

Kirsten A. Fales, Bernard W. Wohlleben, Steven K. Wohlleben, an infant by his next friend Kenneth D. Wohlleben and the said Kenneth D. Wohlleben, residuary beneficiaries of the estate of Kai Wohlleben, Deceased (Plaintiffs) Appellants;

and

Canada Permanent Trust Company, Trustee of the Estate of Kai Wohlleben, Deceased (Defendant) Respondent;

and

Mildred Alice Wohlleben (Third Party) Appellant.

1976: February 9, 10 and 11; 1976: October 5.

Present: Martland, Ritchie, Spence, Dickson and Beetz JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Trusts and trustees — Speculative shares received by co-trustees in exchange for shares owned by testator — Failure to sell shares in timely fashion — Disastrous results — Breach of trust — Damages — Co-trustee acting honestly and reasonably in circumstances — Co-trustee relieved

entered into the exchange arrangement; (iii) Canada Permanent made no real attempt to sell or persuade its co-trustee to agree to a sale of I shares notwithstanding the unsatisfactory and gradually worsening financial condition of I; (iv) failure to sell the shares in timely fashion resulted in a breach of duty rendering Canada Permanent liable to the plaintiffs for damages, which should be assessed at \$250,408, based upon the average price at which I shares traded during the period in which, in the opinion of the judge, the shares should have been sold. The judge dismissed Canada Permanent's claim for contribution from W, and her counterclaim for interest and income on her interest in the estate. He refused Canada Permanent relief under s. 98 of the *Trustee Act*, R.S.B.C. 1960, c. 390, which provides that, if it appears that a trustee is or may be personally liable for any breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, then the Court may relieve him from personal liability.

On appeal to the British Columbia Court of Appeal, the damages were reduced to \$206,398.80, as a result of a change by that Court in the base period, and W was ordered to contribute \$31,127.52. The residuary beneficiaries and the third party then appealed to this Court.

Held: The appeal should be allowed and the damages fixed at \$250,408; the appeal of the third party should be allowed and the cross-appeal of the third party should be dismissed.

Canada Permanent breached the duty which it owed to the residuary beneficiaries of the estate. It failed to meet the standard of care and diligence required of a trustee in administering a trust, *i.e.* the standard of a man of ordinary prudence in managing his own affairs. It

and W remained adamant, the proper course would have been to have applied to the Court for advice and directions. No case could possibly be made out for granting Canada Permanent relief under s. 98 of the *Trustee Act*.

The measure of damages was the actual loss which the acts or omissions had caused to the trust estate. The method selected by the trial judge for determining that loss was approved. The base period, as held by the trial judge, was the period of possible advantageous sale of the I shares.

In accepting the trusteeship, W became obligated to exercise an independent judgment and she assumed a duty to the beneficiaries of the residuary estate which, in failing to sell the I shares in timely fashion, she breached. However, Canada Permanent could look to W for contribution and indemnity only if she was liable to the beneficiaries for breach of trust; she was not liable if the Court relieved her pursuant to s. 98. W should be so relieved as she had acted honestly and reasonably in the circumstances.

Canada Permanent was not negligent nor in breach of trust in agreeing to the exchange of B shares for those of I Ltd. and, accordingly, W's claim for interest and income on her interest in the estate failed.

Learoyd v. Whiteley (1887), 12 App. Cas. 727, applied; *Re Waterman's Will Trusts; Lloyds Bank, Ltd. v. Sutton*, [1952] 2 All E.R. 1054; *National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A.C. 373; *Re Inman, Inman v. Inman*, [1915] 1 Ch. 187; *R*

T. R. Braidwood, Q.C., and R. R. Sugden, for the third party, appellant.

C. C. Locke, Q.C., for the defendant respondent.

The judgment of the Court was delivered by

DICKSON J.—These proceedings emanate from the failure of the co-trustees of the estate of Kai Wohleben, late of the City of Vancouver, to sell in a timely fashion certain shares of Inspiration Limited forming part of the estate, with disastrous results. The shares were received by the co-trustees in exchange for shares of Boyles Bros. Drilling Company Ltd. which had been owned by Mr. Wohleben during his lifetime. The four children of Mr. Wohleben, as residuary beneficiaries of the estate, sued Canada Permanent Trust Company, one of the trustees, which then raised a claim against its co-trustee, Mrs. Wohleben, for indemnity and contribution. Mrs. Wohleben responded with a counterclaim for the loss which, as recipient under the will of life interest income, she allegedly suffered through the mismanagement of Canada Permanent. The children plaintiffs chose not to sue their mother as co-trustee.

I

In the main action three issues faced Munroe J. during a 13-day trial: (1) whether the exchange of Boyles Bros. shares for Inspiration shares was authorized by the terms of the will; (ii) if so, was Canada Permanent, in entering into the transaction, guilty of a breach of its duty to make proper inquiry and to exercise reasonable skill and care; (iii) was there a breach of duty in

was again unsuccessful in its claim for relief under s. 98 of the *Trustee Act* but succeeded on the appeal in obtaining a reversal of the trial judge's dismissal of the third party proceedings brought against Mrs. Wohlleben for contribution. The Court of Appeal considered Mrs. Wohlleben guilty of breach of trust for failure to join in liquidation of the Inspiration Limited shares at advantageous times and ordered that she contribute a moiety of the damages sustained by plaintiffs in the period to September 1, 1969 amounting to \$31,127.52. Her cross-appeal for interest and income was dismissed.

In this Court the appellant residuary beneficiaries seek an increase in the damages awarded to them. The third party, Mrs. Wohlleben, asks that she not be held liable to contribute in any way for the breach of trust by Canada Permanent and that she be awarded her lost interest and income by reason of such breach. Canada Permanent asks that the Court of Appeal be reversed in its decision to relieve Mrs. Wohlleben in part from the consequences of her breach of trust or in the alternative, if relief is afforded her, that the Court declare a different method of calculating the amount of reduction. Canada Permanent also seeks a declaration that the Court of Appeal erred in failing to relieve it from the consequences of any breach of trust.

II

The will of the late Mr. Wohlleben is unexceptional. A bequest of personal effects to Mrs. Wohlleben is followed by a direction to the trustees to sell, call in and convert the estate into money, with power to postpone. The will directs the trustees to invest the residue of the estate in investments authorized by law for the investment of trust funds. The trustees are empowered to deal with any shares or other interest held by the estate in any company or corporation to the same extent and

