without security.

"I see nothing wrong in the defendant saying

in effect, if he did so, 'I am not prepared to provide any more finance unless I am made a partner'. There is no evidence that the defendant dictated the terms of the partnership. There is however evidence that contribution of capital was discussed and it was mutually agreed that each contribute $10,000. It is evident that it was also agreed that the defendant be treated as a partner with effect from 17 February 1971.

....

"In cross-examination [the plaintiff] made a significant admission which in my view considerably weakened his case and also highlighted the fact that was evident on several occasions that he is a person deserving of little credence."

....

"The evidence satisfies me and I hold as a fact that the question of partnership had been raised by the defendant on a number of occasions and discussed by the parties well before the 28th December 1972. It was the plaintiff who repeatedly put off making a decision about a partnership without committing himself either way. On the 28th day of December 1972 believing the defendant would not assist him further he finally agreed to take in the defendant as a partner on terms which I find were very fair and if anything more favourable to the plaintiff than the defendant. It was after or at the time this agreement was reached that the plaintiff signed the Distributors Agreement."

The learned trial judge went on to find that even if he were not correct in his view that there was no special relationship between the parties, "I am satisfied that [the defendant] is an honest man ... Whichever way I view the evidence and wherever the onus lies the evidence does not disclose that any undue influence was used by the defendant ... By no stretch of the imagination can it be said the plaintiff was in extreme need and forced into an improvident bargain." 190-2

In the result his Lordship refused to make the declarations and orders sought in paragraphs (a) to (f) of the prayer since all these claims for relief were dependant upon the plaintiff's success in his allegations relating to misrepresentation and undue influence. 192

The Court of Appeal affirmed the learned trial judge's findings. In addition the Court of 244-7

Appeal pointed to the fact that the plaintiff was aware of his own financial position. He had been receiving annual accounts and he understood them. "The extent of the plaintiff's intellectual capacity and general acumen is demonstrated by the fact that a few years later, in 1977, he was elected as a Member of Parliament. It is plain, therefore, that the plaintiff was well able to look after himself and was at no stage dealing with the defendant from a position of intellectual or emotional weakness."

246 When the plaintiff embarked upon the importation of bus chassis it was obvious to the defendant that he would be expected to provide finance. The Court of Appeal was correct in observing that:

> "The protection which [the defendant] sought for himself in respect of the new venture of Brunswick Motors was to say that he thought he should have a partnership. He pursued this request over a period of about two years, and it is apparent that for most of this time the plaintiff was able to resist these requests. The defendant eventually made it clear he was not prepared to continue financing the plaintiff unless he received a partnership. This was not a matter of pressure or unfair bargaining. It was a business negotiation. The plaintiff was at liberty to seek his finance elsewhere and terminate his association with the defendant. He chose not to do so, and the reason is obvious.
>
> "At no stage did the plaintiff attempt to find an alternative source of finance. It must have been plain to him that he could not possibly have obtained such liberal and satisfactory terms as he had received and could expect to receive from the defendant. He was required to find no security and he could expect to draw almost at will upon the defendant's account upon the basis of a daily rate. All receipts went at once to lower the account.
>
> "He was in truth receiving all the advantages of operating on a current overdraft account but with none of the disadvantages."

247 The Court concluded:

> "We are in full agreement with the learned Judge that there was no undue influence exercised by the defendant to procure a partnership and the appeal against the finding as to this must fail. We should perhaps add that, even if this had been a case in which there was a special relationship, the

presumption of undue influence was, upon the evidence, rebutted for just such reasons as we have already set out."

It is submitted that the conclusions of the learned trial judge and the Court of Appeal are correct and should be upheld.

5. ADJUSTMENT OF THE ACCOUNTS

In paragraph (g) of the prayer for relief the defendant claimed "a declaration that in settling the accounts between the plaintiff and the defendant" 14 items be either included or excluded from the accounts. They are as follows: 192-3

"(i) A Declaration that all monies charged by the Defendant against the said Firm as Accountancy fees be excluded."

The amount involved was $2875. The learned trial judge excluded this sum from the accounts on the ground that the defendant failed to establish that the plaintiff had agreed to the charge and under s.25(f) of the Partnership Act he was not entitled to remuneration for such services.

The Court of Appeal disagreed with the learned trial judge. Their Lordships found that there was evidence that the plaintiff had agreed to the charges. Each year the plaintiff saw and understood the statements of account and must be taken to have approved them and agreed to their contents. The accountancy charges were regularly shown in the annual accounts and they were the subject of no protest or objection. That amounted to an agreement by the plaintiff that accountancy charges be made.

