

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 165 of 2018

BETWEEN: UMLESH PRASAD of Nasasa Road, Nakaulevu, Navua, Taxi Driver.

PLAINTIFF

AND: HIRENDRA PRASAD alias HIREND PRASAD of Nasasa Road, Nakaulevu, Navua, Driver as the ADMINISTRATOR OF THE ESTATE OF NARAYAN PRASAD of Nasasa Road, Nakaulevu, Navua and in his personal capacity.

DEFENDANT

BEFORE: Hon. Mr Justice Vishwa Datt Sharma

COUNSEL: Mr. Naidu R. for the Plaintiff
Mr. Chand A. for the Defendant

Date of Judgment: Thursday 19th October, 2023 @ 9.30am

JUDGMENT

[Entitlement to share, Registration of Beneficiaries Name on Title, Subdivision, injunction to Restrain, Extension of Caveat, Accounts, Damages, Interests and costs]

On the outset it is to be noted that he Plaintiff had not pursued his claim under paragraph 18-22 of the Statement of Claim i.e. **The Alternative Cause of Action**. This was relayed to the court during the Trial on 02nd February, 2022. Therefore, there was no need to address court on the issue within the Pre-Trial Conference minutes 'whether the Deed of Family Arrangement dated 03rd November 2005 was contrary to Section 6(1) of the Succession, Probate and Administration Act, and if so, should the deed be set aside?

Introduction

[1] The Plaintiff filed a Writ coupled with the Statement of Claim and sought for the following orders against the Defendant:

- (1) A Declaration that the plaintiff is entitled to a share in the property comprised and described in Certificate of Title No: 35157 being Lot 1 on DP No: 8846 by virtue of being a beneficiary in the Estate of Narayan Prasad.
- (2) An Order directing the defendant as the administrator of the Estate of Narayan Prasad to take immediate steps to register the name of the plaintiff (and all other beneficiaries) on Certificate of Title number 35157 being Lot 1 on DP No: 8846;
- (3) An Order that the defendant as the administrator of the Estate of Narayan Prasad do subdivide the land comprised in Certificate of Title No: 35157 being Lot 1 on DP No: 8846 and execute a document of transfer transferring to the Plaintiff (and to all other beneficiaries) their respective interest to them in Certificate of Title No: 35157. In the Alternative an order that the Deed of Family Arrangement dated 03 November 2005 be set aside and the Estate of the Narayan Prasad be distributed accordingly to law pursuant to Section 6 (1) of the Succession, Probate and Administration Act Cap 60.
- (4) A Permanent injunction to restrain the defendant whether by himself and/or through his servants and/or agents or howsoever from transferring, selling, alienating, disposing, dealing with or attempting to deal in any way whatsoever with the land and property comprised and described in Certificate of Title No: 35157 being Lot 1 on DP No: 8846 situated in Nasasa, Navua;
- (5) A Permanent injunction to restrain the defendant from interfering with the plaintiff's quiet enjoyment and occupation of and from evicting the plaintiff and his family from the property comprised and described in Certificate of Title No. 35157 being Lot 1 on DP No: 8846 and more particularly, from the house currently by him and his family;
- (6) An Order that Caveat No: 770006 lodged by the plaintiff against Certificate of Title No: 35157 being Lot 1 on DP No: 8846 be extended

until the final determination of this action;

- (7) An Order for Accounts;
- (8) All necessary and consequential inquiries and directions;
- (9) Damages for trespass, harassment, distress and for interfering with the plaintiff's quiet enjoyment and occupation of the said premises;
- (10) Interest;
- (11) Costs on an indemnity basis;
- (12) Further or other reliefs.

[2] The Defendant filed his Statement of Defence together with a Counterclaim to the Plaintiff's claim and pleaded as follows:

- (a) That the Plaintiff shall not be entitled to the shares as per the Deed dated 03rd November 2005 since the Plaintiff is taking the Family House where all beneficiaries and the Defendant has spent their younger days and further, have invested their time, energy and commitments to erect the said dwelling to a living standard. The Defendant further says that the Plaintiff is at a very advantage where the Plaintiff had not had to build any house to live.
- (b) That the Plaintiff breached the Deed dated 03rd November 2003 and failed in his duty to look after the late Kamla Wati and as a result the Plaintiff is not entitled to as per the contentions of the Deed.
- (c) That the Plaintiff to acquire the Dwelling was conditional which the Plaintiff has failed to fulfil.
- (d) That if the Plaintiff wishes to Continue to reside and acquire/ inherit the Family House, then the Plaintiff shall only be entitled to no more than 1000m² of land that is surrounding the Family house since the Defendant and all other beneficiaries now have to build their own dwelling who have not claimed any shares from the family house which was built through their hard work and sacrifice.
- (e) Alternatively, the Defendant says that if the Plaintiff disputes and wishes to get extra land size, then the family house shall be subdivided with separate Titles and sold at the market value and the proceeds to be distributed equally amongst the beneficiaries.
- (f) The Defendant is willing to Administer the Deeds Estate where all beneficiaries have agreed to the shares be distributed as follow:

- (i) Mohini Lata to get $\frac{1}{4}$ acres from the said property;
- (ii) Rohini Lata $\frac{1}{4}$ acres
- (iii) Yogesh Prasad to get $2\frac{3}{4}$ acres
- (iv) Hirendra Prasad to get $2\frac{3}{4}$ acres
- (v) Umlesh Prasad to get Family House together with 1000m² of Land which is surrounding the family house.
- (vi) All disbursement to be paid equally by all beneficiaries
- (vii) If Umlesh Prasad argue and disputes and that he should get more

Oral Evidence

[3] The Plaintiff called 3 witnesses whilst the Defendant called 2 witnesses in these

PW1	Umlesh Prasad (Plaintiff)
PW2	Arvind Prasad
PW3	Kesar Kumar
DW1	Hirendra Prasad
DW2	Rohini Lata

[4] The oral evidence of the witnesses is not paraphrased in my judgment since it was recorded both on the court file and in the court recordings and can be accessed. However, all consideration was given to the entire evidence given during the trial.

[5] The parties to the proceedings furnished court with their respective written submissions.

Plaintiff's Case

[6] The Plaintiff's case is that the only asset of the late Narayan Prasad's Estate is a 7 acres freehold land comprised in the Certificate of Title No. 35157 situated at Nasasa road, Nakaulevu, Navua.

[7] On 03rd November 2005, Kamla Wati, the 3 sons and the 4 daughters entered into a Deed of Family Arrangement prepared by Solicitor Mr. Suresh Chandra.

[8] The Defendant as the Administrator of the Estate of Narayan Prasad has to the current not completed the Administration and the disposition of the Estate since the grant of Letters of Administration De-Bonis non grant on 10th November 2011, some 12 years has lapsed.

[9] The Defendant refuses to comply with the Deed of Family Arrangement dated 03rd November 2005.

[10] The Plaintiff is asking court for an order that the land be distributed amongst the heirs in accordance with the Deed of Family Arrangement dated 03rd November 2005.

