

MAHENDRA KUMAR, RAVIN KUMAR, NAREN KUMAR, DHIREN KUMAR and SUNILA v PASTOR SHIU KUMAR AND RAIJIELI KOSO (HBC0058 of 2007)

5 HIGH COURT — CIVIL JURISDICTION
MUTUNAYAGAM J

8 August 2011, 19 January 2012

10 **Will — sole executor and trustee — whether valid exercise of power of sale — powers of trustee — sale of land — estate debt — consent — valuation — whether property sold for fair market value — damages — Trustee Act s 23(1)(a) — Succession Probate and Administration Amendment Act s 19A.**

15 The plaintiffs' stepmother, acting under a Power of Attorney given to her by the sole executor and trustee of her late husband's estate, sold the testator's property. The plaintiffs alleged that the sale of the land was fraudulent, in breach of the terms of the testator's will and took place without their written consent.

Held –

20 (1) The sale was not necessitated to settle an estate debt.
(2) No written communication was sent to the beneficiaries prior to the sale. There was no evidence that the plaintiffs consented to the impugned sale.
(3) A trustee has a duty to exercise the power reposed in him in the best interests of the different classes of beneficiaries. A trustee has a duty to obtain the best price the property would fetch in the open market. The property was not sold for a fair market value.
25 The defendant failed to discharge his duty as a trustee in good faith and breached his duties as executor and trustee.

Application allowed.

Cases referred to

30 *Re Charteris, Charteris v Biddulph* [1917] 2 Ch 379, considered.
Sang Yee Joy v BPTC Ltd (In Liquidation) [1994] FJHC 173; HPP 29/92S, cited.
Amrit Sen for the Plaintiff.
Adrian Ram for the Defendants.

35 **[1] Mutunayagam J.** This case turns on the validity of the exercise of a power of sale of a land by Pastor Shiu Kumar, the sole executor and trustee of the last will of David Manohar Lal.

40 The plaintiffs, children of David Manohar Lal allege their stepmother Raijieli Kosa, acting under the Power of Attorney given to her by Pastor Shiu Kumar, fraudulently and in breach of the terms of David Manohar Lal's will, sold the testator's undivided 3/20th share of property CT 2908 to Savusavu Bay Estate Ltd for a sum of \$ 70,000 in 2007, without their written consent.

45 David Manohar Lal owned 15 acres, comprising an undivided 3/20th share of CT 2908 known as "*Natoaika Vuinisea*". Clause 10 of the will provided the property was to be subdivided and distributed as follows: 1 acre to each of the plaintiffs, Leslie Manohar Lal and Pastor Shiu Kumar; and 7 acres to Raijieli Kosa.

Pastor Shiu Kumar is the husband of Leslie Manohar Lal. Leslie Manohar Lal is the daughter of Raijieli Kosa and David Manohar Lal.

50 **[2] The determination**
Powers of a trustee

Section 23(1)(a) of the Trustee Act (Cap 65) provides that a trustee may sell property. The defendants asserted that this provision gives a trustee an unqualified power to sell property. This argument is unsustainable in the face of subsection (4), which explicitly provides that as regards land, the power shall be exercised “*if so required in writing*” by the beneficiaries.

The argument that the sub-section takes away the discretion of the trustee and compels him to sell land upon a written request from the beneficiaries, seems to me to be unfounded.

Estate debt

It was also asserted that the sale was necessitated to settle an estate debt and “*Natoaika Vuinisea*” was the only property to which the deceased had title.

The statement of defence provides David Manohar Lal had instituted action against the Savusavu Town Council and the estate did not have a sum of \$ 40,000 of the \$55,000 due to enable Lots 7 and 8 on DP 8118 of CT 9197 to be conveyed by Savusavu Town Council to Pastor Shiu Kumar, who had taken over the case.

Lots 7 and 8 on DP 8118 was bequeathed by David Manohar Lal to Raijieli Kosa, four of their daughters and a grandson. This property was admittedly not in David Manohar Lal’s name on his demise.

In support of the contention that the debt was not an estate debt, counsel for the plaintiff relied on section 19 A of the Succession Probate and Administration Amendment Act, 2004, (Cap 60), which reads as follows:

“where a person dies possessed of, or entitled to... an interest in property, or where an interest in property passes by survivorship on the death of a person, and at the time of his death the interest is charged with the payment of money, whether by way of mortgage, charge, or otherwise and the deceased has not, by will, deed, or other document, signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for payment of all amounts charged thereon; and every part of the interest, according to its value, shall bear a proportionate part of the amounts charged on the whole thereof”. (emphasis added)

When one looks at this section in context of the facts, it is evident that \$ 40,000 was required in order to obtain title to that land. Accordingly, in my judgment, it was not an estate debt.

Consent

Pastor Shiu Kumar conceded that, no written communication was sent to the beneficiaries, prior to the sale. It was contended however, that the plaintiffs encouraged and consented to the sale.

The defence testified that Mahendra Kumar, the first plaintiff, was instrumental in obtaining an increased sale price for the property from a real estate agent. This was denied by Mahendra Kumar and the real estate agent was not called by the defence.

