Privy Council Appeal No. 85 of 1937

Mary Elizabeth Wood and others - - - - *Appellants*

v.

Gerald Allan Wood - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1938

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD RUSSELL OF KILLOWEN
LORD ROCHE
SIR LYMAN POORE DUFF
(CHIEF JUSTICE OF CANADA)

[*Delivered by* LORD RUSSELL OF KILLOWEN]

Mary G. Wood made her will, dated the 29th November, 1923. By it she bequeathed pecuniary legacies amounting in all to $9,000; she bequeathed three life annuities of $400 each; she made bequests of common capital stock of the Bank of Nova Scotia amounting in all to 125 shares therein; she made a specific bequest of 15 shares in the Canada Cement Company to her niece Helen Carvolth; she made a specific bequest of chattels to her sister Charlotte Edwards, and a specific bequest of her shares in the Ottawa Transportation Company, Limited, to her son Gerald A. Wood; and after specific devises of real estate, her will concluded as follows:—

> "ALL THE REST RESIDUE AND REMAINDER of my Estate real and personal which I am seized or possessed of or entitled to or over which I have any power of appointment I GIVE DEVISE AND BEQUEATH as to one half thereof to my son GERALD A. WOOD and as to one half thereof to the children of my deceased son James Russell Wood to be divided equally between them per stirpes and to be paid to them as they respectively attain the age of twenty-one years, the share of any of the said last mentioned children who shall die before receiving his or her share and without leaving issue him or her surviving to be divided equally between his or her surviving brother and sister or sisters as the case may be.
>
> "AND I APPOINT my said son GERALD A. WOOD and my said sister CHARLOTTE ISABELLA EDWARDS Executor and Executrix of this my Will."

By a codicil of the same date she directed that the provision in favour of the children of her deceased son should be accumulated as to income until they attained the age of

25 years respectively and should be distributed and paid to them as to both capital and income when they respectively attained the age of 25 years.

The testatrix died on the 24th February, 1924, and her will and codicil were proved in the Surrogate Court of the County of Peterborough, Ontario, on the 27th March, 1924, by the defendant and the said Charlotte Isabella Edwards. There were three children of her said deceased son who survived the testatrix, viz., the plaintiffs to the action hereinafter mentioned, the eldest being 11 years old when the testatrix died. Their mother had in the year 1922 been appointed their guardian by the Surrogate Court.

The personal estate of the testatrix at her death consisted (in addition to the personal and household effects specifically bequeathed) of (1) cash in banks, (2) a mortgage debt, (3) Government bonds with accrued interest, and (4) shares in the Bank of Nova Scotia, the Bank of Commerce, the Ottawa Transportation Company, and the Canada Cement Company. These last-named shares were 500 in number, of which 15 were specifically bequeathed to Miss Carvolth and 485 fell into residue.

In view of the terms of the will the task of the executors was free from complication. They had merely to realise so much of the estate as was necessary for the purpose, and to pay thereout the debts and funeral and testamentary expenses, and pecuniary legacies; to set aside sufficient funds to provide for the annuities; and to transfer and hand over to the specific legatees their legacies of shares and chattels. The residue remaining of the personal estate of the testatrix would then constitute the ascertained residue and would be divisible into moieties, one half of each investment being the absolute property of the said Gerald A. Wood, who was the defendant to the said action, and the other half would form part of the infants' moiety. Any securities forming part of the infants' moiety which were not trust investments would either have to be sold and the proceeds properly invested, or else retained under the direction of the Court. If the executors chose neither to sell nor to obtain the Court's direction, any retention would be at their risk.

Instead of pursuing this course, the executors appear to have done little during the executors' year beyond paying creditors and making payments to the annuitants. From the account of disbursements (exhibit B) brought in by the defendant in the Surrogate Court as hereinafter mentioned, it would appear that none of the legacies were paid or satisfied until after the expiration of the year.

Miss Charlotte Edwards died on the 24th November, 1928, leaving the defendant sole executor.

In the month of May, 1935, the defendant applied to the Surrogate Court to have his accounts as executor audited and passed. His accounts as brought in showed himself to have taken over as part of his moiety of the residuary estate, the 485 shares in the Canada Cement Company at

the value of $102 per share. The item appears in the accounts as a sale to him by the executors at that price on the 24th February, 1925. The shares were in fact sold by the executors in the month of December, 1927, at the price of $250 per share. On this item being challenged the Surrogate directed an issue "as to the items in dispute," but instead of any issue being tried in the Surrogate Court an action was instituted in the Supreme Court of Ontario on the 31st August, 1935, by the three children of James Russell Wood, against the said Gerald A. Wood as sole defendant.

By their action they claim to make the defendant account for one half of the proceeds of sale of the 485 shares at the price of $250 per share, and one half of the dividends received thereon with compound interest.

The defendant alleged that an appropriation was made by the executors as a result of which the 485 shares were effectively allocated to and became part of his moiety of the residuary estate of the testatrix as on the 24th February, 1925, and at the value of $102 per share which was the market value on that day.

The plaintiffs denied that any appropriation or any effective appropriation of the shares was ever made by the executors, and they claimed the relief already indicated.

The action was tried by Makins J. who gave the plaintiffs substantially the relief which they sought but with simple interest only. He came to the conclusion upon the evidence that no appropriation had been proved: and that as regards what he considered were merely draft proposals as to "setting up the trust for the children," there was no satisfactory evidence that the co-executrix knew anything about such proposed appropriation.