It is submitted that the Court of Appeal was correct in this decision.

"(ii) A Declaration that all income and other transactions on sale and purchase of bus chassis and spare parts prior to the 31st December 1972 be excluded and be regarded as part of the Plaintiff's own income for all purposes."

Having regard to his Lordship's finding that the partnership commenced on 17th February 1971, his Lordship refused to make the declaration. It is submitted that the Court of Appeal was correct in deciding that the fact that the partnership commenced in November 1971 would have no effect on this declaration because such a finding could not affect the financial relationship between the parties (p.253).

194 "(iii) A Declaration that all secret and other profits made by him in the sale of vehicles sold by the said firm between the 9th day of December, 1971 and the 30th day of September, 1978 be debited against the Defendant."

His Lordship correctly found that there was no evidence of alleged "secret and other profits". The accountant called by the plaintiff could not point to any such profits.

195 "(iv) A Declaration that profit or earning out of the sale of Buses which were, imported by "K.R. LATCHAN BUS SERVICE" from Seddon Motors Limited between 1971 and 1974 be excluded from the accounts of "BRUNSWICK MOTORS"."

The learned trial judge correctly held that the plaintiff adduced no relevant evidence on this point and that the claim was otherwise without foundation or merit. By reason of that his Lordship refused to grant the declaration sought.

195-6 "(v) A Declaration that all monies charged by the Defendant as commission against "BRUNSWICK MOTORS" for any purpose or on the sale of buses to various purchasers between November, 1971 to 30th September, 1978 be disallowed."

His Lordship found that the plaintiff had never agreed to the defendant charging commission and disallowed the sum of $17,227.14 charged by the defendant in respect of commission. The Court of Appeal held that these items were correctly disallowed. No appeal is brought from that decision.

196 "(vi) A Declaration that interest charged by the Defendant against "BRUNSWICK MOTORS" be disallowed."

The plaintiff admitted in the pleadings that it was understood between the parties that the defendant would charge interest for moneys lent to purchase more than the two bus chassis imported prior to 9th December 1971. Interest had been charged by the defendant for many years to the plaintiff's mother and the plaintiff's businesses in which the plaintiff had an interest. The learned trial judge was satisfied that, "if it was not in fact specially agreed, it was clearly understood by the parties that all monies
258 advanced by the defendant would be interest bearing." As the Court of Appeal correctly observed, "there was evidence indicating that the

plaintiff had acknowledged the defendant's right to charge interest. Each of the annual accounts showed the payment of interest and these were seen and understood by the plaintiff. He must be taken to have approved of it." There was no evidence as to the rate of interest charged. The plaintiff failed to discharge the onus on him to show that the rate was in excess of 5% as provided by s.25(c) of the Partnership Act. In the circumstances the declaration was properly refused.

"(vii) A Declaration that accounting fees charged by the Defendant for preparing the accounts of "BRUNSWICK MOTORS", be disallowed." 197

This has already been dealt with under sub-paragraph (i) on pp.13-14 above.

"(viii) A Declaration that all travelling expenses charged against or collected from "BRUNSWICK MOTORS" by the Defendant during the years be disallowed." 197

The learned trial judge rejected this claim and the Court of Appeal affirmed his Lordship's decision. The travelling expenses were all recorded in the annual accounts and were not the subject of protest by the plaintiff. They were checked by the plaintiff's accountant, and the only variation suggested by him was in the allocation of expenses to particular years. Indeed the plaintiff's accountant arrived at a total figure which exceeded the amount claimed by the defendant. In any event, as his Lordship found, there was no evidence that any of the sums debited to travel appearing in the accounts were sums that were credited to the defendant or "to cover the defendant's travelling expenses."

"(ix) A Declaration that all moneys lent by the Defendant to "BRUNSWICK MOTORS" and debited by him with interest in the said Firm's account be disallowed." 198

This claim will be dealt with below, at pp. 22ff, in conjunction with paragraph (k) of the prayer for relief.

"(x) A Declaration that the times shown as 'garage and workshop' as being part of the assets of "BRUNSWICK MOTORS" in its Balance Sheet or Trading Account by the Defendant be excluded." 198-9

To comply with the terms of the dealer's franchise the plaintiff had to extend substantially the firm's business premises to house buses and spare parts. He obtained money from the defendant for the purpose. In 1973 and 1974 more additions were made to the buildings which were on the

plaintiff's or his family's land. These buildings were always treated in the partnership accounts as an asset of the partnership. The learned trial judge correctly observed that the effect of excluding these assets would be unjustly to enrich the plaintiff by half of the sum of $34,582 spent by the firm on improvements. If these assets were to be excluded then the amounts expended on improvements (and interest thereon) would have to be treated as advances by the defendant to the firm. This could prove more costly to the plaintiff than accounting for half the value. The learned trial judge correctly rejected the plaintiff's claim in this regard and the Court of Appeal affirmed this decision.

