1952 *Present :* **Gratiaen J. and Gunasekara J.**

WEERASURIYA, Appellant, *and* FUARD, Respondent

S. C. 387—D. C. Colombo, 18,596

Proctor and client—Fiduciary relationship—Conflict between interest and duty—Allegation of fraud—Breach of professional duty established—Duty of Court to give relief to client.

A Proctor, who was employed by a client as legal adviser for the purpose of making an investment of a certain sum of money, caused the money to be lent on security which to his knowledge was precarious, and, by such investment, benefited financially three of his close relatives who had already interests as primary or secondary mortgagees in the same security. The investment, as any reasonable person should have foreseen, proved disastrous.

Held, that the Proctor's conduct in the transaction fell short of the high standard of conscientious duty exacted by well defined principles of the common law and that the client, who lost his money on the investment, was entitled to claim an indemnity from the Proctor for the loss which he had sustained.

A Court of Law, " exercising jurisdiction as a Court of conscience ", must always demand a very high standard of conscientiousness from legal advisers to whose contractual obligations there are superadded certain " duties of particular obligation " arising from a fiduciary relationship of a special nature—such as, for instance, where a Proctor is invited to act professionally for a client in a transaction from which either the Proctor or his close relatives stand to benefit materially.

It was the duty of the Proctor to have informed the client not only of the existence of the subsisting mortgages on the security but also of the identity of the mortgagees whose claims were to be settled out of the money invested. He should have insisted that the client should obtain legal advice from an independent and disinterested lawyer.

Held further, that in such a case it does not necessarily follow that, if sufficient facts have been proved entitling him to succeed in his claim to be indemnified, the client should be denied justice merely because his pleader over-stated his case by unsuccessfully raising against the Proctor an issue of express fraud as distinct from dereliction of duty arising from his position of fiduciary relationship.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *D. S. Jayawickreme* and *G. T. Samarawickreme*, for the plaintiff appellant.

J. R. V. Ferdinands, with *M. H. A. Azeez*, for the defendant respondent.

Cur. adv. vult.

May 27, 1952. GRATIAEN J.—

This appeal relates to a claim against a Proctor of this Court consequential on an alleged breach of professional duty to his client.

2——J. N. B 19618-1,492 (8/52)

The appellant, on his retirement from Government service in 1941, had drawn a commuted pension which, together with a sum lying to his credit with his Benevolent Association, amounted to Rs. 9,158. He had in addition accumulated some modest savings which brought up the total of his capital to Rs. 13,000. He desired to invest this sum in order to supplement his income which was now represented by a monthly Government pension of Rs. 149 and, with this object in view, he obtained an introduction to the respondent who was a Proctor and Notary Public with a good reputation practising his profession in Colombo for over 25 years.

The appellant first invested a part of his capital through the respondent in a mortgage executed in his favour by a borrower named Visvanam. This loan was duly repaid in 1942, and the appellant was once again on the look out for a suitable investment. Apparently, he had at one stage conceived the idea of purchasing a small residential bungalow for himself and his family, but he had not succeeded in finding a property which he could afford to buy. In the result, his capital lay idle for some months, and he was, to the respondent's knowledge, anxious to re-invest his money. " He used to come practically daily ", the respondent said, " and talk to the brokers who come to my office to invest his money ".

It is convenient at this stage to refer to two other persons who played a prominent part in the subsequent transaction which forms the subject-matter of this litigation. They are the respondent's brother Samsudeen (*alias* " Shams ") and a man named Samaratunge who had on many previous occasions borrowed money invested by clients of the respondent.

Samsudeen has been described as an " unlicensed broker ". He shared the respondent's office for the purposes of his business, and was also given access to the respondent's office stationery. Samsudeen made full use of these facilities (whether with or without the respondent's express authority) so as to induce prospective customers to believe that business recommended by him was also recommended by the respondent. By these means, his activities enjoyed the cachet of his brother's professional reputation. The letters marked P48, P49 and P50, with Samsudeen's name significantly typed above the printed name of the respondent on the respondent's note paper, furnish sinister evidence of Samsudeen's technique in attracting business. " He was trying to bait a fish ", said the respondent, " by using my name ". I shall have occasion to examine these letters more particularly at a later stage of my judgment, but in the present context it is sufficient to state that they contain many gross misrepresentations of fact which were designed to tempt the appellant into making an imprudent investment. " These are things ", said the respondent, " which brokers generally write to their clients ". Even if this sweeping exaggeration be construed as giving expression only to his estimate of the business methods of his own brother, it is quite deplorable that, in any view of the matter, the respondent should have acquiesced in a procedure which facilitated such improprieties in regard to business which was ultimately transacted professionally by himself.

