

N2LR



IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

8/9

C.P. NO. 17/95

1137

UNDER the Administration Act 1969

A N D

UNDER the Trustee Act 1956

IN THE MATTER of the Estate of
G DAHYABHAI deceased

BETWEEN A. GORDHAN ANOR

Plaintiffs

A N D T. GORDHANAS

Defendant

Hearing: July 26, 1995

Counsel: Mr. Ronayne for Plaintiffs
Mr. Grant for Defendant

Judgment: July 26, 1995

(ORAL) JUDGMENT OF MASTER ANNE GAMBRILL

Solicitors for Plaintiffs

East Brewster,
DX JP30017, Rotorua

Solicitors for Defendant

John A. Grant,
DX JP30130. Rotorua

I have before me an application for Summary Judgment. The Plaintiffs seek the following orders:

- "A. An order pursuant to Section 21 of the Administration Act 1969 removing Thakorlal Gordhandas as administrator of the estate of Gordhandas Dahyabhai (deceased) and appointing a replacement administrator; and
- B. An order pursuant to Section 51 of the Trustee Act 1956 appointing a new trustee in the estate of Gordhandas Dahyabhai (deceased) in substitution for Thakorlal Gordhandas; and
- C. In the alternative to prayer B above an order pursuant to the inherent jurisdiction of this Honourable Court for removal of Thakorlal Gordhandas as trustee in the estate of Gordhandas Dahyabhai deceased and for the appointment of a new trustee; and
- D. An order that the defendant pay the plaintiffs' costs of and incidental to this proceeding."

The purpose of Summary Judgment is to enable the entry of final judgment for a Plaintiff without unnecessary delay and expense unless a Defendant can satisfy the Court there is a good defence. It is an application which is decided without trial and for the means of a speedy resolution of meritorious claims.

I was concerned on looking at the nature of the claim made by the Plaintiffs as I had not seen a Summary Judgment application based on the Trustee Act 1956 or the Administration Act 1969 on any previous proceedings. Counsel for the Plaintiffs said there was no defence; in fact it is accepted the Defendant has indeed mortgaged the property, possibly for his own benefit. I was somewhat surprised the proceeding had not been brought by way of an originating application under the procedure for

special cases, particularly as under the provisions of Rule 449B it appeared suitable that an application should be made under Part IV(d). The matter is now complicated by the fact that there will be an application by the beneficiaries before this Court to remove the existing caveat on the property, the subject of the trust and the major asset in the estate. This, of course, would fall under Rule 458D, a Part IV proceeding.

The Applicant argued that the Court recognised a wide jurisdiction in Summary Judgment and initially argued the application should not be contemplated as one that fell within Rule 447 because statutory relief was also sought pursuant to s.21 of the Administration Act 1969 and s.51 the Trustee Act 1956. Nevertheless, I think the major portion of the claim falls under the Trustee Act 1956 and the equitable jurisdiction of the Court and the proceeding should be dealt with by way of a Part IV proceeding. I refer to Halsbury's Laws of England Vol. 48 para 942. If there has been a breach of trust that is a violation of an equitable obligation and the remedy for it lies in equity and must be sought in a Court of equitable jurisdiction. I set out s.51 of the Trustee Act 1956:

"51. Power of Court to appoint new trustees - (1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

(2) In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing a new trustee in substitution for a trustee who -

- (a) Has been held by the Court to have misconducted himself in the administration of the trust; or
- (b) Is convicted, whether summarily or on indictment, of a crime involving dishonesty as defined by [section 2 of the Crimes Act 1961]; or

- (c) Is a [mentally disordered person] within the meaning of [the Mental Health Act 1969], or whose estate or any part thereof is subject to a protection order made under the Aged and Infirm Persons Protection Act 1912; or
- (d) Is a bankrupt; or
- (e) Is a corporation which has ceased to carry on business, or is in liquidation, or has been dissolved.

(3) An order under this section, any any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(4) Nothing in this section shall give power to appoint an executor or administrator.

(5) Every trustee appointed by the Court shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust."

