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GANGA RAM & OTHERS

v.

GRAHAME & CO.

[COURT OF APPEAL, 1975 (Gould V.P., Spring J.A.), 6th, 26th November] B

Civil Jurisdiction

Caveat—negligence of solicitors in failing to advise clients in respect of the lodging of a caveat—measure of damages.

Damages—negligence of solicitors in failing to advise clients in respect of the lodging of a caveat—measure of damages.

Law practitioners—solicitors—negligence in failing to advise clients in respect of the lodging of a caveat—measure of damages. C

The appellants purchased sections of land in Suva from a Ram Mahesh and agreements for the sales and purchases were prepared by the respondent, a firm of solicitors who acted for both parties. Subsequently Ram Mahesh, without notice to the appellants, resold the same three sections to other parties.

Actions for negligence were commenced in the Supreme Court against the Public Trustee as representative of the deceased Ram Mahesh, the purchasers, D and the respondent firm. It was alleged against the respondent firm that it had failed to advise the appellants to lodge caveats against the title to the land with the Registrar of Titles. The judge gave judgment against the Public Trustee, dismissed the action against the purchasers and awarded nominal damages of $10.00 in favour of each appellant against the respondent firm.

The judge had taken the view that the burden of proof was on the appellants to establish that, on the balance of probabilities, any damage suffered by them E flowed from the negligence of the solicitors in failing to advise them to lodge a caveat. This was in spite of the admission by counsel for the respondent firm this his client had been negligent.

Held : 1. The judge had fallen into error by overlooking the admission of negligence. The question of the burden of proof was irrelevant as it was conceded by the respondent firm that it had failed in its duty to lodge a caveat. In these F circumstances substantial damages should have been awarded.

2. The appellants were entitled to such damages as would put them in the same position as if the contract of retainer had been properly performed. The contract had been broken when the respondent firm failed to lodge the caveats to protect the agreements in 1967. The loss occurred in Sept/Oct 1969 when the sections were resold. Damages were to be assessed by reference to the difference between the purchase price and the market value at the date of the breach of G contract. Accordingly, in addition to any special damages, $400.00 general damages should be awarded to each appellant. From this award, however, there should be deducted the amount of the judgment given in favour of each appellant against the Public Trustee of Fiji by the trial judge.

(Per Spring J.A.) : There was always an inherent danger in a solicitor acting for all parties in circumstances such as the present case. It was also very dangerous to assume that there was no necessity to lodge caveats where H the title deeds were held.

On the 18th July 1978 The Judicial Committee of the Privy Council allowed an appeal and reversed the order of the Fiji Court of Appeal in so far as it required the deduction from the damages payable by the respondent firm 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.

Cases referred to :

A *Sykes v. Midland Bank Executor Co.* [1970] 3 W.L.R. 273 ; [1970] 2 All E.R. 471.

Moody v. Cox & Hatt (1) [1917] 2 Ch. 71.

Groom v. Crocker [1938] 2 All E.R. 394 ; [1939] 1 K.B. 194.

Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 1 All E.R. 997 ; [1949] 2 K.B. 528.

B *Wertheim v. Chicoutini Pulp Co.* [1911] A.C. 301.

British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Rys. Co. of London Ltd. [1912] A.C. 673.

Dunkirk Collery Co. v. Lever [1878] 9 Ch. D. 25.

Hall v. Meyrick [1957] 1 All E.R. 209 ; [1957] 2 All E.R. 722.

Appeal against the judgment of the Supreme Court in respect of an award of damages made in favour of the appellants against the respondent firm.

C *H. M. Patel* for the appellants.

F. M. K. Sherani for the respondent firm.

The following judgments were read :

SPRING J.A. : [26th November 1975]—

This is an appeal from a judgment of the Supreme Court given at Lautoka on 12th May 1975 in respect of an award of damages made in favour of the D appellants against the respondents. The facts briefly are as follows. The appellants purchased sections of land at Wailoku, Suva, from one Ram Mahesh and agreements for sale and purchase in respect thereof were prepared by the respondents, a firm of solicitors practising at Suva, who acted for both the vendor and purchasers.