199 "(xi) A Declaration that a debit be allowed to be made against "BRUNSWICK MOTORS" in its account in the sum of $3600.00 per annum as rent owing to "K.R. LATCHAN BUS SERVICE" or to the Defendant personally for the use of the garage and Workshop situated at Wainibokasi, Nausori."

"(xii) A Declaration that a sum of $2400.00 per annum be allowed as a credit in favour of the Plaintiff for the use of his car for promoting the business of "BRUNSWICK MOTORS" during the relevant years."

"(xiii) A Declaration that a sum of $6000.00 per annum either as remuneration or allowance be allowed in favour of the Plaintiff in respect of services rendered by him to "BRUNSWICK MOTORS" in managing the day to day affairs of "BRUNSWICK MOTORS", supervising Bus building arranging sales of Buses and spare parts and general welfare and interest of the Partnership at the material times."

200 The learned trial judge found that there was no agreement that the partnership should pay these amounts. The Court of Appeal agreed that the plaintiff's claims for remuneration and expenses were not supported by any evidence. It is submitted that those claims were properly disallowed.

"(xiv) A Declaration that a debit of 10% on all spare parts and a debit of 20% on all chassis taken over by or sold to "BRUNSWICK MOTORS" in favour of the Plaintiff be allowed."

201 Again the learned trial judge found that there was no evidence of any agreement between the parties that a surcharge or a profit component should be added to the value of the stock when it

was transferred to the partnership. The stock was taken in at valuation and was so treated in the accounts. The learned trial judge correctly rejected the claim and his decision was affirmed by the Court of Appeal.

6. THE CLAIM FOR MISUSE OF THE FIRM'S FUNDS

In paragraph (h) of the prayer for relief the plaintiff made the following claim: 20.

"(h) For a Declaration that from 9th December, 1971 until 30th September, 1978 the Plaintiff or and on behalf of the said firm, has been depositing moneys with the Defendant and that the Defendant had at all material times banked the said moneys in his own Bank Account with the Bank of New Zealand, Suva, and that in his Ledger account the Defendant had at all material times showed the monies lying to the credit or debit of the said Firm that the Defendant had used the said monies for his personal use at a time when the Defendant's own account with his bank was overdrawn."

The evidence showed that the plaintiff acted in relation to the firm in the way a banker does. The firm's income was deposited with the plaintiff who banked it in his own account with the Bank of New Zealand at Suva. The money was "on call". The account fluctuated and was sometimes in credit and often in debit. The learned trial judge found that "the plaintiff from the end of October 1977 having decided he would dissolve the partnership, reduced the firm's October credit from $121,097.64 to a debit of $75,830.40 by the end of January 1978 - drawing on the defendant to the extent of $196,928.04 before the defendant probably appreciated that no further moneys were being paid to his account. 202

The parties' respective accountants examined the defendant's books of account. They agreed that a list of twelve receipts or payments recorded in the defendant's books formed part or came from a pool of moneys in the defendant's bank account but it was not possible to identify whose money was paid out of that account. His Lordship correctly held that there was no evidence of conversion or misuse of funds by the defendant. The Court of Appeal agreed (p.250). 201-2

Connected with the claim in paragraph (h) was the relief claimed in paragraph (i) which read as follows: 203

"(i) For an Order that the Defendant do pay to the Plaintiff such damages or compensation as may be just and equitable for the use of the

monies so received for and on behalf of the Plaintiff and the said firm."

203 The learned judge found that the defendant had committed himself and did provide funds to the firm as and when required. This was a valuable service to the firm and was fully utilised by the firm as the books showed. It was not just or equitable that the defendant be asked to pay interest to the firm of which he was a partner when the firm was in credit. In effect the defendant was the firm's banker and there was no agreement that the account be treated as an interest bearing account.

7. THE CLAIM FOR MISUSE OF CONFIDENTIAL INFORMATION

204-5 The learned trial judge found no evidence that there was any breach of confidence or misuse of information. The Court of Appeal thought that the claim was misconceived and without any merit. It is submitted that these conclusions are correct.

