KRISHNA PRASAD & VIJAY LAKSHMI PRASAD

v.

VISHNU PRASAD & RAJ LAKSHMI PRASAD

[HIGH COURT, 1996 (Fatiaki J) 6 June]

Civil Jurisdiction

Practice: Civil- enforcement of compromise- whether fresh action necessary- High Court Act (Cap. 13) Section 22 (2).

The parties compromised an action between them, the terms of settlement being embodied in a Deed. Upon application by the Plaintiff to enforce the terms of the Deed the High Court examined the jurisdiction of the Court summarily to enforce a compromise without bringing a fresh action. It rejected the claim that the Deed was a contract *uberrimae fidei* and granted the Plaintiff the order sought.

Cases cited:

Dawson v. Newsome (1860) 66 E.R.114
Eden v. Naish (1878) 7 Ch.D. 781
E.F. Phillips & Sons Ltd. v. Clarke [1970] 1 Ch.D. 322
Green v. Rozen [1955] 2 All E.R. 797
Law Guarantee Trust and Accident Society (Limited) v. Munich Re-insurance Company (1915) 31 T.L.R. 574
McCallum v. Country Residences Ltd. [1965] 2 All E.R. 264
Rama v. Millar [1996] 1 N.Z.L.R. 257
re Hearn (1913) 108 L.T. 452
Roberts v. Gippsland Agricultural and Earthmoving Contracting Company Pty. Ltd. (1956) V.L.R. 555
Roberts v. Watkins (1863) 32 L.J. C.P. 291,
Salt v. Cooper (1880) 16 Ch. D. 544
Smythe v. Smythe (1887) 18 Q.B.D. 544
Turner v. Green (1895) 2 Ch.D. 205
Wales v. Wadham [1977] 2 All E.R. 125

Interlocutory application in the High Court.

S. Parshotam for Plaintiffs
R. Naidu for Defendants

Fatiaki J:

This is an application by the plaintiffs brought by way of summons issued in the above action seeking judgment and orders against the defendants arising out of a Deed of Settlement entered into between the parties shortly before the trial of the action and dated the 12th of August 1994.

The present application is the latest in a series of applications brought after the original Writ was issued in September 1992 and which earlier applications had culminated in the plaintiffs being granted a mareva injunction until further order in a ruling delivered by this Court on the 2nd of October 1992.

On 24th March 1994 the plaintiffs filed a Statement of Claim and on the 8th of April 1994 defendants filed a bare Statement of Defence which was later amended on the 25th of May 1994. In the mean time on the 18th of May 1994 the plaintiffs sought and obtained leave to file an amended Statement of Claim which was eventually done on the 5th of August 1994. On 9th August 1994, the date fixed for the trial to begin, the defendants filed a further amended Statement of Defence resulting in the trial being deferred to begin on the 12th of August 1994.

It did not begin as scheduled, instead, the parties and their respective legal advisers engaged in several days of negotiations that resulted in the Court being advised that the action had been settled and also, in a consent order being filed in Court on the 17th of August 1994 in the following terms :

> "1. That this action be adjourned sine die ;
> 2. That all costs herein be reserved ;
> 3. That all interlocutory orders herein be vacated and discharged as to the Mareva Injunction ;
> 4. That the Defendant's counsel advise the Fiji Court of Appeal that the Civil Appeal No. 48 of 1992 is withdrawn."

No terms of settlement were mentioned in the order nor were the same made the subject-matter of any subsequent court order until the present application. In the circumstances it cannot be said that the Court in any way adopted or affirmed the terms of settlement, since all that it did was to adjourn the hearing of the action sine die pursuant to the parties agreement.

Indeed the court first became aware of the precise terms upon which the parties settled and compromised the action when the present summons was filed and a copy of the Deed of Settlement was produced as an annexure to the first plaintiff's affidavit in support of the summons.

