IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

APP NO. 1253/2023

IN THE MATTER	of Section 21 of the Administration Act 1969
AND	
IN THE MATTER	of an application for removal of administrator in the Estate of **ATUATIKA TAVAI** ("the Deceased")
BETWEEN	**TIRIAMATE RUATAPU** Applicant
AND	**IOANE HOSEA** Respondent

Date of Hearing: 28 February 2024

Counsel: S Smith for Applicant
M Tangimama for Respondent

Date of Judgment: 15 April 2024

JUDGMENT OF JUSTICE DAME JUDITH POTTER

Introduction

[1] There are two principal matters for determination by the Court:

a) The application by Tiriamate Ruatapu (the applicant) under s 21 of the Administration Act 1969 (the Act) to remove Ioane Hosea (the respondent) as administrator of the estate of Atuatika Tavai (the deceased); and

b) Interpretation of the last will and testament of the deceased dated 17 January 1991 (the will), by which the deceased appointed the respondent sole executor and trustee.

Application for removal and appointment of administrator

[2] The application under s 21 is made on the following grounds:

a) The respondent has been absent from the Cook Islands for a period exceeding 12 months without leaving a lawful attorney;

b) The respondent has materially failed to discharge his duties over a significant period of time;

c) The respondent continues to fail to discharge his duties as administrator and is unresponsive;

d) Proper execution of the terms of the will by the respondent has not occurred since the granting of Probate on 16 May 1994 (NZ Time) and continues to be at risk;

e) The applicant is a beneficiary of the estate of the deceased and is capable of executing the terms of the will effectively; and

f) It is expedient for the Court to make the orders sought.

[3] The respondent initially filed an application for grant of Special Administration under s 8 of the Act. By Minute dated 9 November 2023, I ruled the application was without jurisdiction and directed a Notice of Opposition be filed stating the grounds of opposition.

[4] The Notice of Opposition dated 7 February 2024 provides the following grounds:

a) The applicant no longer has an interest in the estate of the deceased.

b) Tepaeru Opo and Taria Atuatika, the surviving children of the deceased and the directors of Turoa Bakery Limited (TBL), support the respondent remaining as administrator; and

c) Previous distributions of shares in TBL were not compliant to the final wishes of the deceased.

[5] Ground c) is explained and amplified in an affidavit of the respondent sworn 22 November 2023, in which he states at paragraph 9:

> … Please note point 5 of the Last Will of Atuatika Tavai indicates that the rest or remainder of the share is bequeathed unto me upon trust to distribute accordingly. I get to interpret who the beneficiaries are, Taria Atuatika and Tepaeru Atuatika only.

And at para 12:

> Finally, I lived with the deceased Atuatika Tavai before he died. The deceased Atuatika Tavai told me three (3) or four (4) times that Taria Atuatika, Tepaeru Atuatika, Ruatapu Atuatika and Eteta Atuatika will become beneficiaries to his estate. At the time only Taria Atuatika and Tepaeru Atuatika were managing the company and the other two Ruatapu Atuatika and Eteta Atuatika were not part of the operation and I have interpreted the Last Will and Testament according to the desire and intentions of Atuatika Tavai and no one else.

The Will

[6] The deceased's will dated 17 January 1991 is here set out in full:

> THIS IS THE LAST WILL AND TESTAMENT of me ATUATIKA TAVAI of Rarotonga, Retired.
>
> 1. I HEREBY REVOKE all former wills and testamentary dispositions at any time heretofore made by me.
> 2. I APPOINT IOANE HOSEA of Rarotonga to be the sole executor and trustee of this my will.
> 3. I GIVE to my daughter ETETA ATUATIKA of Bluff, New Zealand eight per centrum (8%) of the shares held by me in TUROA BAKERIES LIMITED a duly incorporated company having its registered office at Rarotonga (hereinafter referred to as "the said company") for her sole use and benefit absolutely.
> 4. I GIVE to my son RUATAPU ATUATIKA of Rarotonga, planter, ten per centrum (10%) of the shares held by me in the said company for his sole use and benefit absolutely.
> 5. I GIVE devise and bequeath all the rest residue and remainder of my estate both real and personal whatsoever and wheresoever unto my trustee upon trust for such of my children as shall survive me and if more than one then in equal shares absolutely.
> 6. I DECLARE that if any of the beneficiaries abovenamed predecease me or shall survive me but due before attaining a vested interest in my estate leaving issue who shall survive me such issue shall take and if more than one in equal shares the share which his her or their parent would have taken had he or she survived me and attained a vested interest.

