

1954
*Feb. 5, 8, 9
*Feb. 9

IN THE MATTER OF THE ESTATE OF F. H. MORDEN NEILSON,
DECEASED

GRAHAM MORDEN NEILSON,
AUDREY SHIELDS and SHIRLEY }
E. PELLOWE }

APPELLANTS;

AND

NATIONAL TRUST COMPANY }
LIMITED, Executor of the Estate of
F. H. Morden Neilson, and THE }
OFFICIAL GUARDIAN }

RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Executors—Compensation on passing of accounts—Where neither breach of trust by executor, nor error in principle followed by surrogate court judge established, award maintained.

APPEAL by three of the adult beneficiaries of the Estate of the late F. H. Morden Neilson from an order of the Court of Appeal for Ontario (Henderson, Hogg, Hope, Aylesworth JJ.A.; Laidlaw JJ.A., dissenting) (1) dismissing an appeal from an order of Barton, Surrogate Court Judge, (2) made on the passing of accounts of the respondent, National Trust Co. Ltd., executor and trustee of the Estate, and trustee of a trust for each of the appellants.

R. N. Starr, Q.C. (R. D. Hill with him) for the appellants: The Court of Appeal erred: (1) In not holding that the Trust company had disentitled itself to compensation and costs in whole or in part because of its actions, both in the administration of the Estate and in its conduct upon the passing of the accounts. (2) In not holding that there were errors in principle in the method adopted and in the result arrived at by the Surrogate Court Judge in fixing the amount of compensation and costs to be paid the Trust company. (3) In holding that the sum of \$140,000 was a fair and reasonable allowance of such compensation. (The estate was valued for probate purposes at \$4,383,000 and the period of administration in question was four years.)

*PRESENT: Kerwin, Taschereau, Rand, Locke and Cartwright JJ.

(1) [1953] O.R. 153. (2) [1953] 1 D.L.R. 302.

H. P. Hill, Q.C. for The Official Guardian: The sale of the William Neilson Co. Ltd. stock was decided without submitting the matter to the respondent's Board of Directors, and the non-exercise of a discretion by the Board is a factor to be considered in fixing compensation where an executor does an act in which he does not exercise a discretion. *Re Wilson* [1937] O.R. 769.

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Following the arguments advanced on behalf of the appellants and of The Official Guardian, the Court without calling on *D. J. Walker, Q.C.* (*C. M. Milton* with him) for the respondent, retired. On its return to the bench, Kerwin J., speaking for the Court, delivered judgment orally:

KERWIN J.:—We will not have to call on you Mr. Walker. We have considered all the arguments of Mr. Starr and are of opinion that in none of the circumstances mentioned by him was there any breach of trust by the Trust Company during its administration of the estate and including the passing of accounts. We can find nothing to indicate any lack of fairness, or frankness on the part of the Trust Company towards the Court or the beneficiaries, notwithstanding our agreement with the comments of Mr. Justice Aylesworth (1) on the statement filed by the Trust Company and entitled "Summary of Benefits or Savings by the Estate."

We can find no reason to interfere with the amount of compensation fixed by the Court of Appeal.

Before I proceed to dispose of the point raised on behalf of The Official Guardian, the Court would like to know if that point was raised before. Mr. Hill, or Mr. Starr, could you tell us that?

MR. HILL: "It was not raised before, my Lord."

MR. JUSTICE KERWIN: "We understood so, but we wanted to make sure. In the absence of any evidence, and considering that the point was not raised before, we do not deal with the point raised by Mr. H. P. Hill."

In the result therefore the appeal is dismissed with costs.

(1) [1953] O.R. 153 at 166.

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Mr. HILL: What about the Official Guardian's costs?

Mr. JUSTICE KERWIN: The appeal is dismissed with costs. You were not an appellant, were you?

Mr. HILL: No I was respondent. In view of the position that The Official Guardian took, I wanted to make that clear.

Mr. JUSTICE KERWIN: The Official Guardian will have his costs. That may be added, if necessary.

Appeal dismissed with costs.

Solicitors for the appellants: *Farrell, Gauld & Hill.*

Solicitor for the respondent, National Trust Co.: *D. J. Walker.*

Solicitor for the respondent, The Official Guardian: *F. T. Watson.*