GRENADA

IN THE COURT OF APPEAL

HCVAP 2011/002

In the Matter of the Trustee Act, Chapter 329
of the 1994 Revised Laws of Grenada

BETWEEN:

[1] MICHAEL MC INTYRE
(Personal Representative of the
Estate of Charles Arthur McIntyre, deceased)
[2] MICHAEL MC INTYRE
[3] ANN MC INTYRE

Appellants

and

GRACE STEELE

Respondent

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Don Mitchell, QC — Justice of Appeal [Ag.]

Appearances:

Mr. James A.L. Bristol, for the Appellants
Ms. Celia Edwards, QC, for the Respondent

2011: June 21,
September 19.

Civil appeal – Probate – Application to adduce fresh evidence – Conditions that must be satisfied in order to adduce fresh evidence – The intention of a testator in making a bequest in a will – Whether the learned trial judge erred in holding that a bequest made to the respondent was valid

The late Charles Arthur McIntyre had, for a number of years, been the Managing Director of a car sales company in Grenada, McIntyre Bros. Ltd. ("the company"). At the date of his death, though retired from active management since 1987 due to considerations of age and health, he was still a director of the company. He also held shares in it, received a monthly payment of $2,500.00 from it, drove a company car, and would come to the office to talk and look around.

The respondent, Grace Steele, had lived with Charles for over 25 years at her home in St. Georges. The two shared a comfortable relationship and were committed to each other. The appellants, Michael and Ann McIntyre, were Charles' children from another relationship. Charles was also very close to them. He made his last will on 7th March 2003, and appointed Michael and Ann as his executors. The will was drafted by an attorney, who also acted as one of the witnesses.

Charles made a number of bequests to Michael and Ann, as well as to Grace. In particular, in clause 2 of his will, he bequeathed to Michael and Ann his shares in the company "for their absolute uses and benefits" [sic], and in clause 7 of the will, he directed that the directors of McIntyre Bros. Ltd. pay Grace the sum of $2,500.00 "on a monthly basis for the rest of her natural life – free of any deductions." A grant of probate of the will was made in favour of Michael, with power reserved to Ann to apply in due course. Michael honoured the various bequests in the will, except the one set out in clause 7. Grace brought proceedings in the High Court to enforce the bequest and the matter was decided by the learned trial judge on the basis of an agreed statement of the facts and on legal submissions. In these agreed facts, it was stated that Charles "would take a monthly draw-down against his shares which would be set-off at the end of the financial year against his dividends". In light of this fact, the learned judge took the view that there was some evidence that Charles had intended that his gift of the shares to Michael and Ann would be subject to the life interest of an annuity in them in favour of Grace, and held that the bequest in clause 2 was subject to that in clause 7. The respondents appealed, stating that their counsel in the High Court had no authority to agree that the monthly payment to him had been a draw-down on dividends, and that the learned trial judge had erred in finding that the bequest of the shares to them had been subject to the payment to Grace.

Held: granting the appellants' application to adduce fresh evidence, quashing the decision of the learned trial judge, and ordering that the parties have their costs payable out of the estate and assessed according to Civil Procedure Rules 2000 in both the High Court and the Court of Appeal, that:

1. The new evidence which the appellants sought to adduce satisfied the three conditions set out by Denning L.J. in the case of Ladd v Marshall [2002] All E.R. 745, since it: (i) could not have been obtained with reasonable diligence for use at the trial; (ii) would have had an important influence on the result of the case; and (iii) was presumably to be believed.

   Ladd v Marshall [2002] All E.R. 745 applied; Neale v Gordon Lennox [1902] A.C. 465 applied.

2. Clause 7 of the testator's will, which bequeathed a monthly payment of $2,500.00 to the respondent, is incapable of taking effect. The testator had attempted to give that which was not his to give, which he was not allowed to do. The payment of dividends by a company is a matter for the discretion of the Board of Directors, subject to such approvals by the shareholders as the articles may require. The directors of a company cannot be ordered to pay dividends that have not yet been declared and approved. Further, a dividend is subject to any solvency pre-condition as required by law. The order made by the learned trial judge amounted to an order against the directors of a company which was

not a party to the litigation. It was also an order to the directors to make a payment that may, if the company is not making a profit, be contrary to the law relating to companies.

3. Care must be taken when considering supplying missing words to a bequest in a will. It is certainly not permissible to rewrite the will by giving effect to an intention not expressed therein.