> IN WITNESS WHEREOF I have hereunto subscribed my name this 17th day of January One thousand nine hundred and ninety one.
>
> SIGNED by the abovenamed)
> ATUATIKA TAVAI as and for his)
> last will and testament in the sight)
> and presence of us together present)
> at the same time who in his)
> presence at his request and in the)
> sight and presence of each other)
> have hereunto subscribed our names)
> as attesting witnesses:)

[7] Probate of the will was granted to the respondent on 16 May 1994. In his affidavit sworn 12 April 1994, in support of the grant of probate, the respondent swore at paragraph 4:

> "4. THAT I will faithfully execute the said will by paying the debts and legacies of the said deceased so far as the property will extend and the law binds and will whenever ordered so to do after the grant of probate to me file in this Court and verify by affidavit a true, full and perfect inventory of all the estate effects and credits of the said deceased which shall have come into my hands, possession, knowledge and also a full, distinct and proper account of my execution of the will which shall set forth the dates and particulars of all receipts and disbursements and show which of the same are, in my opinion, on account of capital and on account of income respectively."

[8] He stated the value of the estate, to the best of his knowledge, to be $3,381. This amount appears to equate the nominal value of the shares held by the deceased in TBL at his death.

Evidence

[9] The relevant evidence as follows is not in dispute.

a) The deceased died on 1 January 1994.

b) The respondent was granted probate on 16 May 1994 (NZT).

c) The respondent swore by affidavit to faithfully execute the will and when ordered verify by affidavit a true, full, and perfect inventory of the estate's

assets and to give a full, distinct, and proper account of his execution of the will.

d) The deceased had eight children of whom six survived him. They are: Ruatapu Atuatika, Eteta Atuatika, Tepaeru Opo, Taria Atuatika, Rau Tavae, and Teremoana Tavae. Only Tepaeru Opo and Taria Atuatika now survive the deceased.

e) The respondent is not a beneficiary of the estate. The respondent is the son-in-law of Eteta Atuatika.

f) The applicant is the administrator of the estate of his father, Ruatapu Atuatika.

g) The main asset of the estate appears to be the shares in TBL. The deceased owned 3,380 shares, 17.79% (approximately 18%) of the shares in TBL.

h) The respondent has failed to give an inventory of the assets of the estate and has provided no information to the beneficiaries in the past 30 years. The respondent states in his affidavit dated 22 November 2023, that the assets of the estate at the date of death in 1994, "… only refer to his total shares in Turoa Bakery, being 3,380 ordinary shares of $1.00. There are no other assets".

h) In 2009 Eteta Atuatika applied for and obtained orders from the Court transferring 617 of the shares to herself as beneficiary of the estate.

i) In 2010, Ruatapu Atuatika applied for and obtained orders from the Court transferring 685 of the shares to himself as beneficiary of the estate.

j) In 2009, the respondent lived at 51A Albert Street, Ingleburn, NSW, Australia. The respondent currently lives at 47 Melanie Street, Leppington, NSW, Australia. Leppington and Ingleburn are neighbouring suburbs in Sydney. In oral submissions Ms Tangimama, counsel for the respondent, advised that the respondent proposed to return to Rarotonga in the near future, but there is no evidence to support this.

k) The applicant is knowledgeable of the descendants of the deceased.

l) The Certificate of Good Standing for TBL in the Cook Islands Online Registry dated 26 July 2023, shows, "Atuatika Tavai" as the holder of 2,078 shares. These are the balance of the shares held by the deceased's estate after the Court ordered transfers referred to above.

m) The respondent took no part in the applications to the Court in 2009 and 2010. He admits he told Eteta Atuatika to engage their own lawyer to remove their shares, which they did for each application.

n) The respondent now disputes the entitlement of Eteta Atuatika and Ruatapu Atuatika to the shares vested in them by the Court in 2009 and 2010.

o) The applicant seeks to replace the respondent as administrator of the estate and has sworn that if appointed, he will faithfully administer the deceased's estate. He says he is aware and knowledgeable of the remaining beneficiaries of the estate and the descendants of the children of the deceased who have passed away.

