

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 179 OF 2015

BETWEEN : **RASHID ALI** formely of Ba but now residing at 30 Osprey Avenue, Green Valley 2168 NSW Retired Principal and one of the sons and beneficiaries in the Estate of Mohammed Ali late of Raviravi, Ba.

PLAINTIFF

AND : **RAHAT ALI** formely of Ba but now residing in New Zealand whose current address is unknown to the Plaintiff and is the surviving Trustee of Estate of Mohammed Ali of Raviravi, Ba under the Letters of Administration De bonis Non L/A DBN No. 37243.

1st DEFENDANT

AND : **DIRECTOR OF LANDS**

NOMINAL DEFENDANT

Mr. Kemueli Qoro for the Plaintiff.

Mr. Nazeem Sahu Khan for the Defendant.

Mr. John Pickering, Principal Legal Officer, A.G's Chambers for the Nominal Defendant

Date of Hearing: - 14th March 2016

Date of Ruling : - 06th May 2016

RULING

(A) INTRODUCTION

- (1) The matter before me stems from the Plaintiff's "*Inter Partes*", **Notice of Motion**, dated 14th October 2015, made pursuant to **Order 29 of the High Court Rules, 1988** and the inherent jurisdiction of the Court seeking the grant of the following Orders;
 1. *That an Interim Order that the Defendant by himself and /or his servants and/or his agents and whosoever be restrained from, transferring, selling, alienating or dealing howsoever Crown Lease No. 9962 until further order.*
 2. *That an Interim Order that the Defendant by himself and /or his servants and/or his agents and whosoever be restrained from, dealing or act in his capacity as a Trustee and Executor of the Estate of Mohammed Ali until further order.*
- (2) The "*Inter Partes*", Notice of Motion is supported by an affidavit sworn by the Plaintiff on 14th October 2015.
- (3) The Notice of Motion is strongly resisted by the Defendant on various grounds more expressly set out in the affidavit in opposition sworn by the Defendant on 04th November 2015.
- (4) The Plaintiff filed an Affidavit in reply sworn on 25th January 2016.
- (5) The Plaintiff and the Defendant were heard on the Notice of Motion. They made oral submissions to Court. In addition to oral submissions, the counsel for the Plaintiff filed a careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

- (1) What is the case before me? What are the circumstances that give rise to the present application?
- (2) On 14th October 2015, the Plaintiff issued a Writ of Summons against the Defendant seeking the grant of the following reliefs;
 - a. *A DECLARATION that the Defendant has breached and continues to breach his duty as a Trustee of the Estate of Mohammed Ali.*
 - b. *AN ORDER that the Defendant do provide and furnish full and proper accounts in respect of the said Estate of Mohammed Ali.*

- c. AN ORDER that the Defendant be removed as the Executor and/or Administrator and/or Trustee of the Estate of Mohammed Ali.
- d. AN ORDER that the Plaintiff be appointed as a new Executor and/or Administrator and Trustee of the Estate of Mohammed Ali to complete the administration of the Estate of Mohammed Ali and distribute the same under Court's supervision.

At the same time the Plaintiff applied for an 'interim injunction' seeking the grant of the following orders;

1. That an Interim Order that the Defendant by himself and /or his servants and/or his agents and whosoever be restrained from, transferring, selling, alienating or dealing howsoever Crown Lease No. 9962 until further order.
2. That an Interim Order that the Defendant by himself and /or his servants and/or his agents and whosoever be restrained from, dealing or act in his capacity as a Trustee and Executor of the Estate of Mohammed Ali until further order.