8. THE CLAIM FOR REPAYMENT OF MONEYS LENT BY THE DEFENDANT

205 In paragraph (k) of the prayer for relief the plaintiff sought the following relief:

"(k) For a Declaration that all monies lent to "BRUNSWICK MOTORS" and/or the Plaintiff by the Defendant together with any charged by him since the inception of "BRUNSWICK MOTORS" irrevocible (sic) at law."

The basis of this claim was that the defendant was a moneylender within the meaning of the Moneylenders Act and was unlicensed. Section 15 of the Act provided:

"15. No contract for the repayment of money lent after the commencement of this Act by an unlicensed moneylender shall be enforceable."

The learned trial judge found that the defendant was a moneylender who was not licensed. The plaintiff then claimed that as the defendant was never licensed as a moneylender any sums which had been lent by him to the firm should be held irrecoverable.

Upon the assumption that the advances made by the defendant to the firm were moneylending transactions the only amount which could be irrecoverable by virtue of s.15 was $69,677.63

which was the amount shown in the accounts as owing to the defendant as at 30th September 1978. The plaintiff was seeking a declaration that all moneys lent by the defendant be claimed irrecoverable which was too wide.

His Lordship applied the decision of the High Court of Australia in Kilgariff v. Morris (1955) 91 C.L.R. 524 where it was held that the corresponding section of the Moneylenders Act 1895 of Western Australia did not apply to the case of money contributed by a partner, who was a moneylender, to partnership funds for the purposes of the partnership by way of advances beyond the amount of capital he had agreed to subscribe. The authority of Kilgariff v. Morris was not challenged before the Court of Appeal. The decision has been applied in Australia in Hungier v. Grace (1972) 46 A.L.J.R. 492, 494 and Ex p. Coral Investment Pty. Ltd. [1979] Qd.R. 292. It is submitted that the decision is correct in principle and should be affirmed.

9. THE CLAIM FOR ACCOUNTANCY INVESTIGATION CHARGES

In paragraph (1) of his prayer for relief the plaintiff claimed: 208

"(1) For an Order that all costs incurred by the Plaintiff in examining, analysing the Defendant's books of account, records and papers relating to the accounts of "BRUNSWICK MOTORS" K.R. LATCHAN BUS SERVICE, K.R. LATCHAN BUSES LIMITED and in re-constructing the said accounts be passed by the Defendant."

The plaintiff claimed that he had to engage independent accountants to restructure the accounts. The learned trial judge rejected the claim. The accountants were not employed by the partners. They were engaged by the plaintiff and given instructions to restructure accounts clearly designed to limit the plaintiff's liability to account to the defendant. The Court of Appeal held further that the claim should fail for lack of proof of quantum. 209

10. THE DEFENDANT'S COUNTER-CLAIM

Having rejected the plaintiff's substantive claims, the learned trial judge then found and declared, on the defendant's counterclaim, that the partnership between the plaintiff and the defendant known as Brunswick Motors existed from 17th February 1971 to 30th September 1978 when it was dissolved. 210

The defendant also sought "a declaration that after the dissolution of the said partnership the Plaintiff wrongfully used the partnership's assets to derive profits therefrom without accounting therefor to the Defendant." The relief so sought by 210-11

the defendant was granted.

211 In making the declaration his Lordship said:-

> "I believe the plaintiff when he wrote to the defendant on the 2nd October 1978 intended that the partnership assets 'be properly distributed as mutually determined by (the parties) or as determined by a Court of Law.'
>
> If that letter is taken as evidence of his intention, he at that time acknowledged the existence of the partnership and was prepared to agree to distribution of the assets or have the Court decide the issue.
>
> Somewhere along the line his apparent honest intentions were discarded. I do not know the reasons for his change of heart but it cannot have escaped his notice, when he received the final partnership accounts, that he might have to find a sum of $225,005.25 to buy out the defendant and repay what the firm owed him if he intended to carry on the business himself without selling any of its assets. This would leave the firm with assets of $379,901.28 but with no working capital.
>
> Under section 39 of the Partnership Act the Plaintiff had authority after the dissolution to continue the business as far as was necessary for the purpose of winding up the business but not otherwise.
>
> It is clear from the 'Preliminary Draft' accounts prepared by Messrs. Peat Marwick & Mitchell that the plaintiff continued the business after dissolution. This was not done with the leave or approval of the defendant nor has the plaintiff accounted to the defendant for his use of the partnership assets.
>
> I grant the relief claimed and declare that after the dissolution of the partnership the plaintiff wrongfully used the partnership assets to derive profit therefrom without accounting therefor to the defendant."