The 2009 and 2010 Court Orders

[10] On 21 September 2009, on the application of Eteta Atuatika, which named Ioane Hosea as respondent, this Court ordered that 617 ordinary shares of $1 of the deceased in TBL were to be transferred by the Registrar to Eteta Atuatika. The grounds on which the application was made (confirmed by affidavit of Eteta Atuatika) were:

a) Atuatika Tavai, the father of the applicant died on or about 1 January 1994.

b) Pursuant to the Will of Atuatika Tavai dated 17 January 1991, he bequeathed 8% of the shares held by him in TBL to the applicant, 10% of his shares in TBL to Ruatapu Atuatika with the balance of his shares bequeathed to all the children including Eteta Atuatika equally. Atuatika Tavai had 8 children.

c) On 16 May 1994, Probate was granted in the above matter to Ioane Hosea.

d) The executor of the estate, Ioane Hosea, as at the date of this application has failed to transfer the shares to the applicant as per the wishes of Atuatika Tavai pursuant to the will.

e) The applicant's solicitor requested the executor by way of emails dated 3 August 2009, 10 August 2009 and by way of registered letter dated 19 August 2009 that the executor transfer the shares to the applicant in accordance with the will of Atuatika Tavai.

f) There has been no response by the executor to the emails or the letter.

[11] On 11 November 2010, on the application of Ruatapu Atuatika, a like order was made on like grounds for the transfer to Ruatapu Atuatika of 685 shares of the deceased in TBL.

[12] Both orders were made ex parte after the respondent had failed to comply with requests to transfer the shares to Eteta Atuatika and Ruatapu Atuatika in accordance with the will, and failed to respond to emails and a letter from Eteta Atuatika's solicitor. While the Certificate of Good Standing recognises the transfers by recording 617 shares in the name of Eteta Atuatika, and 685 shares in the name of Ruatapu Atuatika, the balance of the deceased's shares, 2078, continue to be recorded in his name. No transmission or transfer to the respondent as executor has been recorded.

[13] The 617 shares ordered by the Court in 2009 to be transferred to Eteta Atuatika comprised 8% of the deceased's shares in TBL, 270 shares, plus one-eighth of the balance of the shares after transfer of 617 shares to Eteta Atuatika and 685 shares to Ruatapu Atuatika pursuant to clauses 3 and 4 of the will. The one-eighth represented Eteta Atuatika's share of the balance of his (the deceased's) shares bequeathed to all the children including Eteta Atuatika equally. Atuatika Tavai had eight children.

[14] Similarly for Ruatapu Atuatika in 2010.

[15] The transfers of shares ordered by the Court may be extrapolated as follows:

The deceased's shareholding in TBL at date of death	3,380
8% to Eteta Atuatika (clause 3 of the will)	270
10% to Ruatapu Atuatika (clause 4 of the will)	338

Balance	2,772
Divided among 8 children of the deceased - each	346.5
Eteta Atuatika receives 270 + 346.5 shares =	616.5 rounded to 617
Ruatapu Atuatika receives 338 + 346.5 shares =	684.5 rounded to 685

[16] The rounding is explicable and appropriate. The deceased's shareholding in TBL was 17.79% - 3380 of 19000 shares, rounded to 18%.

[17] The Court orders in 2009 and 2010 were made unopposed. They have not been appealed or otherwise challenged.

Application under s 21 of the Act

[18] Section 21 of the Act provides:

> **21. Discharge or removal of administrator** –
>
> (1) Where an administrator is absent from New Zealand for 12 months without leaving a lawful attorney, or desires to be discharged from the office of administrator, or becomes incapable of acting as administrator or unfit to so act, or where it becomes expedient to discharge or remove an administrator, the Court may discharge or remove that administrator, and may if it thinks fit appoint any person to be administrator in his place, on such terms and conditions in all respects as the Court thinks fit.
>
> (2) The administrator so removed or discharged shall, from the date of that order, cease to be liable for acts and things done after that date.
>
> (3) Upon any administrator being discharged or removed as aforesaid (whether or not any other administrator is appointed) all the estate and rights of the previous administrator or administrators which were vested in him or her or them as such shall become and be vested in the continuing administrator or administrators (including any administrator appointed under subsection (1)) who shall have the same powers, authorities, discretions, and duties, and may in all respects act, as if he or she or they had been originally appointed as the administrator or administrators.
>
> (4) This section shall, with all necessary modifications, extend to the case where an administrator dies, and the powers and authorities hereby conferred may be exercised and shall take effect accordingly.
>
> (5) Nothing in this section shall restrict section 8.

[19] Counsel were unable to locate any Cook Islands authorities which consider s 21 but there are ample New Zealand authorities which have considered the equivalent New Zealand provision, identical in its terms.

[20] The Court has a broad discretion under s 21 to remove an administrator and appoint a new administrator on terms and conditions it sees fit.

[21] The guiding principles in the exercise of the Court's powers and discretions under s 21 were summarised by the NZHC in *Farquhar v Nunns*[1]**:**

a) The removal jurisdiction is ancillary to the Court's principal duty to see that a trust is properly executed.

b) The touchstone for removal of an administrator is what is expedient. The overarching question is, "will removal of the administrator be a suitable, practical, and efficient means of advancing the interests of the estate and of its beneficiaries."

c) Does the evidence go far enough to justify removal on application of those principles?

d) The question in each case is whether the circumstances warrant the exercise of discretion.

e) The issues raised must be considered in a macroscopic not microscopic way.

f) Hostility as between administrators or trustees and their beneficiaries is not of itself a reason for removal, but hostility will assume relevance if and when it risks prejudicing the interests of the beneficiaries.

g) Authorities suggest strongly that where there is a conflict between the duty of an administrator and the beneficiaries, removal is likely.

[22] Two years later in *Tod v Tod*[2], the NZCA approved and distilled the principles summarised by Heath, J in *Farquhar v Nunns*:

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1 *Farquhar v Nunns* [2013] NZHC 1670.

a) The starting point is the Court's duty to see estates properly administered and trusts properly executed.

b) This jurisdiction involves a large discretion which is heavily fact-dependent.

c) The wishes of the testator/settlor (evidenced by the appointment of a particular executor or trustee) are to be given consideration, but ultimately the question is as to what is expedient in the interests of the beneficiaries.

d) Expedience is a lower threshold than necessity, and imports considerations of suitability, practicality and efficiency. Misconduct, breach of trust, dishonesty, or unfitness need not be established.

[23] In *Tod*, the Court of Appeal confirmed that courts will not readily replace an executor selected by a deceased to manage his or her estate, and that the mere existence of a conflict of interest between the duty of the administrator and the beneficiaries, does not mean it will be expedient to remove an executor. The conflict must actually prejudice the executor's ability to perform his duties as administrator.

[24] In *Hinde v Cranwell*[3], decided shortly before *Farquhar v Nunns*, the New Zealand High Court found the hostility between the administrators paralyzed and prejudiced the administration of the estate. The Court replaced the administrators, stating: "[m]ore than three years of inertia is long enough".

[25] In the case before this Court, there have been 30 years of inertia. The respondent has simply, "sat on his hands", failing completely to carry out the trusts imposed in him by the deceased when he appointed the respondent sole executor and trustee of his will.

[26] The respondent admits he has failed to discharge his duties as administrator. He pleads ignorance of his obligations and responsibilities and seeks to gain support from the affidavits of Tepaeru Opo and Taria Atuatika, both directors of TBL and the only surviving children of the deceased. They say they support the continuation of the respondent as administrator. It is relevant to note that Tepaeru Opo and Taria Atuatika, on the respondent's misguided and incorrect interpretation of the will (to which I refer

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2 *Tod v Tod* [2015] NZCA 408, [2017] 2 NZLR 145 at [22].
3 *Hinde v Cranwell* [2012] NZHC 63 at [33].

later in this judgment), would be the sole beneficiaries of the residuary estate of the deceased, after the specific bequests of shares in TBL to Eteta Atuatika and Ruatapu Atuatika respectively.

[27] The respondent claims in his affidavit sworn 22 November 2023:

> "I get to interpret who the beneficiaries are, Taria Atuatika and Tepaeru Atuatika only".

The respondent has taken no steps to validate or test this completely incorrect interpretation of the will. However, it may explain their support for an administrator who has continually, woefully failed to discharge his duties over 30 years.

