

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 256 of 2015

BETWEEN : JAYSON RAFFE

Plaintiff

AND : KENNETH NORMAN RAFFE AND BRIAN GREGORY KIRSCH
as Executors of the Estate of REGINALD RONALD RAFFE

Defendants

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 325 of 2016

In the estate of REGINALD RONALD RAFFE

BETWEEN : KENNETH NORMAN RAFFE AND BRIAN GREGORY KIRSCH as
Executors and Trustees of the Estate of REGINALD RONALD RAFFE

Plaintiffs

AND : JAYSON RENDELL RAFFE

Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr Andrew Coleman, Mr A. d'Arville with him, for the Plaintiff
Ms J. Needham, Mr J. Apted and Ms Chen with her, for the Defendants

Dates of Hearing	:	3, 4, 5, and 6 October 2016
Date of Filing of Application to Adduce New Evidence	:	14 March 2017
Date of Hearing of Application	:	24 July 2017
Date of Interlocutory Judgment	:	5 September 2017
Date of Judgment	:	25 September 2017

JUDGMENT

Introduction

This is a matter in which the hearing was concluded on 6 October 2016. I had travelled some distance towards reaching my decision when I had to stop because the Defendants had filed an application to adduce new evidence. The Court's desire to fix an early date for hearing the Application could not be achieved as Counsel for both sides requested dates that accommodated their prior commitments in their home jurisdictions. The Court had to finally decide it could no longer accommodate any further requests from Counsel including one for a September 2017 hearing date. Thus the hearing date of 24 July 2017 was fixed, the Application heard and the decision given on 5 September 2017. This cleared the way for the issue of my judgment.

1. The above 2 actions were by order of this Court on 30 November 2015 consolidated and thereafter carried on as one action. Also by an order of 29 March 2016 made pursuant to s.51 (1) (c) of the Trustee Act, this Court approved the carrying on of the business known as "Raffe & Associates" by the Executors until the final determination of the consolidated proceedings.
2. One of the conditions on which the latter order was made was that the parties would diligently and efficiently move to have the final hearing of the consolidated proceedings resolved as soon as possible. In the event, this proved to be pollyannish.
3. At this juncture, it is expedient for me to quote from *Clarke v. Edinburgh And District Tramways Company, Limited*: The Scottish Law Reporter Vol. LVI at page 303, where Lord Buckmaster said "It is impossible to avoid, regretting that

this action, which involved no uncertain principle of law nor any complicated combination of facts, has been the subject of such prolonged and costly litigation”.

4. The Counsel for the Plaintiff (Jayson) in his opening statement said para 3 of the Will made a direct gift. He sought directions to the executors by the court in accordance with the will, as the executors want to convert the estate before distributing to the 4 beneficiaries. The cash has already been distributed in equal shares. The will is unambiguous. It is the duty of the executors to act in accordance with the will. The powers under the Trustee Act (Act) are not applicable here. There is no legal or practical impediment to distributing under the will now. It is otherwise a bare trust. The administration of the estate is at an end. The executors have no business to act as they propose - to sell the assets to Plantation Village Limited (PVL) not for cash but shares. This is extraordinary.
5. Counsel for the Defendants (the Executors) in her opening statement said this is not a usual case. The father gave PVL to run the resort. The preliminary matter is to look at the words of the will. The Defendants say this gives the executors the ability to distribute in one quarter each and is not a 4 way split. There is no contrary intention in the will to say the Act does not apply. The executors' stand is :
 - (1) Clause 3 of the will does not give a specific gift of $\frac{1}{4}$ in kind.
 - (2) There is nothing to the will that restricts executors to distribute $\frac{1}{4}$ in the current form.
 - (3) The executors are entitled under s.23 (1) (a) of the Act to sell the property. However they have no intention to sell to the new company. The executors ask for court orders to do what they propose, to enable the estate to be finally

distributed. S.85 of the Act gives the Court power to authorize dealings. The Plaintiff wants a mandatory injunction under s.41 of the Succession, Probate and Administration Act, (SPA Act) and has to show there is no other way to do it other than under a mandatory injunction.