By agreement dated 21st April 1967 lot 7 on Deposited Plan No. 3082 was E sold to two brothers Ganga Ram and Shiu Nath jointly for £550 ($1100).

By agreement dated 13th June 1967 lot 3 on Deposited Plan No. 3082 was sold to Chotelal for £600 ($1200).

By agreement dated 23rd May 1968 lot 4 on Deposited Plan No. 3089 was sold to Manorama Pillai for £600 ($1200).

Pursuant to the terms of each agreement the purchase price was payable F by a substantial deposit (which was either paid when the agreements were signed or had been paid earlier) followed by monthly instalments over a period of years ; the unpaid balance to bear interest at £8 per centum per annum. Payments under the agreements were made by the appellants either to the vendor Ram Mahesh or the respondents. In September and October 1969 Ram Mahesh without notice to the appellants sold and transferred the same 3 sections which he had previously sold to the appellants, to third parties ; (one G of the third parties being the mother-in-law of Ram Mahesh).

Proceedings were issued by the appellants out of the Supreme Court of Fiji on 27th August 1970 against the Public Trustee of Fiji (as representative of Ram Mahesh who had died after the sale to the third parties) as first defendant ; the third parties who had purchased the sections as second defendants and the respondent as third defendants. The claim against the respondents was for negligence while acting as solicitors for the appellants.

H The allegations of negligence against the respondents are that the appellants, all of whom were illiterate, had each entrusted to the respondents the conveyancing work involved in the purchase of the sections, and had paid fees

to the respondents in respect thereof. They alleged in their Statement of Claim (inter alia) that the respondents had failed (*a*) to advise the appellants to lodge caveats against the land ; (*b*) to lodge caveats against the titles to the land of Ram Mahesh with the Registrar of Titles to protect the interests of the appellants under the agreements for sale and (*c*) to advise them of their rights under the agreements ; and generally had failed to discharge the duty they owed as their solicitors.

The learned trial judge gave judgment for the appellants against the first defendant ; dismissed the actions against the second defendants and awarded nominal general damages of $10 in favour of each appellant against the respondents. The appellants have appealed to this Court against the award of nominal damages and seek to have the award set aside and substantial damages awarded in lieu thereof. The grounds of appeal are :

" 1. Having found that the Respondents ' firm was in fact guilty of negligence, the learned trial judge erred in law and in fact in speculating whether or not any advice that a caveat should have been lodged might or might not have been followed by the plaintiffs and thereby there was a miscarriage of justice.

2. The learned trial judge erred in law and in fact in not holding that once the Respondents had been guilty of negligence in not advising the plaintiffs to lodge a caveat on the property purchased by them, the Respondents thereby became wholly liable for the consequences that followed, namely the sale of the land by the Vendor to a third party without the knowledge of the Plaintiffs.

3. Having regard to the pleadings, and to the failure of the Respondents to allege that the Plaintiffs would not have followed their advice, if advice had been given to the plaintiffs to lodge a caveat, the learned trial Judge erred in law and in fact in holding that Plaintiffs should have given evidence on this point.

4. Having regard to the fact that the Respondents firm acted for both the Vendors and the Plaintiffs as Purchasers and the latter left the matter of the Sale and Purchase Agreement, and the subsequent transfer to the Respondent, the learned trial Judge erred in law and in fact in not holding that the Respondent's failure to advise the Plaintiffs was a direct cause of the Plaintiffs ' not lodging a caveat, and further erred in not considering that the Respondents could have lodged a caveat themselves if they had so wished as Solicitors for the parties.

5. The Plaintiffs were not lawyers, or expected to know the law, and the learned trial judge erred in law and in fact in holding that they might not have accepted advice not to lodge a caveat since such advice could not protect their purchase ".