[28] Following from his own interpretation of the will, the respondent also claims the distributions of shares in TBL ordered by the Court in 2009 and 2010, are incorrect. Yet he took no steps at the relevant times to oppose or otherwise be heard on the applications of Eteta Atuatika and Ruatapu Atuatika. As executor and trustee of the deceased's will, he was best placed to do so. Instead, he admits he told Eteta Atuatika to appoint her own lawyer, and failed to respond to communications from that lawyer. He has taken no steps to appeal or otherwise challenge the 2009 and 2010 Court orders. Far be it for the respondent now to dispute the entitlements to the shares ordered by the Court in favour of Eteta Atuatika and Ruatapu Atuatika.

[29] I am satisfied the continuance of the respondent as executor and trustee of the deceased's will, will prevent the trusts of the will being properly executed, as has been the situation for over 30 years. Removal of the respondent as executor and trustee of the deceased's will and administrator of his estate is not only expedient but necessary, indeed essential, and amply justified.

[30] I note for the sake of completeness that the respondent has been absent from the Cook Islands for a period exceeding 12 months (he has been living in Australia since at least 2009), without leaving a lawful attorney as required by s 21(1) of the Act. Counsel for the appellant properly noted that s 21(1) refers to "… absent from New Zealand", and there appears to be no amendment replacing reference to New Zealand with reference to the Cook Islands. However, I do not need to examine or rely on this ground for removal of the respondent as administrator.

[31] The applicant has indicated a clear intent to administer the deceased's estate and execute the terms of the will. He has engaged professional services to advise and assist him in his administration of the estate and has sworn on oath to faithfully administer the estate in place of the respondent, and to discharge his duties as administrator. Apart from the actions of Eteta Atuatika and Ruatapu Atuatika which resulted in the 2009 and 2010 orders, he appears to be the only person who has shown initiative to have resolved the unacceptable inertia that has beset the administration of this estate for 30 years.

[32] I accept the submission of the appellant that appointment of an independent trustee is neither practical nor likely to be effective in this estate.

[33] I will therefore, pursuant to s 21 of the Act, order the removal of the respondent as administrator and appoint the applicant in his place.

[34] The applicant is unassisted by information from the respondent as to the assets and liabilities of the estate. Despite his obligations to the Court and the requirements of my Minute of 9 November 2023, he has failed to provide details beyond referring to the deceased's shareholding in TBL. The applicant will need time to make inquiry and gather all relevant information, including, presumably, accounting for any dividends and distributions related to the deceased's shareholding in TBL. He will also need to ascertain the residuary beneficiaries of the estate in accordance with this judgment. I will therefore order the applicant, within four (4) months from the date of this judgment to file in this Court an inventory and account, verified by affidavit in accordance with paragraph 33 of his affidavit sworn 8 August 2023.

The will – Construction and Interpretation

[35] The legal principles for construction and interpretation of testamentary provisions are well established and not in dispute. They were helpfully set out in the written submissions of Mr Smith, counsel for the applicant, citing from *Re Jensen*[4]*:*

a) The overriding objective is to give effect to the intentions of the testator. All canons of construction must be subservient to that end.

[4] *Re Jensen* [1992] 2 NZLR 506 at [510].

b) The testator's intentions are to be gleaned from an objective appraisal of the testamentary documents viewed as a whole but in cases of doubt the wording is to be interpreted in the context of those facts which must have been in the contemplation of the testator.

c) If the testamentary language is unambiguous and discloses no obvious error, the Court must give effect to it as it stands. The Court must guard itself against conjecture as to the testator's possible true intentions notwithstanding the actual testamentary provisions or as to what he might have intended had he been better advised.

d) Where a literal reading of the testamentary provisions shows clearly that an error has been made and the true intention can be deduced from the testamentary documents not by conjecture but with reasonable certainty, the Court will give effect to the true intention.

e) To that end the Court can in appropriate cases supply omitted words and/or modify the words which have in fact been used so long as this stems from a proper construction of the testamentary documents as a whole.

[36] The court must guard against indulging in conjecture, and against an attempt to do what the court thinks the testator would have done if he had been better advised, *In re Joyce, Public Trustee v Smith*[5].

[37] The deceased's will is poorly drawn, but it is duly signed and witnessed and dated 17 January, 1991. There is no dispute it is a valid will.

[38] The appellant's counsel posited three scenarios for interpretation of the will.

Scenario 1:

[39] Owning 18% of the shares in TBL, by clauses 3 and 4 the deceased left 8% to Eteta Atuatika and 10% to Ruatapu Atuatika. The rest of his assets were left to his children, divided equally.

