JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 101 of 1989

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	DUDLEY MAY	
AND	EUGENE FOSTER	
AND	VANETTA MARIE CASE	APPELLANTS
AND	NATIONAL COMMERCIAL BANK	RESPONDENT

Burnham Scott, Q.C. and Norman Harrison for the appellants

Wendell Wilkins instructed by Clinton Hart & Co. for the respondent

Mrs. Margaret Forte for a beneficiary - Vanetta Case

May 4, 6 and June 8, 1992

MORGAN, J.A.:

This is an appeal against an order of Malcolm, J. made on the 29th November, 1989.

The appellant Dudley May claimed that he has been named as joint Executor in the Will of Ernest Egbert Foster, deceased, together with the National Commercial Bank (Jamaica) Limited. The Bank has disputed this claim, holding that it was the sole Executor, and by Originating Summons sought and was granted declarations from the Court, inter alia, that:

> 1. Upon a true construction of the Will of Ernest Egbert Foster deceased dated the 27th day of December, 1968 and the Codicils thereto dated the 19th October, 1976 and 23rd November, 1976 the National Commercial Bank Jamaica Limited is the sole Executor of the said Will.

2. .....

3. On a true construction of Clause 6 of the said Will the gifts made therein have been revoked and/or adeemed and that the assets mentioned and described therein fall to be distributed as a part of the residue of the deceased's estate.

Ademption was not sought on the Originating Summons but the learned trial judge having considered and so ordered, on application of Mr. Wilkins before us, the Originating Summons was amended and the word "Adeemed" inserted.

The appellant Dudley May now appeals against this order and moves the Court for an order that the words contained in the Will of the testator constitute a valid appointment of him as Executor of the estate of the deceased and seeks a declaration thus:

1. Upon a true construction of the Will of Ernest Egbert Foster deceased dated 27th day of December, 1966 and the codicils thereto dated the 19th day of October, 1976 and 23rd day of November, 1976 the National Commercial Bank Jamaica Limited and Dudley May are the Executors of the said Will.

2. On a true construction of Clause 6 of the said Will the gift made therein has not been adeemed or revoked.

No appeal flows from the second declaration of the learned trial judge. After hearing the appeal we set aside the Order of the Court below in relation to Declaration 1 and granted a Declaration as set out in the proposed Order No. 1 of the amended Notice of Appeal (as above).

With respect to Declaration 3 of the learned trial judge, the Order of the Court below was set aside and the case remitted to the Court below to determine by evidence from the parties whether the assets described in Clause 6 of the said Will have been adeemed and if so whether those assets fall into residue.

We promised to put our reasons in writing and this we now do.

The ground of appeal on which the appellant relied in respect of Declaration 1 was:

> "1. The Learned Judge misdirected himself in law in construing and interpreting the said Will in finding that Dudley May had not been -
>
> (a) Expressly appointed an executor under the terms of the said Will, and/or
>
> (b) Appointed an executor according to tenor."

Mr. Ernest Foster, the testator, a merchant and furniture dealer, owned and operated a thriving business, trading as Foster and Company at 153-153½ Princess Street, Kingston, where his nephew Dudley May, the appellant, was employed as Manager and a Mr. Fisher (since deceased) as Accountant. The testator executed his last Will and Testament dated December 27, 1968, followed thereafter by two codicils and died on September 9, 1988.

We will attempt to set out here the Clauses which are relevant to this appeal with respect to the Order now made.

Clause 2:

> "(a) Subject to sub-paragraph (d) of this clause, I APPOINT Barclays Bank D.C.O. (hereinafter called the 'Bank') to be the Executor and Trustee of this my Will and Trustee hereof for the purposes of the Settled Land and Conveyancing Laws.
>
> (b) .....
>
> (c) So long as the Bank shall be a Trustee hereof all trust moneys, securities, title deeds and documents shall be held exclusively by the Bank (but subject to all reasonable facilities for inspection or verification by the other trustee or trustees) and the Bank's name shall be placed first in the register of all registered stocks, shares, securities or property and no appointment of a new trustee or new trustees hereof or of any of the trusts herein contained shall not be made without the consent in writing of the Bank if then remaining a Trustee.
>
> (d) I APPOINT my nephew DUDLEY MAY and FITZROY FISHER, the accountant employed by Foster & Company (Furniture), jointly, as the business Executors and Trustees of this my Will for the purposes, property and effects of the trust hereinafter declared in respect of my business

" known as FOSTER & CO. (FURNITURE) and the said Dudley May and Fitzroy Fisher are for this purpose hereinafter referred to as my 'business Trustees'."

Clause 6:

"I GIVE AND BEQUEATH to my business Trustees the goodwill of my business known as Foster & Co. (Furniture) carried on by me at 153-153½ Princess Street, Kingston and I DECLARE that this bequest shall include all property, land, buildings, vehicles, plant, equipment and other chattels, furniture, fixtures, stock-in-trade, book debts, bank accounts in respect of the said business and other amounts belonging or owing to me in respect of such business at the time of my death and used for the purpose of the said business and the benefit of all contracts subsisting in relation thereto at my death and my business Trustees shall take over and discharge all my liabilities in connection with my said business existing at my death in exoneration so far as possible of the remainder of my estate and shall thereout pay any death duties payable in respect of the same."

Clause 7:

"My business Trustees shall hold my said business and all the assets thereof, subject to the payment of the liabilities of my said business thereout, upon the following trusts and provisions and with the following powers:

(a) To manage and conduct the said business in such manner as they shall from time to time think fit, and I EMPOWER my business Trustees to appoint the said Dudley May as manager of the said business for such term and upon such terms and conditions as my business Trustees shall from time to time decide and to leave the management and conduct of such business to the said Dudley May.

(b) To sell the same either privately or by public auction but with power to postpone such sale for so long as they shall think fit without being liable for any loss thereby arising and my business Trustees shall pay the proceeds of the sale of the said business to the Bank to be held by the Bank upon trust for my nephew the said DUDLEY MAY and my five children VANETTE MARIE FOSTER (also known as JAMES), GLORIA RODWAY, ANGELINE MAGDALEN FOSTER, JANICE NEVENA FOSTER and JACQUELINE MARIE FOSTER in equal shares as tenants in common

" absolutely subject to their attaining the age of 21 years and surviving me.

(c) The profits of the said business shall be determined annually to the satisfaction of the Bank and the same shall be paid to the Bank by my business Trustees within three months of the end of each trading year to be held by the Bank upon the trusts declared in the preceding sub-paragraph of this clause.

(d) The Bank may allow the said Dudley May or other the Manager of my said business **and** the said Fitzroy Fisher **or** other the accountant of my said business such reasonable salary or other remuneration as the Bank shall think fit from time to time for managing or acting as the accountant of the said business, either by permitting the same as an allowable expense in the accounts of the business or otherwise as the Bank may determine, bearing in mind any commission to which they or either of them may be entitled by law; it being my intention that they should each receive such salary as will with their Executor's commission provide them with reasonable remuneration for their services.

(f) Subject to the prior approval of the Bank my business Trustees may mortgage or charge any of the assets of the said business to any person (including the Bank) for the purpose of raising or securing any money used or to be used in or for the purpose of the said business.

(g) My said business may be converted into a limited liability company if my business Trustees so desire and all the foregoing provisions shall apply to such company except that the shares in such company shall be issued in the name of the Bank and be held by the Bank on the trusts declared in clause 7 (b) hereof."

In a clear and careful argument Mr. Scott for the appellant submitted that effect must be given to the words "Executors and Trustees" used by the testator in describing the capacity in which he was appointing Dudley May and Fitzroy Fisher and in addition he urged that on a true construction of the Will the appellant was an executor according to the tenor.

Mr. Wilkins for the respondent, while conceding that the appellant was appointed as executor by the Will, contended that

such appointment was limited for the narrow purpose set out in Clauses 2(d) and 6 (supra), that is to say, executors and trustees called "business trustees" for the business of Foster and Company. But, Mr. Wilkins continued, the appellant remains a limited executor only if that property, Foster and Company, still exists and has not been adeemed. He would argue that it has been adeemed and the office of executor extinguished.

It is well to consider that there is a distinction between ademption of a gift and the appointment of an executor. Ademption being the complete or partial extinction of a legacy or gift by some act of the testator in his lifetime only affects the gift and not the appointment. So with counsel's concession, the only relevant concern is whether the appointment of the appellant as executor is limited or general according to the Will.