At the outset it should be emphasised that in considering a claim for negligence against solicitors the facts vary from one case to another, and it is not always possible to lay down general rules. However, the guiding principle is that a solicitor's duty is to use reasonable care and skill in dealing with his client's affairs as the circumstances of the particular case demand. It is an implied term of a contract between a solicitor and his client that the solicitor should exercise reasonable case and skill in the discharge of his duty. A breach of this implied term, by itself entitles the client to no more than nominal damages. In order to recover anything more than nominal damages the onus is upon the client to prove that the breach caused substantial damage.

In his judgment the learned trial judge found the respondents negligent and he awarded nominal damages only. The judge held that the negligence of the respondents consisted in their failing to advise the appellants to lodge a caveat against Ram Mahesh's title to protect the agreements for sale and purchase; further the learned trial judge stated that before the appellants could succeed it was necessary for them to prove that the failure to give the advice was probably the cause of the appellants' failure to lodge a caveat. In coming to this conclusion the learned judge placed reliance on the fact that the appellants had not been asked any questions as to what steps they would have taken had they received advice from the respondents. The judge then asked himself the question—if the respondents had given the advice to the appellants to lodge a caveat would they, the appellants, have accepted the advice and acted as they were advised. The learned judge answered his hypothetical question by saying, " that the appellants might have said we will take " a chance and save our money. " " Accordingly on the premise that the appellants had not discharged the onus of proof the learned judge awarded nominal damages only. Counsel for the appellants urged upon the Court that the learned judge had misdirected himself on this matter and that he should have awarded substantial damages.

Counsel for the respondents sought to support the judgment and argued that the appellants had failed to prove that the failure by the respondents to give the advice probably caused the appellants to fail to lodge a caveat.

It is necessary to analyse the judgment in the light of the submissions made by both counsel, but before so doing it must be emphasised that at the conclusion of the trial counsel for the respondent addressing the learned trial judge on the question of negligence said :

> " Negligence :
>
> Admitted no caveat. No evidence that they " acted after making agreement. I concede that " it was negligence in 3rd defendants not to enter " a caveat. I can find no excuse for so doing. "

The learned judge referred to this admission by counsel in this way :

> " Mr Kermode concedes that it was negligence in the third defendants not to lodge a caveat—I think he means not to advise the plaintiffs to lodge a caveat . . . . . "

From this point on in the judgment the learned trial judge treats the respondents' negligence as being one of failure to advise the appellants to lodge a caveat, despite the admission made by their counsel that the respondents were negligent in failing to enter a caveat. On the premise adopted by the learned trial judge that the negligence of the respondents consisted merely in failing to advise the appellants to lodge a caveat it is correct in law, as he stated, that it then became incumbent upon the appellants to prove that the failure to give such advice was the probable cause of them failing to lodge a caveat.

Sykes v. Midland Bank Executor Co. [1970] 3 W.L.R. 273 was an appeal against a decision awarding substantial damages to the plaintiffs for the negligence of their solicitor. The plaintiffs were well educated and experienced businessman who held other leasehold premises which contained clauses similar to the lease in respect of which the action was brought ; the solicitor was held to be negligent for omitting to draw the attention of, and explain to, his clients certain unusual clauses therein. The Court of Appeal found that even if the solicitor had given the proper advice the evidence did not show that the plaintiffs would probably have acted in any way different from the manner

in which they did. The Court held that the burden of proof was upon the plaintiffs to establish that on the balance of probabilities that any damage suffered by them flowed from the negligence of the solicitor in failing to advise them on the unusual clauses in the lease. The Court of Appeal held that the plaintiffs had failed to discharge the onus of proof and accordingly set aside the award of damages and gave nominal damages in lieu thereof. In the instant case the appellants said (inter alia). I quote from the record.

