

PRIVY COUNCIL

George Frier Grahame

Vs.

Attorney-General, Fiji

Privy Council Appeal No. 87 of 1935

(Lord Chancellor (Viscount Hailsham) CJ.Lord Russell Of Killowen, Sir Lancelot Sanderson, J. Sir George Lowndes and Sir Sidney Rowlatt JJ.)

28.05.1936

JUDGMENT

SIR LANCELOT SANDERSON J.

1. This is an appeal by special leave from an order of the Supreme Court of Fiji, made on 27th November 1934, by the Chief Justice of the said Court, whereby it was ordered that the appellant, George Frier Grahame should be suspended from practice as a barrister and solicitor of the said Court until 1st July 1936, such suspension to take effect from 8th December 1934, and that the appellant should pay the costs of the application and the costs of the Public Trustee incidental thereto. Prior to the date of the said order the appellant had practised as a barrister and solicitor in Fiji for seventeen years, and according to the judgment of the Chief Justice he had been held in respect by his fellow citizens and he had occupied the highest place among them. On 31st October 1934, an application was made by the Attorney-General at the relation of the trustees of the estate of the late Harry Granville Nicholas Carr (hereinafter called the Carr trustees) and of the Public Trustee (as Custodian Trustee of the estate of the late J. H. F. Vollmer, hereinafter called the Vollmer estate) that the appellant should be struck off the rolls of the said Court or that he should be suspended from practice as a barrister and solicitor or that such other order might be made as the Court should think right.

2. The ground of the application was that the appellant was alleged to have been guilty of professional misconduct in his capacity as a solicitor in relation to the matters stated in the affidavits which accompanied the application. The case against the appellant may be divided into two parts. The first part relates to the estate of the late H. G. N.

Carr and the material facts are as follows: The Carr trustees are Mrs. Esther Rebecca Carr and Frederick Charles Clapcott: probate of the will of the late H. G. N. Carr was granted to them in December 1917. Mrs. Carr, the widow of the late H. G. N. Carr at the material times was living in England and she had given a power of attorney to Samuel Howard Ellis, who acted as solicitor to the said trustees. *F. C. Clapcott* was living at Ba in the said colony. On 25th August 1923, the Carr trustees granted a lease of certain land situated in the island of Vitilevu, known as "Vunivisi," of an area of about 446 acres to one John Linn Hunt for the term of ten years computed from 1st May 1923 at a yearly rent of ?200. It was provided in the said lease that the lessee, should during the currency of the said lease have the option of purchasing all the right, title and interest, of the lessors in the freehold lands thereby demised for the sum of ?4,000: At the date of the said lease and for some time before that date the appellant acted as solicitor for Hunt.

3. On 1st January 1926, Ellis and the appellant became partners, the firm's name being Ellis and Grahame. Generally speaking after the formation of the partnership when both partners were in the colony, Ellis attended to the business of the Carr trustees and the appellant acted for Hunt, but when either member of the firm was absent from the colony, the remaining partner attended to the affairs of all the firm's clients. The "Vunivisi" estate improved considerably in value during the term of the lease. In the autumn of 1932, Hunt consulted the appellant as to the above- mentioned option, which he desired to exercise. Hunt was not able to provide the necessary funds, and he suggested to the appellant that he should find the money required. An arrangement, to which further reference will be necessary, was made between Hunt and the appellant, with the result that on 2nd November 1932, Hunt exercised his option by giving notice in writing to Ellis, which was received by Ellis on 3rd November 1932. On that day Hunt saw Ellis and it was agreed, subject to Mr. Clapcott's approval, that the sum of ?1,350 should be paid in cash and that the balance of the purchase money, viz. ?2,650, should be secured by a mortgage on the property, with interest at the rate of 6 per cent. On 4th November 1932, Ellis left the colony and went to Sydney: he returned on 23rd December 1932. On 8th November 1932, Mr. Clapcott, having been informed by Ellis of the proposed arrangement, wrote to the firm of Ellis and Grahame approving the arrangement except that he thought the interest should be 6? per cent. instead of 6 per cent. On 8th November, the arrangement which had been made between Hunt and the appellant was put into writing, and signed by Hunt and the appellant. The terms thereof are as follows:

I, John Linn Hunt, of Davuilevu, Rewa, planter, hereby acknowledge that I have this day agreed to sell to G. F. Grahame of Suva, Solicitor, all those pieces of freehold land containing an area of 446 acres and 33 perches situated in the district of Toga island of Vitilevu as follows:

Certificate

Area of Title

Name ac r. perches Vol. Folio

Vunivisi 86 0 0 xi/05 241

" 260 0 33 42 4,140

" (part of) 100 0 0 47 4,604

for the sum of ? 4,000, four thousand pounds, payable as follows:

?1,350 to be paid on the day on which the transfer of the said lands to me by the executors of H. G. N. Carr, deceased, is signed ;

?2,650 to be paid on the date on which it becomes payable by me to the executors of the estate of H. G. N. Carr, deceased, in terms of the mortgage for that amount which I am giving to the said executors, with interest at the rate payable by me to the said executors, on the said ?2,650 payable on the date provided for in the said mortgage and on the following terms and conditions :

(1) The said G. F. Grahame shall employ me as his agent to subdivide and sell the said lands in blocks, areas and prices to be subject to his approval, at a remuneration being a commission of ?10 per cent. on the purchase price of the blocks sold up to ?7,000 and half the amount of the purchase prices in excess of ?7,000.

(2) The said commission shall be payable to me on the amount of, and as the principal moneys are received from purchasers by the said G. F. Grahame, that is to say the instalments of commission shall be computed on the instalments of purchase money received by the said G. F. Grahame and shall be payable to me when such instalments are received by him.

(3) Purchase terms shall be one-fifth deposit; four-fifths by four equal annual instalments on the anniversary of the date of sale agreement; interest to be paid on balance due at 10 per cent. per annum, annually. Purchaser to pay costs of (a) agreement for sale; (b) survey; (c) all transfer and other legal fees. Balance of purchase money to be secured by lien over crops of sugarcane and rice on the land.

(4) The said G. F. Grahame shall be entitled on payment of the full amount due to me at any time to require from me a registerable transfer of the said lands

free from mortgages or encumbrances to him or to such person or persons as he shall direct, in whole or parts.

Dated this 8th November 1932.

J.L. HUNT.

I have agreed to purchase the above described lands for the price and on the terms and conditions above set out.

Dated this 8th November 1932.

G. F. GRAHAME.

It is an undisputed fact that the appellant informed Ellis before he left for Sydney that he, the appellant, was going to finance Hunt to the extent of the amount which was to be paid in cash, viz., ?1,350. The appellant alleged that he had told Ellis that he would make an advance to Hunt to the extent of ?4,000 if necessary. This was denied by Ellis. The Chief Justice held that whatever may have been said by the appellant to Ellis, the appellant did not disclose to Ellis the extent to which he was interested in the transaction as shown by the terms of the above- mentioned agreement. Their Lordships on the evidence see no reason to differ from that finding. As already stated Ellis returned to the colony on 23rd December 1932. On 31st December of that year the appellant left Fiji and did not return until 7th April 1933. In the meantime, viz. on 15th March 1933, the Vunivisi property, the subject of the lease, was conveyed to Hunt by the Carr trustees. The sum of ?1,350 was paid by a cheque drawn by the appellant on his own account. It appears that before he went away from the colony on 31st December 1932, the appellant placed in his private safe the cheque for ?1,350 which was to be paid to the Carr trustees in the event of the transaction being completed in his absence.

