

administration when he stated he did not have any information about Frank's whereabouts in the United States and failed to disclose that he had two other half-brothers from 'Ofa's first marriage.

The facts

- [2] 'Ofa was married twice. In 1950 she married Lewis Powell and they had three children of their marriage. The children were all boys born in Fiji and named Frank, David Powell (David) and George Powell (George). After that marriage ended 'Ofa married a second time to Kelepi Pekipaki on 19 September 1961 and they had four children namely Mele Moimoi (Mele), Sione Toutai who has died leaving a widow and children (Sione), Siosaia and Ainise Pekipaki (Ainise).
- [3] 'Ofa and Tevita Moimoi, who were siblings, were the holders of a registered lease of a property on the corner of Railway Road and Salote Road, Nuku'alofa. The lease expires in 2070 and is a valuable asset. Tevita Moimoi died on 15 March 2015 and no application was made to administer his estate. Tevita Moimoi's widow, Mele'ana Moimoi, is aged about 78 years and is living in the property. It is Siosaia's contention that upon his death Tevita's interest in the lease passed to 'Ofa by way of survivorship.
- [4] At her death on 15 April 2016 'Ofa lived in the United States. She apparently died without a will. At the time of her death her one asset in Tonga was the lease.
- [5] On 21 June 2016 Siosaia gave public notice in the Talaki Newspaper of his intention to apply for letters of administration and for any creditor to give notice of any claim to him. No creditor made any claim. He spoke to Ainise about his intention to apply for letters of

administration. She was not interested in getting involved in the estate. He wrote to Mele, who lives in the United States, and advised her of his intentions. He did not make contact with the widow or children of Sione. He did not contact Frank, David or George either.

- [6] Siosaia applied for letters of administration on 26 September 2016. At paragraph 8 of his affidavit of 20 September 2016 Siosaia stated:

To the best of my knowledge and understanding my mother had a son before she married my father whose name is Frank Powell. I do not have information on him but I understand he lives in the United States of America.

- [7] In a memorandum of Siosaia's Counsel dated 18 November 2016 the Court was advised that the rent payable under the lease was in arrears and Siosaia had paid the arrears to avoid cancellation of the lease. Siosaia also paid the duty on the estate. He has since been reimbursed for the rent and duty from the estate which has earned rental.
- [8] The genesis of the present application appears to have been a phone call made to Frank, who lives in the United States, by a cousin named 'Ofa Moimoi when she advised Frank that Siosaia was trying to get the family land in Tonga. She was referring to the land subject to the lease. Frank flew to Tonga and investigated before filing his application.
- [9] A number of affidavits have been filed with the Court both in support and in opposition to Frank's application. Both Counsel advised me that they did not wish to cross-examine any of the deponents.

Frank's submissions

- [10] Frank's allegations against Siosaia are serious. He says in his affidavits and through his Counsel that Siosaia was dishonest and lied when he applied for letters of administration. He argues that Siosaia was aware of 'Ofa's first marriage to Lewis Powell and that there were three sons of that marriage and that he also knew where Frank lived in the United States because he stayed with him at his home. In her submissions Mrs. Pahulu-Kuli went even further and submitted that Siosaia lied to fraudulently obtain for himself a greater share of the estate than he was entitled to.
- [11] Relying on *Halsbury's Laws of England* (10 Edition Vol 17 1058 at page 558) Mrs. Pahulu-Kuli argued that letters of administration may be revoked where they have been obtained by 'a false suggestion, whether fraudulent or in ignorance where the false suggestion obscures a defect in the title to the grant'.
- [12] She further submitted that under section 10 of the Probate Act it is a mandatory requirement that notice of an application for letters of administration be served on all next of kin. She contends that because Siosaia lied in his affidavit no notice of his application was served on his three half-brothers and this is a defect in his title to the grant.
- [13] Mrs Pahulu-Kuli also argued that the Court should revoke the grant because Frank has 'the largest interest' because he has the support of David and George whereas Siosaia has not shown that any of the beneficiaries supported his appointment.

[14] In the alternative Mrs. Pahulu-Kuli argued that Frank should be appointed jointly with Siosaia to administer the estate as this would provide assurance to the beneficiaries in circumstances where doubt has been cast on Siosaia's trustworthiness.

