Privy Council Appeal No. 35 of 1994

Rita Marley and Others *Appellants*

v.

Mutual Security Merchant Bank and Trust Company Limited *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND FEBRUARY 1995

Present at the hearing:-

LORD JAUNCEY OF TULLICHETTLE
LORD GRIFFITHS
LORD OLIVER OF AYLMERTON
LORD SLYNN OF HADLEY
LORD NICHOLLS OF BIRKENHEAD

*[Delivered by **Lord Griffiths**]*

Robert Nesta Marley, known professionally as Bob Marley, died intestate on 11th May 1981 leaving a widow and eleven children. The Mutual Security Merchant Bank and Trust Company Limited, the respondent bank, the deceased's widow and George Desnoes were appointed Administrators of the Estate on 17th December 1981. The widow and George Desnoes ceased to act as administrators in 1987 and the respondent bank is now the sole administrator of the estate.

Bob Marley was a highly successful musician and since his death large sums of recording royalties have been received by the respondent bank on behalf of his estate. The bank's power of investment of these sums was limited to investing them in trustee securities as provided by section 3 of the Trustee Act. In breach of this limitation on their power of investment the bank had between 1st November 1986 and 30th September 1987 placed the total sum of $6,385,449.20 on yearly deposits with itself; $3,425,249.20 had been placed on deposit in the name of the estate main account, $325,000 in the name of each of the nine infant beneficiaries and $35,200 in the name of Karen, a total of $2,960,200.

The bank, presumably realising belatedly that it had no power to invest the estate funds in its own deposits, applied to the High Court for the following relief by summons dated 3rd March 1988:-

"1) That the investment of Estate Funds by the Plaintiff as Administrator by way of deposit with Mutual Security Merchant Bank and Trust Company Limited, Bank of Jamaica and in Government of Jamaica local registered stock be approved;

2) That the Plaintiff as Administrator of the abovenamed Robert Nesta Marley, Deceased may be at liberty to invest Estate Funds by way of deposit within reputable Commercial Banks and Trust Companies and other Financial Institutions which yield a higher rate of interest than that which would be obtained by way of ordinary trustee investment;

3) If and so far as may be necessary, administration of the estate of the said Robert Nesta Marley, deceased;

4) That provision may be made for the costs of this Application."

The only evidence filed in support of this summons for relief was a short affidavit sworn by the Managing Director of the bank, the material parts of which are as follows:-

"3. THAT during the course of administration of the estate, large sums of moneys produced from Royalties earned from the sale of the Deceased's recordings and musical works are received by the Trust Company. I exhibit hereto marked 'A', a Schedule of Investments deposited by the Trust Company on behalf of the estate as at October, 1987.

4. THAT as the estate is an intestate one investments should be in accordance with Trustee Investments.

Trustee Investments only yield 11 percent per annum as they have to be placed in Government Stocks or in mortgages of real estate.

Investments from recognised Commercial Banks and Institutions yield approximately 15 to 18 percent per annum.

5. THAT it is in the best interests of the estate to obtain the best yield on investment for the benefit of the estate and the beneficiaries.

6. THAT the applicant herein, MUTUAL SECURITY MERCHANT BANK AND TRUST COMPANY LIMITED seeks the approval of the Court to invest the estate's funds with Commercial Banks and Institutions so that the best rate of interest can be obtained for the estate."

Schedule A showed the deposits with itself already referred to, and also the sums of $5,000,000 deposited with Bank of Jamaica for one year on 8th June 1987 at 17.5% and $500,000 deposited with Bank of Jamaica for one year on 10th September 1987 at 18%; and holdings of $4,000 Government of Jamaica 15% Local Registered Stock redeemable 1st April 1991 and $58,840 Government of Jamaica 11% Local Registered Stock redeemable 1st May 1999.