(3) The Plaintiff in his Statement of Claim pleads *inter alia*;

- Para 1. The Plaintiff is one of the sons and surviving beneficiaries for the Estate of Mohammed Ali late of Raviravi Ba and who now residing at 30 Osprey Avenue, Green Valley 2168 NSW Retired Principal but formerly of Ba.
2. The Defendant is the son of late Rustum Ali who was the brother of the Plaintiff. He is the surviving Trustee of the Estate of Mohammed Ali late of Raviravi Ba under the Letters of Administration De bonis Non L/A DBN no 37243.
3. The Nominal Defendant is the Lessor of ALL THAT PIECE OF LAND being Lot 1 Plan BA 2400 Lot 10 Plan BA 2406 Pt of Raviravi Formerly CT 11895 (Farm 8084) situated in the Tikina of Vuda in the province of Ba containing an Area of 6.3440 ha which is part of the Estate of Mohammed Ali late of Raviravi, Ba under Crown Lease No. 9962.
- Background – Estate of Mohammed Ali
4. The late Mohammed Ali died on 27th April 1973 leaving a Will dated 27th November 1970 which appointed one of his lawful sons, Rustam Ali (late) of Raviravi Ba as the sole executor and trustee of his Estate.

5. *on or about 16th January 1974, the late Ruatum Ali obtained probate no. 12790 for the Estate of Mohammed Ali which allowed him to administer all and single estate which by law devolves to and vest in him as a personal representatives of his late father Mohammed Ali.*

Particulars

- *Probate No. 12790 for Estate of Mohammed Ali*

6. *The beneficiaries under the Will dated 27th April 1973 for the Estate of Mohammed Ali were Rustum Ali, Mirja Ali, Nasib Ali, Rashid Ali, Shaukat Ali, Kishmat Ali, Mashuk Ali and Ashik Ali of whom some are now deceased.*
7. *The sole executor and Trustee of Estate of Mohammed Ali, RUSTUM ALI died at CWM Hospital, Suva on 5th July 1999 leaving the said Estate of Mohammed Ali un-administered.*
8. *Unbeknown to the Plaintiff and rest of the beneficiaries of the Estate of Mohammed, the two sons of Rustum Ali late namely Roshan Ali and Rahat Ali had applied and obtained letters of Administration De Bonis Non no. L/A DBN No 37243 on 30th November 1999.*

- (4) As I understand the pleadings, the Plaintiff has sued the Defendant for “**breach of Trustee duties**” and “**fraud**”.

The allegations on which the Plaintiff relies and by which he is prepared to swim or sink in that;

Para 10. *Pursuant to the LA de bonis Non No. L/A DBN No. 37243, all the estate which by law devolves to and vests in the personal representatives of the said Mohammed Ali so left un-administered were to be administered by the Defendant and Roshan Ali well and faithfully.*

Un-administered Estate of Mohammed Ali – Will dated 27th November 1970

Para 11. *It was an express term under clause 3 of the Will dated 27th November 1970 that the late Mohammed Ali gave devised and bequeath one half of all his residuary property unto RUSTUM ALI and the remainder of all his residuary property to his sons MIRJA ALI in equal share shares and share alike absolutely.*

Particulars

- *Clause 3 of the late Mohammed Ali's Will dated 27th November 1970*

Para 12. The remainder of the late Mohammed Ali's residuary property is ALL THAT PIECE OF LAND being Lot 1 Plan BA 2400 Lot 10 Plan BA BA 2406 Pt of Raviravi Formely CT 11895 (Farm 8084) part of the Estate of Mohammed Ali late of Raviravi, Ba under Crown Lease No. 9962 (the said Crown Land) which was transferred through transmission by death No. 480355 to Rodhan Ali and Rahat Ali on or about 18th April 2000.

Particulars

- *Crown Lease No. 9962.*
- *Memorial on the Crown Lease No. 9962 confirming transmission by death no. 480355 to Roshan Ali and Rahat Ali.*

Para 13. In fraudulently breaching of his duty as a Trustee to act well and faithfully and abusing his powers in administering the Estate of Mohammed Ali pursuant to the LA De Bonis Non, the Defendant has failed to divide and bequeath half the shares of his Crown Land 9962 to the beneficiaries including the Plaintiff and obtaining loan and fraudulently converting the same and cane proceeds deriving from the said Crown Land to his own use.