Having so declared his Lordship acceded to the submission made on behalf of the defendant that the Court should determine the issues between the parties once and for all by passing the accounts and ordering the plaintiff to repay the defendant's capital with interest from the date of dissolution. His Lordship's decision to do so was, as the Court of Appeal observed, "the only course that can be followed."

In coming to the conclusion that he should settle the accounts, his Lordship took the following considerations into account:-

(a) "It is apparent that from the time the plaintiff decided to dissolve the partnership, which was some time prior to the 31st December 1977, when he ceased paying moneys into the defendant's Bank account, the firm started losing money. There was a significant drop in profits in 1977 from $92,533.16 in 1976 to $50,609.50. For the first nine months in 1978 up to the date of dissolution the firm suffered its only loss, and a substantial one at that, amounting to $21,514.11. 213

"It must also have been early in 1978 that the defendant complained about excessive write off of stocks. The final accounts show that stock to the value of $12,100.47 was written off. The plaintiff admitted he was well aware that the writing off of stock would reduce the profits of the partnership.

"The defendant in 1978 when no moneys were being paid to his account had to rely on the plaintiff for information required to prepare the accounts. The Plaintiff was sole operational manager of the firm at all times and he was in possession of the partnership assets. The opportunities to suppress or reduce figures is a possibility that cannot be overlooked given the plaintiff's patent dishonesty disclosed in this Court. It would also be a very difficult task for any person to now determine what profits the plaintiff actually made since he dissolved the partnership. He has refused to produce his books of account and I do not consider he could be relied on to make full or honest disclosures if I were to order that accounts be taken since the dissolution of the partnership."

(b) "The defendant's decision to claim interest on his capital instead of profits simplifies the task of the Court." 213

(c) There was no relief sought in the plaintiff's pleadings seeking the appointment of a referee to report on the accounts. (Indeed in his prayer for relief the plaintiff expressly sought that certain items be included or excluded from the accounts).

(d) At no time during the hearing did the plaintiff's counsel indicate that he was conducting the plaintiff's case on the basis that the accounts would be referred to a referee.

(e) A substantial amount of time and money had been spent by Messrs. Peat Marwick & Mitchell in preparing reconstructed accounts.

(f) The accounts had been checked and double checked by two firms of accountants. The plaintiff's accountants inspected and reported on the accounts and prepared reconstructed accounts.

(g) The defendant's accountant, whose evidence the learned judge accepted, testified that he and his staff had checked all accounts and he could vouch for the accuracy of the accounts kept by the defendants.

(h) There were ultimately seven points of difference between the two accountants. All these differences were considered and determined by the trial judge and did not require reference to a referee.

(i) It was not practicable to ascertain the market value of the assets of the partnership by sale thereof. The plaintiff did not wind up the business but continued using the assets of the partnership. Four years had elapsed since dissolution of the partnership and the quality of the assets would have deteriorated. There was no certainty that the proper values of the assets were disclosed in the accounts for the year ending 31st December 1981.

(j) It was fair in the circumstances to treat the book values of the assets as the market value thereof.

249-250 The Court of Appeal added the following grounds in support of the learned judge's decision:

(k) The plaintiff did not act promptly after dissolving the partnership to resolve any

Differences by reference to a Referee.

(l) Rather than seeking to achieve a final winding up within a brief period, the Plaintiff, after seven years of accepting the existence of the partnership, sought declarations that no valid partnership ever existed. There inevitably followed long delays which were the Plaintiff's making.

(m) The trial judge had to make an order which was capable, four years after the event, of having some sort of practical application.

(n) In the present case reference to a referee would have achieved nothing.

(o) The learned judge was presented with a set of accounts upon which an experienced accountant

for each side agreed, with the exception to seven points of difference. Those exceptions were of a legal and not of an accounting nature and were capable of resolution by the Judge. Any reference to a referee would have been superfluous.

The learned trial judge was entitled to and justified in settling the accounts. He settled them on the basis of the restructed accounts but allowing for the findings he made upon the matters of difference. This was an entirely proper course and the Court of Appeal agreed.

For the foregoing reasons the Respondent submits that the judgment of the Court of Appeal of Fiji should be upheld and the Appeal herein be dismissed.

ALEX CHERNOV

JOHN KARKAR

IN THE PRIVY COUNCIL No.26 of 1983

ON APPEAL

FROM THE FIJI COURT OF APPEAL

BETWEEN:

KHURBUR RAM LATCHAN
(Plaintiff) Appellant

- AND -

LESLIE REDVERS MARTIN
(Defendant) Respondent

CASE FOR THE RESPONDENT

MACFARLANES
10 Norwich Street,
London EC4A 1BD

Solicitors for the Respondent