6. Counsel concluded by saying the Court can divert from the will under s.85 of the Trustee Act.
7. Counsel for the Plaintiff in his reply said clause 3 of the will unequivocally gave a gift. There is no impediment to the distribution except one share.
8. Before calling her first witness, Counsel for the Defendants said that documents are irrelevant to the construction of the will. The proposals are not needed for the interpretation of the will. Extraneous evidence e.g. proposals are not relevant. The executors rely on the affidavits.
9. The first witness (DW1) was Brian Gregory Kirsch. He said he is a director of PVL and companies connected with the estate. He is an executor and obtained probate in May 2014.
10. Under cross-examination, DW1 said his obligation is to call in the assets and for the debts to be paid off. He has to distribute the assets according to the will. The Plaintiff's view is to distribute the estate in equal shares. DW1 said the will does not say distribute in specie, and he believed the whole estate is to be given in equal shares to the beneficiaries. Each beneficiary is to get $\frac{1}{4}$ of the global estate but not necessarily $\frac{1}{4}$ of each asset.

11. The cash assets were distributed in equal shares except these distributed in accordance with the agreement of beneficiaries. He said there were issues to be addressed before distributing. He agreed the injunction does not remain after the resolution of the suit. There is a divergence between the interests of the beneficiaries and PVL. It is not stated that cash assets are to be used to purchase the resort block. He disagreed that the option was detrimental to the beneficiaries because PVL needed to operate the business.
12. DW1 said he prepared the proposal with M/S Munro Leys. It was the executors' proposal and the co-executor consented. The beneficiaries were not told the interest rate or the loan terms. To do a debt back arrangement is less favourable than paying the beneficiaries directly. One of the concerns of the executors is that the testator's will be given effect to. He thought their plan is in accordance with the will. The executors' proposal is in the interest of all beneficiaries. The proposal to establish a trust was too hard and was taken off the table.
13. The executors' proposal is of benefit to PVL. They put 4 proposals forward because one of the beneficiaries may not act in the commercial interest at all. The executors felt there was a risk if the estate were distributed to the beneficiaries. The long term interest of the family were not within the purview of the executors. The proposal was a deviation from Raffe's will. Distribution in trust is in accordance with the will.
14. DW1 said PVL owns the assets. The beneficiaries do not own the assets. The beneficiaries under the trust have beneficial interests in the assets. He could not give any example of disunity. His view is $\frac{1}{4}$ distribution of its value and not $\frac{1}{4}$

share of the estate. The Plaintiff was talking about distribution in specie. The Plaintiff is entitled to $\frac{1}{4}$ of the assets in specie or in value.

15. He prepared the Board paper as a director of PVL and in the best interest of PVL. The interest of the beneficiaries is not the same as that of the directors of PVL. He did not know how the beneficiaries can agree when they do not know the terms of the loan.
16. The next witness (DW2) was Kenneth Norman Raffe, the co-executor. In cross-examination he said put all the eggs in one basket and distribute. The basket is PVL. It requires selling the Resort Block and the shares to PVL and afterwards distribute in shares to the 4 children. PVL will pay cash to the estate. The children will own 25% each in PVL. It is not the case to distribute $\frac{1}{4}$ each of the estate to the beneficiaries.
17. What the Plaintiff (Jayson) says is consistent with the will. He agreed that executors gather in and pay to the beneficiaries. The loan is an asset of the estate. Each beneficiary would be a creditor of PVL. He would need to understand if a loan to PVL was in the interest of the beneficiaries. He would need to know the loan terms first before he can agree as executor that the proposal is in the interest of the beneficiaries. It is in their interest to distribute $\frac{1}{4}$ each, and it is in accordance with the will. It is not a problem if the beneficiaries each got $\frac{1}{4}$ share in each asset. He now said he would have to see the terms before he could agree to that.

18. In the light of the above and the Defendant's Counsel's statement, the Counsel for the Plaintiff said the executors should not be allowed to proceed and their action struck out. I therefore instructed both Counsel to provide short written submissions on the striking out issue. After considering them I decided on 5 October 2016 not to allow the application to strike out the action.
19. I was informed by both Counsel that the evidence on both sides had been concluded and both had closed their respective cases. Counsel now began their oral submissions.
20. The Defendants (Executors') Counsel said there was a specific gift of the whole of the estate; the debts were taken care of and there was no need to sell the land etc to pay the debts. There was a gift of the assets to each of the children in equal shares. All are agreed that it is $\frac{1}{4}$ share to each beneficiary. The dispute is whether it is a $\frac{1}{4}$ share of the estate or $\frac{1}{4}$ of its value. She said the clear intention from the plain words was a specific gift of the entire estate to the 4 beneficiaries in equal shares. She said a specific gift is the right to receive in specie. This is the beginning and the ending of the construction of the will. She said the administration is completed in the legal sense. She agreed with the court that ancillary/peripheral matters do not prevent the distribution of the estate to the beneficiaries. The running of the business has nothing to do with the administration of the estate in the legal sense. The injunction cannot be an impediment to the distribution of the estate. There was no ambiguity in the will but they came to court with a different plan. There is good commercial reasons for what the executors propose