Particulars of Fraud

- *The Defendant improperly exercised his powers as a Trustee of the Estate of Mohammed Ali by fraudulently and dishonestly keeping and using the cane proceeds derive from the crown land and obtaining loan and converting in to his own use without paying half of the shares to other beneficiaries including the Plaintiff.*

Duty to Provide Proper Accounts

Para 14. Further and in the alternative, it is the duty of the Defendant as the Executor and Trustee to provide proper accounts for the Estate of Mohammed Ali.

Para 15. In breach of such duty and abuse his powers as Executor and Trustee of the Estate of the Defendant had failed to proper accounts to the beneficiaries including the Plaintiff since 2000.

Para 16. *By reason of aforesaid, the Plaintiff has suffered and continued to suffer loss and damages and is being deprived of use of land and cane proceeds which he is entitled to under the Will dated 27th November 1970.*

(5) The Defendant, opposing the application, submits; (As far as relevant)

Para 8. *That as to paragraph 8 of the said Affidavit I vigorously deny the contents therein and further state that the Plaintiff has been dealing with me on many matters regarding the Estate of Mohammed in the last approximately 15 years Ali including the sugar cane payments which has been deposited into the respective beneficiaries bank accounts according to the tons of cane harvested by each respective beneficiary by me at all material times in those 15 years.*

Para 11. *That as to paragraph 10 of the said Affidavit I vigorously deny the contents therein and further state that not only the sugar cane payments of the respective beneficiaries were deposited into the respective beneficiaries bank accounts by me according to the tonnage of cane harvested by each respective beneficiary, I also have kept proper and faithful records of the Estate moneys in two books, however since I am only visiting Fiji from New Zealand they are not in Fiji but kept by me in New Zealand and that in any event all other evidence of payments will be produced at the Hearing of the matter as well.*

Para 14. *That production of all the beneficiaries' accounts will manifest my contention that all the beneficiaries were paid their dues. Refusal on the part of the Plaintiff or any other beneficiary will only reveal that this application to remove me is made for reasons other than the interest of the Estate or for any other legitimate reason.*

Para 24. *That as to paragraph 13 of the said Affidavit I admit taking a loan from Sugar Cane growers Fund however all repayments was made from only my share of the Estate of Mohammed Ali by virtue of the fact that my father was also a beneficiary in the Estate of Mohammed Ali being entitled to as of right to the residuary property therein.*

(C) **THE LAW**

- (1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing “Interlocutory Injunctions”.
- (2) The Plaintiff’s application is made present to **Order 29, rule 1 of the High Court Rules, 1988** which provides;

Application for injunction (O. 29, r.1)

1.- (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party’s writ, origination summons, counterclaim or third party notice, as the case may be.

(2) Where the applicant is the Plaintiff and the case is one of the urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte in affidavit but except as aforesaid such application must be made by Notice of Motion or Summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is not be begun except where the case is one of urgency, and in that case the injunction applied for may ne granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.”

- (3) The governing principles applicable when considering an application for interim injunction were laid down in the leading case of “**American Cyanamid Co v Ethicon Ltd**” (1975) A. C 396, as follows;

- (A) **Is there a serious question to be tried?**
- (B) **Are damages an adequately remedy?**
- (C) **Where does balance of convenience lie?**

In that case **Lord Diplock** stated the object of the interlocutory injunction as follows:-

“...The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial: but the plaintiff’s need for such protection must be weighed against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff’s undertaking in damaged if the uncertainty were resolved in the defendant’s favour at the trial. The court must weigh one need against another and determine where the balance of convenience lies.”

In Hubbard & Another v. Vosper & another [1972] EWCA Civ 9; (1972) 2 WLR389 Lord Denning gave some important guidelines on the principles for granting an injunction where his Lordship said:

“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must regard not only to the strength of the claim but also to the strength of the defence, and then, decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant, but leave him free to go ahead. For instance, in Fraser v Evans (1969) 1 GB 349, although the Plaintiff owned the copyright, we did not grant an injunction, because the Defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rule.”