The Deed begins with the usual identification of the parties to it, including two limited liability companies apparently joined as third parties at the request of the defendants. This is then followed by several recitals which makes reference to three separate court proceedings (including the present action) and in respect of which recital IV records (that) :

> "The Plaintiffs and the Defendants have settled both court actions referred in Recitals I (being the present action) and II (being a related action in the Supreme Court of Queensland) hereof upon terms and conditions hereinafter appearing :"

Quite plainly, in terms of the Deed of Settlement, the parties had finally settled

and resolved their respective claims in the enumerated actions which included the present action.

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The effect of such a settlement or compromise of an action is succinctly set out in Vol.37 Halsbury's Laws of England (4th edn.) where it states at para.391 :

> "Where the parties settle or compromise pending proceedings whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted ; (2) to preclude the parties from taking any further steps in the action except what they have provided for liberty to apply to enforce the agreed terms; and (3) to supersede the original cause of action altogether."

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Counsel for the defendants relying on the above passage and the decisions in In re Hearn (1913) 108 L.T. 452 ; Green v. Rozen [1955] 2 All E.R. 797 and McCallum v. Country Residences Ltd. [1965] 2 All E.R. 264 raised a preliminary question as to the jurisdiction of the Court to entertain the plaintiffs' application and submitted that the plaintiffs only remedy was to issue fresh proceedings by suing on the compromise which had superseded the plaintiffs original cause of action altogether.

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Furthermore counsel argued that Clause 8 of the Deed did not entitle the plaintiffs to issue any interlocutory summons as it merely set out the ordinary rights to specific performance and/or other remedies in contract.

Clause 8 of the Deed provides :

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> "The parties will inform the High Court of Fiji that the Action No. 48 (sic) of 1992 has been settled, that the Action be adjourned sine die. In an event of a default under this Deed either party shall be at liberty to apply to the Court to have an order made in terms of this Deed."
>
> (my underlining)

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In my view the underlined sentence is similar to the stipulation commonly inserted in compromise agreements to the effect that the compromise may be made a rule or order of the Court, or that a judge's order may be obtained (per Sir James Hannen in Smythe v. Smythe (1887) 18 Q.B.D. 544 at 546).

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Furthermore, the very nature of the agreed reservation and consent order is such that the parties must have intended that the present action or proceedings should remain alive for the purposes of enforcement of the compromise. (per Warrington L.J. in In re Shaw (1918) P 47 at 53).

In my view the parties having expressly stipulated in Clause 8 that their agreement may be made the subject-matter of a Court order, that stipulation may be carried

into effect by the Court on an application in the same action, by either party and with or without the consent of the other party.

A In Dawson v. Newsome (1860) 66 E.R.114 a case before the Judicature Act, the order made pursuant to a stipulation for a rule of Court was equivalent to a decree for the specific performance of the agreement, coupled with a direct order for payment of moneys, and was made on petition in the cause and against opposition.

B More recently in E.F. Phillips & Sons Ltd. v. Clarke [1970] 1 Ch.D. 322 Goff J. (as he then was) in upholding a motion in the original action to enforce the terms of a compromise embodied in a 'Tomlin-form' of order :

> "Held : that where there was an order in the normally appropriate form, with a qualified stay and liberty to apply and the application
> C to the Court was strictly to enforce the terms embodied in the order and schedule, an order giving effect to those terms could be obtained under the liberty to apply in the original action, not withstanding that they might go beyond the ambit of the original dispute and could not have been enforced in the original action."

D In his judgment Goff J. distinguished the decision in In re Hearn (op. cit) on the grounds that:

> "... not only did the compromise go outside the ambit of the original action but, first, no liberty to apply had been reserved at all and the stay was absolute and unqualified, and secondly, the relief sought was not a mere enforcement of the agreed terms but sought to modify
> E them to give effect to the original intention in changed circumstances."

If I should be wrong however in my interpretation of the meaning and effect of Clause 8 then there is little doubt in my mind that this Court has a statutory jurisdiction to entertain the plaintiffs' application pursuant to the provisions of
F Section 24(7) of the Judicature Act 1873 (U.K.) which is expressly made applicable in Fiji by the provisions of Section 22(2) of the High Court Act (Cap.13).

