IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Civil Action No. 281 of 1975

000338

Between:

AMRATLAL JAMNADAS s/o Jamnadas Kalidas — Plaintiff

and

KANTILAL PARSHOTAM s/o Parshotam Dahyabhai — Defendant

Mr. Sahu Khan for the Plaintiff
Mr. K.C. Ramrakha for the Defendant

JUDGMENT

Plaintiff is a businessman and the defendant a barrister and solicitor in private practice. Plaintiff's claim is for damages allegedly caused to him by the defendant's negligence as a solicitor.

Many of the facts are not in dispute. In September 1969 plaintiff was negotiating the sale of his property at Spring Street, Suva to one Gulab Ben d/o Ratanji. He and Gulab Ben's husband C.V. Dass went, by appointment, to see the defendant. The proposed sale was discussed in his office as a result of which the defendant prepared a document to which the two parties affixed their signatures. This document (Exhibit 5) is a typed form with blanks filled in in the defendant's handwriting. It provides the necessary terms and conditions of sale.

After the signing of this document a dispute seems to have arisen between the parites and the plaintiff refused to go through with the transfer. Gulab Ben, the purchaser, issued a writ in the Supreme Court seeking specific performance of the agreement. Defendant maintained, without success, that the document (Exhibit 5) was not a binding agreement and an order of specific performance was made in Gulab Ben's favour on 25th February 1974. On appeal to the Fiji Court of Appeal, the Order of the Supreme Court was upheld on 31st July 1974. Plaintiff appealed to the Privy Council against the decision of the Fiji Court of Appeal. On 21st December 1976 the Judicial Committee of the Privy Council delivered its judgment dismissing the appeal and confirming the order with a slight variation as to amount. Validity and enforceability of the memorandum of sale (Exhibit 5) is, therefore, no longer an issue and the contract has since been performed by the plaintiff.

The plaintiff now sues the defendant, the solicitor, for negligence in carrying out his instructions with regard to the proposed sale. By his pleadings, and in his evidence, he says that when he and C.V. Dass went to see the defendant on 26th September 1969, all he wanted was for the defendant to prepare a draft of an agreement which he was later to show his solicitors, Cromptons. It was not his intention at that time to enter into a binding agreement of any kind. He thought, he says, that he was merely signing preliminary instructions and that the defendant negligently prepared a document which turned out to be a final, enforceable contract the performance of which has caused him considerable loss.

The defendant says that the document (Exhibit 5) is what it was intended by the parties to be: a binding agreement of sale. He denies negligence.

Both counsel agree that when the defendant drew up the document in question (Exhibit 5) he was acting for both parties and the question of retainer is, therefore, not in dispute. The sole issue before me is whether or not the document correctly reflects the instructions given to the defendant by the plaintiff.

The parties have by consent put in evidence the record of the Supreme Court trial between the plaintiff and Gulab Ben together with all the exhibits and the judgments of the Fiji Court of Appeal and the Privy Council. These, particularly the exhibits, are of considerable assistance but the issue before me is a completely different one and must largely be decided upon evidence given by the plaintiff and the defendant themselves. The plaintiff did not give evidence at the other trial at the advice of his counsel. The defendant was a witness at that trial and has also given evidence here in his own defence.

I need not deal with the memorandum of sale(Exhibit 5) in any great detail. This has already been done by the Fiji Court of Appeal and the Privy Council. It contains all the necessary details required in a binding agreement of sale. It identifies the property. The sale was subject to mortgage number 63056. The purchase price was $18,000. A deposit of $500 was to be paid immediately to the vendor or his solicitor. Vacant possession of property was to be given on 31st December 1969. Consent of the first mortgagee to the sale was to be obtained. There were some other terms and conditions.

Both the parties signed this document and their signatures were witnessed by the defendant.

About this document the plaintiff said in examination in chief:

> " This bears my signature when I signed this, I did not realise it was a binding agreement. I thought it was a mere draft, that the final agreement would come later. I thought these were mere instructions. I was to consider the two mortgages on the property; rates etc. to be considered. I was to seek my lawyers' advice. Cromptons were my lawyers. I wanted the document signed there.
>
> I owed money to Coubragh Estate. Also to Scott & Co.
>
> I did not give $18,000 as being the purchase price. Mr. Parshottam did not read the contents of the document to me. I was used to signing documents in lawyers' offices; at Cromptons and Scott & Co. They used to take instructions first; then they used to get these typed. They also gave copies of what was typed."

In cross-examination he said:

> " Mr. Parshottam was then acting as a solicitor for both of us as far as the draft was concerned.
>
> I did not believe that Exhibit 5 was an agreement in any shape or form. I swear to that.
>
> I would not call Exhibit 5 an agreement.
>
> I wrote this letter. I did say that the agreement mentioned was null and void.
>
> Exhibit 5 was written in our presence by Mr. Parshottam. I could see him writing. I asked Mr. Parshottam to prepare a draft for Cromptons to take a look at.
>
> Mr. Parshottam did ask what the price was going to be. I gave the figure of $18,000. This was to be the base. It might have been $1 as a base.

I have never read Exhibit 5. I was never given a copy of it.

