

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 185 OF 2011

BETWEEN : **AZIZ MOHAMMED** formerly of Waiwai, Ba, Fiji but now residing at 78 Minchinbury Street, Eastern Creek, 2766 NSW, Sydney, Australia, Machine Operator.

PLAINTIFF

AND : **MOHAMMED JALIL** formerly of Waiwai, Ba, Fiji, Cultivator but now residing at 28 Prangely Ave, Mangere, Auckland, New Zealand as the sole surviving Executor and Trustee of the Estate of Mohammed Hanif, late of Waiwai, Ba, Fiji, Cultivator, Deceased.

DEFENDANT

R U L I N G

INTRODUCTION

1. There is a piece of land namely Native Lease No. 12893 situated at Main Street Ba town on which is erected a double story concrete building. The land once belonged to brothers Mohammed Taiyab (now deceased) and Mohammed Hanif (also deceased) in equal shares.
2. Hanif pre-deceased Taiyab on 15 December 1971. By Hanif's last Will and Testament, Taiyab (surviving brother) and Jalil (defendant, one of Hanif's surviving sons) were appointed executors and trustees.
3. Taiyab has since passed on. His estate is owner of one half undivided share on NL 12893. The other half undivided share, of course, vests in the estate of Hanif, of which Jalil is now the sole executor trustee (since the death of Taiyab).
4. The plaintiff is one of several surviving sons of Hanif. He also has a beneficial interest in the residuary properties of the Hanif estate, which, as far as I can gather from the documents filed, includes Native Lease No. 12893. The other beneficiaries with an interest in NL 12893 are, according to clause 8 of the Will:
 8. **I HEREBY GIVE DEVISE AND BEQUEATH** all my rest and residuary properties both real and personal whatsoever nature and wheresoever situate unto my sons **MOHAMMED JALIL, MOHAMMED KHALIL, MOHAMMED HAKIK** and **MOHAMMED AZIZ** in equal shares absolutely.
5. The application before me is by the above-named Mohammed Aziz who seeks an Order, either, that Mohammed Jalil be removed as trustee of the Hanif estate and that he be appointed to replace Jalil, or, alternatively, that an Order for specific performance be made against Jalil to complete the transfer of the entire interest of the Hanif estate in NL 12893 to him (Aziz) pursuant to a sale and purchase agreement he purportedly entered into with Jalil.

6. In particular, Aziz's summons dated 18 November 2011 seeks Orders that:
- (i). Mohammed Jalil be removed as trustee of the estate of Mohammed Hanif.
 - (ii). Aziz Mohammed be appointed as the trustee of the said estate and be authorised to complete all documentation for the estate to complete the transfer of one undivided half share of Native Lease No. 12893 to himself, or;
 - (iii). alternately, Jalil do specifically perform the contract between Mohammed and Jalil and forthwith obtain the Tax Identification Number for the estate and the Capital Gains Tax Clearance Certificate from the Fiji Revenue and Customs Authority to enable the registration of the transfer, or;
 - (iv). alternatively, that Jalil do sign all the necessary application forms to obtain the Tax Identification number and the Capital Gains Tax Return forms and failing which the Deputy Registrar of the High Court of Fiji be authorised to sign the same.
 - (v). special damages in the sum of \$5000.00 (five thousand dollars) being legal fees incurred.
 - (vi). damages for breach of contract.
 - (vii). general damages.
 - (viii). interest at 10 (ten) per centum from the date of filing of this action to the date of judgment under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 29 Laws of Fiji.
 - (ix). costs on full indemnity basis.
7. The application is made pursuant to Order 85 Rule 4 of the High Court Rules 1988 and to the Trustees Act (Cap 65).

AZIZ AFFIDAVIT

8. The application is supported by an affidavit sworn by Aziz Mohammed on 09 November 2011. Mohammed deposes as follows:
1. The Defendant is the sole surviving Executor and Trustee of the Estate of Mohammed Hanif, late of Waiwai, Ba, Fiji, Cultivator, Deceased. The other Trustee Mohammed Taiyab is deceased.
 2. Annexed hereto and marked with letter "A" is a copy of Probate of the Estate of Mohammed Hanif.
 3. Annexed hereto and marked with letter "B" is a copy of the Death Certificate of Mohammed Taiyab.
 4. The Estate of Mohammed Hanif is the registered lessee of Native Lease No. 12893 as to one undivided half share. The property is situated at Main Street, Ba Town and consists of a double storey concrete building.
 5. Annexed hereto and marked with letter "C" is a copy of Native Lease No. 12893.
 6. I am beneficiary of the Estate of Mohammed Hanif. The Defendant in November, 2010 agreed to sell one undivided half share being the interest of the Estate of Mohammed Hanif to me for a consideration of \$20,000.00 (twenty thousand dollars). The consideration sum of \$20,000.00 (twenty thousand dollars) have already been paid to the Estate of Mohammed Hanif.

7. This was subject to the consent of the Native Land Trust Board. **Consent to the Transfer was granted by the Native Land Trust Board on the 9th day of May, 2011 and the Transfer of the one half undivided share of the Estate of Mohammed Hanif in Native Lease No. 12893 was executed by the Defendant on the 28th day of May, 2011.** (my emphasis)
8. Annexed hereto and marked with letter "D" is a copy of the consent from the Native Land Trust Board.
9. The Defendant had agreed to transfer the half undivided share of Native Lease No. 12893 to the Plaintiff free of all encumbrances and to provide the Plaintiff with proper title documents with the duly registered transfer.
10. Before the Transfer was to be lodged with the Registrar of Titles Office for registration, the Capital Gains Tax Decree 23 of 2011 came into effect on or about the 30th of June, 2011. I am informed of this by Solicitors Mishra Prakash & Associates who handled the transfer.
11. The Transfer was lodged with the Commissioner of Stamp Duties for stamping and which was duly stamped by the Stamp Duties Office on the 21st day of June, 2011.
12. Annexed hereto and marked with letter "E" is a copy of stamped Transfer dated 28th May, 2011.
13. The Registrar of Titles required a Capital Gains Tax Clearance Certificate to be lodged with the stamped Transfer for registration.
14. Under the Capital Gains Tax Decree 23 of 2011, the Defendant is required to obtain a Tax Identification Number for the Estate of Mohammed Hanif and is required to lodge an application for Capital Gains Tax Return with the Fiji Revenue and Customs Authority.
15. I am personally unable to obtain Certificate of Clearance and I am unable to register the Transfer. The consent to the Transfer from Native Land Trust Board was for three months period only and has expired. I am informed of this by Mishra Prakash & Associates. Fresh consent will have to be obtained.
16. There has been no response from the Defendant and he refuses to execute the necessary application forms and/or refuses to obtain the Tax Identification Number for Estate and the Certificate of Clearance and has requested me for further sum of \$3000.00 (three thousand dollars) as extra money.
17. The Defendant despite notices dated 29th August and 21st October, 2011 to obtain the Tax Identification Number for the Estate and to obtain the Certificate of Capital Gains Tax Clearance and/or to sign all necessary application forms to enable the transfer of Native Lease No. 12893 to me has failed refused and/or neglected to obtain a Tax Identification Number for the Estate of Mohammed Hanif and/or to execute the necessary forms sent to him by Mishra Prakash & Associates.
18. Annexed hereto and marked with letter "F", "G" and "H" are copies of the Notices and the letter enclosing the necessary forms for execution by the Defendant.
19. The Defendant in spite of several requests and demands refused to and /or neglected to provide me with proper title(s) and to register the same. I am advised by my Solicitors that it is mortgaged to the Bank of the South Pacific. Arrangement for the discharge of the mortgage is being made.
20. I am unable to carry out my development projects on the Native Lease No. 12893. I wanted to carry out a significant extension at the back of the building. The necessary extension plans cannot be completed as the Transfer to me has not been registered.

21. I have suffered damages and loss as a result of the Transfer not being completed. I am also suffering in increased legal costs.
22. I prayed for an order that the Defendant be removed as the Trustee of the Estate of Mohammed Hanif and I be appointed as the Trustee to complete the administration of the Estate of Mohammed Hanif. I am also a beneficiary therein.

SPECIFIC PERFORMANCE

9. The remedy of specific performance is only available if the agreement is enforceable.
10. Generally, an intended purchaser who has signed a contract of sale of land, is regarded as having an equitable interest in the land. A legal estate will later vest in him upon registration of the transfer to him.
11. Traditionally, the view is that unless a purchaser is entitled to specific performance of his contract of sale, he does not have an equitable interest in land. And his equitable interest is commensurate only with his ability to obtain specific performance. In **Legione v Hately** [1983] HCA 11; (1993) 152 CLR 406 for example, Mason and Dean JJ in their joint judgment stated at p.446:

"In this Court it has been said that the purchaser's equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance (Brown v Heffer (1967) [1967] HCA 40; 116 CLR 344, at p.349).

12. In **Stern v McArthur** [1998] HCA 51; (1988) 165 CLR 489, Deane and Dawson JJ in their joint judgment stated at para 2:

"As Dean J pointed out in Kern Corporation v Walter Reid Trading Pty Ltd [1987] HCA 20; (1987) 163 CLR 164, at p.191, it is not really possible with accuracy to go further than to say that the purchaser acquires an equitable interest in the land sold and to that extent the beneficial interest of the vendor in the land is diminished. The extent of the purchaser's interest is to be measured by the protection which equity will afford to the purchaser. That is really what is meant when it is said that the purchaser's interest exists only so long as the contract is specifically enforceable by him. Specific performance in this context does not mean specific performance in the strict or technical sense of requiring the contract to be performed in accordance with its terms. Rather it encompasses all of those remedies available to the purchaser in equity to protect the interest which he has acquired under the contract. In appropriate cases it will include other remedies, such as relief by way of injunction, as well as specific performance in the strict sense."

13. Similarly, the New Zealand position is explained in **Sale of Land (2000) 2nd ed by DW McMorland** at page 299:

"In broad terms, the passing of the equitable estate to the purchaser depends upon the availability, at least at a theoretical level and without

consideration of any defence which might be available to the vendor, of specific performance, or possibly of an injunction. There must be a contract, either directly for the sale of the land or for an option to purchase, such that the purchaser can take all of the necessary steps to obtain specific performance of that contract, the vendor cannot legally prevent those steps being taken, and the circumstances are such that, if the purchaser did take those steps, specific performance would not be unavailable for jurisdictional as opposed to discretionary reasons. It is the ultimate ability in equity to compel the vendor to transfer the estate or interest which gives the purchaser the equitable estate or interest."

14. In **Re CM Group Pty Ltd's Caveat [1986] 1 Qd R 381**, it was held that property did not pass in equity until the required municipal council approval was obtained. In **Brown v Heffer (1967) 110 CLR 344**, an interest in equity did not pass because the required consent of the Minister had not been obtained.
15. Frankly, I cannot grant an Order specific performance for the simple reason that the consent of the rTLTB which was granted on 28 May 2011 had long lapsed at the time this action was filed in November 2011.

REMOVAL & SUBSTITUTION OF TRUSTEE

16. Section 35 gives power to the Court to Order the removal of an executor and appoint an administrator in his place with will annexed, **for any reason which appears to [the Court] to be sufficient.**

35. The court may for any reason which appears to it to be sufficient, either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after a grant of probate has been made-

- (a) make an order removing any executor of the will of such deceased person from office as, such executor and revoking any grant of probate already made to him; and
- (b) by the same or any subsequent order appoint an administrator with the will annexed of such estate; and
- (c) make such other orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and
- (d) make such further or consequential orders as it may consider necessary in the circumstances.

17. The phrase "*for any reason which appears to [the Court] to be sufficient*" suggests that the Court is given a very wide discretion. What factors should the Court take into account in exercising this discretionary jurisdiction?

18. Order 85 Rule 4 of the High Court Rules 1988 provide as follows:

In an administration action or such an action as is referred to in rule 2, the Court may make any certificate or order and grant any relief to which the plaintiff may be entitled by reason of any breach of trust, wilful default or other misconduct of the defendant notwithstanding that the action was begun by originating summons, but the foregoing provision is without

prejudice to the power of the Court to make an order under Order 28, rule 8, in relation to the action.

19. The plaintiff and the defendant are siblings. They are co-trustees of the estate in question. The defendant has resided in New Zealand for several years now. He has been served with the application but has not appeared in Court either personally or by representation.
20. In **Nizam v Shah** [2014] FJHC 218; HBC 247.2009 (28 March 2014), a ruling of this court, it is noted that apart from the jurisdiction under section 35, this court also has a similar jurisdiction in equity which imposes upon this Court supervisory powers to see that a trust or an estate is properly executed. In other words, the power of the Court to remove an executor and appoint an administrator with Will annexed, is ancillary to the Court's principal duty to see that a trust or an estate is properly executed (see statement of Lord Blackburn in the Privy Council case of **Letterstedt v Broers**[1884] 9 App Cas 371 at 385 to 38).
21. As the New Zealand Court of Appeal said in **Georgina Kain & Ors v Hutton & Ors** CA 246/01:

The jurisdiction to appoint and remove trustees is both inherent and statutory, the legislative authority being s 51(1) of the Trustee Act 1956 which provides as follows:

.....

The inherent jurisdiction is derived from the Court's general supervisory powers in equity relating to the supervision of trusts for the welfare of beneficiaries. The relevance of that objective is recognised in well-known cases such as Letterstedt v Broers (1884) 9 App Cas 371 and Hunter v Hunter [1938] NZLR 520.

22. In **Nizam v Shah** (supra), the following observations were made from reviewed case.

WELFARE OF BENEFICIARIES – "LITMUS" TEST

[16]. For this Court, the primary consideration in whether or not to remove/appoint an executor under section 35 (or a trustee under section 73) is the welfare of the beneficiaries. In **Letterstedt**, Blackburn LJ said as follows at page 386:

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

At page 387:

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated,

that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependant on details often of great variety. But they proceed to look carefully into the circumstances of the case.

[17]. The same principles are resonated in **Snell's Principles of Equity (28th ed)** at pages 210 to 211 - that the welfare of the beneficiaries must be the court's guide in exercising both its inherent and statutory jurisdiction to remove a trustee (or executor) (my emphasis):

Apart from statute, the court has an inherent jurisdiction to remove a trustee and to appoint a new one in his place. As the interests of the trust are of paramount importance to the court, this jurisdiction will be exercised whenever the welfare of the beneficiaries requires it, even if the trustees have been guilty of no misconduct. The welfare of the beneficiaries is also the court's guide in exercising its statutory powers of removal.

[18]. And the High Court of Australia (as per Dixon J) echoes the same sentiments in **Miller v Cameron** (1936) 54 CLR 372 (my emphasis):

The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary.

[19]. And Latham CJ, in the same case, follows suit, by saying that the principal element, when considering the welfare of the beneficiaries, is the safety of the trust estate:

It has long been settled that, in determining whether or not it is proper to remove a trustee, the Court will regard the welfare of the beneficiaries as the dominant consideration (Letterstedt v. Broers[1]). Perhaps the principal element in the welfare of the beneficiaries is to be found in the safety of the trust estate. Accordingly, even though he has been guilty of no misconduct, if a trustee is in a position so impecunious that he would be subject to a particularly strong temptation to misapply the trust funds, the Court may properly remove him from his office as trustee. No distinction in this connection can be drawn between a bankruptcy and an assignment for the benefit of creditors. A trustee who becomes bankrupt is removed almost as of course (Bainbrigg v. Blair[2]). There may be exceptions under special circumstances to this rule, but the rule is generally applied (In re Barker's Trusts[3]). If the bankruptcy is explained by financial misfortune without moral fault and the trustee has recovered from pecuniary distress he may be allowed to retain his office (In re Adams' Trust[4]).

[20]. Smith J of the New Zealand High Court, in **Hunter v Hunter**[1937] NZLR 794, when dealing with section 21 of the New Zealand Administration Act 1969 and section 51 of the New Zealand Trustee Act 1956, which both provide for an "expedient test" (see footnotes), said at page 796:

In determining whether the trustees should be removed, the Court has a discretion. The leading case is Letterstedt v Broers (1884) 9 App Cas 371. The Privy Council there held that there is a jurisdiction in Courts of Equity to remove old trustees and substitute new ones in cases requiring such a remedy, and that the main principle upon which the jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate.

[21]. Scott J said in **Chellaram v. Chellaram** (1985) 1 Ch.D 409 at p.428:

The jurisdiction of the court to administer trusts to which the jurisdiction to remove trustees and appoint new ones is ancillary, is an in personam jurisdiction. In the exercise of it, the court will inquire what personal obligations are binding upon the trustees and will enforce those obligations... The trustees can be ordered to pay, to sell, to buy, to invest,

whatever may be necessary to give effect to the rights of the beneficiaries, which are binding on them. If the court is satisfied that in order to give effect to or to protect the rights of the beneficiaries, trustees ought to be replaced by others, I can see no reason in principle why the court should not make in personam orders against the trustees requiring them to resign and to vest the trust assets in the new trustees .

HOSTILITY BETWEEN TRUSTEES & BENEFICIARIES

[22]. The plaintiff and the defendant in this case before me are brothers. Judging from the tone of their affidavits, there is clearly some hostility between them. Whether "*hostility*" between an executor and a beneficiary, in itself, is enough reason to remove the executor, is a niggling question for the courts.

[23]. In my view, hostility is not irrelevant in the exercise of the section 35 discretionary jurisdiction. However, at the end of the day, the Court still has to be guided by its duty to see that a trust or an estate is properly executed and to protect the interests of the beneficiaries. The question simply is: whether there is any ground for concern that the trust and/or the welfare of the beneficiaries is at risk because of the hostility?

[24]. In **Crick v McIlraith** [2012] NZHC 1290, New Zealand Associate Judge Osborne said:

...hostility as between administrators or trustees and their beneficiaries is not of itself a reason for removal. It will assume relevance if it prejudices the interests of the beneficiaries. An example of where hostility is such that the trustee may be described as being "out of sympathy" with the beneficiaries is seen in the judgment of Panckhurst J in Kain v Hutton.

[25]. I think Fiji Courts should follow suit.

MISCONDUCT

[26]. Nizam hints in his affidavit that Jamal misconducts himself in administering the estate, although the allegations in the affidavit are rather broad and sweeping. I ask whether misconduct on the part of an executor is sufficient reason to remove an executor of a will? Undoubtedly, some types of misconduct will strike at the heart while others may not.

[27]. In **Miller v Cameron** (see above), the High Court of Australia cautions that a trustee is not to be removed unless circumstances exist "**to show that the welfare of the beneficiaries is opposed to his continued occupation of office**".

A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But in a case where enough appears to authorize the Court to act, the delicate question whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight.

[28]. In contrast, the Privy Council in **Letterstedt** (see above) has said that allegations of misconduct against a trustee, even if not established, might still support an Order to remove the trustee, if to keep the trustee in office might still prevent the trust being properly executed.

...charges of misconduct were either not made out, or were grossly exaggerated, so that the trustee was justified in resisting them, ... yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed..

*But **in cases of positive misconduct**, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to*

show a want of honesty, or a want of proper capacity to execute their duties or a want of reasonable fidelity.

[29]. The lesson I draw from these cases and which I apply to guide me in applying section 35 is that misconduct may or may not be sufficient reason to remove an executor but that depends on whether or not the misconduct in question is a threat to the welfare of the beneficiaries or to the estate/trust in question.

RESPECTING THE TESTATOR'S CHOICE OF EXECUTOR

[30]. One of the reasons why the Courts will not lightly remove an executor/trustee is because of the need to respect the testator's (or settlor's) choice of executor/trustee.

[31]. I think this is good principle. In **Harsant v Menzies** [2012] NZHC 3390, the New Zealand High Court (as per Ellis J) said, *inter alia*, said at para [57]:

[57] The intensely discretionary nature of the jurisdiction has been repeatedly recognised in the case law. The particular facts and circumstances of the particular case are all important. Other relevant guiding principles that are evident in the cases are that:

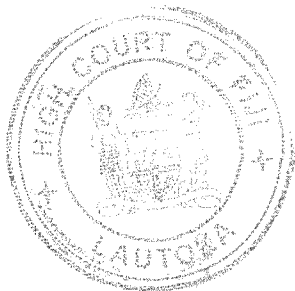
- (a) the starting point is the Court's duty to see estates properly administered and trusts properly executed;
- (b) the wishes of the testator/settlor (evidenced by the appointment of a particular executor or trustee) are to be given considerable weight;
- (c) the welfare of the beneficiaries is the "litmus" test; and
- (d) hostility as between administrators/trustees and beneficiaries is not by and of itself a reason for removal. Such hostility assumes relevance if and when it risks prejudicing the interests of the beneficiaries.

[32]. In the balancing exercise, the court should still give due weight to the testator's/settlor's wishes as evidenced by his choice of executor/trustee. However, at the end of the day, it is the interest of the trust and the beneficiaries which is paramount. This is good law in my view and there is every reason for this court to follow suit when considering whether or not to remove and/or appoint an executor under section 35.

DELAY IN DISTRIBUTION

[33]. Any delay in distribution of the assets of the estate will be a very strong ground for raising a suspicion that the interests of the beneficiaries or the estate are being compromised. However, having said that, an executor may delay the sale of assets and the distribution of proceeds for good reason. For example, he or she may wish to await a favourable market to secure an optimum price.

23. The principal reason (as far as his affidavit goes) why the plaintiff wishes to be appointed administrator of the Hanif estate is because of his purported sale and purchase agreement with Jalil, for which I refuse to grant an Order for specific performance (see above). Other than that, I see nothing in his affidavit to merit the Orders he seeks to remove his brother as trustee and that he be appointed. I refuse to grant any Order in this regard.
24. The application is dismissed with no order as to costs.



A handwritten signature in black ink, appearing to be "Anare Tuilevuka". The signature is written over a horizontal dotted line.

Anare Tuilevuka
JUDGE
14 August 2014.