Section 24(7) of the Judicature Act 1873 (U.K.) reads :

> "The High Court and the Court of Appeal respectively, in the exercise
> G of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seen just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that, as far as

> possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." A

In Salt v. Cooper (1880) 16 Ch. D. 544 Jessel M.R. in discussing the meaning and purpose of the Judicature Act 1873 said at p.549 :

> "It is stated very plainly that the main object of the Act was to assimilate the transaction of Equity business and Common law business by different Courts of Judicature. It has been sometimes inaccurately called `the fusion of Law and Equity' ; but it was not any fusion, or anything or the kind ; it was the vesting in one tribunal the administration of Law and Equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the act." B C

Then at p.550 the learned Master of the Rolls said of Section 24(7) after setting it out:

> "Those are very large terms. The clause clearly applies to any remedy whatever for it says the Court shall grant `all such remedies whatsoever'. The claim must be brought forward in the cause, and must relate to the matter in dispute in the cause; but beyond that I see nothing to qualify the clear indication of intention that multiplicity of legal proceedings is to be avoided ... It is not merely the original claim ; it is `any' claim that may be brought forward in the matter; that is to say, any claim as regards the cause or matter pending. A cause is still pending even though there has been final judgment given, and the Court has very large powers in dealing with a judgment until it is satisfied." D E

More particularly in Eden v. Naish (1878) 7 Ch.D. 781 Hall V.C. in rejecting a submission in that case that it was not competent for the Court to deal with a summons in the action seeking inter alia to enforce an earlier compromise of the action, said at p.786 : F

> "That objection, I think, cannot be sustained. Since the Judicature Act 1873 I consider that the Court can entertain such an application upon a summons."

and later in rejecting an objection that the case was of such a nature that the Court, in its discretion, should require an action for specific performance to be brought (cf: defence counsel's submission 1B and para. 10 on procedure), the learned Vice Chancellor said at p.786 : G

> "Both parties have gone fully into evidence, and there has been a cross-examination of the witnesses on behalf of both parties, and I

have not seen any reason why the case should not be heard and determined now."

A Being therefore satisfied that this Court has jurisdiction to entertain the plaintiffs present application, I grant the plaintiffs Order A as set out in their Summons dated 27th July 1995 thereby making the Deed of Settlement an order or rule of the Court.

Having so ordered ought the Court then to exercise its discretion and grant the
B plaintiffs any of the substantive orders sought ?

Before considering that more difficult question however, it is necessary briefly to set out some of the factual background to the action and the nature and course of the proceedings that culminated in the Deed of Settlement.

C In this regard I adopt the brief summary of facts set out in the Court's earlier-mentioned ruling (op. cit. at p.2) wherein it states :

> "The plaintiffs who are medical practitioners and citizens of Australia are related not only by marriage but also through blood ties to the defendants who are residents of Fiji. During the course of their relationship a proprietary company entitled Burcrest Pty.
> D Ltd. (hereinafter referred to as `Burcrest') was incorporated in October 1984 with the first plaintiff and first defendant as directors. Subsequently in April 1988 the second defendant was also made a director.
>
> On 24th March 1988 the plaintiffs executed amongst other securities
> E a guarantee in favour of the Commonwealth Bank of Australia (hereafter referred to as 'CBA') securing all monies lent to Burcrest.
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> Prior to their executing the aforesaid guarantee the plaintiffs allege that the defendants '... orally promised and represented to the plaintiffs that if they signed the guarantee, the defendants would
> F indemnify and keep indemnified the plaintiffs from any liability, costs or expenses incurred in connection with the guarantee...` This is denied by the defendants.
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> Thereafter on 29th of October 1990 the first plaintiff resigned as a director and secretary of Burcrest and a year later on 18th of November 1991 CBA demanded from the plaintiffs payment of a
> G sum well in excess of $2 million under the term of the guarantee executed by the plaintiffs.
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> Since the CBA demand various efforts have been made by the plaintiffs through their solicitors to obtain from the defendants and various named companies, a written Deed of Indemnity without any success.

Finally on the 16th of September 1992 the plaintiffs issued proceedings in this Court for various orders and obtained ex parte a mareva injunction ..."