In the same safe he placed the document containing the above- mentioned agreement of 8th November 1932, and a mortgage on the lease given by Hunt to the appellant to secure certain other advances made by the appellant to Hunt, which had been fully discharged before the agreement of 8th November 1932 was signed. The key of this safe was given to the managing clerk of the firm of Ellis and Grahame. On the same day, viz. 15th March 1933, Hunt executed the mortgage on the Vunivisi estate in favour of the Carr trustees for the sum of ?2,650. Under the terms of the mortgage the payment of the said sum was due on 15th March 1936, and the rate of interest was 6? per centum per annum payable in quarterly rests. It was provided by Clause 12 that the mortgagor should be entitled on any of the days therein before appointed for payment of

interest to pay off the whole of the principal sum or any part thereof not being less than ?200 upon giving to the mortgagees three months prior notice in writing of his intention so to do and the amount intended to be paid off. On 30th April 1933, the partnership between Ellis and the appellant was dissolved. It appears from a letter dated 12th August 1933, from the appellant to Ellis that the amount due on the mortgage was at that time reduced to the extent of ?650 and that the Carr trustees discharged the mortgage in respect of seventy-six acres of the Vunivisi estate. The amount remaining due on the mortgage therefore was ?2,000. The second part of the case against the appellant relates to the Vollmer estate. It appears that on 22nd December 1931 the Public Trustee of Fiji was appointed by the Court as custodian Trustee of the estate of J. H. F. Vollmer, deceased, and the appellant was appointed managing trustee of the said estate. On 6th September 1933, the appellant sent a letter in the following terms to Ellis :

Dear Sir,

J. L. Hunt to Carr Estate.

I am instructed by Mr. J. L. Hunt that it is his intention to pay off the whole of the principal sum, viz., ?2,000, secured by his mortgage No. 3943, on 15th December 1933, on which date the amount will be paid and a transfer of the mortgage submitted for execution by the executors.

Yours faithfully,

(Sd.) G. F. GRAHAME.

4. On 15th December 1933, the appellant drew his own cheque for ?2,036 14s. 0d., paid it into what he called his "trust account" and on the same day he drew a cheque on the said trust account for the said amount and paid it to Ellis. On 18th December 1933, the mortgage was transferred to the appellant as managing trustee for the Vollmer estate. On 8th January 1934, an agreement in writing was made between Hunt and the appellant, as managing trustee of the Vollmer estate, whereby the terms of the mortgage were varied in the following respect:

(1) The rate of interest shall be ?5 10s. : (five pounds ten shillings) per centum per annum in lieu of the ?6 10s. per centum per annum provided in the second covenant of the mortgage.

(2) 'The mortgagor shall have the right to pay off at any time without giving any prior notice to the mortgagee of his intention so to do the whole of the principal sum or any part thereof not being less than ?100' shall be substituted for the twelfth clause of the mortgage.

5. The transfer of the mortgage to the appellant was registered on 9th January 1934, and the agreement as to the variations of the mortgage was registered on 12th February 1934. It is admitted that the appellant used the funds of the Vollmer estate to repay himself the amount which he had advanced on 15th December 1933, for the purpose of obtaining the transfer of the mortgage, and that when he gave the notice on 6th September 1933, he intended to use the Vollmer trust funds to provide the necessary sums to make the payment. It is also admitted that the appellant did not at any time disclose to the Public Trustee his interest in the transaction. It is not necessary to state the details of this matter; it is sufficient to say that some of the money used by the appellant to repay himself was lying to the credit of the Vollmer estate's current account with the Bank of New Zealand, and another sum was withdrawn by the appellant from the Government Savings Bank as managing trustee of the Vollmer estate. On 29th September 1934 Ellis having obtained certain information had an interview with the appellant and on behalf of the Carr trustees he demanded from Hunt and the appellant all moneys received in excess of ?4,000 and a transfer to his clients of the Vunivisi estate. The appellant, after the above mentioned interview, communicated his position by cable to Sydney for counsel's opinion and he was advised by cable on 4th October 1934 to settle. The result of that advice was that on the same day the appellant and Hunt gave to the Carr trustees the following undertakings :