Abbott v Middleton [1858] VII H.L.C. 68 applied; Scale v Rawlins [1892] A.C. 342 applied.

JUDGMENT

[1] MITCHELL, J.A. [AG.]: The late Charles Arthur McIntyre, more affectionately known as Laddie McIntyre, of St Georges in Grenada had for a number of years been Managing Director of McIntyre Bros. Ltd. ("the company"). At the date of his death, though retired from active management since 1987 due to considerations of age and health, he was still a director of the company. Under his managing hands and those of his son Michael and others, the company had been built up to the point where it had become one of the leading car sales companies in Grenada. When he died he was over 80 years of age. He held shares in the company, was still a director of it, received a monthly payment of $2,500.00, drove a company car, and would come to the office to talk and to look around, though he did not actively partake in the running of the business.

[2] Grace Steele had lived with Charles for over 25 years at her home at Cafe, St. Georges. The two shared a very comfortable relationship. They were committed to each other. He was also close to his two children from another relationship. They are Michael and Ann McIntyre. Charles made his last will on 7th March 2003. It was drafted by an attorney, who also acted as one of the witnesses. In it, Charles appointed Michael and Ann as his Executors. He made a number of bequests both to them and to Grace. Two of the bequests were:

> "2. My Shares in McIntyre Bros Limited I give devise and bequeath in the proportions of Two Thirds (2/3) thereof to my Son Michael McIntyre and One Third (1/3) thereof to my daughter Ann McIntyre-Campbell for their absolute uses and benefits [sic].
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> …

7. I hereby direct The Directors of McIntyre Bros Limited to pay to the said Grace Steele the sum of Two Thousand Five Hundred Dollars ($2500.00 ECC) on a monthly basis for the rest of her Natural Life – free of any deductions."

[3] A grant of probate of the will was made in favour of Michael with power reserved to Ann to apply in due course. Michael honoured the various bequests in the will except the one at paragraph 7 quoted above. Grace brought proceedings in the High Court to enforce the bequest. The matter was decided by the learned trial judge on the basis of an agreed statement of the facts and on legal submissions. She gave her judgment on 20th December 2010. It is that judgment that is now the subject of this appeal.

[4] The learned trial judge found that Charles could not have intended the payment to Grace to be charged on the residue of the estate. He could only have intended that it be charged upon a particular fund or property. There were only two alternative possible sources for the bequest: the general income of the company, or the dividends payable on his shares in the company. He had already in the will bequeathed the residue to Grace. The judge was persuaded by the learning in Re Alexander's Will Trust[1] that, where the same property has been the subject of two different devises, either the last bequest is the effective one or, depending on the nature of the property, both legatees take a moiety. She found that the bequest of the shares in paragraph 2 of the will was subject to that in paragraph 7. She granted Grace a declaration that the shares in the company bequeathed to Michael and Ann in paragraph 2 of the will were subject to the payment to Grace of the annuity in paragraph 7 of the will.

[5] There was uncontroverted evidence before the learned trial judge by way of an agreed statement of facts signed by both trial lawyers upon which she based her decision. One of the agreed facts which the judge relied on was as follows:

> "9. He held shares in the company and would take a monthly draw-down against his shares which would be set-off at the end of the financial year against his dividends."

The judge took the view that, if those were the agreed facts, and if indeed Charles had taken a monthly draw-down against his dividends, then there was some evidence that he

[1] [1948] All E.R. 111.

intended that his gift of the shares would be subject to the life interest of an annuity in them in favour of Grace.

[6] Michael and Ann appealed. They complain that their counsel in the High Court had no authority to agree that the monthly payment to him had been a draw-down on dividends; and that the learned trial judge had erred in finding that the bequest of the shares to them had been subject to the payment to Grace. They seek an order from this court either that the matter be referred back to the High Court for a new trial, or, alternatively, that the judgment of the learned trial judge be reversed and a declaration be made that the bequest granted to Grace by clause 7 of the will fails.

The Application to Admit Fresh Evidence

[7] The determination of the first ground of appeal required this court to deal with an application by Michael and Ann for liberty to adduce fresh evidence at the appeal. The grounds of the application were that due to a misunderstanding between Michael and Ann and their trial lawyer in the court below, at the time when instructions were given by Michael and Ann in order to file the agreed facts with respect to the monthly payments to the deceased, counsel for Michael and Ann in the court below had no authority to agree as a fact that Charles had taken a monthly draw-down against his shares which had been set-off at the end of each financial year against his shares. Michael and Ann claimed that it had not been their intention to agree that Charles had taken a monthly draw-down against his shares as in fact no dividends had ever been declared. They claimed that this lack of authority and misunderstanding had only now become apparent, would have had an important influence on the result, and was credible.