Samsudeen was called as a witness by the appellant in order to establish the fact that P48, P49 and P50 were written by him from the respondent's office and with at least his apparent authority. But I cannot accept the artificial proposition that, merely because Samsudeen was in a sense the appellant's witness, the appellant is necessarily bound by every false statement which Samsudeen took the opportunity of making in the witness box. In the first place, Samsudeen is, on his brother's own assessment, a person whose word should not be accepted by a Court of Law without most careful scrutiny. Moreover, his evidence betrays a desire to assist his brother's defence whenever possible—indeed, in some instances to the point of demonstrable absurdity. I mention by way of illustration his suggestion that the description in P48 of the proposed borrower as " a long standing client of *ours* during the last 10 years " was intended to convey that Samaratunge had during that period been a " client " *of the appellant* and not of the respondent.

I now pass on to the person Samaratunge who had in truth been a long standing client of the respondent and Samsudeen in the sense that he had on many previous occasions borrowed money from persons introduced by them.

At the time when the appellant was looking for a suitable re-investment of his modest capital—i.e., towards the latter part of 1942—Samaratunge was, or claimed to be, the owner of two properties (or, to be more accurate, various allotments of land comprising two properties) to which I shall for convenience refer as " the Panwila Property " and " Fincham's Land " respectively. It is necessary to examine in respect of each property Samaratunge's more recent transactions during the relevant period—all of which transactions the respondent had been instrumental in negotiating in his professional capacity.

The Panwila property consisted of 6 separate lands, some of which are described as " undivided " allotments of larger lands. Samaratunge claimed to have inherited his property from his father Bilinda, but he apparently had no " paper title " to support this claim. On December 20, 1940, he executed in his own favour a somewhat unusual document D3, attested by the respondent as notary and Samsudeen as witness, declaring himself to be its lawful owner " for the better manifestation of his title thereto ". The value of the entire property was stated in the deed to be Rs. 2,000. The respondent admits, both in his evidence and in certain letters written by him before the action commenced, that this property was not such as he would recommend as attractive security to a prudent investor.

On August 20, 1941, Samaratunge borrowed Rs. 3,750 from Naina Marikar on a primary mortgage of the Panwila property (P41). Naina Marikar was the first cousin of the respondent and Samsudeen, and they were on this occasion as well the attesting notary and witness respectively. The chief security for the loan, however, was contained in a contemporaneous " indenture of lease ", so called, which was primarily intended to enable the lender to liquidate the debt by securing for himself the tea coupons issued in respect of the land—a device which, as is well known, was frequently resorted to during the period when " coupons " were negotiable and marketable documents issued in respect

of properties registered under the scheme whereby the export of tea from Ceylon was controlled by Government machinery. "Upon that promise", says the respondent, "the money was lent". Samaratunge did not, however, honour the arrangement by which his debt was to be liquidated. "One day", continues the respondent, "he came to my office with about 6,000 to 7,000 pounds of tea coupons and told me that he was going to deliver those coupons to Naina Marikar". This was a false promise. The coupons were not delivered, and accordingly on February 20, 1942, the respondent, acting on behalf of his cousin Naina Marikar, instituted action No. 532 M.B. in the District Court of Colombo against Samaratunge for the recovery of the debt. "I sued him", says the respondent, "because he tricked me. He was not keeping to his promises".

As one would expect, Samaratunge proved to be an elusive defendant in the mortgage action. Process was issued and reissued against him from time to time without success. Eventually, on August 17, 1942, he appeared in Court and consented to judgment. He was granted 6 months time within which to pay the judgment debt. A formal hypothecary decree for Rs. 3,750, interest and costs was entered of record on this basis on September 12, 1942, and in the result the Panwila property, in whose realisable value the respondent admittedly reposed little confidence, became liable, in default of payment before March 12, 1943, to be sold up for the recovery of the judgment debt. No doubt Naina Marikar and others interested in his welfare were in a state of some despondency as to his prospects of recovering the money which he had lent on unreliable security to a debtor introduced to him by his two cousins. It would certainly have been to his advantage if he could be rescued from his predicament without the need for selling up the Panwila property.