6. In consideration of your refraining for a period of 14 days from this date from issuing a writ against me in respect of the property known as Koronivia or Vunivisi I agree and undertake forthwith:

- (1) To procure the transfer by J. L. Hunt to you of the balance of the lands in Certificate of Titles 42/4140, 47/4604, XI/05/241 now still registered in his name.
- (2) To procure the transfer by J. L. Hunt to you of all agreements for sale and purchase or other contracts in respect of sales or portions of the lands in the said title.
- (3) To procure the transfer by J. L. Hunt to you of all easements and other documents in his name or held by him or by me in respect of the whole or any portion of the lands comprised in the said lands.
- (4) To give you a full account of all money received by me or by J. L. Hunt in respect of (1) sales of any portions of the said lands and (2) interest on balance of purchase money and (3) rents.

(5) To pay to you the whole of the money mentioned in para. 4 upon you repaying to me ?4,000, the purchase money paid for the transfer of the said titles 4140, 4604, XI/05/241 to J. L. Hunt and ?45, money expended on making drains on the said lands, and ?290 25. 9d. interest on the said sum of ?4,000.

(6) To deliver to you all survey plans and copies thereof in the possession of J. L. Hunt or myself in respect of the said lands or any portion thereof.

(7) To give you a complete account of all moneys paid for surveys in respect of the said lands and received by J. L. Hunt or myself from purchasers, and to pay to you the excess (if any) of amounts received over amounts paid -you to pay to me the amount (if any) of survey fees expended over and above the amount received from purchasers.

(8) To pay all stamp duty, registration fees and other outgoings in respect of the transfers mentioned in paras. 1, 2 and 3.

(9) To hand to you all documents relating to subdivisions of the said lands and to sales to purchasers.

(10) Now and whenever hereafter required by you to allow you access to and give you copies of any documents, correspondence or information in the possession of myself on behalf of myself or J. L Hunt relating to the said lands and sales to purchasers or intending purchasers.

(11) To pay you 150 guineas for your solicitor's costs in this matter.

It is understood that upon performances by me of the above agreements and undertaking you will waive and abandon all other or further claims (if any) by you against me in respect of the said transfer of the said lands by you to J. L. Hunt.

(Sd.) G. F. GRAHAME.

In consideration of your refraining for a period of fourteen days from issuing a writ against me in respect of the property known as 'Vunivisi' I agree for my part to execute the transfers referred to in paras 1, 2 and 3 above, and to carry out the undertakings in which I am concerned in paras 1 to 4, 6, 7, 9, 10.

(Sd.) J. L. HUNT.

7. The above- mentioned undertakings have been carried out. It appears that on 23rd October 1934 the Public Trustee obtained an order from the Court permitting him to engage the services of a solicitor and counsel to represent the Public Trustee and to investigate the trust funds in the hands of the appellant as managing trustee of the Vollmer estate and to take such proceedings as may be necessary. In pursuance of that order Mr. Robert Crompton was employed by the Public Trustee. Mr. Crompton,

having inspected the books of the estate and made such searches as he deemed necessary, made a report on 25th October 1934. This report was made an exhibit to an affidavit sworn by the Public Trustee, and was used at the hearing, although Mr. Crompton was not called as a witness and the appellant had no opportunity of cross-examining Mr. Crompton. Indeed Mr. Crompton appeared as advocate for the Public Trustee and cross-examined the appellant. This is not a procedure which commends itself to their Lordships, but they say no more about it, for in their opinion the relevant facts of this part of the case are sufficiently proved without reference to Mr. Crompton's report. It appears that on 8th November 1934, the appellant instituted an action against the Carr trustees to set aside the settlement contained in the document hereinbefore referred to, and an application was made to the Court to postpone the proceedings instituted by the Attorney-General pending the trial of the action.