[8] There were three affidavits filed in support of the application. The first by Michael McIntyre was to the effect that in January 2011 he had instructed Mr. James Bristol of the firm of Henry, Henry & Bristol to represent him and his sister in prosecuting the appeal. Counsel in the court below had been Mrs. Avril A. Trotman-Joseph of the firm of Joseph & Joseph. Upon instructing Mr. Bristol he had provided him with a copy of the High Court judgment. Mr. Bristol had filed the Notice of Appeal on 26th January 2011. In support of an application for a stay of execution of the judgment, he had sworn an affidavit that the

company had never declared any dividends. In April, he had been contacted by Mr. Bristol who told him that he had been informed by counsel for Grace that there had been an agreed statement of facts before the trial judge. He had contacted Mrs. Avril Trotman-Joseph who delivered a copy of the High Court file to Mr Bristol. Mr. Bristol had subsequently informed him that there was indeed a document headed "Facts Agreed" and signed by counsel in the court below and containing the statement that has been referred to above. He had then contacted Mrs. Avril Trotman-Joseph to make inquiries. She had reviewed the file and had confirmed to him that neither Michael nor Ann had given her any instructions specific to dividends. Instead, such instructions had been only with respect to the monthly payment of $2,500.00 to Charles.

[9] The affidavit of attorney-at-law Avril A. Trotman-Joseph revealed that she had received the draft statement of "agreed facts" from Grace's attorney. It was Grace's attorney who had characterised the payment as a draw-down on dividends. She had read out the issues to be agreed on to Michael McIntyre over the telephone. She had urged him to ignore any non-contentious facts so as to bring finality to the matter. His instructions to her had been based on her inquiry "What sum was paid monthly to the late Charles McIntyre?" His response had been directed to the fact that monthly payments had been made by McIntyre Brothers Ltd. to Charles. The focus had not been whether these payments were technically dividends or not, but whether monthly payments had been made to his late father. He had confirmed to her the monthly payment of $2,500.00. It was in this context that she had signed the "agreed facts" and returned them to counsel for Grace for filing.

[10] The third affidavit was from Lauriston Francis Wilson OBE FCCA FCMA. He was the managing partner of Wilson & Co., chartered accountants. They had been the auditors to McIntyre Bros. Ltd. from the year 2008 to the present. He deposed that, in addition to his own audits, he had had access to the audited financial statements for the years 2000-2007. He had never seen any evidence of either a declaration or a payment of dividends by the company.

[11] Learned counsel for Grace objected to the application to adduce this new evidence. She submitted that Michael and Ann did not satisfy the test that it must be shown that the

evidence could not have been obtained with reasonable diligence for use at the trial. The fresh evidence had been within their knowledge at the relevant time and could have been obtained for the trial. In any event, she submitted, counsel is clothed with authority in the conduct of a matter, and counsel having taken instructions and having filed a document as an agreed statement of facts, it would not be open to the court or any other side to challenge the authority of counsel to do so. To have a client at this stage seek to challenge the authority of counsel is unacceptable, unfairly prejudicial to Grace, and without legal basis. She relied on the learning in Halsburys[2] to the effect that the authority of counsel at the trial of an action extends, when it is not expressly limited, to the action and all matters incidental to it, and the consent of the client is not needed for a matter which is within the ordinary authority of counsel and if a compromise is entered into by counsel in the absence of the client, the client is bound.

[12] Counsel for Grace also relied on dicta of Watkins J in Marsden v Marsden[3] to the effect that the court should view with extreme caution any application to interfere to set aside an order based on a compromise, and should not grant such an application except in a case which calls clearly for interference with the order made.

[13] Counsel for Michael and Ann relied on the case of Neale v Gordon Lennox.[4] The Earl of Halisbury LC in the House of Lords explained the law on setting aside an order where a legal practitioner has exceeded her authority. He said that a court of justice is not so far bound by the unauthorised act of learned counsel that it is deprived of its general authority over justice between the parties. When two parties seek as part of their arrangement through a court of justice to say that something shall or shall not be done except on certain terms, then counsel cannot contradict what his client has said.