I now refer to the other property known as "Fincham's Land". After certain preliminary negotiations had taken place, Samaratunge borrowed a sum of Rs. 35,000 from a man named Moolchand on a primary mortgage of this property under the Bond P36 dated June 2, 1941, also attested by the respondent. The truth is that at the time of the earlier negotiations Samaratunge had not yet become the owner of the property and that the entire sum borrowed from Moolchand was utilised by Samaratunge for the purpose of acquiring title to the property, contemporaneously with the execution of P36, under a conveyance also notarially attested by the respondent, from the previous owner.

Fincham's Land is stated to be 146 acres in extent, of which 85 acres were planted in tea and 30 acres in cardamoms, the rest of the property being jungle land. In 1941 its chief source of revenue seems to have been the market value of its tea coupons periodically issued under the tea restriction scheme, and for this reason, when P36 was executed, a so-called "indenture of lease", similar to that created in the Panwila transaction, was executed in favour of Moolchand.

Moolchand gave evidence at the trial, and he stated in evidence that the "tea coupon scheme" terminated in May, 1942. This circumstance possibly explains why the extent of Samaratunge's liability under P36 had increased by January 15, 1943, according to an account stated (P37) between both parties, to Rs. 44,500.

Contemporaneously with the execution of P36, Samaratunge granted a secondary mortgage D2, also attested by the respondent, in favour of Samsudeen and the respondent's wife jointly. The bond stated that the sum due to Samsudeen was Rs. 2,500 and to the respondent's wife was Rs. 3,500. The respondent states that the consideration for these two " loans " was paid in his presence in cash on the date of the bond. The bond D2 was expressed, however, to carry no interest on either " loan ". The reason for this liberality on the part of the creditors concerned was not explained at the trial. At any rate, I am not disposed to probe the interesting theory that the sum covered by the bond represented in truth commission for services rendered by Samsudeen and the respondent in negotiating P36.

It is not suggested that Samaratunge owned any property besides the Panwila property and " Fincham's Land " at any time during the relevant period.

Samaratunge was called as a witness at the trial by the appellant's counsel for reasons which are certainly obscure. He too, like Samsudeen, took the opportunity of making many statements, some of them patently false, unfavourable to the appellant's case. Here again, I reject as artificial the argument that the appellant must necessarily be regarded as bound by the falsehoods to which Samaratunge gave utterance while he was in the witness box.

The scene now shifts to the latter part of November, 1942. The relative financial positions of Samaratunge and the appellant at the point of time may be summarised as follows :—

A. As far as Samaratunge was concerned, his position had, to say the least, become too precarious to justify any hope which he may have entertained of obtaining further loans from any prudent investors :—

(1) A hypothecary decree for Rs. 4,990, interest and costs in respect of the Panwila property had already been entered against him *in favour of the respondent's first cousin Naina Marikar*, and this property was liable to be sold in execution within a few months. No payment had been made in reduction of the judgment debt up to the end of November, 1942, and the prospect of making any future payment by honourable means must have been very remote ;

(2) Fincham's Land was subject to a primary bond in favour of Moolchand to secure the payment of a debt which by this time had increased to very nearly Rs. 44,500. It was also still subject to a *secondary mortgage bond for Rs. 6,000 in favour of the respondent's brother and the respondent's wife*. The loans secured by this latter bond had been outstanding for approximately 18 months without any right in the joint creditors to receive interest. There was no valid reason why Samsudeen or Mrs. Fuard or anyone protecting their interests should regard the security as satisfactory ;

(3) An important source of income from both properties had, if Moolchand's uncontradicted evidence on the point be true, dried up ; when the tea coupons were available, Samaratunge had improperly contrived to divert them from his creditors, and he apparently now lacked the means (even if he had the inclination) to meet his financial engagements at the due dates in any other way. Shortly stated, he was a most unsatisfactory debtor from every point of view.

B. Turning now to the appellant's financial position, he still had capital in his hands to the extent of Rs. 13,000 which he was anxious to invest in order to supplement his only other source of income, namely a monthly pension of Rs. 149 and a modest cost-of-living allowance, for the maintenance of himself and his family.

These facts which I have set out had substantially come to the knowledge of the respondent in the course of his professional employment by the clients concerned.

On November 17, 1942, Samsudeen wrote the letter P48 to the appellant from the respondent's office in the following terms :—

" A. M. Shams
C/o A. M. Fuard, 130, Hultsdorf Street,
Proctor and Notary. Colombo, 17 November, 1942.

