JUDGMENT 2, 1973

No.4 of 1972

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FIJI COURT OF APPEAL

BETWEEN

JAMES SUBBAIYA Appellant

AND

PAUL NAGAIYA Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal, by leave of the Fiji Court of Appeal from an Order of the Fiji Court of Appeal dated 7th November 1969 (Hutchison J.A., and Marsack J.A., Gould V.P. dissenting) allowing with costs an appeal by the above-mentioned Respondent from an Order dated 27th March 1969 of the Supreme Court of Fiji (Thompson J.) (a) adjudging that the property purchased by the Respondent and comprised in Certificate of Title Volume 54 Folio 5387 containing 38 perches more or less and situated in Levuka in the Island of Ovalau, Fiji, and the subsequent sub-divisions thereof were to the extent that any sub-division had not already been alienated held by the Respondent as trustee for the Appellant, himself and his other brothers and (b) granting an injunction against the Respondent restraining him from objecting or interfering with the Appellant's quiet use and enjoyment of that part of the land on which the house occupied by the Respondent and the Appellant stands and (c) dismissing the Respondent's counter-claim, and (d) ordering the Respondent to pay the Appellant's costs. 68 59 42

2. The case concerns the beneficial ownership of the property described in the said Order, the Appellant claiming that on the purchase of the property in 1939 in the name of the Respondent a trust was created for the Respondent, the Appellant (who are brothers) and their three brothers. The Respondent denied the trust. The Judge found for the Appellant. The Fiji Court of Appeal, by a majority decision, overruled the Judge on the ground that the evidence was insufficient to establish the existence of a trust or to identify the beneficiaries.

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3. The family consisted of the parties' parents, their three brothers and three sisters. The Respondent was the eldest of the five brothers. He married on the 14th January 1938: The
76 Certificate of Marriage is exhibit "5". The Respondent agreed to purchase the property on the 14th November 1939. The Agreement is
64 exhibit "3". The purchase price was £125, payable as to £30 down and as to the balance of £95 by monthly instalments of £4 carrying interest
8,12-13 at 7 per cent. The Appellant alleged and the
40-41 Judge found that the deposit was provided by the parties' parents out of family savings and that the property was purchase for all the five brothers. The Respondent said that his father
24, 29 was a poor man and that he borrowed £30 for the deposit from his father-in-law and that he
24 purchased the property for himself.

4. The family lived at the property until 1949 when the Respondent left with his wife leaving the rest of the family at the property. The Respondent admitted that his brothers spent about £300 on repairs to the house, but contended that this was in return for the right to occupy
25, 26 the house. In about 1965 the Appellant carried out at his own expense the work of filling part of the land: The Appellant said that the amount of
9 work done was considerable, but the Respondent
25 contended that very little work was done.

5. The mother died in 1965, the father having died about two years earlier. On the 12th March 1965 the Respondent was certified as proprietor of the property in two blocks under separate title numbers: Certificates of Title are
61-3 exhibits "1" and "2". After the mother's death the Respondent sought to evict the Appellant and his other brothers. The Appellant refused to leave and on the 22nd February 1968 brought
1-2 these proceedings.

3 6. By his Statement of Claim the Appellant contended that the Respondent brought the property "either as nominee for himself, his parents, and other immediate members of his family, or as their agent or trustee" and that he had at all times until recently freely acknowledged that the property was "joint family property".

4-6 7. In his Statement of Defence and Counterclaim the Defendant alleged that he had purchased the property for himself and was the beneficial owner thereof; that he permitted the Appellant and some other members of his family to occupy a part of the property free of rent "on certain terms and conditions" and that the Appellant had refused to

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pay rent to him "despite repeated demands for the same".