It is important that whatever the proceeding is herein, apart from the caveat application which is not yet before the Court, all causes and matters relating to the execution of trusts by the High Court were originally assigned to the Chancery Division. The Applicants seek the appointment of new trustees, either pursuant to the Act or within the inherent jurisdiction of the Court. See paras 725 and 728 of Halsbury (supra). If an order removing the present trustee is made and new trustees are appointed, an order vesting the property in their names will follow. I refer to para. 774 of Halsbury (supra) for the removal of a trustee:

"It is accepted that the removal of a trustee often can involve the serious reflection on character and the Court will need to be required to be satisfied he has refused to execute the trust, mismanaged the trust, disqualified himself by circumstances or conduct continuing to hold office and may perhaps do so if his continuance in office would be likely to be detrimental to the trust owing to his being out of sympathy with its objects or with the

beneficiaries. However, a trustee will not be removed against his will on account of a pecuniary embarrassment which has ceased to exist and which does not appear to have imperilled the interest of the beneficiaries. When a trustee is removed he is usually ordered to pay the costs of his removal." Para 775 Procedure for removal of trustee against his will.

I refer also to paras. 925 and 942 of Halsbury (supra).

The New Zealand authorities are found in Garrow & Kelly, Law of Trusts at page 217 which refers to the statutory power as well as the inherent jurisdiction. The leading New Zealand authorities on the power of the Court to remove executors as well as trustees is Hunter v. Hunter [1937] NZLR 794, affirmed on appeal [1938] NZLR 520; see also In re McLean deceased [1955] NZLR 856.

In summary, it seems to me that this matter is not suitable for Summary Judgment. The Master does not have the jurisdiction to either remove a trustee, make a declaration in respect of the removal of the trustee and take the necessary steps under the Trustee Act 1956; nor does the Master have the inherent jurisdiction of the Court to both remove the trustee and appoint the new trustee and vest the property in the new trustee.

Counsel accepted subsequently that the Summary Judgment procedure was not suitable to the application before the Court. The Court therefore orders the Summary Judgment application is struck out. The substantive proceedings remain extant. There is no order as to costs.

I have conferred with Counsel and it appears to me that the leave of the Court should have been sought. The proceeding should have been initiated as either a Part IV or Part IVA proceeding. There is every

advantage in it being dealt with as Part IV or Part IVA proceeding because of the concurrent and relevant application to remove the caveat which is due to be filed in this Court within the next 14 days. The difficulty is the application is not solely under the Trustee Act 1956 and cannot be brought under Rule 448. The Court has the power to direct that proceedings of this nature may be dealt with under Part IVA under Rule 458D(i)(e). There is accordingly an order that the application for removal of the trustee be dealt with as a Part IVA proceeding under Rule 458D(i)(e). I am satisfied that the relevant affidavits and the Statement of Claim of the Plaintiffs are on file. The relevant Statement of Defence and affidavit in opposition will be filed within 14 days hereof. The parties do not need any further directions for service as the three relevant beneficiaries are before the Court. The application to remove the caveat will be filed by the Defendant within 14 days hereof together with the affidavit in support. The Plaintiffs in this proceeding and the Respondents to an application to remove the caveat will file their affidavits in reply within 14 days thereafter. Both parties have agreed that verified lists of documents in respect of both originating applications will be before the Court by 30 August 1995 and inspection will be carried out by 6 September. If there are any further interlocutory matters they will be filed by 20 September 1995. After that date both parties may seek a fixture from the Registrar for the hearing of the application to remove the trustee and the hearing of the application to remove the caveat. The caveat application is not to be listed in front of the Master as both proceedings should be dealt with by the same judicial officer concurrently and the jurisdiction that should be exercised in respect of the trust property must be exercised by a Judge. The evidence at the hearing will be by way of affidavit with the right to cross-examine on the affidavits and this should

limit the hearing time required in respect of the Trustee Act application. It is not normal to cross-examine on the affidavits in respect of an application to remove or sustain a caveat.

Leave is reserved to seek further directions in this matter and, if it is advantageous to the parties, a judicial conference, as it is important that the remaining asset of the estate be dealt with and the parties' affairs separated in view of the division now existent amongst the family. Because of the sale of the building there is urgency in having this matter determined and if further directions are needed, the matter can be listed in any Chambers list on 48 hours notice by either party for a Master to make further directions in respect of the file.



MASTER ANNE GAMBRILL

