TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: 164 of 2008

BETWEEN

BISSONDAYE SAMAROO

Appellant

AND

1. **AZIZOOL MOHAMMED**
2. **KHALIED MOHAMMED ALSO CALLED KHALID MOHAMMED**
3. **FAZILA MOHAMMED**
4. **AZIMOOL MOHAMMED**
5. **ZAHID MOHAMMED**
6. **SOLOMON MOHAMMED ALSO CALLED SOLAMAN MOHAMMED**
7. **FAZAD MOHAMMED ALSO CALLED FAZAL MOHAMMED ALSO CALLED FASAL MOHAMMED**

Respondents

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PANEL:

A. Mendonca C.J. (Ag.)

P. Weekes J.A.

R. Narine J.A.

Appearances: Mr. S. Jairam S.C. and Mr. A. Singh appeared on behalf of the Appellant.
Mr. R. Amour S.C. and Mr. J. Mootoo appeared on behalf of the Respondents

Ms. N. Alfonso appeared on behalf of the Fourth –Named Respondent

Date Delivered: 22nd April, 2013.

JUDGMENT

Delivered by R. Narine J.A.

1. The Appellant is the surviving common law spouse of Shaffikull Mohammed and executrix of his estate. The Respondents are all siblings of Shaffikull. The Respondents and Shaffikull were the children of Ali Mohammed and Shamshoon Mohammed. Ali Mohammed was the owner of two parcels of land situate at Charlieville. One parcel comprises three acres more or less, and the other comprises seven acres more or less..

2. Ali Mohammed died in 1973 leaving a will, under which he appointed his wife the sole executrix, and leaving all his property for her. Shamshoon obtained a grant of probate of his will in 1980. She died the same year, having made a will under which she appointed Shaffikull, her eldest son, the sole executor, and leaving her estate for all her eight children. Shaffikull obtained a grant of probate of her will in 1985.

3. In March 1986, the Respondents executed a power of attorney under which they appointed Shaffikull to be their lawful attorney and authorised him to do such acts and deeds as contained therein. By Deed of Assent made in July 1986, Shaffikull conveyed the three-acre parcel and the seven-acre parcel to himself and the Respondents as tenants in common.

4. By deed dated 14th July 1993, Shaffikull, purporting to act as lawful attorney for the Respondents, conveyed to himself a portion of the three-acre parcel, comprising 25,670 square feet. The same day Shaffikull made a will under which he appointed the Appellant sole executrix and left his entire estate to her and his children.

5. Shaffikull died in September, 1993. The Appellant was granted probate of his will in February, 2000. Pursuant to the grant, she conveyed the 25,670 square feet to a third party in December, 2000.

6. In 1996, the Respondents filed an action against the Appellant seeking a declaration that the 1993 conveyance, which Shaffikull made to himself in exercise of his powers under the power of attorney, is null and void.

7. They further sought declarations that Shaffikull was trustee of the said land, and that they are entitled to repudiate the act of Shaffikull in purporting to execute the disputed deed.

8. At first instance, the trial judge held that Shaffikull was authorized by the power of attorney to make the 1993 conveyance to himself, but he found that the Respondents were entitled to repudiate the 1993 deed, and he set it aside.

9. There are two issues that arise for determination in this appeal, the first of which is:

(1) Did the power of attorney authorise Shaffikull to make the 1993 conveyance for himself? If it did not, the deed is null and void, and must be set aside on this basis, and

(2) If the power of attorney did authorise the 1993 conveyance, should the deed be set aside for breach of trust or breach of fiduciary duty?

10. We turn to the first issue. The power of attorney authorised Shaffikull in Clause 1 “to make sale, demise, lease or absolutely dispose of the said lands or the said buildings in whole or in part in such manner as the attorney shall think proper, and to receive from the purchaser or purchasers the purchase monies to be payable for and in respect of the said premises. . .”

11. In Clause 10, the power of attorney authorised Shaffikull, “in general to do all other acts and deeds, matters and things whatsoever in or about our estate, property and affairs.”