8. By his Reply and Defence to Counterclaim, the Appellant alleged that he had an interest in the house and that it was "a family home". 6

9. At the hearing the Appellant's case on the question of the identity of the objects of the trust was that at the time the money was given to the Respondent to pay the deposit the parties' parents said and the Respondent acknowledged that the property was for the benefit of the five brothers. Cross-examined about the reference to "family" in his pleadings, the Appellant said that he told his Counsel that it was a family house and that he thought that that meant that it belonged to the brothers. 8, 10, 12-13, 26, 10

10. The Judgment of Thompson J. contains an impeccable summary of the evidence given on each side, each sentence of which was based on evidence duly recorded in his careful note. The Judge then dismissed an argument on behalf of the Respondent that the claim failed on the grounds that the Writ had not been endorsed as a representative action. The Judgment then recites certain facts not in dispute. 35-43, 35-38, 38, 39, 39

11. The Judge then said that he was satisfied that in or about 1967 the Appellant had offered to buy the house from the Respondent but they were unable to agree on a price; and that he found as a fact also that the Appellant did tell a defence witness that he was seeing if he could "buy his brother out". The Appellant had denied these allegations and the Judge held that in doing so he had not told the truth. 39

12. The Judge then said that he accepted the Respondent's evidence that from the time of the mother's death he told the Appellant and the other brothers that they must leave the house, but he observed that this did not necessarily conflict with the Appellant's evidence that he was not aware until 1967 that the title to the land was in the Respondent's name alone, commenting that "it is clearly not unusual for the oldest brother in an Indian family to exercise some measure of control over the way in which the family lives, or at least to try to do so". 40

13. The next three paragraphs of the Judgment set forth and explain the Judge's findings on the central issues of fact. On three subjects, he found that the Appellant was telling the truth and he disbelieved the Respondent, for the 40-41

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following reasons:

(1) The Judge referred to the undisputed fact that the father of the parties had bought a car and was operating it as a taxi in 1939. He said that he could not therefore accept the evidence of the Respondent that his father was a very poor man. Accordingly, whilst observing that he thought it likely that the Appellant, possibly due to the effluxion of years and the fact that he was a mere youth at the time, had inflated the amount of money that was in the house as savings in 1939, he accepted the Appellant's evidence that there was a sum of money available and that the Respondent was given money from those savings to pay the £30 lump sum at the time when the property was bought.

(2) The Judge said that he was satisfied that the repairs carried out by the Appellant and his brothers were very large in proportion to the total value of the property and he said that it was unlikely that they would have spent so much if they had not believed that the property belonged to them. He accordingly disbelieved the Respondent's evidence that he required the Appellant and his brothers to spend the money on the house because they were living in it.

(3) He observed that the Respondent had given no explanation why the Appellant should have spent money on filling part of the land if he had no interest in it or did not at least believe that he had. He accepted the Appellant's evidence, corroborated as it was by that of the labourer, that a great deal of work was done; and he stated that he regarded it as most unlikely that the Plaintiff would have done that work if he had not believed that the property belonged to himself as well as to the Respondent.

14. In holding that the Appellant's evidence on the foregoing issues was true, the Judge stated that he
41 had carefully weighed all the evidence and taken into account his finding that the Appellant had not told the truth in denying that he offered to buy the Respondent's share in the house.

41-2 15. Finally, the Judge rejected the submission on behalf of the Respondent that the Appellant's pleadings were deficient with regard to the identity of the objects of the alleged trust. In rejecting this argument the Judge observed that the Respondent was not misled or prejudiced in any way.

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16. In the Fiji Court of Appeal, seven grounds of appeal are referred to in the Respondent's Notice of Appeal and Additional Grounds of Appeal. With two exceptions, all these attack the Judge's findings of fact. The two exceptions are the argument that the Appellant's claim ought to have been dismissed on the grounds that the Writ was not endorsed as a representative action, and the argument that the Respondent's registered title could not be disturbed in the absence of fraud. 44 46

17. In his dissenting Judgment, Gould V.P., after summarising the facts and quoting from the Judgment of Thompson J., referred to the following criticisms of that Judgment which had been made by Counsel for the Respondent:- 47-52

(1) The Appellant said in evidence that after his marriage each brother ran his own life. Although he had said in chief that the Respondent was married in 1939, he said in cross-examination that the Respondent was not married at that time. He was then asked "If the Defendant was married when the property was bought, would your father refrain from intervening in his affairs?" and answered Yes. 11 10 11 12

(2) The Appellant's failure to call his elder sister whom he had said was concerned in handing over the money to the Respondent for the deposit. 8, 12

(3) It was argued that there was no reason for the father not to have acquired the property in his own name, unless the Respondent had in fact provided the money.