It was submitted the plaintiffs made no protest and provided details of their bank accounts, when requested by Pastor Shiu Kumar. The details of the bank accounts was sought after the sale. The riposte of Naren Kumar, the third plaintiff, as to the reason the money deposited was not returned was: “*who would return free money*”.

There is no pretence in the communication of Pastor Shiu Kumar that the plaintiffs were apprised of the sale previously. The communication states that there was “*no option but to sell the land or loose it*” and carries overtones of appeasement to the beneficiaries in declaring “*what has been done cannot be undone, so lets move on*”.

I find no evidence that the plaintiffs consented to the impugned sale.

[3] Valuation

I now proceed to consider whether the property was sold for a fair market value.

Raijieli Kosa disavowed she was a wicked stepmother and declared her affection for the plaintiffs would remain unchanged, in the aftermath of this lawsuit. It seems to me the mistreatment lay quintessentially in her acting as a trustee, in conflict with her interest as a beneficiary, and her nonchalance, in neither advertising nor obtaining an valuation of the property, prior to the sale.

I turn to the law. The starting point is the duty of the trustee to exercise the power reposed in him in the best interest of the beneficiaries, holding the scale impartially between different class of beneficiaries. The duty is cast on a trustee is to have regard to obtain the best price the property would fetch in the open market.

Swinfen Eady LJ in *Re Charteris, Charteris v Biddulph*, (1917) 2 Ch 379 at 398 stated:

“The duty of trustees entrusted with a discretionary power of this kind is not to have regard to the interests of one person or of another interested in the estate, but to have regard to the interests of the estate as a whole, and I take it that in such a case as the present this means that they are to exercise their discretions in the way that will, in their opinion, tend to produce ultimately the largest amount of money for distribution amongst the several persons interested”.

The plaintiffs, in their written submissions have cited the following passage from the judgment of Justice Byrne in *Sang Yee Joy v BPTC Ltd* [1994] FJHC 173:

“It has been held that it is a breach of trust to disregard the directions given in the Trust Instrument and to sell in a manner or under circumstances not authorized by the settlor or to sell in such a manner as not to obtain the best price for the property and in such cases the trustee will be held liable for any loss sustained by the trust Estate – Oliver v Court (1820) 8 Price 127 at 165; 146 ER 1152 at 1166-67. Thus Trustees should ordinarily invite competition before exercising their power of sale”. (emphasis added)

The defence relied on the testimony of Julian Whippy, a co-owner of a surveyed 15 acres of *“Natoaika Vuinisea”* and Silio Koroi Torinibau, a registered valuer. I disregard the evidence of both witnesses for the following reasons.

Firstly, Julian Whippy confessed he was *“penniless”* and his dire straits necessitated the sale of his property titled *“Bellego estate”* for \$55,000 in 2006. Hence he had neither advertised nor obtained an appraisal, prior to the sale. As such, he was given the epithet *“an ill informed”* and *“over anxious seller”* by the valuer called by the plaintiff, who made the same comment as regards a sale by another co-owner of the property for \$ 120,000 in 2007.

Secondly, Silio Koroi Torinibau, testified he had not taken into account developments in contiguous areas and based his valuation of property CT 2908 on the price obtained for the adjacent *“Bellego estate”*. Unfortunately, *“Bellego estate”* was not sold at the best possible price. Since he was requested to make a brief report, Silio Koroi Torinibau had not explored the terrain to view the vistas of the spectacular Savusavu Bay.

That leaves for consideration the evidence of Peremo Cadinivula, a registered valuer, called by the plaintiffs. In a detailed report replete with photographs, he provides that property CT 2908 has outboard access from Savusavu Town. It is reported the land is *“part of an on-going “lifestyle residential development.now prominent in Fiji”* and is *“suitable for resort/hotel development and subdivision into 1 acre lots mainly for US market”*, since Savusavu is a declared port of entry with a number of yachts visiting annually. On the basis of the most comparable sale identified as CT 23131, which had title and vehicular access as against the property reviewed, a discounted rate of \$22,000 an acre was reached in this report. In cross-examination, Peremo Cadinivula stated he had taken into account the swampy area on the property.

In my judgment, property CT 2908 was not sold for a fair market value. Pastor Shiu Kumar has not discharged his duty as a trustee in good faith and is in breach of his duties as executor and trustee.

The plaintiffs are entitled as damages to their proportionate share of the value of CT No 2908 as assessed by Peremo Cadinivula at \$ 22,000 per acre less the amount they

received from Pastor Shiu Kumar, as sale proceeds. Pastor Shiu Kumar was not entitled to deduct the expenses he had claimed from the sale proceeds.

[4] **Orders**

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- The plaintiffs are granted the following declarations:
- i) that CT No 2908 was not sold to Savusavu Bay Estate Ltd for a fair market value by the defendants.
- ii) that the plaintiffs are entitled to the damages incurred by reason of the sale of CT No 2908 to Savusavu Bay Estate Ltd. The damages are to be assessed by the Master of the High Court.
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- iii) that the defendants have breached the provisions of the will of the deceased David Manohar Lal.
- This provides a complete remedy to the plaintiffs, and I do not need to consider the other reliefs sought. The plaintiffs are granted costs in the sum of \$3000 summarily assessed payable by the defendants.

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Application allowed.

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