

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

Appellant

- and -

LESLIE REDVERS MARTIN

Respondent

C A S E F O R T H E A P P E L L A N T

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|    |  | <u>Record</u>        |
| 10 | <p>1. This is an Appeal against the Judgment and Order of the Fiji Court of Appeal (Gould J.A., Speight J.A. and Quilliam J.A.) dated 23rd March 1983, whereby the Court dismissed the Appellant's appeal (save for minor variations) against the Judgment and Order of Kermode J., dated 13th October, 1982, and allowed (in part) the Respondent's cross appeal. The Appeal arises out of the Appellant's action claiming relief in relation to the affairs of a partnership operated in the name of "Brunswick Motors".</p> | p. 235<br><br>p. 170 |
| 20 | <p>2. The Appeal raises the following principal issues:</p>  |                      |
|    | <p>(1) whether the partnership between the Appellant and the Respondent in the firm known as Brunswick Motors should be set aside by order of the Court;</p>   |                      |
|    | <p>(2) whether the Court has any power after dissolution and without agreement between the partners to order one partner to purchase another partner's share in the partnership;</p>   |                      |
| 30 | <p>(3) whether the Appellant was entitled as a matter of right to have the partnership property applied in accordance with <u>S.40 of the Partnership Act (CAP. 218)</u>;</p>  |                      |
|    | <p>(4) whether the Appellant was entitled to the appointment of a referee and or to an order that the accounts of the partnership be taken.</p>  |                      |

3. THE FACTS

- (1) The facts and circumstances giving rise to the partnership were highly unusual, and the manner in which the Respondent handled the money and accounts of the partnership were likewise highly unusual but were also highly irregular.

The Respondent is now aged approximately 82 years, and the Appellant is aged 43 years. The Appellant's father was, until his death in about 1950, a dairy farmer, and for many years the Respondent had been closely connected with the business. The Respondent, although not qualified, practised as an accountant and kept the books for a dairy (Rewa Dairy Company) to which dairy the Appellant's father sold his milk and cream. By reason of his position the Respondent was able to assist the Appellant's father to obtain speedy payment from the Rewa Dairy.

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In addition the Respondent advised on the dairy farming and helped with the purchase of produce and supplies from the Rewa Dairy. He became a very close adviser of the Appellant's father, so close that the father handed over all the receipts from the dairy farming business to the Respondent who then acted as the family's banker. All the money was paid into the Respondent's own personal account and he made payments out for the family as they requested.

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- (2) In 1950, when the Appellant was aged 9 years, his father died and his mother, on the instructions of her husband returned to the Respondent for business advice. She, Ram Kuar, continued the dairy farming business and like her husband paid all receipts from the business into the hands of the Respondent, who paid them into his personal bank account and continued to act as banker, accountant, financial adviser and business confidant of the family.

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- (3) By 1960 the Appellant and his brother were old enough to assist their mother, who by then had started to operate buses. The Respondent had similarly received all the receipts from the bus operations, and from about 1962 the business operated under the name "K.R. Latchan Bus Service". At all times all receipts from the family's business were paid over to the Respondent and were

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handled by him as before. The closeness and dependent nature of this relationship was described by the Respondent in a letter dated 25th January, 1971 as follows:

"The writer .... had met his father in business some 25 years ago, and when he died I found that I had inherited his family".

p.316

10 According to the Appellant he called the Respondent "father".

(4) It appears that at no time did the Respondent furnish the family with detailed, regular statements of account or records or supply any information as to how he was managing the affairs of the family. There is no reason to believe that at any time the family knew to what extent they had a credit or debit balance with the Respondent. Again it is plain that the system of book-keeping and accounts kept by the Respondent was primitive and any explanation as to what had happened to funds, mixed as they were with funds from other sources, would be very difficult, if not impossible to verify. The Respondent simply produced annually a Statement of Account in the form of a Profit and Loss Account and Balance Sheet.

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50 (5) In 1970/1 the Appellant decided to import bus chassis from Seddon Motors Ltd. in England. In 1971 he imported 2 chassis and on 9th December 1971 caused the registration of the name "Brunswick Motors" to be effected for this purpose. The Respondent was aware of this venture from the outset. Since all the finances of the family including the Appellant's were essentially within his control the importation of chassis was in the broadest sense "financed" by the Respondent, but there is no evidence to establish that the Respondent's own funds as opposed to family funds were used to finance the importation (or indeed any other so called "financing" by the Respondent). It is plain that the Appellant believed the financing to be done by the Respondent but it is equally plain that he had no idea as to how it was done. The sale of chassis and completed buses in the 13 months from November 1971 - 31 December 1972 produced a net profit of \$18,799.29.