An appeal to the Court of Appeal by the defendant was allowed by a majority of the Judges, and the action was dismissed with costs. Latchford C.J.A. and Riddell J.A. thought that the appeal should be dismissed, because on the evidence there was in fact no appropriation of the shares. Masten J.A., Henderson J.A. and Middleton J.A. were of opinion that the evidence established that an agreement to appropriate had been made, though they do not in terms state when or between whom it was made; but it would seem that they accepted the 24th February, 1925, as the date of the agreement by reason of that date appearing in exhibits 11 and 12, to which reference will later be made.

On appeal to His Majesty in Council the matter has been fully argued, with the result that their Lordships are of opinion that the plaintiffs are entitled to some substantial relief, though not to the full extent of their claim.

The task of the different Courts before which this dispute has come, has been rendered a difficult one by reason of the unmethodical conduct of the defendant in the discharge of his duties as executor. He has kept no executorship books or records of any kind: all that he can produce are copies of the accounts ordinarily kept by banks, and a bundle of slips

of paper upon which he has made occasional rough notes. Had he acted as a careful executor should act, and kept proper records of the executorship, the questions in issue in this action could never have arisen, or if they did arise could have been answered without difficulty. Moreover in this case there was every reason why he should have proceeded with care and even with exceptional care, for he was both executor and beneficiary, and the other beneficiaries who were affected by his allocations as executor to himself as beneficiary were infants. It was in these circumstances, as it seems to their Lordships, of great importance for him to have the proposed allocations on each side carefully considered both by his co-executrix and the guardian of the infants. As to his co-executrix, there is little evidence of any active interest on her part. As to the guardian of the infants she does not appear to have been approached at all. Having said this much, their Lordships think it right to add that they make no suggestion against the defendant's honesty in this matter. He seems to have acted with good faith, and to have relied upon his lawyer.

After a careful consideration of the evidence, oral and documentary, the conclusion which their Lordships have reached is that an appropriation was in fact made by the executors, the result of which was that the 485 Canadian cement shares were effectively allocated to that moiety of the residuary estate which belonged absolutely to the defendant. That it was within the power of the executors to make such an appropriation cannot be and indeed has not been disputed; and although if the fact of appropriation had rested upon nothing but the oral evidence of the defendant, it would have been difficult to hold that the fact had been satisfactorily proved; yet his evidence, reinforced by the exhibits 11 and 12, enables their Lordships to say that at some time in the year 1925 an appropriation of the cement shares to the defendant's moiety did take place.

The question of the date of this appropriation, however, remains to be answered. To hold that the appropriation took place on the 24th February, 1925, would be quite unjustifiable. There is no evidence in support of this view; indeed the only proper conclusion to draw from the evidence seems to be that the date of the 24th February, 1925, comes into consideration and into the documents simply because it marked the end of the executors' year.

Their Lordships, however, are of opinion that an approximate date for the making of the appropriation can be fixed with the assistance of the exhibits 11 and 12. Of these two documents the exhibit 12 would appear to be earlier, and not as Henderson J.A. thought, later in date than exhibit 11. That this is so is indicated by the fact that the Rose mortgage debt is entered as a debt of $4,000 in exhibit 11, and as a debt of only $2,000 in exhibit 12, the additional $2,000 having been advanced on the 23rd October, 1925. This exhibit 12 is the first evidence of the appropriation having in fact been made, and it covers a period which includes the month of August, 1925. Exhibit 12

accordingly must have come into existence some time after that date, viz., in the month of September. It is impossible to fix an exact date for the appropriation; but the parties agreed that in order to avoid sending the matter back for further investigation, their Lordships should fix a date as best they could upon the materials before them. As already pointed out the whole difficulty has arisen from the failure of the defendant to keep proper executors' accounts and records. In these circumstances their Lordships think that in the light of the earliest evidence available of the fact of appropriation, he must be taken to have had the Canada Cement shares appropriated to his moiety of the residuary estate during the month of September, 1925. Upon this footing (and that this was the time when the appropriation occurred is borne out by the fact that the October dividend on the Cement shares was the first which the defendant received and kept for his own), it is obvious that he must be treated as if he had taken the shares at their value as at the time of appropriation, and not at their value as at the close of the executors' year: and since it is owing to his omission to keep accounts and records that the exact date for fixing the value cannot be ascertained, he must be charged with the highest value ruling in the month of September, 1925, viz., $113 per share. He must accordingly account for the difference between that value and the value of $102 per share, in respect of the 485 shares, viz., a sum of $5,335, of which one-half will belong to him.

In the result, therefore, their Lordships are of opinion that this appeal should succeed and the order of the Court of Appeal should be discharged; and that in lieu thereof an order should be made substituting for the judgment pronounced by Makins J. an order on the defendant to pay into Court to the account of the plaintiffs the sum of $2,667.50 with interest thereon at the rate of 5 per cent. per annum from the 30th September, 1925, until payment, and to pay to the plaintiffs their costs of action; and their Lordships will humbly advise His Majesty accordingly.

The respondent must pay to the appellants their costs of the appeal to the Court of Appeal, and of the appeal to His Majesty in Council.

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In the Privy Council

MARY ELIZABETH WOOD
AND OTHERS

v.

GERALD ALLAN WOOD

DELIVERED BY
LORD RUSSELL OF KILLOWEN

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