Telephone No. 5446.

" Dear Mr. A. R. Weerasuriya,

After I met you at Main Street in Colombo, When I went to Office in the Noon I was surprise to find the client of ours whose business I casually suggested you. *This client is one Mr. K. R. Samaratunga a long standing client of ours for the last nearly Ten years or so. And he will pay interest very regularly and do good business.* Now he want Rs. 15,000 on a primary Mortgage of his House Property with 3 acres of land and 15 acres fully Planted Tea near his Home. This bungalow where he is reside now, it is a good one with water services, &c. These two properties were situated at Medakotuwa, Panwila is only 13 miles from Kandy. *Title is Crown.* Further Mr. Fuard had suggested me to get another Large Estate of 146 acres tea belonging to him, near about Kandy as Secondary Mortgage as an additional security, *this Estate is worth over 80,000 it has a primary Mortgage of 40,000 and interest have been paid up-to-date. Out of this 15,000 a sum of Rs. 5,000 will be repaid to you in six months time and the balance money will be paid back after an year. As he returning the money early in instalment, he had agreed to pay you an interest of 9 (nine) per cent. This is a good business, he will be very regular in paying you the interest should you accept this.* If so please let me know when you can conveniently inspect the land, I shall make all arrangement. This security does not appear as it sufficient enough, but if you will go to see you will realise. In the other hand *the borrower is absolutely good and you will be more than satisfied.*"

[I have taken the liberty of italicizing the statements which were specially calculated to interest the appellant in the investment proposed to him.] Five days later Samsudeen wrote another letter, P49, to the appellant as follows :—

" A. M. Shams,
A. M. Fuard,
Proctor and Notary.

130, Hultsdorf Street,
Colombo, 23 November, 1942.

Telephone No. 5446.

" A. R. Weerasuriya, Esq.,
Sirisevena,
Ambalangoda.

Dear Mr. Weerasuriya,

I am in receipt of your letter dated the 18th instant and I immediately communicated with my client *having consulted Mr. Fuard.* I have fixed up to inspect these properties of Mr. Samaratunge at Kandy on this Sunday the 29th inst. Please be in Colombo at the Kandy Bus Stand at 5th Cross Street near the Municipal Latrine between 7 and 8 in the morning. We got to inspect this property definitely on this Sunday. From Colombo we have to go by Bus to Kandy and Mr. Samaratunge will be meeting us at the Bus Stand positively at Kandy and we will have to take breakfast at Kandy and then proceed to the Estate by car.

Mr. Fuard highly recommends this loan."

On 26 November, 1942, Samsudeen wrote P50 :—

" A. M. Shams
A. M. Fuard,
Proctor and Notary.

130, Hultsdorf Street,
Colombo, 16 November, 1942.

Telephone No. 5446.

" Dear Mr. Weerasuriya,

I received your letter dated the 24th inst. for which I thank you.

Re Interest. I have managed to fix up the rate of Interest at 10 per cent. through Mr. Fuard. Now it is O.K.

Hope to meet you on the 29th morning at the Bus Stand between 7 and 8."

[The special recommendations contained in P49 and P50 have also been italicized by me.]

On December 3, 1942, the plaintiff lent to Samaratunge a sum of Rs. 15,000 (representing his entire capital augmented by a sum of Rs. 2,000 made available to him by a relative) on the mortgage bond P1 carrying interest at 10 per centum per annum. The bond was attested by the respondent as notary and by the respondent's brother Samsudeen as witness. The security covered by the bond was (*a*) a primary mortgage of the Panwila property, (*b*) a secondary mortgage of Fincham's Land.

At the time of the execution of P1 the appellant handed to the respondent, as attesting notary, two cheques for Rs. 375 and Rs. 14,625 respectively. The cheque for Rs. 375 was endorsed and returned to the appellant to cover 3 months interest in advance. The balance sum of Rs. 14,625 was distributed by the respondent as follows :—

(*a*) Rs. 375 was retained by the respondent on account of stamps fees, &c.

(*b*) Rs. 4,500 was paid to *the respondent's first cousin Naina Marikar*, the judgment-creditor in the pending mortgage action, in consideration of which payment (and of a fresh mortgage for Rs. 1,000 postponed to P1) satisfaction of the decree was duly entered of record. In the result, Naina Marikar had the good fortune to receive back in cash his capital investment, together with a sum of Rs. 750 in substantial reduction of his claim, interest and costs.