(D) ANALYSIS

- (1) Before I pass to consideration of the substantive submissions, let me record that the Counsel for the Plaintiff in his written submissions has done a fairly exhaustive study of the judicial decisions and other authorities which he considered to be applicable. I interpose to mention that I have given my mind to the oral submissions made by the parties as well as to the written submissions and the judicial authorities referred to there in.
- (2) At the hearing in this Court, the Defendant objected to the Plaintiff’s application for interim injunction on the basis that this court has no jurisdiction because the written consent of the Director of Lands was not obtained by the Plaintiff before he filed an application in this court for an interim injunction.

The objection is based on Section 13 (1) of the Crown Lands Act which reads:

“13. (1) whenever in any lease under this Ordinance there had been inserted the following clause:-

“This lease is a protected lease under the provisions of the Crown Lands Ordinance”

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof, whether by sale, transfer or

sublease or in any other manner whatsoever, nor to mortgage charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing affected without such consent shall be null and void."

- (3) Let me now pass to consideration of the preliminary issue raised by the Defendant. It is agreed that the lease in this action is a protected lease and that the consent of the "Director of Lands" was not obtained before the Plaintiff filed an application in this Court for an "Interim Injunction"

I do not consider there is any merit in the preliminary objection raised by the Defendant.

There is nothing in the express wording of Section 13 (1) which makes it necessary to obtain the consent of the Director of Lands before an action concerning a 'protected lease' is initiated. All section 13 (1) provides, in this connection, is that no Court of law may deal with any such lease without the consent of the Director of Lands. It appears to me that the consent of the Director can therefore be obtained up to any time before the land is actually "dealt with" by the Court, which in my view is certainly not the case at any time before an order has been made by the Court or a Judgment of the Court has been delivered. I can see no reason why a judgment of the Court dealing with the land could not properly be made "subject to the consent of the Director of Lands" with liberty to apply for further orders should that consent not be granted.

I reject the preliminary objection as being wholly lacking in substance.

- (4) Now let me pass to consideration of the substantive submissions. As I mentioned earlier, the legal principles and the approach a court should take in considering an application for "Interlocutory Injunction" are those laid in "**American Cyanamid & Co v Ethican Limited (1975) AC 396.**"

Those principles are;

- (i) **Whether there is a serious question to be tried?**
- (ii) **Whether damages would be an adequate remedy?**
- (iii) **Whether balance of convenience favour granting or refusing interlocutory injunction.**

(5) **Whether there is a serious question to be tried?**

Having gone through the affidavits of the Plaintiff, I find that the injunction orders sought by him is mainly to restrain the Defendant from dealing with Crown Lease No-9962 in his capacity as a Trustee and Executor of the Estate of “Mohammed Ali” due to the following grounds;

Para 10. Pursuant to the LA de Bonis Non No. L/A DBN No. 37243, all the estate which by law devolves to and vests in the personal representatives of the said Mohammed Ali so left un-administered were to be administered by the Defendant and Roshan Ali well and faithfully.

Un-administered Estate of Mohammed Ali – Will dated 27th November 1970

Para 11. It was an express term under clause 3 of the Will dated 27th November 1970 that the late Mohammed Ali gave devised and bequeath one half of all his residuary property unto RUSTUM ALI and the remainder of all his residuary property to his sons MIRJA ALI in equal share shares and share alike absolutely.

Particulars

- *Clause 3 of the late Mohammed Ali’s Will dated 27th November 1970*

Para 12. The remainder of the late Mohammed Ali’s residuary property is ALL THAT PIECE OF LAND being Lot 1 Plan BA 2400 Lot 10 Plan BA BA 2406 Pt of Raviravi Formely CT 11895 (Farm 8084) part of the Estate of Mohammed Ali late of Raviravi, Ba under Crown Lease No. 9962 (the said Crown Land) which was transferred through transmission by death No. 480355 to Rodhan Ali and Rahat Ali on or about 18th April 2000.