It has always been accepted that an executor nominate is one expressly appointed by the word "executor" and an executor according to the tenor of the Will is one appointed by inference. The duties of an executor are to bury the deceased, collect the estate, pay debts, satisfy all just claims and distribute property to the persons entitled. If then by any words the testator recommends or commits to any person the rights and duties and involvement which pertain to the office of executor, the performance of those duties becomes equivalent to an express appointment as executor because they are acts of an executory nature: **The Goods of Fry** (1827) 2 P & D 10. Where also there is an express appointment of more than one person all those persons can act jointly as executors of the said Will.

In this case Mr. May was appointed executor for the purpose of a business but was he also given executory duties NOT pertaining to the business?

The words in Clause 2(a) are clear and unequivocal. They appoint the Bank as "Executor and Trustee". This appointment, however, is subject to sub-paragraph (d) of Clause 2, a sub-paragraph which appoints the appellant and another as business

executors and trustees in respect of the furniture business, Foster and Company, and referred to them as his "business trustees".

Having been so appointed, the testator widened the limits of their appointments with other duties. In Clause 2(c) the testator makes the activities of the Bank as trustee (detailed) subject to "inspection or verification by the other trustee or trustees". In so doing the appellant enjoyed supervisory functions in relation to discharge of securities held by the Bank.

By Clause 6 the testator makes a gift of the "good will" of his business, details what it includes, and gave instructions as to a wide discharge of the funds. Among the various duties the business trustees were called upon to perform were to discharge liabilities as far as possible of the remainder of the estate, and pay death duties payable on the testator's estate.

By Clause 7 Dudley May was made manager of the business. He was to be paid a salary and executor's commission. All these are matters unconnected with Foster and Company and are duties performable by an executor but which he was directed and authorised to do.

In construing this portion of the Will the intention of the testator is apparent. He displayed the fact that he had a high opinion of the appellant's habits of business and so devolved the care and management of his business to him, a business which he did not wish the Bank to operate. The Bank, however, would handle and oversee the proceeds of the business in the event of a sale and was given the power to satisfy itself as to the profits by annual statements. On the other hand, the testator's stocks and securities handled by the Bank were to be open to inspection and verification by the trustees one of whom was the appellant.

Significantly in his Codicil of the 19th October, 1976, he appointed Valerie Clarke as executor and trustee of that codicil and recited that her appointment "is limited only" to two properties - named in the Codicil. This indicates that had

he intended the appellant to be a limited executor he would have so expressed it.

All these factors together, in our opinion, support the view that the testator clearly intended that Mr. May and National Commercial Bank should be co-executors. It was so by nomination, and it was so by inference.

Accordingly, we made the order which we did in respect of Declaration 1.

With respect to the third declaration, Mr. Scott made the submission that the Court ought not to give effect to paragraphs 9, 10, 11, 12 of the affidavit of Lana Smith, Manager of the Trustee Department of National Commercial Bank (Jamaica) Limited, which was filed in support of the application of the respondent as it offended section 406 of the Civil Procedure Code and was inadmissible. The section is quite clear and reads thus:

> "Contents of affidavit
>
> Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under section 272 A or 367 an affidavit may contain statement of information and belief with the sources and grounds thereof."

Because this affidavit did not fall within any of the exceptions nor was the source of the information and belief disclosed it rendered the affidavit defective and evidence offered in paragraphs 9, 10, 11, 12 of the affidavit became inadmissible. In **re J. L. Young Manufacturing Company Limited** (1900) 2 Ch. page 754, in addressing the same defect in an affidavit, Lord Alverstone, C.J. said:

> "I notice that in several instances the deponents make statements on their 'information and belief,' without saying what their source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on 'information and belief' ought not to be looked at at all, not only unless the Court can ascertain the source of the information and belief, but also unless the deponent's statement is corroborated by some one who speaks

> "from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever;....."

It follows, then, that inadmissible evidence was used by the learned trial judge to come to his conclusion. Counsel brought to our attention that this point was not taken in the Court below by the appellant. Additionally, the question of ademption granted by the learned trial judge was not sought in the originating Summons in the Court below. The application was made before us to include it, was granted and the amendment made.

A limited liability company under the name of Foster and Company Limited was incorporated in June 1973. The questions relating to the continued existence of Foster and Company as a trading entity and the property which was referrable to that business can only be determined by evidence. Consequently, the issue of ademption must be returned to the Court below with liberty to the parties to file affidavits in support of their respective contentions. We accordingly made that Order.

Costs of the appeal to be agreed or taxed and to be paid out of the estate.

ROWE, P.:

I agree.

DOWNER, J.A.:

I agree.