12. Powers of attorneys are to be construed strictly. Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the

instrument, either in express terms or by necessary implication. See **Bryant, Powis and Bryant Limited v La Banque du Peuple** [1893] A. C. 170 per Lord Macnaghten.

13. In this case, the Respondents have filed a cross-appeal against the trial judge's finding that the 1993 conveyance was authorised by the power of attorney. They submit that a power to dispose of land for consideration is radically different from a power to dispose of land by way of gift or for no consideration. They contend that the 1993 conveyance with Shaffikull is, in effect, a gift, since no consideration passed from Shaffikull to the Respondents under the deed. Accordingly, in their submission, on a strict construction of Clause 1 of the power of attorney, Shaffikull was not authorised to convey the land by way of gift or for no consideration.

14. In addition, the Respondents submit that Clause 10 of the power of attorney did not confer powers at large to the attorney but conferred only such powers as might be necessary to carry into effect the declared purposes of the power of attorney. In other words, Clause 10 must be read in conjunction with Clause 1 and is circumscribed by the express powers conferred by Clause 1. This was a finding of the trial judge with which we respectfully agree and which has not been challenged in this appeal.

15. The Respondents' construction of Clause 1 is based on the occurrence of the words "purchaser" and "purchasers" and "purchase monies." They submit that the words "absolutely dispose of the said lands" must be read in conjunction with the words "purchasers" and "purchase monies" so that the power to dispose is limited to dispositions for valuable consideration and not to dispositions by way of gift or for no consideration. In our view, the words "absolutely dispose of" should not be construed so narrowly. In the first place, such a construction detracts from the use of the word "absolutely" which confers very wide power to dispose of the land and encompasses a wide range of possibilities.

16. In addition, it is noteworthy that the clause gives a power to the attorney to demise and lease the lands but makes no mention of the power to receive rents and to give good and sufficient discharges therefor.

17. It follows that the use of the words "purchaser" and "purchase money" is not exhaustive of the different kinds of disposition that the attorney is authorised to make. If it was intended that the attorney was authorised only to sell the lands, why make

provision for demise, “lease” and “absolutely dispose of” the lands? On that narrow construction, these words would be mere surplusage.

18. Clearly, what was intended by the use of the words was that the attorney should have power to administer the estate of his mother under which all eight siblings had an undivided one-eighth share. It must have been contemplated that some siblings would receive dispositions of land and some would receive money from the sale of land. In fact, there was evidence before the trial judge of dispositions of the land to some of the siblings for which no consideration passed under the deed. The Respondents have not sought to impugn these dispositions as being outside of the powers given by the power of attorney.

19. For these reasons, we hold that the trial judge was correct in his construction of the power of attorney and in his finding that the 1993 disposition to Shaffikull was within the powers given to him under the power of attorney.

20. I turn to the second issue. The Respondents submit that the trial judge was correct in holding that Shaffikull owed fiduciary duties to them and executed the 1993 conveyance to himself in breach of trust and/or fiduciary duty.

21. In coming to his decision, the trial judge was guided by the learning in the case of **Bristol and West Building Society v Mothew** [1998] Ch. 1, at page 18A where Millett L.J. set out the duties of a person who stands in a fiduciary relationship with another:

> "A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of the principal."

22. On the same page (at D,) Lord Millett considered the duties of a fiduciary where he enters into a transaction with his principal:

> "In such a case, he must prove affirmatively that the transaction is fair and that in the course of the negotiations he made full disclosure of all facts material to the transaction. Even the inadvertent failure to disclose will entitle the principal to rescind the transaction."

23. On the facts of this case, it is not disputed that the Respondents reposed trust and confidence in Shaffikull who was their eldest brother and the sole executor of their mother's estate. As executor, he held the legal estate as trustee for the beneficiaries of the estate up to July 1986 when he divested the legal estate to all the children in equal one-eighth undivided shares as tenants in common. The Respondents showed their trust and confidence in him when they executed the power of attorney, giving him wide powers to make sale, demise, lease or absolutely dispose of the land comprising their mother's estate.