Particulars

- *Crown Lease No. 9962.*
- *Memorial on the Crown Lease No. 9962 confirming transmission by death no. 480355 to Roshan Ali and Rahat Ali.*

Para 13. In fraudulently breaching of his duty as a Trustee to act well and faithfully and abusing his powers in administering the Estate of Mohammed Ali pursuant to the LA De Bonis Non, the

Defendant has failed to divide and bequeath half the shares of his Crown Land 9962 to the beneficiaries including the Plaintiff and obtaining loan and fraudulently converting the same and cane proceeds deriving from the said Crown Land to his own use.

Particulars of Fraud

- *The Defendant improperly exercised his powers as a Trustee of the Estate of Mohammed Ali by fraudulently and dishonestly keeping and using the cane proceeds derive from the crown land and obtaining loan and converting in to his own use without paying half of the shares to other beneficiaries including the Plaintiff.*

Duty to Provide Proper Accounts

- Para 14. Further and in the alternative, it is the duty of the Defendant as the Executor and Trustee to provide proper accounts for the Estate of Mohammed Ali.*
- Para 15. In breach of such duty and abuse his powers as Executor and Trustee of the Estate of the Defendant had failed to proper accounts to the beneficiaries including the Plaintiff since 2000.*
- Para 16. By reason of aforesaid, the Plaintiff has suffered and continued to suffer loss and damages and is being deprived of use of land and cane proceeds which he is entitled to under the Will dated 27th November 1970.*

In adverso, the Defendant submits;

- Para 8. That as to paragraph 8 of the said Affidavit I vigorously deny the contents therein and further state that the Plaintiff has been dealing with me on many matters regarding the Estate of Mohammed in the last approximately 15 years Ali including the sugar cane payments which has been deposited into the respective beneficiaries bank accounts according to the tons of cane harvested by each respective beneficiary by me at all material times in those 15 years.*
- Para 11. That as to paragraph 10 of the said Affidavit I vigorously deny the contents therein and further state that not only the sugar cane payments of the respective beneficiaries were deposited into the respective beneficiaries bank accounts by me according to the tonnage of cane harvested by each respective beneficiary,*

I also have kept proper and faithful records of the Estate moneys in two books, however since I am only visiting Fiji from New Zealand they are not in Fiji but kept by me in New Zealand and that in any event all other evidence of payments will be produced at the Hearing of the matter as well.

Para 14. That production of all the beneficiaries' accounts will manifest my contention that all the beneficiaries were paid their dues. Refusal on the part of the Plaintiff or any other beneficiary will only reveal that this application to remove me is made for reasons other than the interest of the Estate or for any other legitimate reason.

Para 24. That as to paragraph 13 of the said Affidavit I admit taking a loan from Sugar Cane growers Fund however all repayments was made from only my share of the Estate of Mohammed Ali by virtue of the fact that my father was also a beneficiary in the Estate of Mohammed Ali being entitled to as of right to the residuary property therein.

The Plaintiff alleges that the Defendant has not provided accounts. The Defendant says that he kept 'proper records' of the Estate money in two books but they are kept in New Zealand.

It is essential to bear in mind that **keeping records of trust property in books** is not sufficient. It is pertinent to note that the Defendant had kept the **books** in New Zealand and the beneficiaries are in Fiji.

The Defendant as the trustee is obliged and under duty to keep an **accurate and proper account of trust property** and must be always ready to render it when required. (Please see; **White v Lady Lincoln, Duke of New Castle, 1803, 3 Ves, 363.**). The Defendant must cause the accounts of the trust property to be examined or audited by an independent accountant. The Defendant must allow the beneficiaries to inspect the trust accounts and all documents relating to the trust. (Please see; **Burrow V Walls , 1855, 5 De GM & G 233, and Hawkesley v May 1956, 1 Q.B 304.**)

It is undisputed that the Defendant in the case before me has not kept accurate account of trust property and not caused the accounts of the trust property to be examined or audited. Moreover, there was no opportunity for the beneficiaries in Fiji to inspect the documents relating to the trust property since the trustee, the Defendant is residing in New Zealand with the documents relating to trust property. The duty is to keep the documents ready in Fiji when called upon to render them. (Please see; **Kemp v Burn (1863) 141, R.R 225**). The Defendant's lack of knowledge on administration of trust property is very much obvious from the Defendant's letter dated 08th June 2015

addressed to Plaintiff's solicitors. (Annexure RA- 6). For the sake of completeness, the letter is produced in full below;

8th June 2015

Jyoti S Naidu
Qoro Legal
P O Box D332
Popular Building
Suite & Vidilo Street
Lautoka
Fiji Islands.