(*c*) Rs. 2,500 was paid to *the respondent's brother Samsudeen* in full settlement of his claim on the bond D2.

(*d*) Rs. 3,500 was paid to *the respondent's wife* in full settlement of her claim on the bond D2 .

(*e*) Rs. 3,750 was paid to Samaratunge personally. (There is no evidence as to whether any part of this sum was later paid by him to the respondent's brother Samsudeen as remuneration for negotiating this most opportune loan. On the other hand, there is no evidence which would justify the assumption that the services rendered by Samsudeen in the transaction had been actuated solely by motives of liberality.)

In the result, at least Rs. 10,500 out of the capital invested by the appellant was directly utilised to the financial benefit of three close relatives of the attesting notary. And in each case the relative so benefited had been rescued from the situation of being the creditor of a person who could have had no reasonable prospect of raising further money from prudent investors and whom the notary concerned admittedly regarded at the time as " a difficult customer who would never keep to his word ". From the point of view of these persons, the completion of the transaction can certainly be regarded as entirely satisfactory.

The investment, as any reasonable person should have foreseen, proved disastrous. No change occurred in either Samaratunge's financial position or in his respect for the sanctity of his contractual obligations. He defaulted in the payment of interest from the very start, and the only sum which the appellant received on this account was the single payment of Rs. 375 which had been retained to cover 3 months interest in advance. The position further deteriorated in September, 1943, when Moolchand sued Samaratunge to enforce his primary bond in respect of Fincham's Land, the appellant being joined in the action as secondary mortgagee. Decree in Moolchand's favour was entered for Rs. 51,620 together with further interest and costs. On April 19, 1944, the mortgaged property was sold in execution of the decree and was bought by Moolchand for only Rs. 16,000. Moolchand

states that he succeeded shortly afterwards in reducing his own loss to some extent by selling Fincham's Land to an outsider for Rs. 30,000. Whether the value of the property has more recently been enhanced by reason of the boom conditions of the post-war period is quite beside the point.

The result of the sale of Fincham's Land in execution of Moolchand's decree was that the appellant's interests as secondary mortgagee were wiped out. There remained only his security on the primary mortgage of the Panwila property. In June, 1944, the appellant sued Samaratunge on the bond and obtained a decree for Rs. 17,765·62. At a judicial sale conducted on the land in the presence of 20 or 30 people on March 9, 1946, it was purchased by an outsider for only Rs. 2,250. This sum, together with the sum of Rs. 375 originally retained as interest in advance, represents all that the appellant was able to recover out of the capital investment of Rs. 15,000, to say nothing of the expenses incurred in the mortgage action. In the result, the appellant has been almost completely impoverished, and he has since been reduced to the necessity of supplementing his income as a pensioner by obtaining temporary employment on a small monthly salary.

Up to this point in the narrative, the facts as I have substantially set them out are not in dispute, but there is much divergence between the versions of the appellant and the respondent respectively as to the part which the latter played in putting through this most disastrous investment.

The gist of the appellant's complaint is that the respondent, acting as his legal adviser, had recommended the unprofitable investment introduced by Samsudeen, and that his conduct constituted a breach of his professional duty arising under the contract of employment; in particular, that the respondent had acted fraudulently and with the dishonest intention of furthering the interests of his own relatives—information regarding which interests he had improperly withheld from the appellant at the time when the transaction took place. In these circumstances he claimed that the respondent should indemnify him for the loss sustained by him which he assessed, at the time when the action commenced, at Rs. 20,000.

The respondent denied the allegations made against him. He admitted in his pleadings that the appellant had "consulted him professionally from time to time regarding his investments", and that he had "rendered the (appellant) professional services from time to time". With regard to the particular investment of December 3,1942, however, he pleaded that he "had at all times expressly told the (appellant) that he must satisfy himself about the value and adequacy of the security" and that "the (appellant) satisfied himself accordingly". Finally, he pleaded that "the security was adequate in fact, though the (respondent) did not recommend either the security or the borrower". The answer does not explicitly refer to the complaint that the adverse interests of "others", i.e., of the respondent's relatives to whom I have referred, were not previously known to the appellant or communicated to him at the relevant time.

The case went to trial on as many as 12 issues. The learned District Judge has answered in the affirmative the following issues :—

"(1) Did the plaintiff employ the defendant *as his legal adviser* and to act for and on his behalf in connection with the investment of Rs. 15,000 in or about November, 1942 ? "

"(2) *In pursuance of such employment* did the defendant invest the said sum of Rs. 15,000 with K. R. Samaratunge on Bond No. 2308 on 3. 12. 42 ? ".

On the other hand, the learned Judge has expressly held that the respondent had not "fraudulently concealed material facts within his knowledge with a view to inducing the (appellant) to make the investment". In this view of the matter, he decided that the further issue whether the respondent had "committed a breach of his contract of employment with the (appellant) and/or an intentional dereliction of professional duty relative to the investment" did not arise for consideration.

For the reasons which I shall later indicate, it seems to me that the learned District Judge has not paid sufficient regard to the very high standard of conscientiousness which a Court of Law, "exercising jurisdiction as a Court of conscience", must always demand from legal advisers to whose contractual obligations there are superadded certain "duties of particular obligation" arising from a fiduciary relationship of a special nature—such as, for instance, where a proctor is invited to act professionally for a client in a transaction from which either the proctor or his close relatives stand to benefit materially. As I read the judgment under appeal, the learned District Judge, in disposing of issue 5, seems to take the view in this particular case that the respondent had sufficiently complied with his duty by informing the appellant of the existence only of the subsisting mortgages on Fincham's Land and the Panwila property respectively (without disclosing the identity of the mortgagees). Accordingly, he holds, "it made no difference to the (appellant) whether the secondary mortgage was in favour of Samsudeen and the (respondent's) wife or in favour of some other parties". With great respect, I cannot subscribe to this view. "A solicitor who accepts such a post puts himself in a false position ; if he acts for both (parties), he owes a duty to both, to do the best that he can for both", *per* Farwell J. in *Powell v. Powell* [1]. It was the plain duty of the respondent to have made it very clear to the appellant that his wife, his brother and another close relative, for all of whom he was also acting and in whose financial advantage he had a special concern, were particularly interested in the proposed loan to Samaratunge going through. He should unambiguously have warned the appellant of the extent to which the situation created a conflict between his interest and his duty in order that, being thus forewarned, the appellant might have the opportunity of preferring to consult an independent and disinterested lawyer before making a final decision in the matter. Indeed, I take the view that he should have insisted that the appellant should obtain his legal advice from someone else.

[1] *(1900) 1 Ch. 243 at p. 246.*

Notwithstanding this infirmity in the learned Judge's method of approach to the matter arising for his decision, I cannot lose sight of the circumstance that there is a very strong finding of fact in favour of the appellant on the issue of deliberate fraud in the sense in which that term implies a dishonest intention, by means of false misrepresentations, to secure a benefit for his own relatives at the appellant's expense. As a Judge of appeal, lacking the advantage of having seen and heard the witnesses, I cannot presume to substitute my own opinion on this grave issue for that of the learned Judge. On the other hand, the trial Judge's answer to issue 5, though it quite explicitly disposes of the allegation of fraud, was clearly not intended to express the view that the respondent had in fact disclosed every fact known to him which was relevant to the appellant's decision whether or not to grant the proposed loan to Samaratunge.

Does the acquittal of the respondent on the issue of *actual* (as opposed to *constructive*) fraud conclude the case against the appellant ? This cannot be so. In the present case, each party had placed his version of the transaction very fully before the Court. The appellant's cause of action, shortly stated, is that the respondent is liable to indemnify him for his loss because the respondent had failed to perform his professional duty in regard to the transaction. No doubt the appellant has failed to satisfy the trial Judge that this alleged breach of duty can be equated to the commission of an intentional and deliberate fraud. But it does not necessarily follow, however, that, *if sufficient facts have been proved entitling the appellant to succeed in his claim to be indemnified*, he must be denied justice merely because " his pleader has chosen to over-state his client's case and the Judge to frame an issue embodying that over-statement ", *per* Lord Atkinson in *Jayewickreme v. Amarasuriya* [1].

If fraud be imputed unsuccessfully but unnecessarily as forming one of the ingredients of a cause of action, justice requires that the Court should nevertheless grant relief to the injured party provided that other matters were alleged and proved which would give the Court jurisdiction as the foundation of a decree. *Archbold v. Commissioners of Charitable Payments for Ireland* [2]. It was by the application of this principle that, in a case which is in many respects similar to the present litigation, the House of Lords granted an indemnity to a client against his solicitor against whom an allegation of fraud had failed but against whom dereliction of duty arising from his position of fiduciary relationship was nevertheless established. *Nocton v. Lord Ashburton* [3]. When the real character of the litigation has been made plain, said Lord Haldane, one should not permit the issue between the parties to be clouded by " difficulties which are concerned with *form* and not with *substance* ". In my opinion the averments in the plaint justify the examination of the plaintiff's claim on the basis of a cause of action founded in *tort* or in *contract* or in *breach of duty* or even in a combination of all these elements.

