

Ganga Ram s/o Ram Sarup and others - - - *Appellants*

v.

Grahame & Co. (a firm) - - - - *Respondents*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 18TH JULY 1978

Present at the Hearing :

VISCOUNT DILHORNE
LORD KEITH OF KINKEL
SIR ROBIN COOKE

[Delivered by LORD KEITH OF KINKEL]

This is an appeal from part of a judgment and order of the Fiji Court of Appeal dated 26th November 1975.

The circumstances under which the appeal comes before this Board are as follows. In 1967 each of the appellants purchased certain land from one Ram Mahesh, under agreements providing for the purchase price to be paid by instalments. The respondents, a firm of solicitors and barristers, acted for both parties to the transactions. In 1969, after each of the appellants had paid certain instalments of the purchase price but before any of them had obtained title to the land respectively purchased, Ram Mahesh, without notice to the appellants, sold all the land to two other persons, who duly obtained title thereto. In August 1970 each of the appellants brought an action in the Supreme Court of Fiji against Ram Mahesh, as first defendant, the two purchasers of the land as second defendants, and the present respondents as third defendants. It was claimed against the first and second defendants that the transfer of the land to the latter should be set aside on the ground of breach of contract and fraud, or alternatively that damages were payable. Damages on the ground of negligence were claimed against the respondents. While the actions were pending Ram Mahesh died apparently without assets, and the Public Trustee of Fiji was substituted for him as first defendant. The actions were consolidated and tried before Stuart J., who gave judgment on 12th May 1975. He held that the appellants were all entitled to damages against the first defendant on the basis of breach of contract, but not fraud, and that their claim against the second defendants failed. He assessed the damages payable at sums ranging between \$1,319 and \$1,143. As regards the respondents, he held that they were in breach of their contractual duty of care to the appellants in that they failed to advise the appellants to lodge a caveat against Ram Mahesh's title to

protect their agreements for purchase of the land, but that this failure was not a cause of the appellants' failure to lodge a caveat. He therefore awarded each of the appellants only \$10 nominal damages against the respondents.

The Fiji Court of Appeal (Spring J.A. and Gould V.P.) by their judgment dated 26th November 1975 held that the learned trial judge was wrong in finding that the appellants were entitled only to nominal damages against the respondents, because counsel for the latter had admitted at the trial that they were negligent in failing themselves to lodge a caveat. Having reached this conclusion, Spring J.A. in his judgment proceeded to consider the assessment of the substantial damages which in his view were payable by the respondents to the appellants. He recorded a submission for the respondents

“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.”

He also said

“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 judgment was given against the Public Trustee of Fiji in favour of the appellants”.

He then proceeded, in his assessment of damages, to deduct that amount from the substantial damages which would otherwise be payable by the respondents. Gould V.P., having dealt with the merits, said

“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”.

The only issue in this appeal relates to the deductions so made from the damages payable by the respondents to the appellants. It is maintained for the appellants that the making of the deductions was wrong in law, that the admission or concession attributed by Spring J.A. to their counsel was never made, and that in any event it ought to be allowed to be withdrawn. For the respondents it is not contended that the deductions were sound in law. They say that if the concession was not made in the terms described by Spring J.A. the proper course for the appellants was to bring the matter to the attention of the Court of Appeal immediately after the judgment had been delivered, and seek to have the judgment rectified. As it was, the appellants proceeded to have the judgment sealed on 8th December 1975, and obtained leave to appeal to Her Majesty in Council on 10th December. There was then a long delay, and it was not until May 1977 that the respondents' legal advisers learnt that the appellants denied the making of the concession. They say that at that stage their counsel at the trial could not remember whether or not the concession had been made. They maintain that Spring J.A.'s description of the concession should be accepted, and that it should not be allowed to be withdrawn now.

If the concession was in fact made, it was a very remarkable one, being plainly wrong in law. It would have been proper to concede that any damages recovered from the estate of Ram Mahesh fell to be deducted from those payable by the respondents, though it was apparently known to the appellants' legal advisers before the hearing in the Court of Appeal that Ram Mahesh had died without assets, so that nothing could be recovered from his estate. Considering that Gould V.P. does not in his judgment allude to any concession such as is described by Spring J.A., while evidently inferring that the judgments against the Public Trustee were collectable, it is possible that the latter may have misunderstood what was said by counsel for the appellants. If that was the situation, it is very unfortunate that no steps were taken by the appellants' legal advisers to correct the misunderstanding immediately after the judgment.

It is not possible for this Board in the exercise of its appellate function to reach any conclusion upon the question whether as matter of fact a concession was made in the terms described by Spring J.A. Both parties sought to introduce into the proceedings before the Board affidavit evidence bearing upon that fact, but both applications to that effect had necessarily to be refused.

In the circumstances the disposal of the appeal must turn on the question whether, assuming the concession to have been made in the terms described, the appellants are bound by it, or whether they may be allowed now to resile from it. The material part of the decision of the Court of Appeal was based upon an error of law, proceeding upon a submission by the respondents, and, unless the concession stands as a bar, that part of the decision is properly to be reversed. The governing principle is that an admission or concession made by counsel for a party to a litigation may be withdrawn at a later stage, unless the other party has acted on it to his prejudice, so as to give rise to an estoppel: *H. Clark (Doncaster) Ltd. v. Wilkinson* [1965] 1 Ch. 694. The essential object is to enable justice to be done between the parties. The matter is one for the exercise of the discretion of the Court. There is no question here of the respondents having acted to their prejudice in reliance on the concession. Their Lordships are of opinion that in the circumstances of this case it would be a proper exercise of discretion to allow the concession to be withdrawn. It follows that the appeal will be allowed, and that the order of the Court of Appeal will be reversed in so far as it requires the deduction from the damages payable by the respondents to each of the appellants of the amount of the judgment given by Stuart J. in favour of each of the appellants against the Public Trustee of Fiji. Their Lordships will humbly advise Her Majesty accordingly.

As regards costs, their Lordships take the view that no adequate explanation has been offered as to why the appellants took no steps to have the judgment of the Court of Appeal corrected immediately after it had been delivered. If such steps had been taken it is reasonable in the circumstances to suppose that the costs of the appeal to this Board would have been saved. At the same time it has to be kept in view that the respondents have insisted in maintaining the judgment of the Court of Appeal. For these reasons no costs of this appeal will be due to or by either party.

In the Privy Council

**GANGA RAM s/o RAM SARPUR
AND OTHERS**

v.

GRAHAMME & CO. (A FIRM)

DELIVERED BY
LORD KEITH OF KINKEL