The plaintiffs final amended Statement of Claim pleads several causes of action including the failure of the defendants to abide by an 'oral indemnity' given to the plaintiffs; a breach of a duty of care in making oral promises and representations to the plaintiffs recklessly and/or without any intention to honour the same; and finally, a claim that the defendants have unjustly enriched themselves at the expense of the plaintiffs.

The defendants for their part have consistently denied ever making any promise to indemnify the plaintiffs or making any representations in relation thereto. Indeed it is averred that the plaintiffs gave the guarantees on their own volition out of goodwill and filial love towards the defendants ... and not in consideration or anticipation of any indemnity, and finally, they plead the provisions of Section 59 of the Indemnity, Guarantee and Bailment Act (Cap.232).

The reliefs and orders sought by the plaintiffs in their amended Statement of Claim are numerous and are conveniently summarised in their counsel's written submissions as follows :

"(a) That the defendants indemnify the plaintiffs in respect of the plaintiffs liabilities under their guarantees to the Commonwealth Bank ;

(b) A Declaration that the defendants had agreed to indemnify the plaintiffs in respect of the Guarantee and have them released within 6 months of the date of the Guarantee;

(c) An order that the defendants pay to the plaintiffs forthwith upon demand any sum ordered, agreed, or determined to be paid by the plaintiffs in respect of the Guarantee to the Bank;

(d) An order that the defendants provide security to secure payment to the plaintiffs under the said indemnity;

(e) An order that the defendants pay the plaintiffs $A1,498,515.80 with interest in terms of the indemnity and have the plaintiffs released from the Guarantee;

(f) Alternatively, pay damages in the sum of $1,493,515.80 plus interest in connection with the said indemnity."

It was within that matrix of facts and pleadings that the parties entered into the Deed of Settlement the substantive text of which is set out below in full (in so far as it refers to the rights and obligations of the plaintiffs and the defendants):

"1. The parties agree that :

1.1 The Defendants shall pay 80% ; and

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1.2 The Plaintiffs will pay 20% of the amounts either settled after negotiation (referred to in the next paragraph) with the Bank or failing such negotiations, such amount as is certified by the Bank as owing by Burcrest to the Bank.

2. Without releasing either party from their obligations under clause 1 hereof, the Defendants will, at their cost and expense

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2.1 Take immediate steps either jointly with the Plaintiffs (or if required by the Bank, separately) to lead settlement with the Bank in order to arrive at a best settlement or compromise of:

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2.1.1 The monies due and payable and/or owing by Burcrest to the Bank ("Burcrest Debt"), and/or

2.1.2 The monies due and payable or owing by the Plaintiffs and/or the Defendants to the Bank in respect of the Burcrest Debt under their respective Guarantees ("the Bank liabilities");

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2.2 Shall, within 6 months or such other exended period as may be agreed in writing between the Plaintiffs and the Defendants:

2.2.1 Complete the process of settlement of the Bank's claim for the Bank Liabilities;

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2.2.3 Release the Plaintiffs from their liabilities to the Bank under the said Guarantee in respect of the said 80% ; and

2.2.4 Pay and/or secure to the Bank 80% of the amount that is settled or agreed with the Bank.

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3. Without in any way derogating from the Defendants liabilities and obligations under Clause 1 of this Deed, the Defendants (sic) hereby jointly and severally;

3.1 That the Defendants agree and undertake to fully compensate and save harmless the Plaintiffs from any action demand claims costs and damages in respect of the 80% of the Bank Liabilities.

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3.2 That the Plaintiffs agree and undertake to fully compensate and save harmless the Defendants from any action demand claims costs and damages in respect of the 20% of the Bank Liabilities.

5. Without in any way derogating the Defendants liabilities and obligations under this Deed, if the Plaintiffs pay any part of the 80% of the Banks Liabilities to the Bank, the Defendants shall pay such amount as falls part of the 80% share together with interest at such rate or rates as shall be charged by the Bank on such monies calculated in the same manner as the Bank and payable within 15 months of the date of payment.