Dear Ms. Naidu

Re: Last Will and Testament of Mohammed Ali

I refer to your letter dated 28th May, 2015 which was received by me on 7th June, 2015.

I take the issues raised by your client, Rashid Ali, seriously and will endeavour to resolve this matter cordially.

Please be advised that any failures in administering my role as trustee has not been intentional which is why I would like to seek a further understanding of the said Letters of Administration De Bonis-Non (Will) number 37243 and fulfil any un-administered task from the said Will.

I am unable to visit Fiji at such short notice to resolve this matter immediately due to my commitments in New Zealand. However, I will be in Fiji from 4th October 2015 and I shall on this visit seek professional help to find a resolution for the grievance raised by your client and will advise you of the same. Meanwhile, I will keep you informed should there be any progress in this matter.

I intend to fulfil my obligation as a trustee sincerely and will appreciate a kind understanding and cooperation from your client.

Enclosed, please find my travel itinerary to Fiji.

Should you need to further communicate to me in relation to this matter, please do not hesitate to contact me on following email addresses; r60ali@yahoo.com and famiza07@yahoo.com.

Thanking you in anticipation.

Yours faithfully

.....
Rahat Ali
Trustee
Will Number: 37233

(Emphasis added)

I note that the trust property is still vested with the Defendant since 08th April 2000 and no steps have been taken by the trustee, the Defendant to distribute the shares of the other beneficiaries as per clause three (3) of the will.

The Defendant is not the sole person beneficially interested in the trust property, and therefore cannot, assume absolute dominion over the trust property. It is undisputed that the Defendant has mortgaged the trust property (without the written consent of the other beneficiaries) to secure a loan from 'Sugar Cane Grover's Council'. The Defendant has acted in a high-handed manner. As I understand the will (exhibit-RA-1), the trustee is not empowered by the will to mortgage the trust property. Such power is not reposed in him expressly by the will. Therefore, there is a plain and uncontested breach of a clear will. It is essential to bear in mind that a trustee may exercise only the powers which are expressly reposed in him by the instrument creating the trust. (Please see; **Costabadie v Costabadie** , (1847) 6 Hare 410, **Austin v Austin** (1876) 4 Ch.D 233, **Gisborne v Gisborne** (1877) 2 App. Case, 300) .

It is stated at **Underhills**, 'Law Relating to Trust and Trustees' 12th edition, Page 398;

"With regards to mortgages, the general rule is, clearly that apart from statute or authority in the statement, trustees has no power to mortgage or pledge the trust property, however, desirable it may be to raise money for the general purposes of the trust. Nor apart from statute, does an express trust to sell impliedly confer on trustees any power to mortgage"

Please See; (1). **Walker v. Southall**

(1887). 56 L.T. 882

(2) **Devaynes v. Robinson**

(1857). 24 Beav, 86.

(3) **Haldenby v. Spofforth**

(1839). 1 Beav, 390.

Moreover, the Defendant says that the loan was paid from part of his share of cane proceeds. I agree with the counsel for the Plaintiff that this clearly shows partiality on the Defendant's part as a trustee.

The duty of the trustee is to exercise the power reposed in him in the best interest of the beneficiaries, holding the scale impartially between different classes of beneficiaries. A trustee must be impartial in the execution of the trust, and not exercise his powers so as to confer an advantage on one beneficiary at the expense of another.

Swinfen Eady L.J in Re Chateris , Charteris V Biddulph (1917) 2 CH. 388 stated;

“The duty of the 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 money for distribution amongst the several persons interested.”