21. Counsel for the Plaintiff (Jayson) said it was strange the executors were bringing 2 years after the death, issues that were non-existent. The executors are doing a proposal that one of them cannot support. That the Plaintiff's proposal is available under the will is accepted by both executors. He relied on s.41 of the SPA Act. The Second Defendant's opinion was that the Plaintiff's proposal was not in the best interest of the estate, but that view did not hold water. An executor should not delay ad infinitum. The probate was granted in April 2014 and there was a long lacuna by the executors. The administration was ended; provisions put aside for tax; all debts paid and all assets called in. The Court can find the administration has ended. It is proper to distribute assets in accordance with their amended summons.
22. At the conclusion of arguments. I informed I would take time for consideration. Having disposed of the application that came in between, I shall now deliver my judgment, based entirely on the evidence and submissions recorded till the conclusion of hearing.
23. The nub of the matter is the construction of the last will of the testator. There is no issue as to its execution but only as to what its contents mean. The Plaintiff (Jayson) one of the beneficiaries says the estate should be distributed in accordance with the will i.e. each beneficiary receives in his personal name one quarter (1/4) of the assets of the Estate as tenants in common.
24. The Executors' stand is diametrically opposed to Jayson's. They say as follows:
 - (i) Clause 3 of the will is a general not a specific gift of residue.
 - (ii) There is no requirement in the will to divide each asset equally between the 4 beneficiaries.

- (iii) Nothing in the will requires the executors to distribute $\frac{1}{4}$ of each asset in its current form to each beneficiary.
 - (iv) The Trustee Act empowers the executors to distribute in a way that achieves equality in value without a four way split of each asset.
25. So I shall turn to the will. If I may say so it is a model of brevity which is not necessarily a virtue in every case. The clause which requires my interpretation is clause 3 and the relevant words thereof are "I give the whole of my estate to my Trustee (sic) on trust for such of my children, Reardon, Barron, Jayson Raffé and Hannah Jane Marella Raffé as survive me....."
26. My careful perusal of the other clauses do not lead me to the conclusion that they may in some way contribute to discerning the Testator's intention behind the said wording in Clause 3.
27. Lord Simon L.C. in *Perrin v Morgan* [1943] AC 399 at 406 said that the fundamental rule in construing the language of a will is to put upon the words used the meaning which the testator intended. The question is what the written words he uses mean in the particular case – what are the "expressed intentions" of the testator.
28. Thus the court will give words their ordinary meaning, and apply the golden rule which is to give effect to the testator's intention and so avoid an intestacy. (see Nevill's Law of Trusts, Wills and Administration (Fourth Edition).
29. In reaching my determination I am accepting as persuasive Hawkins Proposition 1 that in construing a will, the object of the Courts, is to ascertain the expressed intentions of the testator i.e. the meaning of the words.

30. I am further fortified in my determination by the fact that the Executors have distributed the personal estate in equal (1/4) shares to the 4 beneficiaries in specie. They cannot be allowed to resile from this stand when it comes to the Resort Black for what is sauce for the goose is sauce for the gander.
31. It is the bounden duty of an executor to carry out the expressed intention of his testator. He cannot adopt a cavalier attitude and consider he may act in a manner which is not in consonance with those intentions. If he feels entitled to act in a manner which is at variance with those intentions then this Court will bring him into line.
32. At the end of the day it is my determination that the intention of the testator was that the trustees are to transfer the entire estate to the 4 beneficiaries in equal shares as tenants in common.
33. In fine I shall grant the order sought in the Amended Originating Summons by Jayson Raffe against both Executors together with all consequential orders and reliefs sought. I shall also order both Executors (the Defendants) jointly and severally to pay in their personal capacities, the beneficiary, Jayson Raffe, the costs of the consolidated actions which I summarily assess at F\$7,500.

Delivered at Suva this 25th day of September 2017.



A handwritten signature in black ink, which appears to read "D Alfred". The signature is written in a cursive style and is positioned above a dotted line.

David Alfred

JUDGE

High Court of Fiji