6. Without in any way derogating the Plaintiffs liabilities and obligations under this Deed, if the Defendants pay any part of the 20% of the Banks Liabilities to the Bank, the Plaintiffs shall pay such amount as falls part of the 20% share together with interest at such rate or rates as shall be charged by the Bank on such monies calculated in the same manner as the Bank and payable within 15 months of the date of payment.

7. The Defendants will discontinue action No. 1364 of 1992 instituted by them in the Supreme Court of Queensland against the Plaintiff's forthwith upon the execution of this Deed with each party bearing their own cost.

8. The parties will inform the High Court of Fiji that the Action No. 48 of 1992 (sic) has been settled, that the Action be adjourned sine die. In any event of a default under this Deed either party shall be at liberty to apply to the Court to have an order made in terms of this Deed.

9. The parties hereby agree to maintain confidentiality in respect of this Deed until such time as there is default on the Defendants part to perform their obligations under this Deed.

10. The Defendants will not do anything to dissipate their assets with intent to defeat their obligations under this Deed.

11. All interim or interlocutory orders made (including the Mareva Injunction) against the Defendants by the High Court of Fiji or the Court of Appeal shall by consent be dissolved.

12. Each party to use their best endeavours to fully implement their respective rights and obligations under this Deed and to implement the terms hereof.

13. Notwithstanding to the contrary herein provided the Plaintiffs hereby expressly agree and declare that the Defendants and the third parties shall be entitled to a release of the mortgages if the monies to be raised against those properties are raised for the express purposes of repayment of the whole of the

Bank Liabilities and the monies are in fact so paid to the Bank."

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Quite plainly, from a claim seeking a full indemnity from the defendants in respect of their liability to the Bank under their personal guarantees, the plaintiffs had settled their claim(s) on the basis that they would bear 20% of Burcrest's liability to the Bank. Equally clearly, from a complete denial of any liability to the plaintiffs, the defendants had agreed to accept 80% of Burcrest's liability to the Bank.

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Furthermore, in terms of Clause 1 of the Deed of Settlement the amount owing by Burcrest to the Bank was to be an amount either settled after negotiation (a negotiated amount) or such amount as is certified by the Bank as owing by Burcrest ... (a certified amount).

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Clause 2.1 of the Deed then imposed on the defendants in respect of the negotiated amount, the obligation to lead negotiations with the Bank with a view to arriving at the best settlement figure for the amount owed by Burcrest and/or the amounts owed by the parties under their respective guarantees.

Clause 2.2 fixed a time frame of six months within which the defendants were

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required to "complete the process of settlement of the Banks claim ...; release the plaintiffs from their liabilities under their guarantee and pay and/or settle to the Bank 80% ..." of the negotiated amount.

Clause 3 then provides a cross-indemnity where each party agreed to indemnify the other to the extent of their agreed shares, ... from any action, demand, claims, costs and damages in the event that enforcement proceedings (for want of a

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neutral term) are taken by the Bank against either party. Relative to this Clause, the plaintiffs claim that they have been sued by the Bank in an action issued out of the Queensland Supreme Court claiming almost $A1.5 million from them pursuant to their earlier-mentioned guarantees.

Clauses 5 and 6 contains mutual re-imbursement undertakings by each party to

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repay to the other within fifteen months, any of their share of the amount owed to the Bank which is paid by the other.

Clause 7 in terms required the defendants forthwith to discontinue an action instituted by them in Queensland against the plaintiffs. In this regard it is common ground that as at the 10th of November 1994 (i.e. 3 months after the Deed was

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signed) the defendants Queensland action had not been discontinued.

The undisputed evidence in this case is that the defendants were also unable to conclude negotiations with the Bank to achieve settlement within the 6 months time-limit imposed in Clause 2.2 nor was any extension sought or granted in terms of the Clause. Is that a 'default' in terms of Clause 8 ? I am more than satisfied that it was.

I turn next to consider the law as it relates to the exercise of the Court's discretion on an application by interlocutory summons in an action, to enforce the terms upon which such action has been earlier settled or compromised. A
I am grateful to the plaintiffs' Counsel for his references to a series of judgments of various Courts in Australia which I have found extremely helpful in my deliberations.