As discussed above, I find that there is an issue to be tried in this matter; viz, whether the trustee (Defendant) has breached his duties imposed on him by the will and if so what orders should be made to remedy the breach. This question is enough for me to determine that there is a serious question to be tried in this matter.

(6) **Inadequacy of damages (to either side)**

“The court should go on to consider whether....If the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

If on the other hand, damages would not adequately compensate the plaintiff for the temporary damage, and he is in a financial position to give a satisfactory undertaking as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial, an interlocutory injunction may be granted. If the plaintiff is not in a financial position to honour his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction will usually be refused: *Morning Star Co-operative Society Ltd v Express Newspapers Ltd* [1979] FSR 113; but not always: *Allen v Jambo Holdings*

Ltd [1980] 1 WLR 1252.” (**INJUNCTIONS, DAVID BEAN, SIXTH EDITION, P.30**)

In Natural Waters of Viti Ltd v. Crystal Clear Mineral Water (Fiji) Ltd ABU 11 of 2004, it was held;

‘Application for interim injunction who offers an undertaking as to damages should always proffer sufficient evidence of their financial position.’

In Sailosi Saqalu & Another v. Arula Investment Company Limited ABU 67 of 2000, it was held;

‘A party giving an undertaking as to damages needs to provide evidence of its financial position with reasonable particulars or run the risk of its undertaking will not be regarded seriously.’

In considering the balance of convenience I would highlight the following paragraph by Lord Diplock in **American Cynamid v. Ethicon Ltd [1975] 1 ALL ER 510.**

“As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the second defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff’s claim appeared to be at that stage”.

In **CYANAMID** (*supra*) at page 406 **LORD DIPLOCK** stated the object of the interlocutory injunction thus:

“...to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff’s need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the

plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience "lies".

(Emphasis mine)

A similar view was expressed by McCARTHY J in **NORTHERN DRIVERS UNION v KUWAU ISLAND FERRIES (1974) 2 NZLR 61** when he said:

"The purpose of an interim injunction is to preserve the status quo until the dispute has been disposed of on a full hearing. That being the position, it is not necessary that the Court should have to find a case which would entitle the applicant to relief in all events: it is quite sufficient if it finds one which shows that there is a substantial question to be investigated and that matters ought to be preserved in status quo until the essential dispute can be finally resolved...."

"It is always a matter of discretion and ... the court will take into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted ...and that which the plaintiff, on the other hand, might sustain if the injunction was refused..."

The Counsel for the Plaintiff argued that the Plaintiff will be deprived of the use of the trust property if injunction is not granted. In the same breath he argues that if an injunction is not granted it would amount to an on-going breach of the will and there will be irreparable injury to the trust property by the flagrant breach of the will which cannot afterwards be compensated by any decree which the Court can pronounce. In this connection, I must mention Mr. Qoro's emphasis on the fact that the status quo should be preserved until the trial, because the Crown Lease will expire on 01st January 2017 and there is a strong possibility that the Defendant will put an end to the trust by not renewing the lease under the estate of Mohammed Ali. He says that if the trust property goes off, it might never return and to deny an injunction in these circumstances would be to deny a measure of assurance to the Plaintiff which he is entitled to have.

I must confess that I acknowledge the force of the submissions of Mr. Qoro.

In *adverso*, the Counsel for the Defendant argued that the Plaintiff has not suffered and will not suffer any damage which cannot be made good in damages, whereas, the loss to the Defendant would be incalculable and the inconvenience enormous. In the same breath he argues that there is no undertaking as to damages and there is no evidence of the ability of the Plaintiff to meet an award of damages. The Counsel argued that this is fatal to the Plaintiff's claim for an interlocutory injunction.

I accept, of course, that a usual condition of granting an interlocutory injunction is that the Plaintiff must give an undertaking as to damages. The undertaking operates as a protection to the Defendant should the Court later rule that the interlocutory injunction should not have been granted. The undertaking binds the Plaintiff to compensate the Defendant for any damage suffered by the Defendant on account of granting of the interlocutory injunction.

