

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 18 of 2023**

**BETWEEN:**     **RAVEEN MAHARAJ** of 71 Chick Street, Roselands, NSW 2196,  
Australia, Project Engineer

**PLAINTIFF**

**AND:**           **MOHITESHWAR VIJENDRA PRASAD** of 2 Bellbird Place Lysterfield  
South Victoria, 3156. Australia, Group Chief Financial Officer.

**1<sup>st</sup> DEFENDANT**

**AND:**           **VIJENDRA DURGA PRASAD** OF 63 Arundel Drive, South Harrow,  
Middlesex, HA2 8PN, United Kingdom, Pharmacist.

**2<sup>nd</sup> DEFENDANT**

**AND:**           **DIVENDRA PRASAD** of 3 Loloma street. Tamavua, Suva Fiji Solicitor.

**3<sup>rd</sup> DEFENDANT**

**AND:**           **ASISH VINAY PRASAD** of 17 Park Road, 3 Miles Raiwasa, Suva, Fiji,  
School Teacher.

**4<sup>TH</sup> DEFENDANT**

**Before:**           Mr. Justice Deepthi Amaratunga

**Counsel:**        Ms. Chaudhary M. for the Plaintiff  
Mr. Sahu Khan A. for the 1<sup>st</sup> Defendant  
Ms. Nandan S. for the 2<sup>nd</sup> Defendant  
3<sup>rd</sup> Defendant in person

**Date of Hearing:** 28.02.2024

**Date of Judgment:** 11.3.2024

# JUDGMENT

## INTRODUCTION

[1] Plaintiff who is one of the beneficiaries of the Estate of late Hannah Indra Rati Prasad (the Estate) by way of originating summons sought orders inter alia for distribution of shares of the Estate in terms of the last will dated 19.7.1994, removal of caveat lodged by third Defendant trustee on CT 12303 and also third Defendant to pay to the Estate a fair market rent for his use and occupation of a flat on CT 12303. By consent of all the parties the first order was granted for the trustees to distribute the Estate in terms of the last will made on 19.7.1994.

Initially third Defendant objected to order one of this originating summons but later wiser counsel prevailed and he objected to payment of rental for occupation of one flat on CT 12303.

A considerable time had passed through distribution of the properties belonging to the Estate had not ended. Third Defendant who is the caveator of one of the trust properties on which he resides in one flat in open court consented to the removal of the caveat he placed on CT 12303. He is residing on the same property and object to payment of rental, while being trustee to the Estate.

A trustee has fiduciary obligations and if there are violations of that obligations he can be removed.

[2] The only contentious order at this moment is the order 5 of the originating summons filed on 23.1.2023 which reads;

*“5. That the Third Defendant pay to the Estate of Hannah Prasad a.k.a Hannah Indra Rati Prasad a fair market rent for use and occupation of the freehold property legal description of which is Lot 18 on Deposited Plaint No 1911 on Certificate of Titles no 12303.”*

[3] There is no dispute as to third Defendant's occupation in CT 12303. He is also one of the trustees of the Estate and also one of the beneficiaries. Third Defendant cannot abuse his trusteeship and enjoy beneficial rights over the Estate. If that is done it can result removal of trusteeship. So there is simply no merit in refusal to pay a fair market value for rental for his occupation in CT1203.

- [4] Third Defendant who is a trustee objected to an order being made for him to pay a fair market rent to the use and occupation of CT 12303. He appeared in person and raised an issue as to why he had to pay for occupation when second Defendant had also previously lived on one flat on the same premises and did not pay any rent. A past wrong doing cannot create a future legitimacy of a wrongful action.
- [5] Hearing of this started on 1.3.2023 and at the hearing third Defendant raised an issue of determination as to existence of one adopted child of the late Hananah Indra Rati Prasad. Though this was not an issue for determination this became relevant as all the grand children of the testator are beneficiaries hence there was an issue as to determination of all the beneficiaries by the trustees for due execution of the Estate. At that moment all the parties did not accept this position and hearing was adjourned for the parties to consider this issue after filing of birth certificate of said adopted child. This fact was revealed by third Defendant who was one of the trustees and limited time granted for him to file supplementary affidavit with birth certificate of the adopted child and also issues from that adopted child.
- [6] Third Defendant did not file the birth certificate as directed, but Plaintiff's counsel in open court admitted the existence of adopted child to testator and also admitted children of that adopted child are beneficiaries of the Estate. These children can be determined from birth certificates of them. This is a duty of all the trustees. This position was accepted by all the parties at the adjourned hearing.
- [7] As the hearing had commenced on 1.3.2024 and only window of opportunity allowed was to file birth certificate of the adopted child of the testator any affidavit or material other than the birth certificate of adopted child of the testator are struck off as the hearing had started and without leave of the court no fresh material can be filed in court.

## **ANALYSIS**

- [8] The narrow issue for the court to determine is whether an order should be made for third Defendant to pay to the Estate a fair market rent for use and occupation of CT 12303 which belongs to the Estate.

- [9] At the moment only third Defendant occupies a property belonging to the Estate. The order sought by Plaintiff as beneficiary is to pay to the Estate a 'fair market rent' for the occupation by third Defendant.
- [10] Third Defendant is one of the trustees to the Estate and CT 12303 belonged to the Estate. Third Defendant admitted that he reside in the property for which he lodged a caveat.
- [11] Accordingly he had lodged the caveat for the said property belonging the Estate on the basis of being a trustee and beneficiary.
- [12] Third Defendant had not sworn an affidavit in terms of Order 41 of High Court Rules 1988. His purported 'affidavit' was attested by a person authorized to attest. Neither party raised this issue at hearing.
- [13] In this unsworn statement, he had refused to transfer shares of the said property to beneficiaries and he is a trustee for the said property. He is refusing to pay a fair rental for his occupation.
- [14] The issue before the court is a legal one hence there is no need to consider defective 'affidavit' of third Defendant.
- [15] Halsbury's Laws of England (Vol 98) (2019) under 124. Profits from trust property or fiduciary relationship<sup>1</sup> stated,

*"A trustee or other fiduciary is liable to account for profits arising directly or indirectly from the trust property itself or for profits acquired by reason of the fiduciary relationship"(Swain v Law Society [1981] 3 All ER 797 at 814, [1982] 1 WLR 17 at 37, CA, per Oliver LJ (approved [1983] 1 AC 598 at 619, [1982] 2 All ER 827 at 838, HL, per Lord Brightman, although the House of Lords reversed the decision of the Court of Appeal on the basis that the Law Society was performing a public duty). See also Brown v IRC [1965] AC 244, [1964] 3 All ER 119, HL; Boardman v Phipps [1967] 2 AC 46, [1966] 3 All ER 721, HL; O'Sullivan v Management Agency and Music Ltd [1985] QB 428, [1985] 3 All ER 351, CA; Alimand Computer Systems v Radcliffes &*

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<sup>1</sup> Halsbury's Laws of England > Trusts and Powers (Volume 98 (2019)) > 1. Nature and Creation of Trusts and Powers > (3) Constructive and Resulting Trusts > (i) Constructive Trusts > b. The Fiduciary as Constructive Trustee

*Co (1991) Times, 6 November; Satnam Investments Ltd v Dunlop Heywood & Co Ltd [1999] 3 All ER 652, [1999] 1 BCLC 385, CA; Wilkinson v West Coast Capital [2005] EWHC 3009 (Ch), [2007] BCC 717, [2005] All ER (D) 346 (Dec). See further equitable jurisdiction vol 47 (2021) para 236. There is no generally agreed definition of 'fiduciary relationship' but see Bristol and West Building Society v Mothew [1998] Ch 1, [1996] 4 All ER 698, CA; MacLean v Arklow Investments Ltd [2000] 1 WLR 594, PC; and para 639.)*

[16] Third Defendant being one of the trustees cannot refuse to pay a reasonable rent for his occupation of CT12303 till completion of the administration of the Estate. Such refusal can even lead to abuse of trusteeship and removal of trustee if he refuses to pay a fair rental for his occupation of the property in CT 12303.