I refer in particular to the scholarly analysis of law in the judgment of Smith J. in Roberts v. Gippsland Agricultural and Earthmoving Contracting Company Pty. Ltd. (1956) V.L.R. 555 in which, as in this case, without an agreement compromising an action being made a Court order, a party to the action comes to the Court seeking what is, in effect, an order specifically enforcing the agreement. B

His Honour firstly traces the historical origins of the jurisdiction through the early Court of Chancery and noted six "... vaguely defined rules of practice (that) came to be acted upon ..." by the Court of Chancery in exercising its jurisdiction (pp.562/563). Then his Honour considered the effect on the jurisdiction, of the introduction of Section 24(7) of the Judicature Act 1873 (op.cit) and concluded at p.564: C

> "... that the resulting position would appear to be as follows : D
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> (i) The Court will now enforce the agreement of compromise upon motion in the action whenever the circumstances are such that it would have been enforced in a corresponding manner in the old Court of Chancery.
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> (ii) In addition the agreement may be so enforced notwithstanding the fact that it involves matters extraneous to the action, and notwithstanding that there is a substantial question raised as to the terms or validity or enforceability of the agreement, provided that the Court is clearly satisfied that justice can be done under the summary procedure. At least this is so where all that the Court needs to order for the purpose of enforcing performance upon just terms is a stay of proceedings or a dismissal of the action or some relief claimed in the action. E F
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> In deciding whether justice can be done under the summary procedure the Court, of course, needs to consider a variety of matters involving questions of degree. These, I think, must include the extent to which extraneous matters are involved, how substantial are the questions to be determined, what extent questions of credibility are likely to arise, and whether pleadings and discovery may be desirable." G

In this particular case and despite defence counsel's submission that "... it is plain that the issues involved (in the enforcement of the Deed of Settlement) are far from simple or straightforward ...", I am firmly of the view that the Deed of

Settlement may, with justice, be enforced under the summary procedure of the Court.

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The Deed is before the Court and the principal protaganists in the action have been cross-examined at length upon their opposing affidavits. Comprehensive written and oral submissions have been presented to the Court and there appears nothing to be gained from requiring the very narrow issues that still exist between the parties to be litigated in a separate action.

B As was observed by Smith J. in his judgment at p.565 :

> "(that) though the fact that the agreement expressly stipulates that it shall be made a rule of Court, or that it shall be enforced by order in the action, is still, I think, an important consideration in determining whether the summary procedure should be adopted,
> C the Court is not bound to give effect to such an agreement. It has a discretion as to whether it will do so, which appears to be wide enough to enable it to give effect to any matter of such a nature as would afford a defence to an action for specific performance."

In this latter regard it is convenient at this stage, to deal with a submission of
D defence counsel that :

> "... the Deed sued upon appears to have come about in circumstances of actionable non-disclosure. Parties contracted in terms akin to indemnity/partnership. Issues arise as to the duties on Plaintiffs to disclose their earlier offer to secure their own release for A$750,000."

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This submission is principally based on the non-disclosure of a letter (not produced) dated 7th July 1994 (i.e. 1 month before the Deed was signed) ostensibly written by the plaintiffs financial advisor to the Commonwealth Bank of Australia offering amongst other things, to settle the plaintiffs liability to the Bank for a sum of $A750,000 and which was first disclosed to the defendants Brisbane
F solicitors in a letter dated 8th November 1994 (i.e. almost 3 months after the Deed was entered into).

It appears from the evidence that the first defendant had anticipated making an offer to the Bank of a settlement figure of around $A400,000 with interest, and that had he been aware of the plaintiffs earlier offer to settle their liability for
G $A750,000, he "... would not have executed the Deed of Settlement in its existing form" since their offer severely restricted his ability to negotiate a better settlement with the Bank.

In support of his submission that the Deed of Settlement required utmost good faith on the part of the parties, defence counsel sought to equate it with a partnership or a joint-venture agreement which required the parties to deal jointly with the Bank in seeking a settlement for their joint and several liabilities and in which "... the possibility of one party negotiating a separate release was not

contemplated at all."