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5 *In re Joyce, Public Trustee v Smith* [1926] NZLR 835 at [845].

[40] Counsel submitted the intention of the deceased was to dispose of his total shareholding in TBL by the specific bequests to Eteta Atuatika and Ruatapu Atuatika.

[41] Counsel submitted this to be the "more natural" interpretation of the will. He claimed support for this interpretation from the untidy fractional division which results from calculating 8% of 3380 shares for Eteta Atuatika (= 270.4 shares), and dividing the fractional balance amongst the residuary beneficiaries.

[42] Counsel submitted that under this interpretation, the 2009 and 2010 orders "need not be interfered with". The additional shares to which Eteta Atuatika and Ruatapu Atuatika would be entitled, can be simply transferred to the beneficiaries of their respective estates.

Scenario 2:

[43] Of the 3,380 shares he held in TBL, the deceased left to Eteta Atuatika 8% and to Ruatapu Atuatika 10%. Clause 5 then disposed of the rest of his assets, including the remaining 82% of the shares (2,772) he held in TBL, to his children equally.

[44] On this interpretation, Eteta Atuatika receives 8 % and Ruatapu Atuatika 10% of 3,380 shares, plus a share in the remaining 82% of the shares, as part of the residuary estate of the deceased.

Scenario 3:

[45] Of the 3,380 shares he held in TBL, the deceased left to Eteta Atuatika 8% and to Ruatapu Atuatika 10%. Clause 5 then disposed of the rest of his assets, including the remaining 82% of the shares, to his surviving children equally, excluding Eteta Atuatika and Ruatapu Atuatika. This follows the respondent's interpretation of the will, though the respondent goes further and states in his affidavit dated 22 November 2023 that only Tepaeru Opo and Taria Atuatika should be beneficiaries of the residuary estate.

Discussion

[46] **Scenario 3:** Is clearly wrong. It reflects the respondent's interpretation of what he says the deceased wanted, or ought to have done. It is inconsistent with the provisions of

the will and the terms of the 2009 and 2010 orders which the respondent has never challenged. It is dismissed.

[47] **Scenario 1:** The applicant contended the words in Clauses 3 and 4 "(x) % per centum of the shares held by me", are ambiguous when considering the specific bequests and the will as a whole.

[48] However, the bequests in clauses 3 and 4 clearly relate to percentages of the deceased's shareholding in TBL, to "… the shares held by me in TBL". Had the deceased intended to dispose of the whole of his shareholding in the company by these bequests, it would have been a simple matter to omit the words, "held by me" from clauses 3 and 4. To omit them, or separate them by punctuation as the appellant urges, is to ignore the plain words and their meaning, and to enter the realm of conjecture. I do not find the ambiguity for which the applicant contends.

[49] Counsel for the applicant further submitted the use of the words, "sole use and benefit absolutely" in clauses 3 and 4, reinforces the deceased's intention to distribute the full 18% of the shares in TBL, to Eteta Atuatika and Ruatapu Atuatika, to the exclusion of anyone else. I do not accept this submission. The phrase "sole use and benefit absolutely," describes the basis upon which the beneficiaries are to receive and hold the shares. They are confirmatory of unconditional and absolute bequests. They do not define the subject matter of the bequests, namely, "(x)% of the shares held by me in TBL".

[50] While acknowledging the dispositions of TBL shares to Eteta Atuatika and Ruatapu Atuatika by the 2009 and 2010 orders, the applicant submitted they were in error. However, counsel proposed that if **Scenario 1** were to find favour with the Court, the error could be simply rectified by the transfer to Eteta Atuatika and Ruatapu Atuatika of additional shares to meet their entitlement under this interpretation.

[51] The 2009 and 2010 orders were made unopposed. They have not been appealed or otherwise challenged in the intervening 13/14 years. They stand as orders of the Court. They cannot now conveniently be ignored or by-passed, as is implicit in the applicant's proposal. Counsel acknowledged in oral submissions, that the passage of time presents difficulties with rectification.

[52] On the available evidence, disposition by clauses 3 and 4 of the total shareholding of the deceased in TBL would have left nothing for the residuary beneficiaries under clause 5. This cannot have been the deceased's intention. However, I do not rely on this factor, because there is no satisfactory evidence before the Court as to the nature and extent of the deceased's assets and liabilities at his date of death in 1994.