[14] The English Court of Appeal case of Ladd v Marshall[5] usefully sets out the principles on which fresh evidence can be received. This was a case where a witness came forward

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[2] Halsburys Laws of England, 3rd Ed., Vol 3, p. 50.
[3] [1972] 2 All E.R. 1162 at 1165 c.
[4] [1902] A.C. 465 at 470; (1900-3) All E.R. Rep. 622. Applied by Alleyne J [as he then was] in Dipcon Engineering Services Ltd. v Gregory Bowen, (Grenada High Court) Suit No. 452 of 1999 (unreported).
[5] [1954] 3 All E.R. 745, recently applied by this Court in Marius Wilson v Julienne James et al, (Saint Lucia) Civil Appeal No. 6 of 2009 (unreported).

and said, "I told a lie but nevertheless I now want to tell the truth". Denning LJ, laid down three conditions which must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[15] Voaden v Champion[6] was a more recent case where the English Court of Appeal admitted further evidence on a vessel's value and awarded a higher figure than the judge below. The case established that the previous test for the admissibility of new evidence before the Court of Appeal was still relevant under CPR, but ought to be applied as guidelines rather than rules and subject to the overriding objective.

[16] Having considered the evidence of the affidavits of Michael McIntyre, Lauriston Wilson and Avril Trotman-Joseph, this Court was satisfied that the new evidence met the three tests in Ladd v Marshall. The evidence could not have been obtained with reasonable diligence for use at the trial. It would have had an important influence on the result of the case. It was presumably to be believed. Following Neale v Gordon Lennox we had no doubt of the propriety of Michael and Ann seeking to repudiate what their counsel had agreed on their behalf. We therefore allowed the application and proceeded to hear the appeal and to take into account this new evidence.

The grounds of appeal

[17] Counsel for Michael and Ann and for Grace argued the grounds recited at paragraph [6] above together. In very helpful written submissions they provided the court with their view of the applicable law on the interpretation of wills as it pertains to the facts in this case. To recap, it will be recalled that by clause 2 of his will, Charles had bequeathed his shares in the company to his son Michael and to his daughter Ann "for their absolute uses and benefits" [sic]. By contrast, the subject of clause 7 was a direction to the directors of the

[6] [2002] All ER (D) 305.

company to make a payment to Grace of a sum of $2,500.00 per month for the balance of her life. Charles had not identified the fund from which the annuity was to be paid. Michael and Ann argued that the gift was bad and must fail. Grace contended that the gift of the shares to Michael and Ann must have been intended to be subject to the bequest of the annuity to her. The learned trial judge had accepted the argument of her counsel and had held that the bequest at clause 2 was subject to that in clause 7.

[18] Counsel for Grace relied on the learning in Williams on Wills[7] to the effect that the will must be so construed as to give effect as far as possible to the general intention of the testator. A testator must not be presumed to intend an absurdity. The court is bound to give effect to every word of the will without change or rejection, providing an effect can be given to it not inconsistent with the general intent of the whole will taken together. Apparent inconsistencies must as far as possible be reconciled and where it is impossible to reconcile the separate parts, the latter will prevail. If on consideration of the relevant parts of the will one comes to the conclusion that the testatrix intended to pass something and can determine what that something is, the fact that she has given it a wrong description will not prevent her will taking effect in regard to that which is wrongly defined.

[19] Counsel for Michael and Ann submitted that a testator can only lawfully dispose by his will of property to which he is entitled at the time of his death. He did not own the money referred to in clause 7 of the will, as the money would have been the company's. Further, having bequeathed his shares to Michael and Ann, and the bequest having taken effect at his death, he was no longer entitled to any dividends after his death from which the directors could make a payment to Grace. There can be no doubt however that if he had in clause 7 expressly provided that Michael and Ann were to make a payment to Grace out of any dividends that they might receive from the shares during Grace's life, that would likely have been a valid bequest. Those would have been plain words, incapable of any misunderstanding. However, he had not done that.

[7] The Law of Executors and Administrators, 13th Ed., 958, at p.538.

[20] The extent to which a court may go to ferret out the intention of a testator has been the subject of much judicial ruling. So, per Lord Selbourne in Pearks v Moseley:[8]

> "The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law."