Ganga Ram, a bus driver said :

" no one advised me to lodge a caveat. I did not know it was necessary. It came as a surprise to me to know that land sold. I relied on my solicitors. "

In cross-examination, he said,

" I had not purchased land prior to this.... I had never heard of lodging a caveat..... I was taken to Grahame & Co. by Mahesh because they were his solicitors. I was not told that land under mortgage. "

Shiu Nath, a carpenter said :

" Grahame & Co. acted for me..... No one advised me in Grahame & Co. to put a caveat on the land. "

In answer to the Court he said :

" I do not speak English. "

Chotelal, a gardener says :

" I entered into sale and purchase agreement with Ram Mahesh drawn up by Grahame & Co. I paid them fees and I expected them to do my work properly. Nobody advised me to lodge a caveat. "

Manorama Pillai, a salesgirl said :

" I was not advised to lodge a caveat and did not do so. "

The learned trial judge says in his judgment :

" In this case the plaintiffs in effect say—

We failed to take all reasonable steps to prevent Ram Mahesh from dealing with the land in his title without notice of an interest, because the third defendants did not advise us to lodge a caveat. "

With the greatest of respect to the learned judge I cannot find in the evidence support for this interpretation. Further, how could it be said that the appellants had failed to take all reasonable steps when they were illiterate persons, unversed in land transactions and would not have the slightest idea what steps to take to prevent Ram Mahesh from dealing with his land, nor would they know what a caveat was, or what steps should be taken to lodge one. The learned judge in his judgment said :

" The plaintiffs cannot succeed unless they can prove that the third defendants negligence was probably a cause of their omitting to lodge a caveat. The plaintiffs themselves were not asked any questions on this subject. "

In my view the learned judge fell into error here as he had apparently overlooked the unequivocal admission of negligence made by counsel for the respondents—that the respondents were negligent in failing to enter a caveat. Had the judge accepted this admission of negligence, (as, in my view, he should have done) the question of burden of proof that the appellants would have acted on the advice of the respondents to lodge a caveat would never have arisen because it was conceded by the respondents that they had failed in their duty to lodge a caveat. Further, in view of the admission of negligence made by counsel for the respondents it would have been pointless for respon-

dents' counsel to have embarked on a cross-examination of the appellants as to what steps they would have taken had Ganga Prasad given them the advice to lodge a caveat. No doubt this was the reason, no such cross examination was undertaken by respondents' counsel. There is ample authority for the proposition that an admission made by counsel at the trial of an action is binding on the client. See Vol. 3 *Halsbury's Laws of England* 4th Edition p. 652 para. 1184 where the learned author says :

> " The statements of counsel, if made on the trial of an action... and not repudiated at the time, bind the client and may be used as evidence against him. "

In fairness to the respondents it is true to say that they have never resiled from the admission of negligence made by their counsel ; nor was there any cross appeal before the Court ; the admission of liability for negligence has not been challenged by the respondents in anyway.

Further, it is to be noted the respondents called no evidence at the trial ; Ganga Prasad their Chief Clerk was called by the appellants. The learned trial judge, in my view, had no justification upon the evidence, and having regard as to how the case was " run " by the respondents before the Court below, for importing into his judgment the proposition that the negligence of the respondents consisted merely in their failure to advise the appellants to lodge a caveat to protect the agreements ; in so doing I believe he became confused over the matter of burden of proof when he said :

> " It must be borne in mind that the negligence of the third defendants is, not that they failed to lodge a caveat but that they failed to advise the plaintiffs to lodge a caveat. "

This statement as to the acts of negligence of the respondents conflicts in my view with the following statement in the judgment where he says :

> " I think it fair to say that it was third defendants ' omission to register a caveat which made possible, or at any rate facilitated the fraud by which the plaintiffs have lost their land. "

It is obvious that the judge distracted by the question of burden of proof and other matters failed to acknowledge that the respondents admitted liability for failing to enter caveats against Ram Mahesh's title.