Counsel for the plaintiffs forcefully submits however, that there is nothing in the Deed to support that interpretation and considerable emphasis was also placed by counsel on the seemingly non-derogating manner in which Clauses 2, 3, 5 and 6 were prefaced. Indeed counsel went so far as to suggest that Clause 3 stands independently of all other provisions of the Deed - i.e. as a separate contract of indemnity capable of subsisting alone and enforceable as such upon proof of any proceedings being taken by the Bank to enforce the plaintiffs' Guarantees.

Bearing in mind the background to the present proceedings and the various clauses of the Deed of Settlement earlier set out, I am satisfied that the nature of the agreement concluded between the parties was and is not a contract *uberrimae fidei* requiring either utmost good faith or full disclosure of facts.

In Law Guarantee Trust and Accident Society (Limited) v. Munich Re-insurance Company (1915) 31 T.L.R. 574, Eve J. said of the nature of a contract of indemnity:

> "(It is) a contract imposing, as every contract does, an obligation on each contracting party to perform his part with honesty and good faith, but not placing either in a position from which there could arise those higher and more burdensome obligations imposed on a contractor whose relationship with his co-contractor is of a fidiciary nature."

More directly on point is the judgment of Chitty J. in Turner v. Green (1895) 2 Ch.D. 205 where, in upholding an application for specific performance of a compromise and in rejecting a defence that a material fact had been suppressed by the applicant before the terms of the compromise were concluded, the learned judge :

> "Held : that there being no obligation on (the plaintiff's solicitor) to disclose all he knew, the defendant was bound by the terms of the settlement."

More recently in Wales v. Wadham [1977] 2 All E.R. 125 where a divorced wife failed to disclose her intention to remarry during negotiations for a property settlement and obtained a larger settlement than her husband would otherwise have agreed to, Tudor-Evans J. in refusing the husband's application to set aside the settlement on the basis of non-disclosure:

> "Held : (inter alia)
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> (2) The wife was not under any duty, in relation to the agreement to disclose to the husband that she intended to remarry because -

(i) She was not under a contractual duty to do so.

A (ii) The agreement was not a contract *uberrimae fidei* since it was not a contract in which one party only possessed knowledge of all the material facts but a compromise agreement reached on each side without full disclosure. Nor was there a duty on the wife to disclose facts material to the agreement on the ground that it effected the release of a right, i.e. her right to maintenance, since the agreement was a settlement of the wife's claim to
B maintenance and not the release of a right thereto."

Finally in Rama v. Millar [1996] 1 N.Z.L.R. 257 the Privy Council in rejecting a similar argument in a claim by one partner against another for compensation for breach of fiduciary duty in circumstances not dissimilar to the present case said at p.261 :

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"Whatever be the ordinary position when there is a deadlock, in this case Their Lordships consider that Mr. Rama, as the financially exposed partner, would have been entitled to proceed to settle the matter without further delay unless Mr. Millar was able and willing to provide a financial indemnity to Mr. Rama. Mr. Millar could
D not have done that. The Court of Appeal held that Mr. Rama was not free to settle with the B.N.Z. without the agreement of Mr. Millar. Their Lordships are unable to agree. Partners must act honestly and fairly towards each other, but this does not mean that one partner can require another to undertake a financial risk to which he has not agreed.

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Of course, when proceeding to settle the dispute unilaterally, Mr. Rama remained under an obligation to act honestly and fairly. He was not entitled to prefer his other interests, although he was entitled to give weight to his reluctance to expose himself to further financial risks in a venture which had foundered."

F (my underlining)

Returning then to the judgment of Smith J. in the Gippsland case (op.cit), His Honour in considering whether the introduction of the Judicature Act system had the effect of making the Chancery rules of practice applicable in common law actions and in agreeing that it did have that effect, concluded that the breadth of the words in Section 24(7) of the Judicature Act 1873 were such :

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"... that a claim for summary enforcement cannot be excluded from the category of claims for relief properly brought forward in the cause or matter merely because the claim is made in a common law action."

The parties also seriously differ as to the consequences of a default under the Deed and their rights and remedies in such an event.