(4) It was argued that the Appellant's evidence as to the identity of the objects of the trust conflicted with his statement of claim.

18. Gould V.P. then referred to a point which had been raised by the Court and not by Counsel, namely that it appeared strange, if the Appellant's claim was true, that in his evidence he had disclaimed any interest in the part of the land which had been sold by the Respondent to the Levuka Club, and which was the same part of the land which had been filled at the expense of the Appellant. 51 15

19. In conclusion Gould V.P. said that "It is 51

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a case in which the questions of fact had to be decided partly by inference (an area in which this Court might more readily interfere) but more by the assessment of the credibility of the witnesses by the Judge based upon his observation of them and the impression he gained from their evidence as it was given. I think, after full consideration, that the challenge by Counsel for the Appellant to the evidence falls rather in the latter category than in the former". And after certain other observations he said "there was a great deal
52 of evidence and I take the view that the advantage enjoyed by the Learned Judge of hearing and seeing the witnesses outweighs any considerations which Counsel for the Appellant has been able to raise by his argument".

53-57 20. In his Judgment, Marsack J.A. said that the evidence for the existence of a trust must be "cogent and compelling" and expressed the view that the evidence as to how the trust came into existence and who are the beneficiaries "falls far short of establishing these two facts with reasonable certitude". He also said that the
56 identity of the beneficiaries must be established
54 "with certainty". After quoting certain of the Appellant's evidence as to the source of the money he examined the evidence for the purpose of
55 finding if the conduct of the Appellant and his brother had been consistent with the understanding alleged by the Appellant that the property really belonged to all the brothers. On this question he referred to three aspects of the evidence:

(1) He expressed the view that the evidence as to the repairs carried out by the Appellant and his brothers was inconclusive, as it might be held to support the Appellant's claim despite the claim by the Respondent that the expense incurred amounted merely to a payment in return for the brothers' use and occupation of the premises.

(2) He held that the understanding alleged by the Appellant could "in no sense be regarded as consistent with the fact, as found by the learned trial Judge, that in 1967 the /Appellant/ offered to buy the house from /Respondent/ but they were unable to agree on a price". He said that the obvious inference from that evidence was that the Appellant regarded the Respondent as the sole owner, in his own

right.

(3) He held that the understanding alleged by the Appellant "cannot be regarded as consistent with the fact that part of the land was sold by /Respondent/ to the Levuka Club to the knowledge of the other members of the family; and neither /Appellant/ nor any other member of the family had made, or now makes, any claim to the purchase price or any part of it. It is recognised that the purchase price will be paid solely to /Respondent/".

21. Marsack J.A. then said that it was necessary to look at the evidence on the question of the identification of the objects of the trust. He drew attention to the differences in the terminology employed in the Appellant's pleadings and his evidence that the property was bought "for all the brothers" and to the fact that in his evidence the Appellant had said "When my mother gave the money we expected the property to be in the name of my father and my brothers". 56 13

22. Marsack J.A. concluded that the evidence was insufficient to establish in the first place that the property was purchased on terms that the Respondent would be a trustee only and in the second place who were the beneficiaries under any such trust. 56-7

23. Hutchison J.A. concurred in the Judgment of Marsack J.A. 58

24. The Appellant submits that there was ample evidence to support each of the findings of fact made by the learned Judge, that the matters which Marsack J.A. regarded as inconsistent with the Appellant's case are not in fact inconsistent with it and that it is apparent from the Record that the learned Judge conducted a difficult case with great care, fairness and good sense; and that there are accordingly no grounds to justify an appellate Court in interfering with his findings.