24. The powers conferred on Shaffikull were expressly stated in the power of attorney to be exercised for the use and benefit of the Respondents, not for Shaffikull. As fiduciary, Shaffikull was under a duty to act in good faith. He must not place himself in a position where his duty and his interest may conflict. And he must not act for his own benefit or the benefit of a third person without the informed consent of his principal. In conveying the remaining portion of the 3-acre to himself, clearly Shaffikull was in actual or potential breach of all of his duties as stated above.

25. He signed the conveyance and published his last will on the same day. He died a few months later. Clearly, the conveyance and will were made in contemplation of his imminent demise, with a view to providing for his spouse and children and not for the benefit of the Respondents. It can hardly be disputed that he was in breach of his duty not to place himself in a position where his duty and interest might conflict.

26. In addition, in conveying the remaining portion of the 3-acre parcel which had road frontage to himself, he may be found to be making a profit at the expense of his

principals. Since he was acting for his own benefit in signing the 1993 conveyance, he was under a duty to obtain the informed consent of his principals.

27. In addition, in conveying the land to himself, Shaffikull was entering into a transaction with his principals. In such a case, the onus was on the Appellant to prove affirmatively that the transaction was fair and that in the course of negotiations he (Shaffikull) made full disclosure of all material facts to the Respondents.

28. The trial judge found on the evidence that all the Respondents had not consented or agreed to the 1993 conveyance and held that the Respondents were entitled to rescind or repudiate the 1993 deed.

29. The Appellants submitted that the trial judge was wrong to set aside the deed. While conceding that the power of attorney was capable of creating a fiduciary duty, the Appellant contended that no such duty arose in this case. The Appellants submitted that a fiduciary duty would have arisen in this case if there had been a conveyance for valuable consideration, which would have given rise to a duty to account to the principals for monies received. In this case no such duty arose and Shaffikull was simply under a duty to exercise care and skill to ensure that his principals received what was due to them from the sale, demise or the disposition of the land.

30. Further, and in the alternative, the Appellants submitted that there was, in fact, a family arrangement or agreement that Shaffikull should get the remaining portion of the three-acre parcel which he conveyed to himself under the 1993 deed.

31. Mr. Jairam asked the Court to make this finding from the following facts:

(1) The failure of the Respondents to call Mr. Lutchman Ramcoomarsingh, the family lawyer, who was privy to all the family transactions.

(2) The failure of the sixth Respondent to testify or make himself available to be cross-examined, he having stated in an earlier affidavit that Shaffikull was entitled to "the disputed land."

(3) The failure of Khalied, the second Respondent, to reconvey the land after he had obtained letters of administration to Shaffikull's estate in May, 1995.

(4) The statement of Khalied in an affidavit filed in High Court Action No. 3554 of 1984 in support of his application to be substituted in place of Shaffikull as a Defendant, where he stated that the common law wife of Shaffikull had not indicated any

interest in probating Shaffikull's will in as much as he had already obtained his share of his mother's estate. Based on this statement, the Appellant contends that Khalied must have known of the 1993 deed, at least from 26th July, 1994, the date on which the affidavit was sworn, and would have shared that information with the other Respondents.

(5) The evidence of the Appellant in her witness statement that it was agreed by all concerned that Shaffikull would get the parcel of land on which the family home stood as a portion of his share of their parent's estate and they were all fully aware of this, and all agreed to the transfer of the parcel of land. Further, she deposed that Shaffikull and the Respondents met at her home and discussed the matter in her presence.

32. We have considered the submissions of the Appellant and we reject them for the reasons that follow. We hold that the trial judge was correct in finding that a fiduciary relationship arose in this case. The evidence clearly established that the Respondents reposed their trust and confidence in Shaffikull, who was the eldest brother and the sole executor of their mother's estate. They entrusted to him wide powers to deal with the land for their use and benefit, not for his own. If Shaffikull intended to benefit himself and provide for his family, in contemplation of his death, he owed the Respondents a duty to obtain their informed consent and to make full disclosure to them of all the material facts in relation to the transaction.

