IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 231 OF 1989

IN THE MATTER of the Estate of
CORNEL KORVIN D'OYEN deceased

A N D

IN THE MATTER of the Administration
of the said Estate.

IN CHAMBERS:

W. K. Chin-See Q.C., and Miss E. Chin instructed by Dunn, Cox and Orrett for the Executor.

Noel Levy instructed by Myers, Fletcher and Gordon, Manton and Hart for the widow Andrea D'Oyen.

Mrs. G. Hanna in person.

Mr. N. Forrest in person.

Clough, Long and Company for Christopher Yarrid.

Mr. Robbins for Raquel M. D'Oyen.

March 13, 1989 and October 1, 1990

ELLIS, J:

JUDGMENT

This is an Originating Summons in which the executor seeks determination of questions 1(b), (c), (d), (f) and (g). For ease of reference, I will recite the questions as they appear in the Summons:

(b) As to clause 9 of the said Will is a beneficiary named therein entitled to shares in the Company Autofix Ltd if:-

(i) he was not resident in Jamaica at the date of death of the testator;

(ii) although remaining resident in Jamaica he was not working in the business of the Company at the date of death of the testator;

(iii) he has not carried on in the business of the Company since the death of the testator; and

(iv) although remaining resident in Jamaica, he has never worked with the Company?

(c) In the event of a failure of any of the bequests at clause 9 of the said Will are the shares to be vested according to the rules relating to intestacy?

(d) If the answer is in the negative to whom are the shares to be transferred?

(f) As to Clause 10 of the said Will whether GLENDA HANNA who appears in the Register of Shareholders of the Company as the owner of 25% of the shares is entitled to the bequest if she is in fact the true owner of the said shares?

(g) As to clause 13 of the said Will how will the bequests rank and vest in the event that the residuary estate is insufficient to meet all these bequests?

By clause of his Will dated the 4th of May, 1965, the deceased Cornel K. D'Oyen made a bequest of 40% of property and business known as Autofix Limited in four equal shares to Newton Forrest, Everard Lee, Freddie Lodenquai and Christopher Yarrid.

The bequests are subject to the proviso that each person remain a resident in Jamaica and continue to carry on in the business of Autofix Limited to the satisfaction of the deceased's trustees. One of the trustees at paragraph 11 of an affidavit of 20th October, 1988, has made statements which if accepted suggest the exclusion of three of the persons named beneficiaries at clause 9 of the Will. There is no affidavit refuting the statement of the trustee.

What is the status of the proviso at clause 9 of the Will? Is it a condition precedent or a condition subsequent?

In deciding the status of the provision, I am assisted by the dictum of the Master of the Rolls in Re Allen (deceased) (1953) 2 All E.R. at page 904 letters E-D cited by Mr. Chin-See and I quote:

> " Because in the case of a Will it is in general the function and duty of a court to construe the testator's language with reasonable liberality and to try, if it can, to give sensible effect to the intention he has expressed. To this general rule, conditions subsequent seem to me to be an exception".

The proviso is in this term - "that they each remain resident in Jamaica and continue to carry on in the business of the Company in a manner satisfactory to my trustees".

To my mind, a reasonable construction of that clause suggests that the persons are to subsequently reside in Jamaica and carry on in the business. I say so since a Will is ambulatory until death, and to remain resident, of necessity demands residence and participation in the business prior to the date of death.

The paragraph 11 of the affidavit of Mrs. Panton states that the persons at clause 9 of the Will with the exception of Everard Lee ceased to be either residents of Jamaica or to be involved in the business of Autofix Limited before 4th September, 1987, the date of testator's death.

The condition deictated by the proviso must be satisfied before the legatees can be qualified for the gifts set out in clause 4 of the Will.

Messrs. Newton Forrest, Freddie Lodenquai and Christopher Yarrid have not in any way complied with the condition precedent.

Clause 9 of the Will in my opinion created conditional gifts which have failed for non-fulfilment of the condition.

In that premise, the question posed at 1(b) of the Originating Summons is answered in the negative.

The gifts at clause 9 of the Will would have been immediate and absolute if the condition was fulfilled. The failure of the gifts at clause 9 creates an intestacy in relation to those gifts and in the absence of a contrary intention they would have had to be vested under rules relating to intestacy.

But clause 11 and 12 of the Will are suggestive of a contrary intention on the part of the testator. Clause 11 gives and bequests the rest, residue and remainder of the testator's state, excepting those parts specified at clauses 4 - 10 to his trustees on trust for certain named persons.

In the circumstance, the question at 1(c) is in the negative.

The answer to question 1(d) is that the failed gifts (shares) are to be transferred to the trustees on the terms contained in clause 11 of the Will.

Clause 10 of the Will purports to give sixty per cent of the property and business in Autofix Limited in three equal shares to three persons including Glenda Hanna. It appears that Mrs. Hanna is and was the registered proprietor of 25 per cent of the shares in Autofix Limited at the date of the Will.

There is no dispute that Mrs. Hanna owned 25 per cent of the shares. She therefore held an alienable interest in Autofix Limited at the date of the Will.

In that circumstance, Mrs. Glenda Hanna is not, without her electing, entitled to the bequest under clause 10 of the Will. In my opinion, she should take against the Will.

I so hold in answer to question 1(f) of the Originating Summons.

Clause 13 of the Will bequeaths legacies to certain persons. The question posed at 1(g) seeks a determination of the rankings of the bequests in case the fund from which the legacies are to be paid is insufficient.

If a fund for the payment of pecuniary legacies is insufficient, the legacies must abate rateably subject to priority among the legacies. (See Theabald on Wills 13th Edition at paragraph 2078 and 2079.

At paragraph 2079 the learned authors say that as a general rule, general legacies are payable pari passu unless the testator has indicated that some should have priority.

It is my opinion that the legacis at paragraph 13 of the Will are general legacies albeit contingent on the legatess attaining twenty-years of age.

In the absence of any indication as to priority between the legacies, I hold that they are payable pari passu and subject to abatement rateably.

Costs to the trustee to be borne by the estate.