It is indeed unfortunate that, having satisfied himself that the respondent had not intentionally defrauded the appellant, the learned

[1] *(1918) 20 N. L. R. 289 at p. 297.* [2] *(1849) 2 H. L. C. 440.*

[3] *(1914) A. C. 932.*

Judge did not direct his mind to the further question whether upon the facts the respondent had nevertheless "violated, however innocently (because he had misconceived the extent of the obligation which a Court of Equity imposes on him), an obligation which he must be taken by the Court to have known". *Nocton's case* [1]. This Court is therefore deprived of the advantage of having before it any clear adjudication upon many material issues which are controversial. Normally, the situation would have called for a retrial, but in the present case I am satisfied that justice can be done without exposing the parties to the inconvenience and expense of a trial *de novó* regarding the circumstances of a transaction which had taken place nearly 10 years ago.

I shall now enumerate the points which have particularly weighed with me in reaching the conclusion that there is sufficient material upon which the liability of the respondent has been established even if one were to take a view that is least unfavourable to his professional honour—

1. The learned Judge has expressly held that the respondent acted as the appellant's legal adviser in the transaction, and the respondent admits that he did in fact tender certain professional advice to the appellant in that connection : in determining the sufficiency of this advice, it is not improper, I think, to pay special regard to the version contained in his letters P61 of November 14, 1945 (in reply to P60), P63 of November 30, 1945 (in reply to P62), and P67 of October 17, 1945 (in reply to P66). Certain statements made by him for the first time in the course of cross-examination, and which the appellant had not been given the opportunity of denying when he was in the witness box, are to my mind far less reliable.

2. Notwithstanding the protestations of Samsudeen and Samaratunge, it is very clear from the documents P48, P49 and P50 that the loan and the proposed borrower Samaratunge were in the first instance recommended to the appellant by Samsudeen. These letters not only contain many false statements as to the nature of the security and the integrity of the borrower, but they also expressly purport to associate the respondent with those statements. The appellant, who was not cross-examined on this point, has stated that these letters were shown by him to the respondent, and this fact has not been denied by the respondent. I regret that, in spite of my admitted disadvantages as an appellate Judge, I do not believe the respondent could have unambiguously removed the false impression which Samsudeen had given as to Samaratunge's personal unsuitability as a debtor. This point was not suggested to the appellant in cross-examination, nor did the respondent claim to have so acted in any of his earlier letters addressed to the appellant or the appellant's proctor. It is inherently improbable that the appellant would have proceeded with the business if he had been made to realise that Samsudeen's written encomiums of Samaratunge, purporting to have been endorsed by the respondent himself, were deliberately false ; in this respect also the respondent has failed in his professional duty.

[1] *(1914) A. C. 932 at p. 954.*

3. There is a finding in favour of the respondent, and the appellant admits, that the respondent had warned him that he must satisfy himself as to the value of Fincham's Land, and that it was safer to regard this property as the substantial security for the proposed loan. But in the present case I do not regard this advice as even nearly approximating to the kind of professional advice which the situation demanded. Before the action commenced, the respondent set out in writing the nature of the professional advice which he claims to have given. " I cautioned you ", he said in his letter P61, " that you should not lend unless you were satisfied that the big property (i.e., Fincham's Land) is worth over Rs. 50,000. In fact, I remember very well that I advised you not to place any value over his (Panwila property) because it consisted of several small lots. Further, I told you that you should lend Rs. 50,000 only if (Fincham's Land) is worth Rs. 50,000." This letter also confirms that the respondent had told the appellant that in his own opinion Fincham's Land was in fact worth "somewhere near Rs. 50,000". It seems to me that even on this hypothesis, the professional advice given by the respondent was in all the circumstances quite inadequate. It is not pretended that the appellant was warned that the sum outstanding on the primary bond in Moolchand's favour now exceeded, or (in the absence of precise information) must be assumed to have exceeded, Rs. 40,000. The proper advice should have been that there was a real risk that the security of a secondary mortgage would, particularly in the event of a forced sale, prove to be virtually negligible unless its realisable value left over an ample margin to meet that contingency. A lay client, inexpert in valuation and known to possess little previous experience of investments, cannot reasonably be expected to advise himself as to the sufficiency of the security offered unless he is forewarned of the special risks to be avoided.