8. This application for postponement was refused. The Chief Justice in his judgment of 27th November 1934 held that the appellant was the real purchaser of the Vunivisi estate from the Carr trustees, that he made the purchase without disclosing to the Carr trustees that he was in fact the purchaser, and at a time when he was a member of the firm of Ellis and Grahame who were acting as Solicitors for the Carr trustees ; that the appellant knew full well that it would be to the benefit of the Carr trustees that Hunt's option should lapse and that the trustees should reap the benefit of the enhanced value of the property, that the appellant saw an opportunity to make personal profit out of the transaction and far so forgot his duty to his clients, the Carr trustees, as to place himself in a position which was wholly wrong from a professional point of view. As to the second part of the case the Chief Justice held that the dealings with the Vollmer trust funds were for his own account and especially the variation of the mortgage was made for his own benefit and to the detriment of the cestui que trust. He drew attention to the fact that the cestui que trust, Mrs. Vollmer, is a native Fijian and the other beneficiaries are half-castes. The Chief Justice adopted *mutatis mutandis* the definition of professional misconduct as set out in *In re a solicitor Ex parte the Law Society*, as follows :

9. If it is shown that a solicitor in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency then it is open to say that he is guilty of professional misconduct.

10. The final conclusion of the Chief Justice was that he acquitted the appellant of fraud but held that the appellant had been guilty of what he termed very grave and

serious forgetfulness of the duty the appellant owed to his clients concerned in the above- mentioned transactions, namely the Carr trustees, the Vollmer beneficiaries and also the duty he owed to his partner Ellis; and the Chief Justice made the order of suspension already referred to. Their Lordships are of opinion that the above- mentioned transactions, which form the two parts of this case, should be dealt with separately. They have no connection with each other, except accidentally, and different considerations arise with regard to them. As to the first transaction, there is no doubt that Hunt had the option to purchase the Vunivisi property at any time during the term of the lease and at a fixed price, viz. ?4,000.

11. Their Lordships accept the evidence that in the autumn of 1932 Hunt was anxious to exercise the option and that the proposal that the appellant should provide finance to enable the option to be exercised came from Hunt.

12. It is clear that it would have been for the benefit of the beneficiaries of the Carr estate if Hunt's option had been allowed to lapse, as the property had improved considerably in value during the existence of the lease, and if it could have been shown that the appellant had instigated Hunt to exercise the option and had offered to provide the necessary finance, different considerations might have arisen, as to which their Lordships express no opinion. They are satisfied however that that was not the fact, and that the intention to exercise the option, as already stated, originated with Hunt, and that he solicited the assistance of the appellant to enable him to carry out his intention. The appellant was Hunt's solicitor, who had advanced moneys to Hunt on previous occasions, and it was only natural that Hunt should consult the appellant with a view to obtain his financial assistance for the purpose of exercising the option. The option was in fact exercised on 2nd November 1932, and from that time the only question was as to the manner in which the necessary finance was to be arranged.

13. In these circumstances the question arises: was there any duty on the part of the appellant to the Carr trustees to abstain from assisting his client Hunt to complete the purchase to which he had become entitled by the exercise of the option on 2nd November 1932 ? Their Lordships are of opinion there was no such duty. It is true that the appellant was a member of the firm of Ellis and Grahame, who acted as Solicitors for the Carr trustees, but on the view of the facts, which their Lordships have taken, Hunt of his own initiative had exercised his right of option on 2nd November 1932, and as far as the Carr trustees were concerned there was nothing to be done except to see that the matter was duly completed and the purchase money paid or secured. That being so, their Lordships do not take the view adopted by the Chief Justice, namely

that the appellant was the real purchaser; in their opinion Hunt was the purchaser, and although they cannot regard the course which the appellant took with approval they are not able to hold that there was any breach of duty on the part of the appellant towards the Carr trustees in agreeing to purchase the property from Hunt. Their Lordships take this opportunity of saying that in their opinion it is most desirable that a solicitor, acting for a client in any transaction, should not have a personal interest in that transaction without making full disclosure of the nature and extent of that interest to the client. Their Lordships have not allowed the fact of the settlement made in October 1934 to affect their judgment. The settlement was made upon a cabled statement of the facts and upon a cabled reply from counsel in Sydney. It must obviously have been difficult to obtain a satisfactory legal opinion in that way upon such a matter as the present, and the exact terms of the case and of the opinion were not before their Lordships.

