

**D'Offay v Hoareau & Ors  
(2001) SLR 174**

Nichole TIRANT for the Plaintiff  
Phillippe BOULLE for the Defendants

*Appeal by the Appellant was dismissed on 8 August 2001 in CA 9 of 2001.*

**Ruling on Submission of No Case To Answer delivered on 22<sup>nd</sup> day of March, 2001  
by:**

**JUDDOO J:** The Plaintiff is one of the five children and heir to the estate of late Marie-Thérèse D'Offay (hereinafter referred as "the deceased") who passed away on 12 August 1998. The Defendants, all three children of the deceased, were appointed as joint executors under the terms of the deceased's testament. The Plaintiff claims that the Defendants have "breached and failed to comply with their duties and functions as executors of the estate..." and requires that they be removed as joint executors and be replaced by another. The plaint is resisted by all three Defendants.

At the close of the case for the Plaintiff, Learned Counsel appearing on behalf of the First and Second Defendants made a submission of "no case to answer". The 3<sup>rd</sup> Defendant who was represented by Counsel at the beginning of the instant proceedings and filed a joint defence became unrepresented at a later stage of the proceedings.

The essence of the claim by the Plaintiff is that the three Defendants have been in breach of their duties and responsibilities as joint fiduciaries of the estate of the deceased. The particulars of the alleged breach have been expressly spelt out, as follows:

- (a) No inventory of the succession has been drawn up despite repeated requests by the Plaintiff that same be done.
- (b) The first Defendant, as executrix and as co-heir is in a serious situation of a conflict of interest in that she is the main beneficiary under the terms of the Will and is directly enjoying an asset of the succession by virtue of her position as shareholder and director of Bougainville Investments (Pty) Ltd and has so far failed to act in the interests of the heirs to the deceased's estate.
- (c) The executors have all their own personal interests in the estate and have refused to seek a valuation of the estate.
- (d) The Defendants have failed to render account of movables including monies and jewellery held in reversion by their late mother since the opening of the succession..

Marie-Therese D'Offay passed away on 12 August 1998. The three Defendants were appointed joint-executors under the terms of the Will and their appointment was confirmed by an order of this Court on 17 September 1998. About one month later, by virtue of a letter, exhibit P3, the Plaintiff through his lawyer requested from the joint executors:

... It is therefore necessary at this stage for you, as Executors of your mother's estate, to take the necessary steps to settle this succession, which must first consider what estate your mother has left in her will, taking into account the fact that during her lifetime, your mother was holding over the estate of your grandmother, Mrs. Yvonne Deltel, née Hoareau.

You are aware that by the terms of the will dated the 9<sup>th</sup> February 1958, your grandmother, Mrs. Yvonne Deltel had left both immovable and moveable property to your mother with the express obligation of holding over this property for you and your brothers in reversion. ... There is an obvious need to determine what properties included in the will of Mrs D'Offay form that part of the estate of Mrs. Deltel and give effect to this.

Furthermore, the issue of the Bougainville Guest House becomes a very pressing matter as the estate should be receiving rental from this establishment which should then be shared out equally to all the heirs. It is evident that the longer the matter remains unresolved, the greater the loss suffered by the heirs collectively....

There is also a need, at this stage, to carry out an evaluation of all the properties held by your mother from which must then be made subtraction of the properties which revert to all the heirs in equal shares from the estate of your grandmother, Mrs. Deltel.

The purpose of this letter is to request that you immediately carry of a full inventory of the estate of your mother and in consultation with the other heirs, seek the appointment of an executor for the estate of your grandmother so that her succession may be duly settled. The inventory will naturally cover all movable property including any monies held in banks in Seychelles or overseas and will also require an evaluation of all the immovable property comprising the estates...

By way of a reply ten days after receipt of the above request letter, the Plaintiff was informed, as per exhibit P5, that:

An inventory has been carried out and a copy is annexed herewith. We have requested the Manager of Barclays Bank Plc, at Independence Avenue, Victoria, Mahe, to Write to the other branches of the same Bank

in Jersey and Guernsey ...

...Barclays Bank in Guernsey has confirmed that our late mother Mrs. Julie Marie-Therese D'Offay did not maintain an account with them. As for Barclays Bank in Jersey, we are still awaiting a reply.

We have Written to First International Bank and the Permanent Bank in South Africa and we are awaiting a reply.

A bank account has been opened by us at Barclays Bank Plc, Independence Avenue, Victoria, which is operated by the three of us.

Regarding the subject of Bougainville Guest House, the monthly rental has been deposited in the account above-mentioned.

The large properties at Anse Soleil, Bougainville and Val D'en Dor are registered in our mother's name. It has been estimated that the valuation will cost between SR20,000 to SR30,000. It is too costly to carry out a valuation of the said properties and therefore we as Executors and Mr. Olave D'Offay, one of the heirs, have decided not to do it.

Should you require any further information please do not hesitate to contact us...

The letter was accompanied by an inventory of house at Anse Baleine (Le Bougainville) which identified those of the movables at the said house which belonged to the estate (referred therein as "heirs") and those belonging to "Bougainvilla", most presumably Bougainville Investments Pty Ltd and an express note at the bottom, thereof, that "All other equipments, fixtures and furnitures non listed here belongs to Bougainville Investments (Pty) Ltd."

I shall first consider the claim that the first Defendant is in a "serious situation of conflict" in that she is enjoying the benefit of an asset as shareholder and director of Bougainville Investments (Pty) Ltd. There is no evidence on record that the First Defendant was either a shareholder or a director of Bougainville Investments (Pty) Ltd. Exhibit P6, produced by the Plaintiff, discloses that the First Defendant was only the 'secretary' of the company. Taking into account that the First Defendant has resigned in her office with the company, as per exhibit P6(a), the issue does not arise for further determination. I shall therefore turn to the claim pertaining to immovable and movable properties of the estate.

In his testimony in Court, the Plaintiff testified that to his knowledge at the time of her death, the deceased left behind both movable and immovable properties. He agreed having instructed his lawyer to Write to the joint executors as per exhibit P3 and received the reply as per exhibit P5. The Plaintiff explained he was not satisfied with the reply because "the inventory was not made properly. Only part of the property was

done. Only the hotel and the house at the bottom of Anse Royale where Harland lives. There is another house at Anse Baleine that belong to the heirs..." Under cross-examination, the Plaintiff admitted that the house at Anse Soleil is unoccupied, that at Val D'en D'or there are houses for the workers and at Anse Baleine "there is the hotel, the house at the bottom, and next to the hotel there is a worker's house..." The evidence of the Plaintiff pertaining to dispositions made to his two brothers, as per exhibits P8 and P8(a), are ultra petita since they were purportedly inter vivos dispositions made by Mrs Marie-Therese D'Offay during her life time. The Plaintiff also produced, as exhibit P11, an affidavit of transfer of shares in respect of the estate of the deceased. The latter is an agreement. between four of the heirs mutually abandoning their rights in favour of each other and does not deprive, in any manner, the Plaintiff of his share to the estate. This is confirmed by the Plaintiff himself when he produced exhibit P14, a certificate of official search, disclosing his entitlement to one fifth of title T1063. In the end resort the Plaintiff agreed that the inherited parcels of land were duly surveyed by a land surveyor and the boundaries delineated and explained that his concern was "how much is my one fifth." Accordingly, the main concern of the Plaintiff boils down to his request for a valuation which shall be considered at a later stage.

With reference to the monies her mother left behind at the time of her death, the Plaintiff testified that he was shown two bank accounts, one from Barclays Bank Plc and another from Nouvobanq Ltd. He has received his "full share" of the money without any deduction for the medical expenses pertaining to the deceased before the latter passed away and without a reservation as to his share of the expenses for a "tomb" for the deceased. The Plaintiff agreed that he did not have knowledge of the overseas bank accounts of the deceased but has received his share of South African Rand five hundred (SAR500/-) from the executors. In relation to the sum of R40,000 which figures under the will of the deceased's mother, Yvonne Hoareau, it cannot be said that the intention in the will was that the said sum was included in the definition of "les biens meubles et immeubles" and accordingly held in reversion nor that the said sum was in existence at the time of Marie-Thérèse D'Offay passed away thirty years later. Additionally, by virtue of Section 533 of the Code the word movable used on its own in a private document shall not include cash.