25. One of the matters raised in the Fiji Court of Appeal was that there was no evidence to support the Judge's finding as to the role of the eldest brother in an Indian family. The Judgments in the Court of Appeal did not refer to this argument. In case it should be raised

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again, it will be submitted on behalf of the Appellant that his own evidence that "in an Indian family the eldest brother is in charge of all
7 the things in the house" does support this observation; secondly that the reasoning in the Judgment is not materially affected by this finding.

26. The Appellant will submit that the learned Judge was justified in arriving at his conclusions on the main issues for the reasons explained in his Judgment. In the respectful submission of the Appellant, it is abundantly clear from the Judgment that the learned Judge did in fact carefully weigh all the evidence.

27. With regard to the inferences to be drawn from the Appellant's evidence in relation to the date of the Respondent's marriage, it is conceded that the Appellant did make a mistake when under cross-examination about the date of the marriage. It is respectfully submitted that it does not follow that the Judge was not justified in believing his evidence on other matters, particularly when the Respondent also contradicted himself in the course of his evidence, for example, as to the date when he and his wife began
26, 29 cooking in a separate kitchen, and as to the
24,28,30 reasons for his leaving the house in 1949. Further, it is respectfully submitted that the father, in giving the Respondent money to buy the house for the brothers, was not
12 "intervening in the Respondent's affairs.

28. In relation to the Appellant's failure to call his elder sister as a witness, it is respectfully submitted that an appellate Court should not draw any inference from a party's failure to call a particular witness, particularly when, as in the present instance, that party was not cross-examined on his failure to do so. It is submitted that it may be equally significant that the Respondent did not call this witness. Moreover, the Respondent did not call any evidence to corroborate the alleged loan from his father-in-law, nor did he give any evidence as to repayment of this loan.

29. On the submission that there was no reason for the father not to have acquired the property in his own name, it is respectfully pointed out on behalf of the Appellant that he does not appear to have been asked in cross-examination why the property was purchased in the

Respondent's name. In the absence of such cross-examination, it is submitted that an appellate Court cannot draw any inferences. There is a possible explanation, namely that the Respondent was, whereas his father was not, acceptable to the vendor as a contracting party to undertake the obligations to pay the balance of the purchase money by instalments, the Respondent having been at the time employed by a government department, whereas the father was self-employed. 23, 24

30. It will be submitted on behalf of the Appellant that Marsack J.A. in referring to the need for "cogent and compelling evidence", "reasonable certitude" and "certainty" was laying down too fine a test of the evidence required. It is submitted that, while the onus of proof was on the Appellant to prove how the trust came into existence and who the beneficiaries were, it was sufficient to satisfy the Court on the balance of probabilities that the down-payment of £30 was provided out of the parents' savings and that they and the Respondent intended at the time of the purchase that the property should belong to the five brothers. It is submitted however that if the test described by Marsack J.A. is the correct test, there are no grounds on which an appellate Court can hold that the evidence did not satisfy that test.

31. It is submitted that Marsack J.A.'s quotation of the Appellant's evidence as to the source of the down-payment is incomplete, in that he omitted to set out certain of the Appellant's evidence on page 12 of the Record. It is further submitted that Marsack J.A. failed to take into account the careful reasoning in the Judgment of Thompson J. which satisfied him that the Respondent made the first payment for the house with money which his parents gave him for that purpose.

32. On the repairs to the property paid for by the Appellant and his brothers, it is respectfully submitted that Marsack J.A. failed to take into account the learned Judge's findings that the expenditure was very large in proportion to the total value of the property. It is submitted that the Judge was justified in his view that it was unlikely that they would have spent so much if they had not believed that the property belonged to them. As to the Respondent's view that the expenditure was a payment for use and occupation, it does not appear that this

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explanation of the expenditure was put to the Appellant in cross-examination. Nor did the Respondent plead this explanation in answer to the Appellant's allegation in relation to these repairs
3 contained in paragraph 3 of the Statement of Claim.

33. With regard to the significance of the Appellant's alleged negotiations to purchase the property, it is submitted that Marsack J.A. ignored the learned Judge's finding that the Appellant was
39 seeing if he could buy his brother out, and the
41 Judge's reference to this transaction as the Appellant's offer "to buy the Defendant's share in the house". On the assumption that the evidence about the Appellant's negotiations to purchase the property was true, it is submitted that the probable explanation of such evidence is that the Appellant was seeking to purchase the legal ownership of the property, together with the Respondent's interest therein and his claim to be the sole owner thereof. Such explanation is entirely consistent with the Appellant's claim. It is submitted that it is clear from his Judgment that Thompson J. considered this point carefully and it is submitted that his finding against the Appellant in relation to this evidence is not inconsistent with his finding for him on the main issues.

34. With regard to the significance of the attitude of the Appellant and of his brothers with regard to the land "sold" to Levuka Club, it is respectfully submitted that it is not clear from the Record that any land or building had in fact been sold by the Respondent to the Levuka Club, because the only recorded evidence given by the Respondent in relation to this matter was "I let the building from 1st August 1967 for £24 a month. I received that rent myself. My brothers have never asked me to account for that money". It is submitted that it is
25 accordingly doubtful whether the land in question had in fact been sold to the Levuka Club. It is submitted that it is significant that the point as to the significance of the Appellant's attitude was raised by the Fiji Court of Appeal, and not by Counsel. The cross-examination of the Appellant on this issue does not show that he was asked for any explanation of his or his brothers' attitude in this connection. It is possible that he only meant to indicate that he did not wish to disturb the Club's possession of the building occupied by it (he
15 said he was a member). In so far as he intended to express a lack of concern to claim a share in the rents or proceeds of sale received from the Club, it

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is possible that he did not appreciate that he might be entitled to make a proprietary claim. It is accordingly submitted that the Appellant's apparent failure to date to make any such claim and his evidence on this topic cannot be regarded by an appellate Court as inconsistent with his claim in these proceedings.

35. As to the argument on behalf of the Respondent that the Appellant's claim failed on the grounds that the Writ was not endorsed as a representative action, the Appellant submits that it is not a representative action and the Appellant will adopt the reasons given by the learned Judge and by Gould V.P. for dismissing this argument. 38, 39 52

36. In answer to the argument that the Respondent's registered title cannot be disturbed in the absence of fraud, it is submitted that it is competent for the Court to decide that the registered proprietor is holding the lands as trustee and not as beneficial owner, as held by Marsack J.A. 53

37. The Appellant respectfully submits that the Order of the Court of Appeal should be discharged and the Order of Thompson J. restored for the following (amongst other)

REASONS

(1) BECAUSE the evidence was sufficient to establish the facts found by the learned Judge.

(2) BECAUSE the learned Judge was justified in disbelieving the Respondent's version of the circumstances of the purchase.

(3) BECAUSE the Judge was justified in regarding the evidence as to the repairs to the property done by the Appellant and his brothers as supporting the Appellant's case and that the evidence about the filling work done to part of the land at the expense of the Appellant also supported his claim.

(4) BECAUSE the evidence about the Appellant's negotiations to purchase the Respondent's share in the property was not inconsistent with his claim.

(5) BECAUSE the evidence about his and his

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brothers' attitude to the land occupied by the Levuka Club was not inconsistent with his claim.

(6) BECAUSE none of the evidence other than that expressly disbelieved by the Judge was inconsistent with the Appellant's claim.

(7) BECAUSE there is ample evidence to justify each of the findings of fact made by the Judge.

(8) BECAUSE there are no grounds to justify an appellate Court in interfering with the findings of fact by the Judge who heard and saw the witnesses.

(9) BECAUSE it is apparent from the Record that Thompson J. conducted a difficult case with great care, fairness and good sense and judgment.

JOHN JOPLING

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