- [11] Certificate of Title No. 35157 contains 2 hectares six thousand six hundred and seventy five square meters which converted into acres is 6,591 acres.
- [12] The Plaintiff is entitled to 5993 square meters under the Deed of Family Arrangement dated 03rd November 2005.

Defendant's Contention

- [13] However, the Defendant's contention is that-
- The Plaintiff shall not be entitled to the shares as per the Deed of Family Arrangement dated 03rd November 2005.
 - Clauses 5, 6 and 7 of the Deed of Family Arrangement dated 03rd November 2005 are relevant.
 - Pursuant to clause 7 of the deed of Family Arrangement whether the Plaintiff met the daily needs of Kamla Wati including the medical expenses during her lifetime or not is a question to be determined.
 - The Defendant's case is that the Plaintiff Umlesh Prasad did not meet Kamla Wati's daily needs and medical expenses. Therefore, the Plaintiff is not entitled to the benefit or consideration given to him under clause 7 of the Deed of Family Arrangement dated 03rd November 2005.
 - The Plaintiff shall only be entitled to no more than 1000 square meters of land that is surrounding the family house.
 - In the alternative, if the Plaintiff disputes and wishes to get extra land size, then the Family House shall be subdivided with separate Titles and sold at market value and the proceeds of sale to be distributed equally amongst the beneficiaries.

Determination

- [14] The Plaintiff and the Defendant are brothers, the lawful children of the Deceased, Narayan Prasad. They are beneficiaries of the Estate of Narayan Prasad.
- [15] The case concerns the distribution of the Estate of the late Narayan Prasad as to who gets what share and what section of the land owned by Narayan Prasad. The only asset of the Estate is a 7 acres freehold land comprised in Certificate of Title No. 35157 situated at Nasasa Road, Nakaulevu, Navua.
- [16] Narayan Prasad died intestate on 01st January 2005. At the time of his death, the deceased Narayan Prasad, was the owner of a substantial freehold land comprised in the Certificate of Title No. 35157, having an area of 2.6675 hectares situated in Nasasa, Nakaulevu, Navua.

- [17] On 11th of August 2005, Letters of Administration in the Estate of Narayan Prasad was granted to his said wife, Kamla Wati.
- [18] It is not in dispute that the Plaintiff is one of the beneficiaries of the Deceased's Estate of Narayan Prasad, being an equal beneficiary to 6 other beneficiaries, out of these 6 beneficiaries, 2 are his brothers and 4 are his sisters namely; Hirendra Prasad alias Harend Prasad, Mohini Lata, Rohini Lata, Prem Lata, Suman Lata and Yogesh Prasad accordingly.
- [19] After the demise of Deceased Narayan Prasad, his widow Kamla Wati as the intended Administratrix of the Estate of Narayan Prasad and Yogesh Prasad, Rohini Lata, Mohini Lata, Suman Lata and Pram Lata, the Plaintiff and the Defendant entered into a Deed of Family arrangement dated 03rd November, 2005 and agreed upon the terms and conditions and matters as enumerated therein accordingly.
- [20] However, Suman Lata and Prem Lata as beneficiaries of the Estate renounced their shares in favour of Kamla Wati, Hirendra Prasad, Yogesh Prasad and Umlesh Prasad.
- [21] Subsequent to Narayan Prasad's demise, his wife Kamla Wati also took demise on 12th January 2011.
- [22] The Defendant, subsequently applied for a grant of Letters of Administration, which was granted to him on 10th November 2011 for him to fully administer the Deceased's Estate of Narayan Prasad.
- [23] The Defendant was confirmed in his role as the Administrator of the Estate for some 10 years and 04 months now. The performance of his duties as the Administrator has been subject of significant contention and dispute.
- [24] The relationship of the Plaintiff and the Defendant is not just a family relationship. The Plaintiff is younger than the Defendant and the Plaintiff and 5 other beneficiaries put him into a relationship with them as a fiduciary.
- [25] The Defendant as the Administrator of Deceased's Estate of Narayan Prasad has fiduciary duties which are imposed under the Law. A Fiduciary Duty is one of the highest duties. A Fiduciary is a person put in a position of Trust and is expected to be loyal to the person to whom he or she owes the fiduciary duty. The Fiduciary Duty holds fiduciaries to attentive and honest conduct and behavior. The Administrator of the Estate has the duty to make decisions that benefit the entire Estate. There is a high degree of Care; diligence, personal and fiduciary obligation involved in the administration of the Estate. The personal Representative is obligated to act as a prudent person in the care and management of the Estate and to act in a manner consistent with the Will and not in conflict with any applicable Estate administration Laws or house of Intestacy. The personal Representative is barred from self-dealing. The personal representative may not gain any personal benefit from serving as Executor or Administrator except as otherwise provided by the Will or by relevant law.

- [26] Narayan Prasad died intestate. Therefore, his Estate property is to be distributed according to the rules set out under **Section 6 (1) of Succession, probate and Administration Act**.
- [27] However, in the present case the situation is different. Why?
- [28] After the demise of Narayan Prasad, all the beneficiaries entered into a **Deed of Family Arrangement** dated 03rd November 2005.
- [29] All parties to the 2005 Deed of Family Arrangement that is, the Defendant, Kamla Wati, Yogesh Prasad, Mohini Lata, Rohini Lata and the Plaintiff elected to act pursuant to the deed and build and occupy that portion of the land allocated to them under the deed except Yogesh Prasad who continues to live with his wife elsewhere. Once they elected to take that portion of land allocated to them and reside on it, they are bound by their decision.
- [30] Once they agreed to act in accordance with the Deed they cannot go back on their own words and simply say the plaintiff is not entitled to the parent's house and 5993m² land. This position is further strengthened by the fact that the Defendant (and all other siblings) did not take any objection to the Plaintiff having the parent's house with 5883m² land surrounding the house after the death of their mother Kamla Wati in 2011.
- [31] With regards to the principle of approbating and reprobating this Honour Brown- Wilkinson in **Express Newspaper plc, v News (UK) Ltd**, [1990] 1 WLR 1320 observed at pp. 1329, para F-G:
- "There is a principle of law of **general application** that it is not possible to approbate and reprobate. This means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."*
- [32] The Plaintiff objected to the Plaintiff's share for the first time when his solicitors wrote to Naidu Lawyers on 6 July 2018. (Exhibit D3) after service of the Writ on the Defendant, stating that the Plaintiff breached clause 6 of the deed. In that he did not look after and take care of Kamla Wati's daily needs. A month prior to this, the Defendant's solicitors wrote to all the beneficiaries, including the Plaintiff advising that the administrator wishes to engage the surveyor, carry out the survey of the land and obtain separate titles for separate beneficiaries in **equal shares**.
- [33] The Defendant cannot approve and reject the Deed at the same time. He has taken his share of the house and land allocated to him under the 2005 Deed and therefore must accept the whole of the Deed of settlement. He cannot "approbate the Deed by accepting the benefit in confers to him and at the same time reprobate it, by denying the effect of its other terms, in particular clause 7 which award the parent's house and 5993m² land to the plaintiff.
- [34] The Defendant's primary obligation in the circumstances is therefore to see and ensure that the terms laid out in the **2005 Deed of Family Arrangement** are carried out

accordingly. The Defendant had to adhere to the terms of this Deed entered into by the beneficiaries.

[35] Further, the Defendant as the Administrator of the Deceased's Estate of Narayan Prasad, holds a fiduciary duty to act loyally and faithfully for the benefit of all the beneficiaries.

[36] Clauses 5, 6 and 7 of the Deed of Family Arrangement dated 03 November 2005 are relevant for the purposes of these proceedings. These clauses state as follows:

"5. That the said **KAMLA WATI** of the first part shall continue to occupy and own portion of the said Estate property and comprised on Certificate of Title No: 35157 with an area of **Five Thousand Nine Hundred and Ninety Three meter square** more particularly described in the schedule hereto during her life time.

6. That **UMLESH PRASAD** one of the said Beneficiaries of the second part shall continue to live with the said Kamla Wati of the first art on the said Estate property comprised in Certificate of Title No: 35157 free of rent **but to meet the said Kamla Wati's daily needs including medical expenses during her life time.**

7. That **UMLESH PRASAD** one of the said Beneficiaries of the second part **subject to clauses (5) and (6) above shall upon the death of the said Kamla Wati of the first part shall continue to occupy and to own the said Estate property mentioned in clause (5) above."**

[37] There has been no challenges by the defendant to clause 5 in that Kamla Wati continued to occupy and own an area of 5993 square meter of land on the estate property [on which her house was constructed (parents' house)] during her life time.

[38] There has been no challenge by the defendant to clause 6 in that Umlesh Prasad continued to live with Kamla Wati in the parents' house free of rent during the lifetime of Kamla Wati.

[39] Pursuant to clause 7 of the deed, the plaintiff shall continue to occupy and to own Kamla Wati's portion of the estate property upon Kamla Wati's death subject to him meeting Kamla Wati's daily needs including medical expenses. The bone of contention is whether Umlesh Prasad met the daily needs of Kamla Wati including medical expenses during her lifetime.

[40] The Defendant's case is that Umlesh Prasad did not meet Kamla Wati's daily needs and medical expenses therefore he is not entitled to the benefit or consideration given to him under clause 7 of the 2005 Deed.

[41] Firstly, the Deed does not define the term "*daily needs*". One can reasonably assume "*daily needs*" mean the basic needs for human survival such as food, water, air and shelter. If any one of these basic needs is not met, then humans cannot survive. Neither the Defendant nor his witness gave evidence on what they understood by the term "*daily needs*" and that Umlesh Prasad thereby failed to meet those "*daily needs*". The Defendant also made suggestions that Kamla Wati died after complaining about severe gastritis and that her

gastritis worsened after she ate tin fish and that this only led to the fact that her diet was not looked after, no medical consultations were taken by the Doctors, her daily needs and medical were not catered for by the plaintiff which led to Kamla Wati's death.

- [42] I have analyzed this issue of daily needs and medical consultations of Kamla Wati in terms of the totality of evidence. I find that there is insufficient or no conclusive or reliable evidence before this court to prove and establish on the balance of probabilities the fact that Kamla Wati died because she was not fed properly.
- [43] The Plaintiff gave evidence that he lived with his mother until her death which is not disputed. He said he looked after his mother's daily needs and medical expenses, he bought everything for her, he took her everywhere, his wife would buy clothes for her, him and his wife used to take her to Calia to her sisters place, they took her out on Sundays and they provided her with everything in terms of food essentials.
- [44] According to the Plaintiff, his mother was not bedridden. She was "fit and fine". She did not suffer from any health condition. PW2 Arvind Prasad said Kamla Wati was in good health, she was fine. She had a heart attack on the day she died. A day before her death she told PW2 she ate tinned fish and her gastritis was severe.
- [45] PW2 Arvind Prasad in his evidence confirmed that the plaintiff was a good son, he never ill-treated his mother, he was never harsh or rude to his mother and that he took good care of her.
- [46] PW3 Kesar Kumar said he never heard of the plaintiff ill-treating his mother. He said the plaintiff was a good son and that he took very good care of his mother. On the other hand, PW3 Kesar in cross examination told court that the defendant Hiren came and attended the mother's funeral and lifted the coffin but he could not recall if the Defendant Hiren was in USA or Fiji during the 6 months and 1 year after funeral rituals of her mother Kamla Wati.
- [47] The Defendant in his evidence in Court confirmed that he agreed that his brother was taking care of some medicine but not up to par. The Defendant further agreed in cross examination that his mother was not suffering from any sickness, she was not dependent on tablets or medication, she did not have any medical condition and that she was never admitted to the hospital.
- [48] I have borne in mind the Plaintiff's, [PW!] Umlesh Prasad's evidence together with PW2 Arvind Prasad's, PW3 Kesar Kumar's and the Defendant [DW1] Hirendra Prasad's evidence hereinabove and have given a very careful consideration to the same. .
- [49] The Defendant failed to show by any cogent and reliable evidence that the Plaintiff did not meet Kamla Wati's daily needs; *his mother was a sickly person; his mother's condition was such that she took tablets regularly and that the Plaintiff did not provide it for her; his mother's condition was such that she took tablets regularly and that the plaintiff did not provide it for her; and his mother's condition was such that she*

required regular medical attention/treatment which the plaintiff did not pay or provide for.

- [50] Therefore, I find that the Defendant was unable to establish and/or make a case against the Plaintiff that the Plaintiff in fact breached clause 7 of the 2005 Deed of Family Arrangement.
- [51] Secondly, in terms of Defendant's contention that the actual size of the land is more than what is distributed in the Deed and that in absence of the distribution, of whole of the Estate property, the deed becomes Null and Void and should be distributed in terms of the Succession Probate and administration Act.
- [52] The Defendant gave evidence and it is undisputed that Narayan Prasad sold 5 Lots and these lots do not form part of the Certificate of Title No. 35157. These 5 lots were sold from the head title and therefore the Certificate of Title no. 35157 was issued on 25th July 2003. Before the parties entered into the Deed of Family Arrangement in 2005.
- [53] The Certificate of Title no. 35157 contain 2 hectares 6 thousand 6 hundred and seventy five square meters which converted to 6.5991 acres [Exhibit P3 refers]. The Plaintiff is entitled to 5993meter squares under the 2005 Deed of Family Arrangement which comes to 1.481 acres.
- [54] From 2.6675 hectares [6.591 acres], Kamla Wati sold 520.19 acres to Diwakar Prasad in 2007 leaving a balance area at 6.070 acres which currently exists and this is reflected in the manner in which the land is apportioned and allocated to the beneficiaries under the 2005 Deed of Family Arrangement as follows-

• Plaintiff	-2 acres approx.
• Yogesh	- 2 acres approx.
• Mohini	- $\frac{1}{2}$ acre
<u>Sub Total</u>	<u>4.5 acres</u>
• Defendant	-1.5 acres approx.
Total	6 acres.

- [55] Therefore, the fact of the matter is that no one should receive anything less than what is stated in the 2005 Deed of Family Arrangement.

Breach of Fiduciary Duty by the Defendant

- [56] However, on the other hand, the Plaintiff claims that the Defendant has breached his fiduciary duty towards the plaintiff.
- [57] I note at paragraph 15 of the Plaintiff's Statement of Claim, the Plaintiff pleaded as follows:

- *15. The defendant owes a fiduciary duty to the plaintiff in that he as the administrator has been entrusted with the assets of the deceased Narayan Prasad's estate and the power to administer the estate for the benefit of the estate. The defendant has breached the said duty.

Particulars

- (1) The defendant as the administrator of the Estate of Narayan Prasad has failed and/or neglected and/or refused to complete the administration of the said Estate by subdividing the said land comprised in Certificate of Title No: 35157 and issuing separate titles for the benefit of the beneficiaries of the said Estate and transferring it to the respective beneficiaries.
- (2) Failing to register the name of the plaintiff (and all other beneficiaries) on Certificate of Title No: 35157
- (3) Refusing and failing to inform the plaintiff of the expected date of distribution of the deceased's property comprised in Certificate of Title No: 35157
- (4) Openly refusing to distribute the estate property and holding the estate property indefinitely since January 2011.
- (5) Excessive delay in the administration of the deceased's estate as mentioned above.
- (6) Refusing to give the plaintiff any information in relation to the operation of the deceased's estate for the plaintiff to effectively monitor the administration of estate property.
- (7) Threatening to evict the plaintiff and his family from the estate property comprised in Certificate of Title No: 35157.
- (8) Openly stating an intention to sell the estate property to the detriment of the plaintiff.
- (9) Delaying distribution of the estate property comprised in Certificate of Title No: 35157 so as to use part of the estate property on a rental basis to generate income for his own use and benefit when the estate administration is incomplete.

[58] The evidence before this Court reveals that:

- (1) The Defendant has refused to comply with the terms of the Deed of Family arrangement dated 03 November 2005, more particularly, refusing to allow the Plaintiff to take the Residential house in which he lived with Kamla Wati (parents' house) together with an area of 5993 meter square land and openly declared in Court whilst giving evidence that he disagrees with the said Deed;
- (2) Obviously, the Defendant has failed to complete the administration of the Deceased's Estate since being appointed an administrator some 10 years 4 months ago. The delay is excessive and no good reason has been

advanced for the delay;

- (3) He has failed to register the name of the Plaintiff (and all other beneficiaries) on certificate of title no: 35157;
- (4) He has threatened to evict the Plaintiff and his family from the estate property, more particularly from the parents' house.
- (5) He has openly stated his intention to sell the parents' house which the Plaintiff and his family occupy if the Plaintiff does not accept 1000m² land;
- (6) He has delayed in the administration of the deceased's estate but uses part of the estate property (i.e. his own house) on a rental basis to generate income for his own and benefit when the administration of the estate remain incomplete;
- (7) He proceeded to prepare another deed of family settlement in 2018 (second deed) without consulting the plaintiff in which he unilaterally gave the plaintiff only 1000m² of land surrounding the parent's house, which is contrary to the Deed of Family arrangement dated 03 November 2005;
- (8) Under the second deed he has benefitted himself and Yogesh Prasad with a larger piece of land (2½ acre each) as opposed to his entitlement under the Deed of Family arrangement of 03 November 2005;
- (9) In the second Deed of family settlement, the Defendant gave Suman Lata and Prem Lata ¼ acres of land from the Estate property, without consulting the Plaintiff and which is contrary to the Deed of family arrangement dated 03 November 2005 as their father Narayan Prasad had already provided for Suman Lata and Prem Lata before his demise;
- (10) The Defendant proceeded to prepare another Deed of family settlement made in 2018 (third deed) without consulting the Plaintiff in which he again unilaterally gave the Plaintiff only 1000m² of land, surrounding the parents' house which again is contrary to the Deed of family arrangement dated November 2005;
- (11) Under the third Deed of family settlement, the Defendant has benefitted himself and Yogesh Prasad with a larger piece of land (2 ¾ acre) as opposed to his entitlement under the Deed, of family arrangement of 3 November 2005.
- (12) Under the second and third Deed of family settlement made in 2018 he has benefitted himself and Yogesh Prasad with "any balance area of the land" and not giving the plaintiff any land from that "balance areas of the land".

- [59] The Defendant is in a position of conflict of interest and duty. It is in his interest to say that he does not agree with the Deed of family arrangement dated 3 November 2005 and that he will not follow it. He has in very clear terms said in his evidence that he does not want to follow the Deed of family arrangement dated 03 November 2005.
- [60] However, it is his duty not to do so. As an administrator he is bound by the Deed of family arrangement dated 03 November 2005, he must respect it and comply with it. It demonstrates that the defendant is failing to pursue the interest of the plaintiff.
- [61] In his failure to comply with the 2005 Deed of Family arrangement dated 03rd November 2005 and to carry out the disposition of the Estate Property as enumerated in the Deed is a clear indication of the fact that the Defendant is clearly in breach of his fiduciary duties.
- [62] The Defendant wanted to alter the terms of the Deed of family arrangement made on 03 November 2005. In his capacity as the Administrator of the Deceased's Estate, the evidence is that he instructed his solicitors to prepare the second and third Deed of family settlement in 2018 (Exhibit P14 and P15 respectively) which not only benefitted him and Yogesh Prasad rather deprived the Plaintiff of his beneficial Rights and entitlement under the 2005 Deed of Family arrangement. He acted contrary to clause 7 of the 2005 Deed of family arrangement. The defendant is using his powers to his own benefit and to deprive the Plaintiff of his legal entitlement. We respectfully submit that the second and third Deed of family settlement of 2018 is rather unconscionable and tainted with fraud.
- [63] A fiduciary must not profit from his or her position as a fiduciary. There is unchallenged evidence that the Defendant is making profit out of the Estate property by taking bigger share of the land and by pressing to sell the Plaintiff's share of land and the parents' house and stating in court the sale proceeds will be divided amongst all the beneficiaries. Where persons in a fiduciary position act in bad faith, the court interferes: *Klug v Klug [1918] 2 Ch 67; bad faith amounts to maladministration*. The Defendant's conduct amounts to maladministration (known by its Latin name *devastavit*) wherein:
- (1) The Defendant in distributing the Deceased's Estate incorrectly by giving the Plaintiff a smaller share (area) of the land;
 - (2) By refusing to give the Plaintiff 5993 square meters of land inclusive of the parent's house;
 - (3) Giving Yogesh Prasad a bigger piece of the land in contrast to the Plaintiff; and
 - (4) Taking a bigger piece of land for himself in contrast to the Plaintiff thereby engaging in self-dealing with the Deceased's Estate of which he is a personal representative and an administrator;
- [64] The Defendant in his capacity as the administrator has acted as administrator in serious breaches of his duties for personal gain. The failure to distribute the Estate of Narayan

Prasad after the death of the wife in 2011 is one. There is unchallenged evidence that the defendant had neglected or refused to distribute the Estate to the beneficiaries. The other is an attempt to defraud the Plaintiff of his entitlement under the 2005 Deed of Family arrangement by arranging and participating in the settlements by preparing the second and third Deed of family settlement in 2018, which if put into effect, would have distributed the Estate in a manner which would have been contrary to the 2005 Deed of family arrangement. The second and third Deeds simply were ineffective attempts to alter the 2005 deed contrary to the intentions of the Plaintiff and Kamla Wati who were parties to that deed.

- [65] The Defendant in his evidence told the court that he will sell the house occupied by the Plaintiff (parent's house) if the Plaintiff did not take 1000m² land offered to him. As an Administrator he is adamant to give the Plaintiff only 1000m² land and the parent's house. This court does bear in mind the powers to sell by an Administrator.
- [66] It is evident that he Defendant lives in the USA. He could quietly sell the parent's house and abscond with the funds leaving the Plaintiff without any recourse.
- [67] Therefore, it is utmost importance that an injunction be granted restraining the defendant from selling the parents' house and the caveat be extended until the Defendant completes the administration of the Deceased's Estate, which the Plaintiff can uplift at the appropriate time, at the request of the Defendant's solicitors, to enable administration of the Deceased's Estate to be completed.
- [68] The Defendants counterclaim for the Plaintiff to either receive 1000m² land together with the parent's house or for him to agree for the parents' house to be sold is motivated entirely by self-interest. It will be noted that the Defendant was granted the Letters of Administration De Bonis Non on 10th November 2011 and to the current he has failed to complete the administration together with the disposition of the assets to the beneficiaries in the Deceased's Estate.
- [69] The freehold land in question is 6.591 acres in acreage. It is fair to suggest, in the absence of a Will, that Narayan Prasad would have desired that upon his death the land be subdivided and partitioned into 3 equal shares for his 3 sons minus the $\frac{1}{4}$ acre to each of the 2 daughters who reside in the estate land. If the scheme being proposed by the Defendant at the trial, which is also set out at paragraph 19 of his counterclaim is to be allowed for the final distribution of the Estate, the Defendant and Yogesh Prasad would stand to gain some three quarter acre each or so of the freehold land to which the Plaintiff is beneficially entitled. The 5993 square meter land to which the Plaintiff is beneficially entitled to is actually pursuant to the 2005 Deed of Family Arrangement. The effect of the orders which the Defendant seeks at paragraph 19 of his counterclaim will effectively deprive and disentitle the Plaintiff from a proprietary freehold interest in the 5993m² land will escalate in years to come.
- [70] I have observed the dilemma of the Defendant whilst giving evidence in court. The body language showed to court whilst answering Questions put to him that he had a dislike for the Plaintiff for one reason or the other best known to him.

- [71] The Defendant being in the position of a fiduciary must conduct himself honestly and fairly, he must not put his personal interest before the Estate duty required of him, and must not profit from his position as a fiduciary or engage in self-dealing.
- [72] The Defendant in this case is a beneficiary of the Deceased's Estate and also serves as the Administrator of the Estate. Since grant of Letters of Administration De-Bonis non on 10th November 2011, he has failed to complete the administration of the Deceased's Estate. His intention all along has been to vary and/or amend the share entitlements of the beneficiaries of the Estate for the reasons best known to him.
- [73] The Defendant is taking undue advantage of his position and using the Administration of the Estate to his own benefit and is advancing his own interest to claim a larger area of land in the Deceased's Estate and is giving the Plaintiff a smaller area of land.
- [74] The Defendant as the Administrator is objecting to the Plaintiff from receiving his share and entitlement of land which is 5993 meter square allocated to him under the Deed of family arrangement dated 03 November 2005. The Defendant is failing in his duty to treat a beneficiary to the Estate, i.e. the Plaintiff with due regard to his respective rights and entitlement to the Estate property.
- [75] The Plaintiff also claims an **equitable interest** in his parents' house in the Estate through **proprietary estoppel**. In claiming equitable interest the plaintiff pleads at paragraph 10 of the statement of claim as follows;

"The Plaintiff has also expended time, labour and money to develop and upgrade the house owned by the deceased and Kamla Wati (mentioned in clauses (5), (6) and (7) of the deed of family arrangement) in which he also resided with his family, on the said estate property comprised in Certificate of Title No: 35157 in the expectation induced and/or encouraged by Kamla Wati and/or on the assurance and promises made by Kamla Wati that he and his family would be allowed to permanently remain on the said land and in the same house which he and his family had been residing in with Kamla Wati all along."

- [76] The Plaintiff is seeking the equity of proprietary estoppel has endeavored to establish a type of interest in the house and land owned by the plaintiff's parents with reliance being placed on a representation and having acted on the representation have consequently suffered a detriment.
- [77] The Plaintiff was born in Rovandrau Road, Nakaulevu, Navua and had been living there from birth. The Plaintiff moved with his family to his parents' house in Nasasa to live with his mother in 2005 after the death of his father on 01 January 2005. The very pertinent aspect of evidence of the plaintiff was when he stated this:
- (1) His brothers Hirendra Prasad, Yogesh Prasad, his sisters Mohini Lata, Suman Lata and Rohini Lata asked him to stay with his mother after his father died. His mother was also happy. He left the family house in Rovandrau and moved to live with his mother in 2005, after the death of his father. He didn't feel his brothers and sisters will ask him to move out of the family house;

- (2) His mother said to him to develop the land, extend the property as it will belong to him. His understanding was the parents' house will belong to him. On that basis he carried out all the developments. He used his own labour. He gave \$3,000.00 labour contract to his friend Sanjay who did the work. Sanjay lives in Naitata. The work was done on a piecemeal basis. Hira Sami did the block laying.
- (3) He did plaster inside and outside of the house, he put double wall, built a toilet and bathroom inside, built a kitchen inside the house, made a terrace, a garage for the vehicle. The size of the house now is 45X60 feet. It has 3 bedrooms, 1 big kitchen inside, 1 kitchen outside. Last year he changed all the roof as it was leaking.

[78] The evidence of PW 2 Arvind Prasad and PW3 Kesar Kumar supported the position taken by the plaintiff. According to PW 2 the plaintiff's father Narayan Prasad had built a small house. It was a lean to house with 2 roofs made up of cement and tin. It had 2 rooms and a verandah. There was no terrace. The plaintiff made a lot of changes to the house after Narayan Prasad's death. There has been a big extension. The plaintiff built a porch, there are 4 extra bedrooms now, kitchen has been extended, the plaintiff has built a toilet and bathroom.

[79] The evidence of PW 3 Kesar Kumar was that he helped Narayan Prasad construct his house in Nasasa. It was not a god house, about 30 x 20 feet in size. It was about 2 or 3 rooms but not in a good condition. It was a cement house with roofing iron. The plaintiff built the house after he began residing in the house. The plaintiff renovated and extended the house. There has been a lot of changes to the house. It has a big terrace, porch new sink, new toilet with tiles, new kitchen.

[80] There are 3 key components of proprietary estoppel claim:

- (1) Representation - The owner of land induces, encourages or allows the claimant to expect or believe that he has or will enjoy some right or benefit over the owner's property.
- (2) Reliance - a reliance on that representation or assurance by the claimant; and
- (3) Detriment - the claimant acts on the strength of the representation or assurance which leads to detriment suffered by the claimant.

(Mohammed v Gomez and others [2019] UKP C 46 [para 24] citing Tharner v Major [2009] UKHL 18)

[81] The evidence that the Plaintiff was encouraged by his mother to build and develop the house is clear. The mother in explicit terms told the plaintiff the house would be his upon her death and he should develop the land and extend the property. Those were the precise words used by the mother.

[82] The Plaintiff relied on his mother's encouragement to his detriment. The Plaintiff spent money and improved the house by extending the house, renovating and developing it which he said he would not have done [if his mother had not built up an expectation in his mind]. The plaintiff incurred expenditure.

[83] There is undisputed evidence showing that the representation made to the Plaintiff that the parents' house would belong to him (i.e. that is he would inherit the house) influenced his judgment, thus he decided to develop the building, extending and renovating it.

[84] The evidence herein establishes that

- (1) A representation or assurance was made to the plaintiff by his mother (and all siblings). The representation was clear and unequivocal. The plaintiff's mother encouraged him to develop and upgrade the house. The promise is precise and substantiated.
- (2) The Plaintiff relied on the said representation or assurance to his detriment. The evidence established the plaintiff had a genuine belief that he will be allowed to permanently live in the house and he will own the house upon the death of Kala Wati. There is cogent evidence that the plaintiff had this genuine belief that he will have ownership rights to the land and house.
- (3) There is compelling evidence that the Plaintiff developed and upgraded the house on the assurance and promise. There has been substantial expenditure by the plaintiff in constructing and developing the house.

[85] The Defendant gave evidence, and it is undisputed that Narayan Prasad sold 5 lots and these lots do not form part of Certificate of Title No: 35157. These 5 lots were sold from the head title and thereafter Certificate of Title No: 35157 was issued on 25 July 2003.

[86] The Certificate of Title No: 35157 contain 2 hectares six thousand six hundred and seventy five square meters which converted into acres is 6.591 acres (Exhibit P3 is a copy of Certificate of Title No: 35157). The plaintiff is entitled to 5993 meter squares under the 2005 Deed of Family Arrangement which comes to 1.481 acres.

[87] From 2.6675 hectares (6.591 acres) Kamla Wati sold 520.19 acres to Diwakar Prasad in 2007. This is evidenced by the sale and purchase agreement dated 16 February 2007 (Exhibit P16) and the two receipts (Exhibit P17) leaving the balance area as 6.070 acres which currently exists and this is reflected in the manner in which the land is apportioned and allocated to the beneficiaries under the 2005 Deed which is as follows:

Plaintiff -	2 Acres approx.	
Yogesh -	2 acres approx.	•
Mohini -	$\frac{1}{4}$ acre	
Rohini -	<u>$\frac{1}{4}$ acre</u>	
	4.5 acre	
Defendant	1.5 acre approx.	
Total	6 acres	

[88] Hence no one should receive anything less than what is stated in the 2005 Deed.

[89] I have observed the dilemma of all the witnesses who testified in this case.

[90] I find that the Plaintiff and his witnesses are credible witnesses. Therefore, I accept the Plaintiff and his witness's evidence as evidence of truth over that of the Defendant and his witnesses for the following reasons:

- (1) The Plaintiff [PW1] appeared to answer questions honestly. He was a frank witness. He did not overstate his case in any respect. His evidence was strong and clear. His evidence on relevant matters was not shaken in cross examination;
- (2) Arvind Prasad [PW2] was a clear and forthright witness. He is the brother of Kamla Wati. He was completely frank and did not take anyone's side. In fact he had no reason to take sides. Both the Plaintiff and the defendant are his nephews. He was very calm witness. It appears he was confused on when the Plaintiff had moved to Nasasa as he was of the view that the plaintiff had moved to Nasasa with his parents.
- (3) Kesar Kumar [PW3] is a cousin of the Plaintiff and the Defendant. Again, this witness was able to clearly recall the important matters such as that about the construction of the parents' house during the lifetime of Narayan Prasad and subsequent to his death and how the plaintiff looked after his mother. He was very forthright in his evidence and his evidence on relevant matters was not shaken in cross examination.
- (4) The Defendant's [DW1] evidence was not so reliable. He changed his evidence on some important matters during cross examination. The question of truth cannot be determined with any certainty from his evidence. He had convinced himself that he was right about not following the Deed of family arrangement made on 03 November 2005 and was interpreting some events from that perspective. There are some areas of fact where his evidence cannot be accepted uncritically. He was opinionated on some crucial matters. He was too sure that he was on the right when it came to the manner in which he wanted to manage and distribute the estate property. The defendant's case depicts and opportunistic distortion of facts in order to make his defence and counterclaim.
- (5) Rohini Lata [DW2] is the sister of the Plaintiff and Defendant. The question of truth cannot be determined with any certainty from her evidence. It appears she was coached. She overstated the Defendant's case and her evidence in some crucial aspects was conflicting with that of the defendant. For example she was being dishonest when she said Umlesh did not take the body of Kamla Wati to the hospital after she died, Umlesh was making his van.

- [91] The Counsel representing the Defendant during the trial proper also objected to the admissibility of the email written by Amrit Chand Lawyers to Naidu Lawyers on 12th June 2018 together with a Deed of Family Arrangement. The Deed claimed that it was sent for settlement purpose on a without prejudice basis (exhibit p15). The question that arises here for determination is whether the email and the deed are privileged.
- [92] There is nothing on the email to show that it was written on a "without prejudice" basis for settlement purpose and the Defendant failed to establish at the trial that it was aimed at settlement.
- [93] The Defendant has refused to comply with clause 7 of the 2005 Deed of Family Arrangement. Instead his solicitors have been writing to the plaintiffs solicitors to accept something less than his entitlement under clause 7 of the 2005 Deed of Family Arrangement. The Plaintiff did not participate in any way in the preparation of the third deed. There is no evidence that the plaintiff participated in any discussion to settle the matter or instructed his solicitors to settle on the terms proposed by the defendant or his solicitors.
- [94] The Defendant cannot claim that Exhibit P15 is without prejudice. Also it was not labeled "without prejudice".
- [95] Therefore, the email of 12 June 2018 together with the Deed of Family Arrangement is admissible into evidence accordingly.
- [96] The Defendant in his evidence told the court that the Deed of Family arrangement dated 03 November 2005 was not explained to him by the lawyer Mr. Suresh Chandra who drafted the Deed and that he received his copy of the documents after sometime. An objection was raised on the ground that the Defendant did not plead in his statement of Defence and counterclaim that the Deed was not explained to him or that he did not understand the nature and effect of the deed. In cross-examination the Defendant said he was not sure whether he was present or not at that moment when Mr. Suresh Chandra explained the deed to everyone i.e. his 2 brother, 4 sisters and mother. He admitted Suresh Chandra gave a copy of the deed to everyone at the same time.
- [97] The importance which the law ascribes to the act of signing a legal document may be readily discerned from the decision of the High Court of Australia in *Wilton v Farnworth* (1948) 76 CLR 646 which stated:

"Where a man signs a document knowing that it is a legal document relating to an interest which he has in property, he is in general bound by the act of signature. He may not trouble to inform himself of the contents of the document, but that fact does not deprive the party with whom he deals of the rights which the document gives to him. In the absence of fraud or some other of the special circumstances of the character mentioned, a man cannot escape the consequences of signing a document by saying, and proving, that he did not understand it. Unless he was prepared to take the chance of being bound by the terms of the document, whatever they might be, it was for him to

protect himself by abstaining from signing the documents until he understood it and was satisfied with it. Any weakening of these principles would make chaos of ever-day business transactions."

- [98] A plea of *non- est factum* is not lightly allowed when a person of full age and capacity has signed a written document embodying contractual terms: *Fiji Development Bank v Raqona* (1984) 30FLR 151. The general rule is that a party of full age and understanding is bound by his/her signature to a document whether he/she reads or understands it or not: *Mary Maraia Peterson Hewitt and Another v Habib Bank Ltd*, Civil Appeal No. ABU 7 of 2004.
- [99] This is clearly opposite to the present case. The Plaintiff did not take any issue with the deed since he signed it in 2005. All parties to the Deed have acted pursuant to the Deed in the sense that they have been allocated a section of the land on the Estate which they have continued to occupy and reside on save for the Defendant who migrated to the USA in 2014.
- [100] The Defendant has not been deprived of his legal rights under the Deed.
- [101] The Deed carries the signature of the Plaintiff, the Defendant, Kamla Wati, Yogesh Prasad, Rohini Lata, Mohini Lata, Suman Lata and Prem Lata. The attestation clause states the contents of the Deed was first read and explained to them in the Hindustani language by Mr. Suresh Chandra. The Defendant did not challenge the fact in his evidence.
- [102] The Defendant is deemed to be familiar with the obligations under the Deed. There is no plausible reason to believe that Mr. Suresh Chandra did not explain the Deed to him and that he did not understand what document he was signing and his obligations thereunder. The Defendant is bound by his signature.
- [103] If the Defendant's case was that he did not understand what he had signed, he was obliged to plead it together with the material facts and circumstances surrounding the signing of the Deed. However, he did not do so.
- [104] Therefore, the Defendant is not permitted to approbate and reprobate. He cannot say at one time that a transaction is valid and thereby obtain some advantage and then turn around and say it is void for the purposes of securing some other advantage. He cannot say the Deed he signed was not explained to him and hence he will not follow it but then he continues to own the land which was given to him and separately allocated to him under the Deed on which he resided until he migrated to USA.
- [105] The Defendant filed his **Counterclaim** and sought for the orders therein as enumerated at paragraph 2 hereinabove of my Judgment.
- [106] The orders for distribution sought in the counterclaim enumerated at (i-iv) is contrary to the Deed of Family Arrangement dated 03 November 2005. The Defendant has not filed an action to set aside the Deed of Family Arrangement dated 03 November 2005. The Deed of Family Arrangement dated 03 November is a valid and binding deed and the Estate must be distributed in accordance with the Deed. The Deed stipulates the intention of all the parties to the Deed. The Defendant has not challenged the Deed in his counterclaim. The

parties have acted in accordance with the Deed since 2005. The Defendant cannot approbate and reprobate. The Defendant cannot now unilaterally say that he will give the Plaintiff no more than 1000m² of land and the parents' house. The Defendant being the administrator of his father's Estate thinks he can impose on the Plaintiff his own conditions on how he wants the Estate land to be distributed amongst the beneficiaries. He thinks he is the boss and the Plaintiff has to listen to his dictates. It is simple -he can't. This is unlawful.

[107] For the reasons stated hereinabove, the Defendant's counterclaim fails and is accordingly dismissed.

In Conclusion

Compliance with the 2005 Deed

[108] There was no challenge by the Defendant to clauses 5 and 6 of the 2005 Deed of Family Arrangement.

[109] In terms of clause 7 of the 2005 Deed, the Defendant was unable to make a case against the Plaintiff that the Plaintiff breached clause 7 of the 2005 Deed when he failed to provide Kamla Wati with her daily need and medical expenses during her lifetime.

Breach of Fiduciary Duty as an Administrator

[110] The Defendant was entrusted with the Assets of the Deceased's Estate of Narayan Prasad and the power as an Administrator appointed on 10th November 2011 to complete the administration and disposition of the Estate of Narayan Prasad.

[111] The Defendant failed to and/or neglected and/or refused to complete the administration and disposition by not sub-dividing the Estate land Comprised in Certificate of Title No. 35157 and issuing separate Titles and transfer the land to the beneficiaries.

[112] The Defendant even failed and refused to comply with the terms of the 2005 Deed of Family Arrangement.

[113] The defendant acted in breach of the Fiduciary duty as an Administrator of the Estate of Narayan Prasad. The Defendant has not acted Bona Fides.

Proprietary/Promissory Estoppel

[114] The Plaintiff claimed an equitable interest in his parents' house in the Estate through proprietary Estoppel. It is evident that the mother Kamla Wati told the Plaintiff that the house would be his upon her demise and that he should develop the land and extend the property.

[115] The Plaintiff spent money and improved the house by extension and renovated and developed it. The Plaintiff relied on the mother Kamla Wati's assurance and there is compelling evidence that the Plaintiff developed and upgraded the house on this assurance and promise. Therefore, the Plaintiff has proved the requisites of the equitable Doctrine of proprietary estoppel.

What area of land is Plaintiff entitled?

[116] It is undisputed that Narayan Prasad sold 5 lots and these lots do not form part of Certificate of Title No. 35157.

[117] The Plaintiff is entitled to 5993 square meters of land under the 2005 Deed of Family Arrangement. Hence. The Plaintiff gets 2 acres, Yogesh gets 2 acres, Mohini gets $\frac{1}{4}$ acres, Rohini gets $\frac{1}{4}$ acres and the Defendant gets 1.5 acres. The Total comes to 6 acres.

Approbation and Reprobation

[118] All parties to the 2005 Deed of Family Arrangement elected to act pursuant to the Deed, build and occupy that portion of the land allocated to them. They are bound by their decisions.

[119] They cannot go back on their words and say that the Plaintiff is not entitled to the parents' house and 5993 square meters of land. The Defendant did not take any objection to the Plaintiff having the parents' house with 5883 square meters of land surrounding the house after Kamla Wati's demise in 2011.

[120] The Defendant cannot approve and reject the 2005 Deed (which he is rejecting now). He has taken his share under the 2005 Deed. He cannot approbate the 2005 Deed by accepting the benefit it confers to him and at the same time reprobate it by denying the effect of its other terms in particular clause 7 which award the parents' house and 5993 square meters of land to the Plaintiff.

Credibility of witnesses

[121] The Plaintiff and his witnesses evidence is accepted as evidence of truth over that of the Defendant and his witnesses for the reasons cited at paragraph 79 of my Judgment hereinabove.

[122] The Plaintiff did not take any issues with the 2005 Deed since he signed it.

[123] The Defendant has not been deprived of his legal rights under the 2005 Deed.

[124] If the Defendant's case was such that he did not understand what he had signed for, then he was obliged to plead it together with the material facts and circumstances surrounding the signing of the 2005 Deed.

Defendant's Counter Claim

- [125] The orders sought by the Defendant in his counterclaim (i-iv) inclusive is contrary to the 2005 Deed of Family Arrangement.
- [126] The 2005 Deed is a valid and binding Deed and the Estate must be distributed in accordance with the 2005 Deed herein.
- [127] The 2005 Deed stipulates the intention of all parties and the Defendant has not challenged the 2005 Deed in his counterclaim.
- [128] The Defendant cannot now say that he will give the Plaintiff no more than 1000 square meters of land and the parents' house.
- [129] The Defendant's counterclaim is accordingly dismissed.

Costs

- [130] The court has an absolute and unfettered discretion to award or not to award costs. That discretion has to be exercised with reason and justice. Factors that will justify an award of increased costs include the urgency and complexity of the matter and the conduct of the unsuccessful party.
- [131] This case was filed and commenced on 06th June 2018. Both counsels have made approximately 26 court appearances from 11th June 2018 to 11th February 2022. The Plaintiff also filed an application to extend the caveat which order was granted on 1st June 2018. The matter was initially listed for trial on 06 November 2019 which did not proceed. Instead the matter was refereed for mediation by consent of both parties on an application by the Defendant. The matter was then listed for trial on 05 May 2020 and 13 October 2020 and got adjourned on both occasions at the application of the Defendant. The matter was then finally heard on 02, 03 and 11 February 2022. The trial lasted for 3 days. The Plaintiff called 3 witness and the Defendant called 2 witness. Both parties to the proceedings furnished court with their respective written submissions. The
- [132] Taking into consideration the conduct of the Defendant as the administrator, the court appearances, delays and adjournments, the Plaintiff is entitled to substantial costs summarily assessed at \$6,500.
- [133] The Defendant is personally held liable to pay the substantial costs of \$6,500 to the Plaintiff and not the Estate. The reasons are as follows:
- (1) The Defendant was appointed as the Administrator of Narayan Prasad's Estate on 10th November 2011.
 - (2) The duty that the Defendant was assigned as the Administrator was to ensure that he takes the responsibility of completing the administration of the Deceased's Estate together with the disposition of the assets

therein as per the 2005 Deed of Family Arrangement. This duty which was fiduciary in nature was not carried out by the Defendant since the grant of the Letters of Administration De-Bonis non to him on 10th November 2011.

- (3) The actions of the Defendant and his conduct towards the Plaintiff and other beneficiaries is unreasonable;
- (4) The defendant did not act in good faith, fairly and impartially towards the plaintiff.
- (5) The defendant filed a counterclaim in order to defeat the Plaintiff's interest in his share of the land allocated to him under the Deed of family arrangement made on 03 November 2005. The Defence and counterclaim was solely for the benefit of the Defendant and beneficiary Yogesh Prasad;
- (6) It would be fair to say after hearing the Defendant's evidence in court that the Defendant acted in substance for his own benefit;
- (7) The Defendant has misconducted himself. In that the Defendant did not act in accordance with the terms of the 2005 Deed of family arrangement. He is denying and not distributing the Plaintiff's title to the parents' house and 5993m² land to the Plaintiff;
- (8) The administrator is more or less showing the rest of the beneficiaries of the Estate a preferential treatment;
- (9) He is self-dealing and avoiding conflicts of interests;
- (10) In exercise of powers, he has failed to act within those powers, he has failed to act honestly and failed to act in the interests of all the beneficiaries; He has in fact breached the duties required that of the appointment as the Administrator of the Deceased's Estate
- (11) Personally entered into transactions with the trust property. He found a buyer to sell the parent's house;
- (12) The defendant has been very hostile and vindictive towards the plaintiff resulting in unnecessary and extensive delay in the administration of the deceased's estate;
- (13) The Defendant seemed to have a personal agenda. In that he put his personal interests before his fiduciary duty;
- (14) The Defendant has abused his powers as the administrator;

- (15) The Defendant has failed to discharge his duties with due care and loyalty to the beneficiaries;
- (16) The Defendant has misconducted and misbehaved himself by making the second and third Deed of Family settlement (*Exhibit P14 and P15 refers*).

[134] Following are the orders of this court:

Orders

[135] Liability is entered against the Defendant on the Plaintiff's claim and the following orders are accordingly made:

- (1) A Declaration that the Plaintiff is entitled to a share in the property comprised and described in Certificate of Title No: 35157 being Lot 1 on DP No. 8846 by virtue of being a beneficiary in the Estate of Narayan Prasad.
- (2) An Order that the Defendant as the current administrator of the Estate of Narayan Prasad to take immediate steps to register the name of the Plaintiff (and all other beneficiaries) on Certificate of Title number 35157 being Lot 1 on DP No: 8846.
- (3) An Order that the Defendant as the current administrator of the Estate of Narayan Prasad is hereby directed to subdivide the land comprised in Certificate of Title No: 35157 being Lot 1 on DP No: 8846 and execute a document of transfer, transferring to the Plaintiff (and to all other beneficiaries) their respective interest to them in Certificate of Title No: 35157.
- (4) A Permanent injunction is granted against the Defendant and the Defendant is restrained whether by himself and/or through his servants and/or agents or howsoever from transferring, selling, alienating, disposing, dealing with or attempting to deal in any way whatsoever with the land and property comprised and described in Certificate of Title No: 35157 being Lot 1 on DP No: 8846 situated in Nasasa, Navua;
- (5) A permanent injunction is granted against the Defendant and the Defendant is restrained from interfering with the Plaintiff's quiet enjoyment and occupation of and from evicting the Plaintiff and his family from the property comprised and described in Certificate of Title No: 35157 being Lot 1 on DP No: 8846 and more particularly, from the house currently occupied by him and his family;
- (6) An order that Caveat No: 770006 lodged by the Plaintiff against

Certificate of Title No: 35157 being Lot 1 on DP No: 8846 is extended until the Plaintiff is issued with the separate Certificate of Title for his share;

- (7) The Defendant's counterclaim is dismissed.
- (8) The Defendant is hereby personally held liable and ordered to pay a sum of \$6,500 summarily assessed costs to the Plaintiff within a timeframe of 21 days.

Dated at Suva this 19th day of October, 2023.




VISHWA DATT SHARMA
JUDGE

CC: *Naidu Lawyers, Suva.*
Amrit Chand Lawyers, Suva.