The Plaintiff agreed that, by letter dated 21 October 1998, the executors were informed that the deceased had withdrawn her "safe custody box" from Barclays Bank Plc in 1986. He further agreed that by letter, dated 7 October 1998, the executors have through the local branch of Barclays Bank Plc inquired about overseas accounts of the deceased, as per exhibit P4, and were informed by both Barclays Bank Finance (Company) Jersey Limited and Barclays Finance Company Guernsey Limited on 9 November and 14 October 1998 respectively that the deceased-holds no account as per exhibits D4(c) and D5. Accordingly, there is no evidence to support the claim of the Plaintiff under this head.

Lastly, with reference to the "jewellery held in reversion", the Plaintiff explained that there were some items of jewellery left behind by his grandmother to his mother and he has been informed by one of the executors, the First Defendant that they could not be

traced. The least that can be said, on this score, is that there is no specific mention whatsoever, in the will of late Yvonne Hoareau, exhibit P4, of any item or items of jewellery legated thereunder. Additionally no evidence has been adduced as to the existence of such jewellery or a description thereof, however brief, been given. The mere assertion from the Plaintiff that there was "some jewellery" is insufficient to require evidence in reply. I shall now turn to the issue of valuation

Where there is co-ownership as a result of succession, the executor has the function of the fiduciary, not only in his capacity as executor but also because of the requirement of the law of co-ownership under Article 817 and 818 of the Civil Code. The duties and responsibilities of the executor are laid down under Article 1027 and 1028 of the Code:

1027 –The duties of an executor shall be to make an inventory of the succession to pay the debts thereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the will as the case may be. He shall be bound by any debts of the succession only to the extent of its assets shown in the inventory.

The manner of payment of debts and other rights and duties of the executor, insofar as they are not regulated by the Code or by analogy to the rights and duties of successors to the estate, shall be settled by the Court.

1028 -The executor, in the capacity as fiduciary of the succession, shall also be bound by all the rules laid down in this code under Chapter VI of Title I of Book III relating to the functions and administration of fiduciaries, insofar as they may be applicable.

The chief functions of an executor appointed by the testator are to ensure compliance with the provisions of the will by preparing an inventory of the succession and by distributing the properties comprised in the succession in accordance with the terms of the will. A reading of Article 1027 discloses that there is no explicit requirement for a valuation of the assets. Neither can such a requirement be imposed under the applicable provisions under Chapter VI, Title I, Book III of the Code.

Under Article 825, the fiduciary shall be "to hold, manage and administer the property honestly and in a business like manner..." and under Article 830 the Court is given "wide powers ... to make such orders relating to the appointment or removal of a fiduciary or to his management as it thinks fit ..." However, this does not entitle the Court to order a valuation where there is no such requirement in law upon the executor. In the present case where four of the five heirs under the succession do not intend such a valuation as per exhibit P5. In such circumstances, the Plaintiff is entitled to embark upon a valuation exercise, if he so wishes, at his own expense. The Plaintiff elects to do so, the joint-executors, as fiduciaries, will only be under a duty to make available to him or his valuers all relevant information.

In the last resort, it is observed that during the course of the present proceedings, the joint executors have sold parcel T685, the land at Anse Soleil, and distributed the proceeds of sale held by the estate. There is no evidence that the Plaintiff had any dispute as to his share of the proceeds, nor that the sale value obtained was not in the interest of the heirs or alternatively that the Plaintiff accepted his share of the proceeds "under protest."

For reasons given and to the extent determined above, the submission of "no case to answer" succeeds. I take account that the testamentary executors were appointed "jointly" under the will. By virtue of Article 823 of the Civil Code, having been appointed jointly, the executors have to act jointly. Accordingly, I find there is no case to answer against all three Defendants and dismiss the plaint but without costs.

**Record: Civil Side No 401 of 1998**