Further, the learned judge in his judgment states :

> " It is of course, quite impossible at this stage to speculate as to whether, if such advice had been tendered, it would have been accepted or whether the plaintiffs might have considered themselves sufficiently protected, as Ganga undoubtedly did, by the vendor's solicitors having custody of the instrument of title. "

However, having stated the impossibility of speculating whether Ganga Prasad's advice if it had been given would have been accepted the learned judge then proceeds to do precisely that when he says :

> "I suspect that if Ganga had said to the plaintiffs ' You should lodge a caveat to protect yourselves here, but we are holding the title and will probably be quite safe, and of course you will have to pay additional costs if you do ', that plaintiffs might have said ' We will take a chance and save our money. ' "

In my view the judge was wrong to concern himself with such hypothetical matters as in so doing he overlooked the real point—namely that the respondents had conceded negligence.

It was stated by counsel for the appellants that the respondents were acting for the vendor Ram Mahesh as well as for the appellants and in so doing had failed in their duty to take all proper steps to safeguard the interests of the appellants. Ganga Prasad, the Chief Clerk of the respondents said : A

" Grahame & Co. did act as solicitors for both parties when agreement prepared in April 1967. Parties were not advised to lodge a caveat and in fact none lodged. "

He also said :

" When all payments were complete we would have made a transfer. " B

In fact, the respondents were acting not only for the vendor and purchasers but also for the mortgagee, J. P. Bayley Ltd., I would hasten to point out that there is always an inherent danger in a solicitor acting for all parties in circumstance such as the present one discloses and I respectfully endorse the remarks of Scrutton L.J. in : *Moody v. Cox & Hatt* (1) [1917] 2 Ch. 71 at page 91 when he said : C

" It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been that of a solicitor acting for vendor and purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and who, if he does not disclose the flaw in the title, may be liable to an action by the purchaser D for not doing his duty as solicitor for him. It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them. "

It could well be that the respondents considered that as they were holding E the title deeds to the property in question there was no necessity to lodge caveats to protect the interests of the purchasers. In my view this was an assumption fraught with danger.

Therefore for the reasons given the appellants had on the evidence, coupled with the admission of negligence by the respondents, shown that the respondents ' negligence in failing to register a caveat had made a difference to them—in F that they had lost their land ; and the loss suffered by them flowed directly from the negligence of the respondents. In coming to this conclusion I am mindful of the learned trial judge's finding that the evidence of the appellants was unreliable but " at the end of the day " the judge concludes—

" although I do not think the plaintiffs have told the whole truth I do not know that this affects their case against the third defendants. "

Accordingly, I would conclude that the appellants are entitled to an award G of substantial damages against the respondents. I would therefore set aside the award of nominal damages only.

I turn now to a consideration of the amount of damages which should be awarded. The cause of action against the solicitors is one for breach of contract. It is clear from what was said in *Groom v. Crocker* [1938] 2 All E.R. 394 that although the term " negligence " is used to describe the nature of the appellants' H claim, that claim is, in effect, a claim for damages for breach of contract. The measure of damages is compensation for the consequences which follow as a natural and probable consequence of the breach ; or in other words which could

reasonably be foreseen. The measure of damages for breach of contract was discussed in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 1 All E.R. 997 where Asquith L.J. said at page 1002 :

" What propositions applicable to the present case emerge from the authorities as a whole including those analysed above? We think they include the following (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed : *Wertheim v. Chicoutimi Pulp Co.* [1911] A.C. 301. This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence, (2) : In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach. (3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or, at all events, by the party who later commits the breach. "

I agree with the learned judge in the Court below when he said in the course of his judgment :

" I think it fair to say that it was the third defendant's omission to register a caveat which made possible or at any rate facilitated the fraud by which the plaintiffs have lost their land. "

Further the learned judge states in his Judgment :