[53] For these reasons, I dismiss the interpretation of the will advanced in **Scenario 1.**

[54] **Scenario 2:** This is the interpretation essentially adopted by the Court in making the 2009 and 2010 orders. In ordering the transfers of 617 shares in TBL to Eteta Atuatika, and 685 shares to Ruatapu Atuatika, the Court implemented the provisions of clauses 3, 4, and 5 of the will, on the basis that the 8 children of the deceased were to share equally in the residuary estate of the deceased, after the specific bequests to Eteta and Ruatapu.

[55] The applicant contended the beneficiaries of the estate under clause 5 of the will are the six children who survived the deceased at the time of his death in 1994, being Ruatapu Atuatika, Eteta Atuatika, Tapaeru Opo, Taria Atuatika, Rau Tavae and Teremoana Tavae. The applicant's affidavit sworn 8 August 2023 refers to the deceased's death certificate which records four living male children aged 55, 47, 44 and 43, and two living female children aged 49 and 46 years.

[56] Counsel submitted that all interests under the will vest immediately on the death of the deceased; that the class of residuary beneficiaries under clause 5 closed on his death and included only those children who survived him. Any child of the deceased who predeceased him would be struck out of the class of beneficiaries under clause 5. He submitted that because there is no gap or contingency to which clause 6 could apply, clause 6 has no application in determining the class of residuary beneficiaries under clause 5.

[57] Counsel further submitted the will should be interpreted to limit the application of clause 6 to the "beneficiaries abovenamed", Eteta Atuatika and Ruatapu Atuatika, the legatees named in clauses 3 and 4 respectively. He invited the Court in interpreting the will to "reposition" clause 6 to follow clauses 3 and 4.

[58] Clause 6 is a clumsily worded substitution provision. All interests under the will vest on the death of the deceased. Therefore, the phrase in clause 6 "or shall survive me but die before attaining a vested interest in my estate", is redundant. There is no potential beneficiary to which this could apply. But these words do not render clause 6 ambiguous or meaningless. To ascertain the intent of the deceased, clauses 5 and 6 should be read and construed together. Clause 6 can be logically and meaningfully interpreted and applied as a standard substitutionary provision by which the issue of a child who predeceased the deceased, who was living at the death of the deceased, takes, and if more than one in equal shares, the share in the residuary estate which his, her or their parent would have taken had he or she survived the deceased.

[59] The evidence is that the deceased had eight children. The class of residuary beneficiaries under clause 5 closed on the death of the deceased. It includes those children who survived him (six in number), and, under clause 6, any issue of the two children who predeceased him, who were living at the death of the deceased.

[60] The substitutionary provision in clause 6 applies to dispositions under clauses 3, 4 and 5 of the will. It is artificial and illogical to suggest it applies only to the specific bequests in clauses 3 and 4, placed, as it is, following clause 5.

[61] To summarise :

- By clause 3 of the will, Eteta Atuatika receives 8% of the shares held by the deceased in TBL (270 shares).

- By clause 4 of the will Ruatapu Atuatika receives 10% of the shares held by the deceased in TBL (338 shares).

- The balance of the deceased's shareholding in TBL (2772 shares) and other assets of the deceased (the residuary estate) are to be divided among the 8 children of the deceased. The one-eighth share of a child who predeceased the deceased will pass in equal shares to his or her issue who survived the deceased.

[62] I conclude this interpretation properly gives effect to the intention of the deceased as expressed in the words of his will.

Result

[63] The application for an order under s 21 of the Act for the removal of the respondent as administrator of estate of Atuatika Tavai is granted.

[64] In his place the applicant, Tiriamate Ruatapu, is appointed administrator with immediate effect.

[65] Within four calendar months from the date of this judgment, Tiriamate Ruatapu as administrator shall file in the Court, verified by affidavit, an inventory of the estate, effects and credits of the deceased and an account of his administration of the estate, in accordance with paragraph 33 of his affidavit dated 8 August 2023 in support of his application.

[66] The construction and interpretation of the will is as set out in paragraphs [35] to [62] above and summarised in [61].

[67] The applicant is entitled to costs against the respondent. Any application is to be filed and served on the respondent within one calendar month of the date of this judgment.

Judith Potter, J