

LILA WATI

v.

A

THE PUBLIC TRUSTEE & JASODA RAMSEY

[HIGH COURT, 1998 (Scott J) 2 September]

Civil Jurisdiction

B *Wills and Trusts- compromise of actions by the Public Trustee sanctioned by the Court- whether liable to be set aside- family provision- how applications to be made. Succession Probate and Administration Act (Cap 60) Sections 8 & 9; Inheritance (Family Provision) Act (Cap 61); Public Trustee Act (Cap 64) Section 6; Trustee Act (Cap 65) Section 65.*

C The Public Trustee purported to compromise actions in which the claimant sought to impugn a will and alternatively sought provision from the deceased's estate. At no time was the sole beneficiary under the will consulted. The High Court set aside the compromise and explained the duties of the Public Trustee in such circumstances.

D Cases cited:

Abdul Rauf v Burns Philp Trustee Co Ltd (FCA Reps 1974/1)

Attorney-General v Downing (1767) Wilm 1

Chapman v Chapman [1954] AC 429

Hallows v Lloyd (1888) 39 Ch.D 686

In re Bidie Dec'd [1949] 1 Ch 121

E *In re Earl of Stafford* [1980] 1 Ch 28

In re Ezekiel's Settlement Trusts [1948] 1 Ch 230

In re Searle Dec'd [1949] 1 Ch 73

Livesey v Jenkins [1985] 2 WLR 47

re Hazeldine's Trusts [1908] 1 Ch. 34

re New [1901] 2 Ch 534

F *Sill v Thomas* (1839) C&P 762

Wharton v Masterman [1985] AC 186.

Action for declaratory relief in the High Court.

Mrs T. Jayatilleke for the Plaintiff

G *A. Labo* for the 1st Defendant

H. Nagin for the 2nd Defendant

Scott J:

The Plaintiff seeks a declaration that she is the sole beneficiary of the will of George Ramsey who died on 30 December 1993. She also seeks an order setting aside an Order of this Court (Kepa J) made by consent on 8 September 1995, the effect of which was to grant the 2nd Defendant an entitlement to 45% of George Ramsey's estate.

The essential facts are not in dispute and are contained in two affidavits:

- (i) Plaintiff, in support, filed 11 November 1997;
- (ii) Mahendra Lal, senior law clerk, in answer, filed 27 January 1998

A

The executor and trustee of George Ramsey's will was and remains the 2nd Defendant (the Public Trustee) while from the face of the will the sole beneficiary was the Plaintiff (Exhibit P8).

B

On 5 January 1994, six days after the death of George Ramsey his widow Jasoda Ramsey, the 2nd Defendant, lodged a caveat against application for probate of the will.

On 4 November 1994 the Public Trustee commenced proceedings in the High Court (HPP 83/94) seeking removal of the caveat.

C

Attached to the Originating Summons (Exhibit P5) was an affidavit (Exhibit P6) which contains serious allegation of harassment and intimidation by the 2nd Defendant and her son against the Plaintiff. It was also alleged that on 4 January 1994 the Plaintiff had been taken to the offices of a firm of solicitors where she had been induced to sign a deed of variation of the will (Exhibit P2) the principal effects of which were to appoint the 2nd Defendant in place of the Public Trustees and to grant the 2nd Defendant absolutely the deceased's motor car and cash proceeds of his bank accounts together with the proceeds of sale of his house at 56 Tivi Road Kinoya, the estate's principal asset. According to the deed this house was to be put up for sale at the end of January 1995.

D

It is the Plaintiff's contention that she was not aware of the meaning and effect of what she was induced to sign. She is uneducated and virtually illiterate. According to the deed (which is written in English) the contents were explained to her in the Hindustani language.

E

On 2 December 1994 a second action was commenced (HBC 571/94) this time by Writ. The 2nd Defendant herein and her son James Ramsey were the Plaintiffs and the Public Trustee and the Plaintiff herein were 1st and 2nd Defendants respectively. A copy of the writ and statement of claim is Exhibit A to Mahendra Lal's affidavit. The Plaintiffs in their action sought a declaration that George Ramsey's will was null and void, a declaration that Jasoda Ramsey was entitled to apply for letters of administration, alternatively that specific performance be ordered of the deed of 4 January and in the further alternative that provision be made for Jasoda Ramsey under Section 3 of the Inheritance (Family Provision) Act (Cap 61).

F

G

On 21 March 1995 a meeting was held at the offices of Sherani & Co, solicitors, between Mr. M. L. Ahmadu, counsel for the Public Trustee and Mr. H.K. Nagin, counsel for Jasoda Ramsey, the Defendant in Action No. HPP 83/94.

A A copy of the minutes of this meeting is Exhibit C to Mahendra Lal's affidavit. It was agreed that the Plaintiff would have a 55% share of the estate of George Ramsey while Jasoda Ramsey would have 45% of the estate. The Public Trustee would arrange for the sale of the estate property (including the house at Tivi Road) in consultation with Messrs Sherani & Co.

B On 8 September 1995 the matter came on before Kepa J. A copy of the Court's Order is Exhibit D to Mahendra Lal's affidavit. Both actions namely HPP 83/94 and HBC 571/94 were settled on the basis of the division of the estate as agreed at the offices of Messrs Sherani & Co on 21 March 1995.

C As appears from the file HPP 83/94, which I have inspected, there was no hearing as such before Kepa J. There is nothing to show that any papers were drawn to his attention although the original of the affidavit, Exhibit P6 herein, was on the file. The Plaintiff herein was not present. According to the file Ms Ma'ata Sakiti, Counsel for the Public Trustee, simply informed the Court that the matter had been settled and invited the Court to make an Order in the terms of the settlement, which it did.

On a subsequent date unknown to me, Jasoda Ramsey withdrew her caveat and probate was granted to the Public Trustee on 6 May 1997 (Exhibit P8).

D According to the undisputed evidence of the Plaintiff, the first she came to know of the agreement reached between Mr. Ahmadu and Mr. Nagin and the consent order made by Kepa J was on about 2 October 1997 when she received a letter from the Public Trustee giving her 30 days to vacate the house at Tivi Road in which she was living (Exhibit P6). She then consulted her present solicitors.

E The rival contentions of the parties are simply expressed: the Plaintiff says that the Public Trustee in breach of trust purported to compromise Jasoda Ramsey's claim. She also says that the Court had no jurisdiction to sanction the compromise. The 1st Defendant Public Trustee generally accepts these contentions but the 2nd Defendant, Jasoda Ramsey asserts that Plaintiff's Counsel had the usual authority to compromise an action vested in Counsel while furthermore the compromise was sanctioned and endorsed by the Court.

It may be helpful at this point to be reminded of a few basic legal principles applicable to trusts and compromises.

G Upon death, the property of a testator vests in the Public Trustee pending grant of probate and where the Public Trustee has been appointed trustee and executor of the will, remains vested in him upon grant of probate pending distribution to the beneficiaries (see Succession, Probate and Administration Act - Cap 60 - Sections 8 & 9 and Public Trustee Act - Cap 64 - Section 6).

The first duty of a Trustee is to make himself thoroughly acquainted with the terms of the trust (Hallows v Lloyd (1888) 39 Ch.D 686) but his preeminent

duty is to adhere rigidly to the terms of the trust which he has undertaken (Attorney-General v Downing (1767) Wilm 1). The principal relevant qualification to this rule is that the Trustee may depart from the strict terms of the trust or even put an end to the trust if instructed to do so by beneficiaries *sui juris*, and absolutely entitled and unanimous (Wharton v Masterman [1985] AC 186.

A

Where the Public Trustee encounters difficulty either in interpreting the terms of the trust or in carrying out his duties provision is made for the opinion of the Court to be had (Public Trustee Act - Section 47). Although the Court has an inherent jurisdiction to sanction deviation from the trust where circumstances have arisen of an exceptional or urgent nature (re New [1901] 2 Ch 534) the primary rule is that, statutory provision apart, the Court, as much as a trustee, is bound to act within the terms of the trust as constituted by the testator (see Chapman v Chapman [1954] AC 429). It has been said that the business of the Courts is to execute trusts not to alter them (re Hazeldine's Trusts [1908] 1 Ch. 34). Certain statutory powers of the Court to authorise variation of the trust are set out in Section 86 of the Trustee Act (Cap 65) and the power of the Court to order provision from an estate, already briefly referred to, is contained in the Inheritance (Family Provision) Act.

B

C

The general powers of trustees are set out in Part IV of the Trustee Act. For the purposes of these proceedings the most important section is Section 38 (f) which gives the trustee power:

D

"If and as he thinks fit ... (to) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatsoever relating to the trust of the trust property ...".

E

The question which lies at the heart of this matter is whether a trustee may validly compromise a claim brought against the estate under the provisions of the Inheritance (Family Provision) Act.

Although I am reasonably confident that this question must have arisen before I was not referred to and have not been able to find any authority directly on the point. For a number of reasons taken together however I am satisfied that the compromise entered into and sanctioned by the Court must be set aside.

F

As already noted the compromise was entered into before probate had been granted to the Public Trustee. Accordingly, at the time the estate was only vested in him under the provisions of Section 8 of the Succession Probate and Administration Act already noted. As pointed out by Mr. Labo in his careful written submission Abdul Rauf v Burns Philp Trustee Co Ltd (FCA Repts 1974/1) is authority for the proposition that Section 8 "does not give the Public Trustee *locus standi* as a Plaintiff or a belligerent defendant".

G

As has also already been seen a sole beneficiary *sui juris* is effectively entitled to control the trust and it seems no more than the statement of the obvious

A that this means that such a beneficiary should be kept fully informed of the nature and purpose of a compromise into which it is proposed to enter. Under Section 90(1) of the Trustee Act a beneficiary has the right to apply to the Court to review any act or omission or decision of a Trustee. This mirrors the right of the Trustee to apply to the Court under section 88 (and see also RHC O 85). If the beneficiary is not kept informed of decisions about to be taken by the trustee Section 90 would cease to have any effectiveness.

B In In re Ezekiel's Settlement Trusts [1948] 1 Ch 230 where application was made by the trustee to sanction a compromise concerning children it was explained that:

C "the Court when assisting trustees in a case of this kind listens and pays full attention to the view put before it on behalf of the beneficiaries but in essence it is deciding what the trustees ought to do having regards to the interests of everybody concerned."

D While the power to compromise given to a trustee is undoubtedly very wide the sole criterion for the exercise of the power is whether it is "desirable and fair as regards all the beneficiaries" (see In re Earl of Stafford [1980] 1 Ch 28, 35). In my view it cannot be doubted that a compromise of which the sole beneficiary is kept ignorant cannot satisfy this criterion.

E As has been seen Jasoda Ramsey's claim was brought under a deed (which the Plaintiff said she signed under duress) and alternatively under the Inheritance (Family Provisions) Act. It is clear to me from the statement of Claim in HBC 571/1994 and in particular from paragraph 5 thereof (Exhibit A to Mahendra Lal's affidavit) that the foundation of the claim was that Jasoda Ramsey as George Ramsey's widow claimed to be entitled to a share of his estate.

The procedure for making a claim of this kind is set out in RHC O 99 the most important part of which, for present purposes is O 99 r 6(1) which provides that:

F "The personal representatives of the deceased to whose estate an application under the Act relates must produce in Court at the hearing of the application the probate or letters of administration under which the estate is being administered".

G Obviously, that rule was not complied with in this case since probate was not in fact granted until long after the compromise was reached.

Of more central importance however is the nature of the jurisdiction conferred on the Court under the Inheritance (Family Provision) Act.

As can be seen from the Act and in particular Sections 3(1), 3(5), 3(6) and 3(7) the Court is required to embark on a detailed investigation of all the relevant circumstances including the means and conduct of the claimant and the reasons for the disposition made in the will before it orders provision to be made from

the estate.

As pointed out by David Foskett in the "Law and Practice of Compromise" 2nd Edn p 261 the nature of the Court's jurisdiction in this field is very similar to that conferred upon it by the Matrimonial Causes Act 1973, Section 25(1) (the Fiji equivalent of which is the Matrimonial Causes Act (Cap 51), sections 84 (1) and (2)) and accordingly :

"when the Court is invited to exercise its power by consent it will be under a dual duty: first to consider whether the financial provision actually made for the applicant is reasonable and, if not, secondly to consider how, if at all, its powers are to be exercised."

In the leading case of Livesey v Jenkins [1985] 2 WLR 47 it was held that the Court cannot lawfully or properly exercise its discretion to order financial provision under the 1973 Act unless provided with correct, complete and up to date information covering all matters which the Court is required to take into account before making its award. Furthermore:

"Once it is accepted that the principle of full and frank disclosure exists it is obvious that it must apply not only to contested proceedings heard with full evidence adduced before the Court but also to exchanges of information between parties and their solicitors leading to the making of consent orders without further inquiry by the Court. If that was not so it would be impossible for the Court to have any assurance that the requirements of (the Act) were complied with before it make such consent orders" (ibid p 57G).

In the present case I am satisfied that Counsel for the Public Trustee had no *locus* or authority to compromise the actions between the parties. He did not inform the client of the offer of compromise (see Sill v Thomas (1839) C&P 762). There was no full and frank investigation of the circumstances surrounding Jasoda Ramsey's claim to provision out of the estate. The discretion of the Court was not exercised as required by the Act.

In these circumstances the Order of the Court made on 8 September 1995 will be set aside and the declaration sought will be granted.

The 2nd Defendant having commenced proceedings under the Inheritance (Family Provision) Act before probate was granted, those proceedings were commenced within the time specified by the Act (see Section 4, In re Searle Dec'd [1949] 1 Ch 73 and In re Bidie Dec'd [1949] 1 Ch 121). The effect of setting aside the settlement is that those proceedings are still pending and may now be further prosecuted in accordance with the Rules of Court.

(Declaration granted.)