" They (the appellants) learned of Ram Mahesh's transfer of the land in or about October 1969. "

Accordingly, the damages are to be assessed as at the date when the breach occurred and the contract was broken. It is clear that the appellants were under a responsibility to mitigate any loss or damage sustained by the professional default of their solicitors, and to take all reasonable steps to mitigate such loss. This duty arises as soon as the loss arises, and they must act as best they can, not only in the best interests of themselves as claimants, but also in the interests of the respondents. The burden of proof is on the respondents. Vol. II *Halsbury's Laws of England* 3rd Edition page 289 and 290 paras. 476 and 477.

The classic statement of the doctrine is that of Viscount Haldane L.C. in *British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Rys. Co. of London Ltd.* [1912] A.C. 673 at page 688.

" The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity. Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach ; but this first principle is qualified by a second,

which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co. v. Lever* [1878] (9 Ch. D. 25), ' The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business '. ''

The principles are clear ; each case necessarily turns upon its own facts. The appellants in this case being under a responsibility to mitigate the loss sustained, issued proceedings against the vendor Ram Mahesh and the third parties, to whom, the learned judge found, Ram Mahesh had wrongfully sold the sections ; the proceedings against Ram Mahesh and the third parties were consolidated with the instant action and heard together. Judgment was given against the Public Trustee of Fiji (as representative of Ram Mahesh dec'd) in favour of each appellant for the amounts of moneys paid by them, together with $400 general damages in each case for loss of bargain. The claim against the second defendants, who were the third parties to whom the sections were sold, was dismissed.

Counsel for appellant urged upon this Court that the amount of general damages that should be awarded in the event of this Court setting aside the award of nominal damages should be for loss of bargain based on the value of the land, which the appellants had lost, valued as at the date of judgment together with (*a*) the amount paid to the vendor Ram Mahesh under the agreements for sale and purchase, (*b*) the amount of the appellants' solicitor and client costs in bringing the actions against the first and second defendants and (*c*) the amount of the party and party costs which the appellants' have been ordered to pay to the second defendant in the Court below. 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.

The respondents submitted that if substantial damages were to be awarded against them the amount thereof should (*a*) in the case of Ganga Ram, Shiu Nath and Chotelal comprise only the amounts paid by these appellants to the vendor Ram Mahesh since they were in default under the agreements for sale and purchase ; and had the vendor exercised his rights under the said agreements they would in all probability have lost the moneys paid whether or not the respondents had entered a caveat against the title (*b*) In the case of Manorama Pillai the damages awarded should consist of general damages for loss of her bargain plus the amounts paid by her to the vendor. Further it was submitted 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.

The learned trial judge found that the market value of each section of land was $1600 at the date of the breach of the contract which he stated was in September or October 1969 ; he did not assess damages as at the date of judgment but as at the date of the breach of contract. It is true to say that even if the respondents had lodged caveats against the title those appellants whom the judge found were in default under their respective agreements for sale and purchase may have lost the moneys paid by them in the event of the

vendor giving the appropriate notices and exercising his rights under the agreements for sale and purchase. This is a contingency which may have happened, but, as events turned out, did not happen. As was stated in *Hall v. Meyrick* [1957] 1 All E.R. 209 at page 218 Ashworth, J. says :

> " On the other hand, the contingencies must be fairly assessed, and, if there was a reasonable prospect of their being satisfied in a manner favourable to the plaintiff, the amount by which the full claim falls to be discounted is correspondingly reduced. "

In my view we have to consider the matter upon the facts that obtained at the date of the breach of contract. The learned trial judge found that the appellants Ganga Ram, Shiu Nath and Chotelal were in arrears in respect of payments due under their respective agreements but he stated that there was evidence that payments were made and accepted in July 1969, in each case. As to mitigation it was incumbent upon the appellants to attempt to recover from the Estate of Ram Mahesh the moneys paid under their respective agreements, and to bring proceedings against the Public Trustee of Fiji in an endeavour to mitigate the loss caused through the neglect or omission on the part of the respondents.