[17] Third Defendant also state that he had maintained the property and for that a substantial amount of money was spent. How much third Defendant had spent on the trust property cannot be determined in this originating summons, as no such orders sought. These are matters for trustees to determine at appropriate time upon proof of such expenditure.

It is common knowledge a structure cannot exist for over twenty seven years, which is close to one generation without maintenance and improvements. Who did it and what were the cost of improvement must be done by trustees. Testator died in 1997 and maintenance of the Estate over the years was an obligation of all past and present trustees.

[18] At the hearing there was consensus that property comprised in CT 12303 should be sold and money distributed among the beneficiaries, there were no orders sought in this regard. If so there is no need to make an order for payment of reasonable rent from now onwards as it can be done with disbursement of sale proceeds for beneficiaries. It is not clear how soon this can happen.

[19] This application is made in terms of Order 85 of High Court Rules 1988

*“ORDER 85 –*

*ADMINISTRATION AND SIMILAR ACTIONS Interpretation*

*(O.85, r.1) 1. In this Order “administration action” means an action for the administration under the direction of the Court of the estate of a deceased person or for the execution under the direction of the Court of a trust.*

*2.–(1) An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.*

*(2) Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions:–*

*(a) any question arising in the administration of the estate of a deceased person or in the execution of a trust;*

*(b) any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust;*

*(c) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust*

*(3) Without prejudice to the generality of paragraph (1), an action may be brought for any of the following reliefs:–*

*(a) an order requiring an executor, administrator or trustee to furnish and, if necessary, verify accounts; (b) an order requiring the payment into court of money held by a person in his [or her]<sup>441</sup> capacity as executor, administrator or trustee;*

*(c) an order directing a person to do or abstain from doing a particular act in his [or her]<sup>442</sup> capacity as executor, administrator or trustee;*

*(d) an order approving any sale, purchase, compromise or other transaction by a person in his [or her]<sup>443</sup> capacity as executor, administrator or trustee;*

*(e) an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a*

*trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court.*

.....”

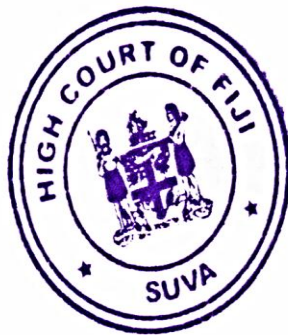
- [20] Third Defendant being a trustee cannot refuse to pay a fair rental to the Estate. He needs to pay for occupation of trust property. As sought in the orders a fair market value must be paid by third Defendant to the Estate. This amount can be set off from any expenses done at the time of sale, but till the sale is completed it is necessary to make a payment to the Estate by third Defendant to the Estate.
21. Third Defendant also stated that he had invested rental money he received from the Estate in Unit Trust under his name. This should also be in the name of Estate as trustee.
22. In the same manner , third Defendant should pay to the Estate a fair market rental for his occupation in transparent manner, if he fails to pay for occupation in CT12303 third Defendant’s trusteeship obligations are clearly in conflict and may result removal him as trustee .

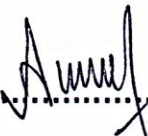
### **Conclusion**

Third Defendant must pay a fair rental for his occupation in one flat in CT12303 to the Estate. Third Defendant is a trustee and he may create a separate account for that purpose and pay to it monthly rental for his use, in transparent manner. Failure to do so may result in breach of obligations of trustee and may result in removal of third Defendant as trustee

**FINAL ORDERS:**

- a. Third Defendant to pay to the Estate of Hannah Prasad fair market rent for his occupation and or use of CT 12303 belongs to the Estate.
- b. After payment such payments can be set off at the sale of the said property in accordance with law.
- c. No order as to costs.



  
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**Deepthi Amaratunga**  
**Judge**

At Suva this 11<sup>th</sup> day of March, 2024.

**Solicitors:**

**Neel Shivam Law**

**Matera Law**

**Diven Prasad Lawyers**

**3<sup>rd</sup> Defendant in person (Mr. Asish Vinay Prasad)**