The principles

[15] Section 6 of the Probate Act provides that the Court may revoke or alter a grant of probate or administration 'for reasons to be recorded' but does not provide any guidance as to the circumstances where this might be appropriate.

[16] The authorities to which I was referred satisfy me that a grant may be revoked if it was obtained by false evidence, whether fraudulent or not, that obscures a defect in the title to the grant or if the grant has become inoperative or useless or where to allow the grant to continue would prevent the due administration of the estate (such as where there is a failure of the administrator to perform his duties).

[17] The case law provides illuminating examples where the Court has found a defect in the title to the grant such as where there was false suggestion that the person entitled to the grant was dead (*Harrison v Weldon* (1731) 2 Stra 911) or where a women claiming to be the widow was not in fact married to the deceased (*In the Goods of Moore* (1845) 3 Notes of Cases 601).

[18] Importantly in this context in *In the Goods of Loveday* [1900] P 155, which was referred to in *Cope, Jeune*. P said at p 155:

After all the real object which the court must always keep in view is the due and proper administration of the

estate and the interests of the parties beneficially entitled thereto...

Discussion

- [19] It is not necessary for me to traverse the evidence about whether Siosaia knew that he had three half brothers from 'Ofa's first marriage and where Frank lived. I am not satisfied that Siosaia knew that 'Ofa was married to Lewis Powell but I find that that he did know Frank, David and George were his half-brothers and that he had stayed with Frank. It was well within his ability to have obtained the contact details of Frank, David and George. However, I am not satisfied that Siosaia's failure to make full disclosure was either fraudulent or obscured a defect in his title to the grant.
- [20] If as Mrs. Pahulu-Kuli submitted Siosaia was fraudulently seeking a greater share of the estate I cannot see why he would have made any mention of Frank in his affidavit. Clear or cogent or strict proof is necessary were so serious a matter as fraud is alleged (*Wang v Fund Management Limited* [2008] Tonga LR 90) and the Court will not lightly make such a finding. It appears to me that the failure to make full disclosure is likely to have been the result of a lack of care in the preparation of what in many cases is a non-contentious application. Before inviting the Court to make a finding that Siosaia was fraudulent in pursuit of a greater share of the estate Mrs. Pahulu-Kuli should have cross-examined him and put the allegation directly to him but did not do so.
- [21] I do not accept either Mrs. Pahulu-Kuli's submission that section 10 makes it mandatory to serve a notice of

application for letters of administration on all next of kin. Section 10 provides only that the Court 'may' require proof that notice of the application has been given to the other next of kin equally entitled to apply for administration. In this case the Court required confirmation that notice of the application had been given to Siosaia's sisters but not to Frank notwithstanding that he had been identified as a son of 'Ofa in Siosaia's affidavit nor did the Court require notice to be given to Sione's children notwithstanding their interest in the estate.

- [22] I should not be thought to be approving the contents of Siosaia's affidavit. I have sympathy with the submission that some doubt has been cast on Siosaia's trustworthiness (albeit falling short of establishing an intention to defraud). However after careful reflection and consistent with my principal concern to ensure the due and proper administration of the estate I would not revoke his grant for the following reasons.
- [23] First, whilst Frank says he is concerned to ensure a fair distribution of the estate his concern was not such that he or anyone other than Siosaia made any attempt to preserve the lease or to apply for letters of administration. It appears that there was at least the prospect that the lease would have been cancelled but for the steps taken by Siosaia to preserve it by paying the outstanding rent.
- [24] Secondly, I am satisfied that the steps taken by Siosaia to administer the estate to date are prudent and appropriate. I am also satisfied that Siosaia understands his obligations as administrator and has identified those who are entitled to share in the estate including his half-brothers. He has preserved the lease and arranged tenants to pay rent during

the period of the administration. The major criticism that he is attempting to evict Mele'ana Moimoi from her home is not justified. The proceedings filed against her do not seek an order evicting her from her home. A declaration is sought as to the ownership of the lease and whilst Siosaia may consider that Mele'ana should vacate the property he has not rushed to make her leave. In Mr. Edward's letter to her of 24 November 2016 he wrote:

It will be necessary to hold discussion with you and Siosaia Pekipaki as to the time that you may move from that property.

Before any decision or notice is given as to the date to vacate, it is important to hold a discussion before giving you that notice.