[21] The plain words of the testator must be applied and given effect to, regardless of any misunderstanding that the testator may appear to have been labouring under when he used technical words. The testator may not have been aware that he could not give that which he did not own, but if that appears to be the meaning of the words which he used, the plain meaning must be followed. As per Lord Davey in Higgins v Dawson,[9]

> "My Lords, I have already said that the gift in this will does not, in my opinion, present any difficulty of construction. No doubt the word "residue" is in itself a relative term; but in this case the testator has himself told us the meaning in which he uses the word "residue," and the subject-matter with reference to which the word "residue" is used, namely, it is to be the residue of the mortgage debts, after the payment of debts and funeral and testamentary expenses. Am I to change my opinion of the meaning of those words, which I think very plain, because I know that at the time when he made his will the mortgage debts formed the bulk of his property? I think not. Nor do I think I ought to admit that consideration to influence my opinion merely because other persons as well qualified, or better qualified than myself, have attached a different meaning to those words. It may be that the testator may have been imperfectly acquainted with the use of legal language; he may not have understood the legal effect of making a specific gift or what a specific gift was, and he may have used language the legal interpretation of which does not carry out the intentions that he had in his mind. I do not know whether that is so or not. But, whether that be so or not, of this I am quite clear, that that fact should not induce the Court to put a meaning on his words different from that which the Court judicially determines to be the meaning which they bear."

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[8] (1880) 5 App. Cas. 714 at 719 (H.L.(E.)).
[9] [1902] A.C. 1 at 11.

[22] It seems clear from the plain meaning of Charles' words in clause 7 of his will that he intended to make a gift of a monthly income of $2,500.00 to Grace. The question for the Court must be what was to be the source of the gift. The learned trial judge correctly found that the deceased had not intended the payments to Grace to be charged on the residue of his estate, which in any event he had bequeathed to her. He had instead given clear directions to the directors of the company to make the payments. That he had no authority to do. Was the judge right to have attempted to save the gift by making the payments a charge on any dividends that the shares may have earned? Had that been the intention of the testator? Lord Wensleydale in Abbott v Middleton[10] reminds us of the care to be taken when considering supplying missing words to a bequest in a will:

> "The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation, that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means. The will must be expressed in writing, and that writing only is to be considered."

[23] Certainly, it is not permissible to rewrite the will by giving effect to an intention not expressed therein. As Lord Halsbury LC put it in Scale v Rawlins,[11]

> "My Lords, in this case I cannot help thinking that there is not any doubt as to what a Court of construction ought to do. The difficulty which I have here is not in speculating upon what peradventure may, at some time or other, have been in the testator's mind; but I must find words which are absolute and express. I might be perfectly satisfied that he intended that this lady should have an estate of inheritance in this property. I might be satisfied that that was his intention otherwise than by the words of the will; but I should be compelled to come to the same conclusion as I do now, namely, that that intention is not sufficiently expressed. It is manifest that taking either alternative proposition put forward by the appellants this House, if it is called upon to give that effect to the instrument, must put words into the will in order to do it. The thing has not been done; and I am not aware of any authority which would lead your Lordships to come to the conclusion that, because the testator had at some time or other the intention in his mind to give this property to the person in question, you are justified in saying that he has done so by the instrument which he has executed."

[10] [1858] VII H.L.C. 68 at 114.
[11] [1892] A.C. 342 at 343.

[24] There is no suggestion in the agreed facts that the directors were bound by any contract to make any monthly payment to Charles whether before or after his death. His being a director, a previous managing director, given a company car to drive, it is more likely that he was in receipt of the monthly sum of $2,500.00 as director's fees. These would cease to be payable on his death. The payment of dividends by a company is a matter for the discretion of the Board of Directors, subject to such approvals by the shareholders as the articles may require. A dividend is additionally subject to any solvency pre-condition as required by law. The order made by the learned trial judge amounted to an order against the directors of a company which was not a party to the litigation. It was also an order to the directors to make a payment that may, if the company is not making a profit, be contrary to the law relating to companies.

[25] For all these reasons the decision cannot stand. Factors extrinsic to the will ought not to have been taken into account to validate an invalid bequest. Charles had attempted to give what was not his to give, and that he cannot do. Nor can the directors of a company be ordered to pay dividends that have not yet been declared and approved. Clause 7 of the will is incapable of taking effect. I would quash the decision of the learned trial judge. The parties will have their costs payable out of the estate and assessed according to Civil Procedure Rules 2000 in both the High Court and the Court of Appeal.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal