



pursuant to Letters of Administration No. 42584 granted on 9 August 2004" until further orders of the Court, as well as orders for the Defendant to provide an inventory and certified accounts of the said estate.

**The claim**

3. In the statement of claim filed on 17 November 2006, the Plaintiff pleads that there are substantial properties in the estate. He alleges that the Defendant as administrator has not provided proper inventories of the estate and despite numerous requests from the Plaintiff's solicitors for these to be furnished, the Defendant has not done so. The Plaintiff also pleads that the Defendant has not rendered a true and just account of the administration of the estate and that the Court should therefore appoint an independent valuer or auditor to value the net worth of the estate and thereafter, pay to the Plaintiff his share.

**The application**

4. By this application, the Plaintiff seeks the following orders:
  1. That the Defendant disclose the present status of the estate's accounts with the Bank of Baroda, ANZ, Westpac, Colonial Life Insurance of the deceased which is now under Bank of South Pacific life Insurance, Home Finance Corporation, Credit Corporation.
  2. That the estate bank accounts be audited by an independent auditor.
  3. The disclosure of how much the vehicle no. CR 007 was sold for, and;

4. The details of the sale of the estate property at 58 Votua Road, Suva.
  5. Transactions on the estate's Carpenter Credit cards No. 54833101 and 5483312.
  6. That the Defendant continues to pay the outstanding and present wages of the Plaintiff.
  7. That the tenants at 29 Votua Road, Suva allow the plaintiff to use the common driveway of the said property.
  8. That the Defendant and his servants and agents be restrained from selling, disposing, lending, hiring or transferring any property including all workshop machineries, tool and raw materials to the said estate until the final determination of this matter.
  9. For costs of the Application to be costs in the cause.
5. At the hearing of the application, and in answer to a question from the Court, counsel for the Plaintiff chose not to proceed with that part of the application seeking injunctive relief in 8 above.

**The affidavit in support**

6. In support of the application, the Plaintiff deposes:
  - a. That as beneficiary of the estate, he wishes to know the status of the estate's accounts with Westpac Bank, Bank of Baroda, ANZ, HFC and Credit Corporation, so as to be able to ascertain his share in the estate.
  - b. On 7 November 2013, Amaratunga J had directed that estate accounts from 2003 must to be audited by an independent auditor in order to decide this case. The Defendant's solicitors

had initially conceded to this but later reneged from this position.

- c. That the Defendant had, sometime in 2013, sold the estate vehicle registration No. 007 without his consent. He seeks disclosure of the details and proceeds of this sale.
- d. In the same year, the Defendant had also sold the house and estate property at 58 Votua Road without his knowledge and consent. He seeks an order directing the Defendant to disclose the details of the said sale, including the mortgage.
- e. The Plaintiff similarly seeks disclosure of details of transactions on estate credit cards No. 548331/01 and No. 5483312.
- f. The Plaintiff deposes that he has not been receiving his “wages and salary” since June 2003 and so asks for the details of these to be furnished to him and to the Court.
- g. That he be allowed access to estate properties at the Vatuwaqa Industrial area, stall number 17 at the Handicraft Centre, and to be able to use the estate vehicle registration number EG 010.
- h. That he be allowed to use the common driveway at 29 Votua Road which is part of the estate.

**The answering affidavit**

7. In response, the Defendant deposes:
  - a. That the estate does not have any bank accounts with Westpac Bank and Bank of Baroda, but has accounts with ANZ and term deposits with HFC and Credit Corporation. Statements of the accounts with HFC and Credit Corporation are annexed to the Defendant’s affidavit, with the statement from the ANZ Bank

annexed to his supplementary affidavit in response filed 14 April 2014.

- b. That on 7 November 2013 before Amaratunga J, the Plaintiff's summons was struck off with costs of \$150 to be paid within 14 days to the Defendant Solicitors, and the matter was then referred to the Master for directions. There had been no request for an independent auditor as all beneficiaries, including the Plaintiff, had unanimously agreed on Kumar Dharam.
- c. There was no need to obtain the Plaintiff's consent on the selling of the vehicle registration number 007 as it was depreciating and needed to be sold for the benefit of the estate. The receipt for this sale is exhibited.
- d. The Defendant deposes that the property at 58 Votua Road is not part of the estate, and he is therefore not obliged to disclose details of this property.
- e. The credit card numbers cited by the Plaintiff are the same, with the numeral 01 referring to a trade account. The estate card is used to pay for maintenance and fuel and the daily running of estate affairs.
- f. The Plaintiff is not entitled to wages since he is not a salaried staff. Instead, he receives an advance payment of \$200 per week. In any event, the estate has paid for his medical expenses.
- g. That the Plaintiff was never locked out of estate premises and had only been requested not to carry out private jobs thereat. He is not aware of any vehicle with registration number EG 010 but knows that the Plaintiff uses estate vehicle EJ 010 in the weekends.
- h. He does not reside at 29 Votua Road, and the Plaintiff who lives there is in charge of the common driveway.
- i. All transactions on estate matters are shown in the Financial Reports.

### **Affidavit in reply**

8. The Plaintiff denies agreeing for Kumar Dharam to provide a financial report and says that it is up to the Defendant to “show” an independent auditor to audit the estate’s accounts from the year 2003. He maintains that the property at 58 Votua Road is estate property since it was mortgaged to the estate. An independent auditor must be appointed by the Court to determine how the monies in the two accounts have been used. He says he had been working and had stopped working owing to an illness. The Defendant owes him wages for the past years. He does not have a key to the estate premises and so does not have access to the property. He denies having used EJ 010. The Defendant had resided at 29 Votua Road but moved out because he (the Defendant) wanted to sell the said property. The Defendant must disclose how he had spent money on repairs to estate property. To prevent the Defendant from selling or disposing of estate property, the Plaintiff ought to be restrained, so as to maintain the status quo on the estate. The ANZ report exhibited by the Defendant in his supplementary affidavit should be given to an independent auditor for the purposes of auditing the accounts from 2003 to date.

### **The submissions**

9. Apart from oral submissions presented at the hearing, the parties also filed written submissions.
10. Plaintiff counsel submits that an independent audit of the estate’s accounts needs to be conducted to show how the defendant has administered the estate. This will enable the Plaintiff to have access to relevant information about his share as a beneficiary.
11. For the Defendant, it is submitted that:
  - The Plaintiff has included in its application matters in respect of the property at 58 Votua Road, as well as Bank accounts with Bank of Baroda and Westpac Bank, that were never part of his original statement of claim.

- The application for discovery has been brought very late in proceedings. No explanation for the delay has been given in the Plaintiff's affidavit and counsel's submissions from the bar table, being not deposed as evidence by the Plaintiff, ought to be expunged.
- The Plaintiff has not said why an audit should be ordered when an Accountant has already looked at the Estate's accounts.
- The Plaintiff has not said whether his three sisters who are also beneficiaries, share his concern. Costs for the auditing exercise will have to be borne by the estate and will therefore affect every beneficiary's entitlement.
- The Plaintiff has not shown any evidence to support its application such as to warrant an independent audit.

### **The law**

12. The application is brought pursuant to Order 43 r 2 (1), Order 25 rule 7, and Order 29 rules 2 (1) (2) and (3) of the HCR, and the inherent jurisdiction of the Court.
13. O. 43 r. 2 (1) provides:

The Court may, on an application made by summons at any stage of the proceedings in a cause or matter, direct any necessary accounts or inquiries to be taken or made.

14. O. 25 r. 7 imposes a duty on any party on whom a summons for directions has been served, to make all interlocutory applications on the summons for directions. However, an interlocutory application such as this may still be made subsequent to the summons for directions and prior to judgment. (O. 25 r. 7 (3); see also Carbon Industries (Fiji) Ltd v Australia and New Zealand Banking Group Ltd [1998] FJHC 212; Hbc0451d.93s (3 December 1998))

## Analysis

15. The High Court has power to deal with any issue arising in the execution or administration of estates (section 41 Succession, Probate and Administration Act), and any beneficiary of property the subject of a trust may apply to the Court concerning such property. (Section 89 Trustee Act).
16. The Plaintiff seeks orders for the Defendant to provide independent audited accounts of the estate and discovery of the following:
  - a. The current status of the estate's bank accounts and any other account with the Bank of Baroda, ANZ, Westpac Bank, Colonial Life Insurance, Home Finance Corporation, and Credit Corporation;
  - b. How much vehicle registration No. CR 007 was sold for;
  - c. The details of the sale of the property at 58 Votua Road, Suva, and
  - d. Estate credit cards bearing numbers 54833101 and 5483312.
17. The Plaintiff submits that the Defendant should be made to provide an accounting of the administration of the estate so as to enable him (the Plaintiff) to ascertain his entitlement as a beneficiary of the said estate. He relies on Order 43 Rule 2 (1) HCR.
18. Unlike Order 43 Rule 1 which applies only in a writ action indorsed with a claim for an account, Order 43 Rule 2 (1) enables the Court to make an order for the taking of accounts at any stage of proceedings in any action, even after judgment. (Supreme Court Practice 1999, 43/2/1; *Barber v Mackrell* (1879) 12 Ch.D. 534; *Taylor v Mostyn* (1886) 33 Ch.D. 226p).
19. The relationship between administrator and beneficiary, such as that between the parties in this matter, is one which usually attracts in law a fiduciary duty, owed by the administrator of the estate to the



beneficiaries thereof. It is therefore a relationship of trust, requiring the administrator to act in the best interests of the beneficiaries.

20. In *Patel v Nodhana Ltd* [1994] FJHC 208; [1994] 40 FLR 118 (26 August 1994), Fatiaki J (as he then was) stated:

That a trustee has a duty to provide beneficiaries with accounts there can be no doubting. In *Re Watson* (1904) 49 Sol. Jo. 54 Kekewich J. speaking of the duty said:

"The duty of a trustee is three-fold: there is a duty to keep accounts, the duty to deliver accounts and the duty to vouch accounts ... The duty to keep accounts is an essential duty, he must keep such accounts so as to be able to deliver a proper account within a reasonable time showing what he has received and paid."

In similar vein and a good deal earlier Stuart V.C. said in *Kemp v. Burn* (1863) 141 R.R. 225, 226:

"... where an account is demanded of trustees ...by a residuary legatee, there seems no doubt what the duty of the (trustee) is. Their duty is to keep proper accounts, and to have them always ready when called upon to render them."

21. Vol. 48 of Halsbury's Laws of England (also cited by Fatiaki J in *Nodhana* (supra) says:

830. A trustee must furnish to a beneficiary, or to a person authorised by him, on demand, information ... as to the mode in which the trust property or his share in it has been invested or otherwise dealt with, and as to

where it is and full accounts respecting it, whether the beneficiary has a present interest in the trust property or only a contingent interest in remainder, or is only an object of a discretionary trust.

**Delay**

22. The current application was filed on 14 February 2014, a decade after the filing of the writ, and eight years after the filing of the statement of claim. I note that part of the delay was for adjournments over a period of two years, for settlement. The Plaintiff changed counsel three times in the course of these proceedings, with current counsel filing a notice of change of solicitors on 13 March 2012. The first application for further discovery was made five months thereafter, on 20 August 2012. Following the striking out of that application by Amaratunga J on 7 November 2013, the Plaintiff filed this application on 14 February 2014. I note that for close to three years, from 2009 to 2012, this matter was not called in Court, with the result that the Defendant filed an application to strike out for want of prosecution. That application was struck out on 20/01/12.
23. In light of the history of this matter, I do not consider the delay in the bringing of this application to be inexcusable, and am of the opinion that any prejudice to the Defendant may be met by an award of costs.

**Specific discovery**

24. Applications for specific discovery are governed by the provisions of Order 24 Rule 7 HCR. Sub rule (3) of Rule 7 requires the applicant to depose an affidavit stating his belief that the party from whom discovery is sought, has, or had at some time in their possession, custody or power the document sought to be discovered, “and that it relates to one or more of the matters in the cause or matter.”
25. In *Berkeley Administration v McClelland (1990) FSR 381* the Court, referring to the principles of discovery under Order 24 Rule 7, stated:

(1) There is no jurisdiction to make an order under Order 24 rule 7 for the production of documents unless:-

(i) There is sufficient evidence that the document exists which the other party has not disclosed;

(ii) The documents relate to matters in issue;

(iii) There is sufficient evidence that the documents are in possession custody and power of the other party.

(2) When it is established that the above three prerequisites for jurisdiction exists then the Court can make an order.

26. In this matter, though the Plaintiff's affidavits do not comply with the requirements of sub-rule (3) of Rule 7 in failing to state that the documents are in the possession, custody or power of the Defendant, the Defendant has annexed these documents to his answering and supplementary answering affidavits, showing not only that the documents exist, but also that he has possession and custody of them.
27. In the statement of claim filed on 17 November 2006, the Plaintiff states that despite his requests through his former solicitors for the Defendant to provide a proper and true inventory of the estate, the Defendant has not done so. He also deposes in his affidavit in support of this application that he had requested the Defendant to furnish the details of the sale of vehicle registration number CR 007, but his request was ignored.
28. Having considered the provisions of Order 43 Rule 2 (1), the Plaintiff's writ of summons and statement of claim, the affidavit material filed, the case law cited above as well as the oral and written submissions of counsel for both parties, I am left without a doubt that accounts with

ANZ, HFC and Credit Corporation the status of which are sought by the Plaintiff, are those belonging to the estate of Jai Ram.

29. It is not disputed that the credit cards bearing numbers 54833101 and 5483312 belong to the estate. The Defendant admits the credit cards were used to enable the daily running of the estate. The details of transactions carried out with the use of these cards are therefore dealings with estate properties and, being relevant to the proceedings, need to be disclosed.
30. The parties agree that vehicle registration number CR 007 is also estate property which the Defendant admits was sold "for the benefit of the estate". There is a need to account for this sale and the Defendant is therefore required to disclose, in addition to the copy of the receipt annexed to his answering affidavit in this matter, all the relevant documents pertinent to the sale of the said vehicle.
31. Both parties agree that the Defendant had been paid some monies as income and for medical expenses, from the estate. An accounting for this is also required.
32. On the other hand, there is contention as to whether the property at 58 Votua Road, Suva, is estate property. There is no mention of this property being estate property either in the pleadings or in the minutes of the pre-trial conference filed 12 September 2007. I do not consider the status of this property relevant to the proceedings and accordingly refuse the Plaintiff's application for discovery of the details of the sale of this property.
33. I have considered the orders sought in paragraphs 6, 7 and 8 of the summons and, finding them to be irrelevant to the application under Order 43 Rule 2, dismiss them accordingly.

**Orders:**

34. The Defendant, as administrator of the estate, is to file and serve an affidavit of certified accounts within 30 days of the date of this ruling, on the following:
- a. the estate of Jai Ram aka Ganga Jai Ram from when the Defendant was granted letters of administration on 9 August 2003.
  - b. the present status of the estate's accounts with the ANZ Bank, HFC Credit Corporation, and any other account of the estate;
  - c. the transactions on and current status of the estate credit cards 54833101 and 5483312
  - d. Financial and other relevant records pertaining to the sale of vehicle CR 007.
  - e. Details of payments by way of salary or for medical expenses, made from the estate, to the Plaintiff
35. In this matter, the Defendant had opposed the application for audited accounts of the estate though it ought to have known that as administrator and trustee of the estate, it had a duty to account to the Plaintiff for the administration of the estate of which he was a beneficiary. In addition, I am mindful of the possibility of further arguments and applications following the provision of accounts. In light of the above, I have decided to reserve costs.



S.F. Bull  
**Acting Master**