33. Mr. Jairam contended that the Respondents were fully aware of and agreed to the transaction. However, in our view the evidence on which Mr. Jairam relies, is vague, speculative, and lacking in cogency.

34. In the first place, it was open to either party to call Mr. Ramcoomarsingh to give evidence as to whether there was any family agreement or arrangement as to how the three-acre parcel was to be distributed. It is therefore not appropriate to draw an adverse inference against the Respondents from their failure to call the witness. Mr. Ramcoomarsingh was not called and the Court cannot speculate as to what he would have testified.

35. In the second place, the sixth Respondent, Solomon, did, in fact, swear to an affidavit early in the proceedings to the effect that at a family meeting it was agreed that

Shaffikull would share in the 25,670 square feet which remained from the three-acre parcel and would be given a lot of land from the seven-acre parcel. His evidence does not support an agreement that Shaffikull would convey the entire 25,670 square feet to himself.

36. With respect to the submission made in relation to the second Respondent, (Khalied), at best the evidence may establish that by July 1994 he was aware that Shaffikull had conveyed land to himself. However, the affidavit is not specific as to the land that was conveyed. In addition it does not establish that the conveyance was made with the informed consent of the Respondents or that Shaffikull had made full disclosure to them of all material matters in relation to the proposed conveyance.

37. As to why Khalied did not reconvey the land after he obtained the letters of administration of Shaffikull's estate the Court cannot speculate as to his reasons, assuming that he knew of the 1993 conveyance.

38. The only direct evidence led by the Appellant of any agreement or family arrangement is to be found in her witness statement where, at paragraphs 15 and 16, she deposed that all the Respondents agreed to the transfer of the land to Shaffikull. She referred in paragraph 16 to a meeting between Shaffikull and the Respondents at her home, at which the matter was discussed in her presence. In cross-examination, however, she admitted that not all the Respondents were present, and not all were in Trinidad at the time. In fact, the only Respondents who were present were Azizool, Fazad and Khalied. However, she asserted that all the Respondents knew about the proposed conveyance, since Khalied used to fill them in.

39. So that even if the Appellant's evidence is taken at its highest, only three of the Respondents were informed of the proposed transaction by Shaffikull and only three agreed to same. However, there is no evidence that Shaffikull made full disclosure to the Respondents who were present of the exact area of land he intended to convey to himself and the value of same. These would have been material facts which Shaffikull was under a duty to disclose. In our view, the evidence of the Appellant fell far short of what was required to show informed consent of the Respondents and full disclosure of material facts to them.

40. For the sake of completeness, we will deal briefly with a further submission of the Appellant based on the principle of estoppel. Mr. Jairam submitted that the Respondents were estopped from denying that the 1993 conveyance was a valid and subsisting deed by reason of their knowledge of its existence, at the very least, from 26th July, 1994, the date of Khalied's affidavit and by their unequivocal conduct, evinced an intention to affirm the deed.

41. We have already considered the evidence on which the Appellant relied to establish that the Respondents were aware of the existence of the 1993 conveyance. Taken at its highest, this evidence established knowledge in only three of the Respondents.

42. In addition, there was no evidence of prejudice or detriment suffered by Shaffikull nor were any particulars provided of same; nor was there was any evidence that Shaffikull acted to his detriment in reliance on any representation made to him by the Respondents; nor was there any evidence to show that by their unequivocal conduct the Respondents evinced an intention to affirm the 1993 deed. In our view, the trial judge was correct in rejecting the Appellant's submission based on estoppel.

43. Accordingly, we hold that the trial judge was correct in finding that the deed should be set aside for breach of fiduciary duty. In the result, we dismiss the appeal and the cross-appeal, and affirm the decision and orders of the trial judge. The Appellant will pay the Respondents' costs of the appeal and the Respondents will pay the Appellant's costs of the cross-appeal, to be taxed in default of agreement.

Dated the 22nd day of April, 2013.

A. Mendonca,
Ag. Chief Justice.

P. Weekes,
Justice of Appeal.

R. Narine,
Justice of Appeal.