In this regard defence counsel submits that the plaintiffs remedies are either :

"(a) In terms of the Deed :

(i) suffer judgment for the full certified amount and seek recompense under Clause 3; or

(ii) pay the full amount (Bank Liabilities) to the Bank and make demand under Clause 5 (and wait 15 months) ; or

(b) If they choose to make a settlement, prove this against the Defendants as their loss arising from the Defendants breach of contract."

Counsel for the plaintiffs however submits equally forcefully that after the expiry of 6 months, the Defendants lost their right to negotiate and/or pay a negotiated amount. In that event counsel argues that the Defendants are obliged to pay 80% of the amount certified by the Bank as owing by Burcrest to the Bank immediately after the expiration of the 6 months period (i.e. the certified amount).

In so far as it is necessary to resolve this difference, I am in agreement with the submission of counsel for the plaintiffs. In my view defence counsel's submission, if accepted, would render nugatory the reservations agreed to in Clause 8 which are made operative in the event of a default under the Deed.

Needless to say I read the phrase "an order made in terms of" in Clause 8 as meaning any order which the Court can make with justice and moulded so as to give effect to the clear intention of the parties as principally defined in Clause 1 of the Deed.

In this respect Clause 1 itself points the way by providing that in the event of a failure to arrive at a negotiated amount, the parties are obliged to pay their respective shares of the certified amount. In my view, no further litigation is or was anticipated by the parties in compromising the present action nor is there any need in the event of a default, to invoke either Clause 3 or Clause 5 as defence counsel appears to suggest.

Is there then an amount certified by the Bank as owing by Burcrest to the Bank in terms of Clause 1 of the Deed ?

In this respect defence counsel queries whether the amount demanded by the plaintiffs namely, $A600,000 has been "certified by the Bank" and counsel points to the without prejudice nature of the correspondence relied upon and the absence of any break down in the amount or any formal character in the letter such as to identify it as a certificate.

Counsel for the plaintiffs submits on the other hand that there is no requirement in the Deed that the amount be certified in any particular manner or be broken

down into its component parts (if any) and accordingly a without prejudice letter from the Bank would suffice.

A

In Roberts v. Watkins (1863) 32 L.J. C.P. 291, Byles J. said of the meaning of "certify" in the contract before him, at p.293 :

> "The words in this contract do not import that the architect is to certify in writing. The Recorder of London when he certifies to the Court the custom of the City does so by word of mouth, and it is plain that the usual meaning of `certify' does not require anything written: otherwise why should parties ever expressly stipulate as to certifying in writing."

B

Similarly in this agreement there is no express stipulation that the amount owing to the Bank be certified by the Bank in writing or that it be provided to both parties or be broken down.

C

I note that the letter relied upon by the plaintiffs is signed by the Bank's Manager, Credit Recovery is headed: "Burcrest Pty. Ltd". and states:

> "The amount owing on this account as at 31 May 1995, (but not including interest accrued during May), was $1,882,948."

D

In my view the Bank's letter is a clear certification by an appropriate Bank official of "... (the amount) owing by Burcrest to the Bank" and a sufficient compliance with the requirements of Clause 1 of the Deed.

On the law as discussed and on the evidence disclosed in the various affidavits and accepted by the Court, I hold that the plaintiffs are entitled to succeed in this application and that the most just order to make from amongst the various alternatives provided in the plaintiffs several amended Summonses, is that set out in the plaintiffs amended Summons filed on the 2nd of November 1995 and identified by the alphabet "BB", and which reads as follows:

E

F

> "... that the Defendants pay forthwith the sum of One Million Five Hundred and Six Thousand Three Hundred and Fifty Eight Australian Dollars and Forty Cents (A$1,506,358.40) (or that sum of equivalent Fijian Dollars calculated at the exchange rate prevailing on the date of the payment) to the Plaintiffs together with interest thereon at the rate of 11.50 per centum per annum, calculated monthly rests from 1 June 1995 to the date of payment by payment into the trust account of Messrs. Parshotam & Co."

G

The plaintiffs are also awarded the costs of this application to be taxed if not agreed.

(Judgment for the Plaintiffs.)