14. Their Lordships therefore are of opinion that the appellant in respect of the first part of this case was not guilty of professional misconduct. With regard to the second part of the case, viz. that which relates to the Vollmer estate, it was not disputed at the hearing before their Lordships that in using the funds of the Vollmer estate in the manner already stated the appellant was in fact lending trust money to himself, and that he thereby committed a serious breach of trust. That in itself is not necessarily sufficient to constitute professional misconduct, and the question therefore, whether the appellant was guilty of professional misconduct in regard to this part of the case, remains to be considered. It was not suggested that the mortgage, which was transferred to the appellant as trustee for the Vollmer estate, was not sufficient security for the £2,000 and interest at 6% per cent. per annum. But assuming that it was not improper for the appellant to lend the trust funds on the security of the mortgage, their Lordships are wholly at a loss to find any justification for the alteration in the terms of the mortgage which the appellant made in agreement with Hunt. Why the appellant should have agreed that the beneficiaries, for whom he was trustee, should be paid only 5% per centum interest, when the mortgagor was liable under the mortgage which was transferred to pay 6% per centum, has not been explained in any way satisfactory to their Lordships. This is a serious matter, especially having regard to the opinion of the Chief Justice, who would know the conditions existing in the Colony, that 5% per centum was a low rate of interest.

15. The other alteration in the terms of the mortgage by which the mortgagor was given the right to pay off at any time without any prior notice to the mortgagee the

whole of the principal sum or any part thereof not being less than ?100 can only have been made in order to facilitate the transactions which the appellant and Hunt had agreed to carry out, namely the sale of the Vunivisi property in blocks and areas to be approved by the appellant.

16. At the time when the alteration in the mortgage was made by the appellant and Hunt, the appellant was in effect the owner of the Vunivisi property and Hunt was acting as his agent in negotiating sales of parts of the property and no doubt it was anticipated that the appellant would make a considerable profit out of such sales and that Hunt would be enabled to earn in respect thereof the commission specified in the agreement of 8th November 1932. These matters, in their Lordships' opinion, inevitably lead to one conclusion, namely, that the appellant was considering the interests of himself in preference to and to the detriment of the interests of the beneficiaries of the Vollmer estate for whom he was trustee.

17. The definition of professional misconduct adopted by the Chief Justice, to which reference has already been made, was accepted by learned counsel on both sides at the hearing before their Lordships. Applying the test therein contained the question arises whether the appellant in the above- mentioned transactions relating to the Vollmer estate did something which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency. To that question their Lordships are of opinion, there can be only one answer, namely, that solicitors of good repute and competency would undoubtedly condemn the appellant's conduct in this respect as disgraceful and dishonourable. Their Lordships therefore are of opinion that on this part of the case the conclusion of the Chief Justice was correct; and that the appellant was guilty of professional misconduct. Their Lordships have already referred to the fact that one of the beneficiaries of the Vollmer estate is a native Fijian and that the others are half-castes, and they cannot emphasise too strongly the importance of the high standard of duty which is required from a solicitor to his client, being maintained without any diminution when a solicitor is dealing with clients who happen to be natives or half-castes, who, as the Chief Justice pointed out, may be ignorant and semi or wholly illiterate people. Although their Lordships have dissented from the conclusion of the Chief Justice on the first part of this case, their finding that the appellant has been guilty of professional misconduct as regards the second part, must result in the appeal being dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Cases Referred.

(1912) 1 KB 302=81 LJ KB 245=105 LT 874=56 SJ 92=28 TLR 50