This being an action against the respondents for breach of contract at Common Law the appellants are entitled to such damages as will put them in the same position as if the contract of retainer had been properly performed. The contract of retainer was broken when the respondents failed to lodge caveats to protect the agreements ; this was in 1967 and it was a continuing breach until the loss occurred in September or October 1969 when the sections were sold. The section sold to Manorama Pillai by Ram Mahesh was re-sold to a subsequent purchaser in November, on the open market for $1600 and I respectfully agree with the statement of the learned judge when he says :

> " Dhanpat in November of that same year (1969) sold the land she had obtained a month before—the land originally sold by Ram Mahesh to Manorama Pillai—for $1600 and I regard that sum as the market value of the land, and the difference between the market value and the contract price as the loss which Manorama Pillai suffered. I think that the land of each of the plaintiffs must be looked at in this light. "

Had the respondents lodged a caveat against the land and the vendor given the appropriate notices and exercised his rights under the contracts against the defaulting purchasers, they may well have lost their moneys, but it was not established that the vendor gave any such notices or took any steps to rescind the agreements.

On this appeal the appellants did not challenge in any way the amount of the damages awarded to them by the Supreme Court against the Public Trustee of Fiji, or claim that the general damages as awarded should have been assessed on any different basis than that adopted by the learned trial judge.

Before this Court counsel for the appellants urged that the general damages for loss of bargain should be assessed as at the date of judgment.

However, having regard to the fact that the assessment of general damages against the first defendants (Ram Mahesh's estate) has not been challenged, and to all the other relevant factors, I cannot see any justification on this occasion for departing from the general rule that in cases of breach of contract, at common law, for the sale of land, damages are to be assessed by reference to the difference between the purchase price and the market value at the date of the breach of contract. Therefore I would adopt the course which the learned judge in the Court below said he would take if substantial damages were to be had by the appellants when he stated :

" I think that perhaps I should add that if I had found the plaintiffs entitled to more than nominal damages against the third defendants I should have awarded them a sum equal to the amount paid by each to Ram Mahesh and $400 in each case, those sums in each case being what they lost through their not lodging a caveat. "

Accordingly I would award damages to each of the appellants against the respondents for sums equal to the amounts found by the learned trial judge as having been paid by each appellant to Ram Mahesh (together with such legal fees as the judge found had been paid to the respondents by the appellants) together with $400 general damages in each case ; the total sum so awarded to each appellant to be diminished by the amount of the judgment given in the Supreme Court on 12th May 1975 in favour of each appellant against the Public Trustee of Fiji.

As to costs, I am of the view that the solicitor and client costs of the appellants in the action against the Public Trustee of Fiji should be included in the damages as a natural and probable consequence which flowed from the breach of duty owed by the respondents to the appellants. I would refuse to include the appellants ' solicitor and client costs in the action against the second defendants ; and the party and party costs which the appellants have been ordered to pay the second defendants. In so doing I am conscious of the words of the learned judge when he said,—" plaintiffs offered no evidence against the second defendants who if a fraud had been committed must have been almost equally culpable with Ram Mahesh ". Further in concluding that no costs be allowed to the appellants in the Supreme Court the judge said :

" They the plaintiffs did not seek to ascertain whether Ram Mahesh had indeed got money from his transferees and they made no attempt whatever to prove any of their specifications of fraud against the second defendants in each action. "

Accordingly I would set aside the judgment for nominal damages in the Supreme Court and direct that judgment be entered against the respondents in favour of (1) Ganga Ram and Shiu Nath for :

(*a*) the sum of $919.00 by way of special damages.
(*b*) the sum of $400.00 by way of general damages.
(*c*) the amount of their solicitor and client costs and disbursements in the action against the Public Trustee of Fiji (as representative of the Estate of Ram Mahesh dec'd) as taxed by the Registrar.