[25] Thirdly, whilst Frank submits he has the greatest interest by reason of the support he has from his brothers as I noted in *Application for Letters of Administration for Taufahema* [2015] Tonga LR 322 at [22] the Court is not bound by the wishes of those entitled to the estate and will not place an estate in the hands of one who has an interest which is incompatible with the due and proper administration of the estate (*Budd v Silver* (1813) 2 Phill. 115 and *Earl of Warwick v Greville*, 161 ER 934).

[26] In his affidavit of 21 April 2017 Frank says the following:

[9] I would like to state herein that the civil case CV.10/87 issued by my half-brother against our aunty Mele'ana Moimoi who is about 78 years old, has brought a lot of tension and grievances to our extended family members including some of our first cousinsI believe that our aunty Mele'ana Moimoi is no threat to the

leasehold property and indeed has an interest in this property and should remain on it until she passes away. I do not see anything wrong with this arrangement as it was the same living arrangement when our mother was still alive.

[18]...Also I intent not to cause unnecessary disruptions to our extended family here in Tonga and overseas by making drastic changes to the current occupancy and arrangements to the leasehold property because although the leasehold property was under our late mother and her brother Tevita Moimoi's names, but this property was the home of most of our extended family members.

[23] ...Further I do believe that giving the power of administering our mother's leasehold property that is in a prime location for businesses, will give my half-brother the ultimate power to decide what is to be done with the place that our family call home whenever we are in Tonga

[24] I have full intention of applying for the Letters of Administration upon our mother's estate if the Court will set aside the Administration granted to my half-brother and I promise the Court that I will do my best not only to properly administer my mother's estate but to also share any benefits equally with all beneficiaries prescribed by the Probate Act and most importantly will do my best not to cause unnecessary disruptions in our extended family.

[27] In my view Frank's expressed intentions are neither prudent nor consistent with the duties of an administrator. In relation to Mele'ana Moimoi, it is clear is that she does not

accept that 'Ofa acquired Tevita Moimoi's interest in the lease my way of survivorship and she is defending the Court proceedings that have been filed to decide that issue. Siosaia says, and I accept, that Mele'ana applied to cancel 'Ofa's entitlement to the lease after Tevita Moimoi's death on the grounds that she was living away from Tonga. I do not therefore accept Frank's evidence that Mele'ana poses no threat to the property. Clearly Mele'ana's interests are in conflict with the interests of the estate. The issue of who owns the lease must be resolved and it should be resolved now. It is not an issue that will necessarily resolve itself upon Mele'ana's death. The Court proceedings filed by Siosaia are appropriate in my view.

[27] In addition, under section 16 of the Probate Act the estate must be distributed in accordance with Schedule 1 of the Act. It appears that is not Frank's intention as he wishes to maintain the property not just for those entitled to share in the estate but also for others in the wider family both here in Tonga and overseas.

[28] For those reasons I do not consider it would appropriate to grant letters of administration to Frank. No one else has been proposed as a suitable administrator and it would be clearly imprudent to revoke the grant to Siosaia when there is no one else both able and willing to fulfil the role.

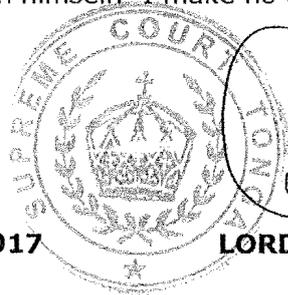
[29] For completeness, I note the submission that Frank could be appointed jointly with Siosaia as administrator. That is not realistic. I have no confidence that they could co-operate in the interests of the estate and I would be inviting further litigation.

[30] I note that should Frank or any others entitled to share in the estate be concerned at the manner in which Siosaia administers the estate they are not without a remedy. They may always apply under section 15 of the Act.

The result

[31] The application to revoke the grant of letters of administration to Siosaia is dismissed.

[32] As far as costs are concerned whilst cost usually follow the event in this case Siosaia did not act reasonably. He failed to make full disclosure when applying for his grant and his affidavit was misleading. Whilst I have found that the grant of letters of administration shall not be revoked he brought this proceeding upon himself. I make no orders as to costs.



G Paulsen
G Paulsen

NUKU'ALOFA: 29 May 2017

LORD CHIEF JUSTICE