I must not, however, lose sight of the important fact that there is a strong prima facie case in favour of the Plaintiff. The Defendant had taken no steps for 17 years to distribute the shares of the beneficiaries as per clause three (03) of the will. It is undisputed that the Defendant has mortgaged the trust property without the written consent of the beneficiaries to secure a loan. The Defendant is exercising his powers so as to confer an advantage on him at the expense other beneficiaries. **This is a flagrant on-going breach of the will. To be more precise, this is a plain an uncontested on-going breach of a clear will.** The Court is satisfied that there is a serious question to be tried and the Plaintiff has made out a prima facie case. **There has been no attempt here by the Defendant to produce on an affidavit an arguable defence which he intends to raise at the trial. There has been no attempt here to justify the on-going flagrant breach of the will, and therefore the principles appropriate to final relief apply and no irreparable damage need be shown by the Plaintiff. As I said earlier, the Defendant is acting in a high-handed manner by exercising his powers so as to confer an advantage on him at the expense of other beneficiaries. Therefore, the injury cannot fairly be compensated by money because the Defendant cannot buy the privilege of infringing the beneficiary's rights. The Defendant himself created that situation by acting in breach of obligations freely undertaken. The injury in infringing the beneficiary's rights is not capable of being estimated in money terms.**

The Defendant's claim is, in essence, that he will suffer an 'incalculable loss' if he is not permitted to continue his plain breach of the obligation of a trustee. Stripped of the persuasions of Mr.Khan's advocacy, the proposition is; *'I am making handsome profits by doing what I undertook not to do; therefore, it would be wrong for the Court to stop me'*

I see no reason for allowing a trustee who stands in clear breach of a will to have a holiday from the enforcement of his obligations until the trial. As I said earlier the Plaintiff has made out a strong prima facie case against the Defendant. Therefore, the governing consideration is the maintenance of the *status quo* pending the trial. In all cases of applications for interlocutory injunctions the governing principle is that pending the settlement of the dispute between the parties the Court will as far as possible keep matters in "*Statu Quo*". (Please see; **Donmar Productions Ltd v Bart**

and Others , (1967) 2 ALL.E.R. 338.) Having regard to the serious issue to be tried in this case, viz, whether the trustee has breached his duties imposed on him by the will and if so what orders should be made to remedy the breach, I see no reason why the failure of the Plaintiff to give an undertaking as to damages should debar him from obtaining an injunction. As Lord Denning pointed out in '**Allen and Others v Jambo Holdings Ltd and Others**' (1980) (1) W.L.R 1252, question of financial stability should not affect the position in regard to what is the essential justice of the case as between the parties. Where there is a plain and uncontested breach of a clear will not to do a particular thing, the trustee promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is restrained from on-going breach the better.

If one applies the principle that the proper order is one which would result in a due balance of justice and convenience, it would follow that in the circumstances of this case the course to be taken is that which would involve the least risk of ultimate injustice having regard to that actual and potential rights and liabilities of the parties on both sides. This, in my view will be best achieved by granting an interlocutory injunction.

(7) **Balance of convenience**

The balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the Plaintiff's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction. The strength of the Plaintiff's case is relevant in determining where the balance of convenience lies. Where a Plaintiff has an apparently strong claim, the Court will more readily grant an injunction even when the balance of convenience is evenly matched.

As I said earlier, there is a strong prima facie case in favour of the Plaintiff. Therefore, it is desirable that the status quo should be preserved until the trial and that in the circumstances the balance of convenience is in favour of the Plaintiff. (Please see; **Donmar Productions, Ltd v Bart and Others**, (1967) 2 ALL.E.R. 338). If an injunction is not granted it would amount to an on-going breach of the will.

(E) **FINAL ORDERS**

- (1) An interim injunction order is granted (subject to the written consent of the Director of Lands under Section 13 (1) of the Crown Lands Act) restraining the Defendant from transferring, alienating, selling or dealing with Crown Lease No- 9962 until further order.
- (2) Costs in the cause.



At Lautoka
06th May 2016

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Jude Nanayakkara
Master