Less the amount of the judgment given in favour of Ganga Ram and Shiu Nath against the Public Trustee of Fiji dated 12th May 1975.

(II) Chotelal for

(*a*) the sum of $743.80 by way of special damages.
(*b*) the sum of $400.00 by way of general damages.
(*c*) the amount of his solicitor and client costs and disbursements in the action against the Public Trustee of Fiji (as representative of the Estate of Ram Mahesh dec'd) as taxed by the Registrar.

Less the amount of the judgment given in favour of Chotelal against the Public Trustee of Fiji dated 12th May 1975.

(iii) Manorama Pillai for

(*a*) the sum of $900.00 by way of special damages.
(*b*) the sum of $400.00 by way of general damages.
(*c*) the amount of her solicitor and client costs and disbursements in the action against the Public Trustee of Fiji (as representative of the Estate of Ram Mahesh dec'd) as taxed by the Registrar.

Less the amount of the judgment given in favour of Manorama Pillai against the Public Trustee of Fiji dated 12th May 1975.

I would allow the appellants their costs in this Court as taxed by the Registrar. The Order as to costs in the Court below in favour of the appellants against the respondents I would allow to remain.

GOULD V.P.

The facts of this case and the law applicable have been fully set out in the careful judgment of my learned brother Spring J.A.

The main question in the appeal, that is whether the learned judge was correct in awarding only nominal damages against the respondents, is one which I think presents no real difficulty. With all respect to his very painstaking judgment I think he was, in this particular respect, in error. When counsel for the respondents admitted in the Supreme Court that it was negligence in the respondents not to have entered a caveat, he was admitting that the circumstances and the nature of the agreements were such that this precaution was called for. If counsel meant by his admission that the respondents should have lodged a caveat by virtue of their retainer without advising or consulting the clients the matter is clear. If counsel meant, as the learned judge took him to mean, that the negligence lay in failure to advise the clients to lodge a caveat, I think the position is not altered in a material way. The learned judge held that it was upon the appellants to show that, if such advice had been given, they would have taken it. I do not think the effect of the case of *Sykes v. Midland Bank Executor Company* [1970] 3 W.L.R. 273, which is discussed by Spring J.A. in his judgment, can be strained to this extent.

In the first place the learned judge has imagined words of advice which are, with respect, couched in terms likely to deter their acceptance. I would not describe that as advising the appellants to lodge a caveat. Secondly, as so often happens in the context of Fij, the appellants were illiterate people completely ignorant of the law concerning land transactions and the purpose or existence of caveats. When matters were explained to them after the loss occurred a year or two later how could they give evidence of what their decision would have been if advised to caveat at the time of the agreements. What could they possibly say except " Of course we would have accepted the advice if given. " At least in the circumstances of this case I think the only possible approach to this problem is to say—the respondents failed in their duty to advise the appellants to put caveats on the titles ; they thereby deprived the appellants of any opportunity to consider whether they would have accepted such advice if given ; therefore the respondents cannot be allowed to rely on what must remain a speculation, the possibility that the advice might not have been accepted. I would add that if probabilities are being considered, I do not myself see that any weight should be attached to the suggestion that clients such as these, relying in all matters upon their solicitors, might be expected to reject their advice, properly given, in this one important particular. I think also that considerations applying to advice by a solicitor to a client to take a certain course of action, are not the same as those applying to the failure by the solicitor to ascertain and communicate a certain fact (as in the Sykes case) upon which the clients might base a decision. Subject to these brief remarks I am entirely in agreement with all that Spring J.A. has said on this question.

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. A

The learned President of this Court has directed that this appeal might be heard by two judges, and as my brother Spring J.A. and I are in agreement, the appeal is allowed and the orders will be those proposed in the judgment of Spring J.A.

Appeals allowed. Quantum of damages increased. B