(6) According to the Respondent's own evidence, by the end of 1972 he knew the Appellant was

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making a success of the business importing chassis. He knew the Appellant could sell buses at competitive prices. The Respondent was keen to become a partner. He asked several times. The Appellant was apparently reluctant to agree. Then on about 28th December 1972 he informed the Appellant that he owed him a lot of money. At that time only the Respondent was in a position to know whether that was true or false. Again only the Respondent could know the extent of the liability. Further it is not plain whether the Respondent was referring simply to the affairs of Brunswick Motors or generally to the family affairs. The Respondent also stated that the Appellant and his family could end in bankruptcy. Again only the Respondent could know the truth or otherwise of that statement, and or know the weight which should be attached to the opinion being expressed. The Appellant's account of this conversation was to the effect that the Respondent said he would withdraw financial support unless he was made a partner. As a result of this exchange the Respondent became a partner in Brunswick Motors.

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4. THE TRIAL

The salient features of the trial relevant to the issues on the appeal are:

- (1) both parties prayed for the partnership to be dissolved in accordance with the provisions of the Partnership Act;
- (2) both parties prayed for accounts to be taken;
- (3) neither side conducted the case upon the basis that the Reconstructed Accounts were accurate as settled accounts. Neither side presented evidence with a view to the Court settling the accounts of the partnership;
- (4) the Counterclaim was amended on the penultimate day of the trial and the day before the final submissions. It was by such amendment that the Respondent requested the Court to pass the accounts and to order the Appellant to buy out the Respondent. At no stage of the evidence had the Court being informed that the value of the assets in the accounts could be treated as a fair valuation.
- (5) It had become common ground in the course of the trial:

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- (i) that the Respondent's book-keeping methods and accounting were unreliable and grossly inadequate;
  - (ii) that the Respondent (without the knowledge or consent of the Appellant and his family) had acted as a money lender, lending money at interest to third parties from the same pool of funds into which the very substantial sums of money from the Appellant and his family were paid;
  - (iii) that there was simply no way in which it could be determined on the material before the Court whether the Respondent had employed his own funds or the partnership funds or the family funds when fulfilling his so called "financing" of the partnership. It was not disputed that "perusal of the cash book showed that in most months bulk of the cash was contributed by K.R. Latchan group of companies".

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  - (iv) that the Respondent had exploited his position as partner by
    - (a) taking interest for himself on Bills of Sale held from purchasers of the partnership buses and acquiring purchasers as "banking clients";
    - (b) charging interest when the partnership account was in debit, but in allowing no interest when in credit;
    - (c) charging as a debit "commission for financing and sale of buses";
    - (d) charging as a debit accountancy fees.
5. The learned Trial Judge, to whose lengthy judgment the Appellant will refer in detail, held:
- (a) that in December 1972 there was no special relationship between the Appellant and the Respondent;

p.186 1.17
  - (b) that if there was, the presumption of undue influence had been rebutted by the Respondent.

p.190 1.27  
p.291 1.43

Further that notwithstanding the terms of S.40 of

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p.213	the Partnership Act he would not make an order for sale and consequential orders but order the Appellant to buy out the Respondent at a valuation which he (the Judge) carried out (apparently without any assistance from Counsel or from appropriate evidence). He concluded (without evidence) "that	
p.219 1.12	the gross value of the assets shown in the accounts is the fair realisable market value of those assets". He declined to order any account, any inquiries and declined to give the Appellant any relief save in respect of the charges for accountancy fees and commission.	10
p.247 1.25	6. The Court of Appeal agreed with the learned Trial Judge that there was no special relationship and that if there was the Respondent had rebutted the presumption of undue influence. They also concluded that the settlement of accounts would have been superfluous.	
	As to the request for an order for sale, the Court acknowledged that such was the usual order, but nevertheless, upon the basis of a passage in Lindley on Partnership, 14th Ed. at page 499, concluded there was sufficient flexibility in the court's jurisdiction to decline to make the order. Further the Court ruled on specific ancillary matters, and on the cross appeal, in effect affirming the learned Judge's findings but allowing the Respondent's cross appeal in relation to his entitlement to accountancy fees and costs.	20
p.155 1.18	7. The Appellant respectfully submits as follows. The Respondent was undeniably in a position of a special relationship to the Appellant (and for that matter to his family). The critical aspect of that relationship which both the Trial Judge and the Court of Appeal ignored was that the Respondent was the only person who possessed all the information upon which a proper judgment and opinion could be formed as to the Appellant's financial standing. By his defence the Respondent expressly pleaded that "the Plaintiff did not appreciate fully his financial position".	30 40
	"It is clear law that, in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows; and that unless such information has been furnished, the sale is voidable and may be set aside." <u>(Law v Law, 1905 1. Ch. at p.157.)</u>	50

This concept is no more than an aspect of an obligation to perfect fairness and good faith, and such obligation extends to a partnership not yet existing. (Hichens v Congreve, 1 R & M 150). It is manifest that an opinion expressed by the Respondent as to the financial position and prospects of the Appellant was bound to carry immense weight with the Appellant, it was pronounced from a position of authority, by a close personal adviser and confidant and it was quite wrong for the Respondent to exploit his position to achieve a personal benefit in something he had concluded was profitable by telling the Appellant, not that it was profitable, but so risky he ran the danger of bankruptcy.

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8. It is submitted that unless the partnership agreement otherwise provides the Court has no power but to order a sale and the application of partnership property in accordance with S.40 Partnership Act. Further and alternatively, in view of the inadequacies of the Respondent's accounting and the irregularity of his conduct in the course of the partnership, justice and fairness could not possibly be done upon the basis of the limited enquiry into the accounts carried out at the trial. According to the annual accounts drawn up by the Respondent the partnership capital was ploughed back into the partnership. In fact no profits from the partnership had ever been paid to the Appellant. By the terms of the learned Trial Judge's order the Appellant is required to pay the Respondent \$144,812.96 capital. If such truly represented capital the Respondent has at all times held it for his own benefit, and if he does not hold it, then along with the Appellant's share of capital a full account of the profits ploughed back should have been ordered. Again the Trial Judge's Order forces the Appellant to make payment for book debts at full value, and necessarily assumes the validity of accounting figures and values which have never been subject to proper enquiry.

9. As to the various ancillary matters it is respectfully submitted as follows.

Use of Assets after Dissolution

No proper enquiry was carried out into this allegation and it should have been allowed to go over for proper enquiry. It is respectfully submitted the learned Trial Judge had no justification for treating this part of the case as an "acknowledgement by the Appellant that the assets were worth at least the book value".

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The Respondent's Money Lending

The Court should have held that the use of the Appellant's funds for his own purposes was an abuse of his position of partner. Alternatively at the very least it should have ordered a full enquiry into the operation of the Respondent's bank account. At no time had the Respondent's bank statements been made available to the Appellant or his advisers for full enquiry and investigation.

Interest charged to the Defendant

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No proper enquiry was conducted into this conduct and it was plainly a matter for further inquiry. Conversely the Respondent's failure to pay interest on the account of the partnership when in credit was a matter for full inquiry.

Buses Imported in the name of K.R. Latchan Bus Service

The affidavit evidence of the Appellant was plain as to this aspect of the business. No material was placed before the Court to contradict it. If it was in issue again it was a matter for full and proper enquiry.

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Use of Confidential Information

It is submitted that there was sufficient material before the Court to give rise to the need for a general inquiry as to how the Respondent had profited from the business affairs and connections of the partnership.

As to the matters numbered 9, 10, 11, 12 and 13 in the judgment of the Court of Appeal, it is submitted each confirm the necessity for full and proper enquiries being ordered by the Court.

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Accountancy Fees

It is submitted the Court of Appeal were wrong to conclude there was sufficient evidence of the Appellant's agreement to such being charged.

Costs

It is respectfully submitted there were no grounds for interfering with the learned Trial Judge's discretion.

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10. It is respectfully submitted that this appeal should be allowed with costs (here and below) and that the Order of the Court of Appeal should be set aside for the following (among other)

R E A S O N S

1. BECAUSE the partnership agreement between the Appellant and the Respondent should be set aside.
2. BECAUSE the sale of partnership property should have been ordered by the Court.
3. BECAUSE an Order should have been made for the taking of partnership accounts.
- 10 4. BECAUSE an Order should have been made appointing a referee or otherwise for all necessary enquiries to be carried out into the affairs of the partnership.
5. BECAUSE the Judgment of Kermode J. and that of the Court of Appeal are wrong.

GEORGE NEWMAN

G.P. SHANKAR.

No. 26 of 1983

IN THE PRIVY COUNCIL

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CASE FOR THE APPELLANT

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Philip Conway Thomas & Co.,  
61 Catherine Place,  
London SW1E 6HB.

Solicitors for the Appellant