Final price would have been base plus two mortgages and interest plus rates plus profit. C.V. Dass had agreed to it. We gave Mr. Parshottam the formula for the final price.

$18,000 plus first mortgage was not correct.

No date for possession was agreed. Don't remember if date of possession was mentioned.

We gave the date of possession only if the transfer went through i.e. 31st December 1979.

Wong Chee Win was a tenant. Don't recall any agreement about him. No date was fixed for him to start receiving rents. I did not give 15th October 1969 as being that date. I never gave that date. It is in Exhibit 5, but it is wrong.

$18,000 was the cost of the building to me. That is why I used it as a base.

Estate Coubragh wanted the mortgage money. But I had no difficulty. I would have got it from the Bank.

Never gave instructions contained in paragraph 7 of Exhibit 5.

I would have given the price later on. The draft was only to contain the 'base'.

A 'deposit' was paid that day. It could be a deposit. I don't know if it was a deposit.

I did not want to take a deposit from C.V. Dass. I did not want to be bound.

Not true that $500 was paid as a deposit with my full concurrence."

The defendant's version of what happened in his office is as follows:

" They came in the morning, together.

C.V. Dass was buying Spring Street property. Amratlal Jamnadas agreed. I asked for price and other material information. When I was satisfied that there was an agreement, I took out a standard form which I used to keep for use.

This is the form. I adopted this from Munro, Leys & Co. I think they still do use it. I made certain modifications.

I explained to the parties what the form was and that when completed it would constitute an agreement. I filled the form as they gave answers to my questions. I spoke to them in English.

The particulars were supplied by both parties. I recorded them.

No formula as to price was mentioned. They gave me an agreed price or I would not have gone ahead with it.

Name of Cromptons was mentioned. I knew that a mortgage had been given to Robert Crompton. I had learnt it from the search. Mr. Falvey was trustee.

I have recorded that consent of first mortgagee to be got. Plaintiff wanted time to pay it off; so I thought I would have to discuss it with Cromptons. I have, therefore, recorded.

There was no mention of any 'draft' by plaintiff. If I had known Cromptons were acting for plaintiff, I would not have touched the deal without ringing them.

After completing the form I read out all the details that were relevant. I told them that was a binding agreement for both and that a deposit had been paid. They agreed at $500 deposit. It was paid by cheque. This was deposited in the vendor's account; I put it in my trust account. I returned it to Mr. Ramrakha just before Gulab Ben's action started.

When the parties were in my office, they were extremely happy. Plaintiff looked pleased to have found a buyer who was a close relative."

Having heard the plaintiff and the defendant, I find it difficult to accept the plaintiff's evidence on the most crucial matter, that is, whether or not the parties intended to make a conclusive agreement on 26th September 1969 when they gave instructions to the defendant. I accept Mr. Ramrakha's submission that all the vital information on the memorandum of sale (Exhibit 5) such as the price, date of vacant possession, names of existing tenants etc. must have come from the plaintiff himself. The plaintiff, I have no doubt, is an experienced businessman with a good command of English who has had dealings with several firms of solicitors. I do not believe that he merely wanted a draft to be prepared by the defendant to be shown to some other solicitor. The defendant's Trust Receipt No. 1726 (Exhibit 16A) clearly shows that a deposit of $500 was paid on that very day in plaintiff's presence. I do not accept that the plaintiff was unaware of what the money was for. He knew it was a deposit, a security for the performance of the contract which he was then entering into.

Both counsel agree that the defendant at that time was acting as solicitor for both parties. The firm of Cromptons came into the picture only later when the question of mortgagee's consent came to be dealt with. I am satisfied that on 26th September 1969 there was no question of a draft agreement being submitted to Cromptons for perusal.

I have no reason to doubt the defendant's statement that Exhibit 5 is the standard form of agreement used by him for such transactions and that this is the only document parties are required to sign before the actual transfer is effected. I have also no reason to doubt his statement that other reputable firms os solicitors in Suva use similar forms and follow the same practice. Whether this is the ideal conveyancing practice is not a matter on which I should express an opinion. Suffice it to say that the Judicial Committee of the Privy Council has found this document, standing by itself, to be an effectively binding agreement; this despite the wording of paragraph 10 which in very general terms makes reference to other "documents".

I accept the plaintiff's counsel's submission that a solicitor has a duty to exercise that care and skill on which he knows that his client relies and he must not fail to do what he has undertaken to do in his client's interest (Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp 1978 All E.R. 571). In the case cited the solicitors had, contrary to their duty, failed to register an option and they were held to be negligent. In the instant case I cannot find any failure to exercise necessary skill and care.

I have, therefore, come to the conclusion that the plaintiff did intend to enter into a binding agreement to sell his property to Gulab Ben at the price of $18,000 plus what was owing under the first mortgage and that the document (Exhibit 5) drawn up by the defendant was in accordance with the plaintiff's instructions. Other evidence, such as that relating to valuation of that property only helps to confirm this conclusion.

Plaintiff's claim is, therefore, dismissed with costs which will be taxed in default of agreement.

(Sgd) G. Mishra

Suva, JUDGE

11th January 1980