4. As I have previously said, the respondent should have disclosed the fact that his close relatives, for whom he was acting, were Samaratunge's creditors and stood to benefit if the transaction went through. The appellant consistently maintained that he was unaware of this circumstance until long afterwards. In his letter P60 dated March 12, 1945 (i.e., nearly 5 years later) he wrote to the respondent " I understood that the money lent by your relations, also I believe on your advice, has been paid by Mr. Samaratunge ". The reply to this categorical allegation was " In your letter you seem to imagine lots of things to blame me. Still Mr. Samaratunge owes money to my relatives ." This was certainly not a very frank statement in the circumstances of the case, and I am perfectly satisfied that the respondent had not at any relevant period of time disclosed to the appellant the nature or the extent of the interests of his relations in the transaction. Indeed, the respondent admits that he did not give this vital information, his excuse being that the appellant had told him " that he had heard that my wife had lent money and that my brother had lent money on that land. I did not therefore tell (the appellant) that my wife had a mortgage ". Indeed, it is implicit in the findings of the trial Judge that this relevant information, *which*

the learned Judge erroneously regarded as immaterial, had not in fact been disclosed to the appellant. I find myself unable to accept as valid or as truthful this excuse for non-disclosure which was not suggested to the appellant in cross-examination or given when the first opportunity arose to offer an explanation.

When a proctor is engaged to advise a client in regard to a proposed investment, " his contract of employment imposes on him a duty to act skilfully and carefully . . . . and, superimposed on this contractual duty, is the duty imposed by his fiduciary position to make a full and not a misleading disclosure of facts known to him when advising his client ". *Nocton's case* (*supra*). As Lord Haldane states, " when a solicitor has financial transactions with his client and has handled his money to the extent of using it to pay off a mortgage made to himself, the Court has jurisdiction to scrutinize the transaction ". No less vigilantly should his conduct be examined when the money is utilised to settle not his own personal claims but those of his relatives. See also *Abdul Cader v. Sittinisa* [1] where the same principles were applied by this Court in setting aside a transaction put through by a proctor for his wife's benefit.

Examined in this way, the respondent's conduct in the transaction under consideration fell far short of the duty imposed on him by contract and also of " the duty of particular obligation " imposed on him by his special fiduciary relationship. Putting the case against him at the very lowest, he did not disclose to the appellant the extent to which his relatives stood to gain if the transaction went through ; he did not sufficiently advise the appellant as to the safe margin which should be insisted on if the main security for the loan was to be a secondary mortgage of Fincham's Land—having regard particularly to the appellant's known inability to purchase the property himself at a forced sale in order to protect himself ; Samaratunge was a debtor of proved unreliability whose financial position had by the beginning of December, 1942, become well-nigh desperate ; and the respondent did not sufficiently, if at all, refute the recommendation of the borrower with which Samsudeen had deliberately associated him in the letters P48, P49 and P50. In other words, he refrained from communicating to his client many circumstances within his knowledge which were material to his client's decision. It was a breach of duty in the facts of the present case to withhold any information as to the special risks attending the proposed transaction.

In any view of the matter, the respondent's conduct has fallen short of the high standard of conscientious duty exacted by well defined principles of the common law. The appellant has lost his money in consequence and is in my opinion entitled to claim an indemnity for the loss which he has sustained.

It is not suggested that the sum of Rs. 20,000 claimed on this account is in any way excessive. The appellant could not by any means within his power or within the realm of practicability have minimised his loss. I mention this point because the learned Judge has stated, presumably by way of criticism, that the appellant " does not appear to have taken

[1] *(1951) 52 N. L. R. 536.*

any steps to purchase (Fincham's Land) himself or pay off the money due to Moolchand. If he had paid the money due to Moolchand, then (the appellant's) bond would have been a primary bond ". I really do not understand how a Government pensioner who had already invested his entire capital (and indeed, some borrowed money as well) in granting the loan to Samaratunge could have been expected to raise sufficient funds to settle the very substantial judgment-debt in favour of Moolchand in order to protect his own hypothecary rights.

In my opinion the judgment under appeal should be set aside and a decree entered in favour of the appellant against the respondent as prayed for with costs both here and in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.