In his judgment in the Court of Appeal Downer J.A. points out:-

> "It does not appear, therefore, to have been necessary to seek approval for investments made in the Bank of Jamaica securities or in Local Registered Stock. For the status of these instruments as authorised Trustee Investments see section 23(d)(i) and (ii) of Bank of Jamaica Act and Local Registered Stock Act; see also The Treasury Bills and other relevant Acts pursuant to section 3(b) of the Trustee Act."

The deposits with the Bank of Jamaica were yielding 18% and 17.5% and if they are trustee securities it is difficult to understand the assertion in the affidavit of the managing director of the bank that trustee securities were only yielding 11%. Their Lordships are not however concerned with the status of the deposits with the Bank of Jamaica but only of those with the bank, which it is conceded were not trustee investments.

On 2nd May 1988, the summons was adjourned because three of the infant beneficiaries were not represented. On 21st July 1988 Mr. Hylton wrote on behalf of the beneficiaries to the bank's lawyers pointing out that the affidavit of the managing director did not say whether the interest paid by the bank was equal to or higher than other commercial banks. On 2nd August 1988 the bank's lawyers replied "Prior to the hearing we shall have the Administrator file an affidavit showing the amount of funds on deposit and the rates of interest thereon, as well as showing comparative rates being paid by other Trust companies/Commercial Banks".

Mr. Hylton, having heard nothing further from the bank's lawyers, filed an affidavit sworn on 27th February 1989 in which he exhibited letters from two merchant banks which showed rates of interest marginally higher or at least comparable to those paid by the bank.

On 30th November 1989 the managing director of the bank swore an affidavit in reply exhibiting the rates offered by other commercial banks which again were marginally higher or comparable to those of the bank, and claiming that the bank offered the following special facilities to the estate:

There may be a wholly exceptional case in which the court would be justified in approving a bank investing estate funds in its own deposits on the grounds that it gave a unique advantage to the beneficiaries unobtainable elsewhere; but no such unique advantage was established by the sparse evidence adduced by the bank in this case. The interest obtainable on deposit at other commercial banks was equal to if not higher than that paid by the bank, and as to the suggestion that there would be no penalties on encashment of deposits prior to maturity dates, or interest on overdrafts, no evidence suggested that either contingency had arisen or was likely to do so. In view of the large liquid sums in the estate it is difficult to believe that proper management would have allowed them to occur. The only other suggested advantage to the beneficiaries was that interest was paid monthly on the children's accounts, but again it was not suggested in evidence that other commercial banks would not have offered this facility in return for such large deposits.

In their Lordships' view the judge was fully justified in his view that the material before him was insufficient to approve of the respondent bank investing in its own deposits in the past or in the future. The majority of the Court of Appeal were of opinion that the record of the meetings in September and October 1987 between the bank and some of the beneficiaries and their attorneys was conclusive evidence of the agreement of the beneficiaries to the deposit by the bank with itself. The difficulty with this view is that three of the infant beneficiaries were not represented at any of these meetings, nor could any of the infant beneficiaries be bound by such an agreement unless it was demonstrated to be in the best interest of the infant beneficiaries.

The judge did not refer in his judgment to these meetings nor to a claim for loss of profits by the beneficiaries. No doubt this was because the summons claiming loss of profits issued by the 7th, 8th and 10th appellants was not before him when he dealt with the bank's summons. In the absence of any claim for an account of loss of profits before the judge, the beneficiaries' appeal that he erred in failing to order such an account was bound to fail, nor can it be successfully resurrected before this Board.

If the beneficiaries do choose to pursue a claim for an account of profits, the nature of the agreements and the extent to which they may bind the beneficiaries will have to be considered. It is possible that some beneficiaries might prove to have lost the right to claim for breach of trust by the acquiescence of themselves or their attorneys, whilst others would not be so bound. These, however, are not matters with which their Lordships can deal on this appeal.

The parties did not invite the judge to make an order for the delivery of quarterly accounts and all are agreed that it would involve the estate in unnecessary expense. It

should also be recorded that the bank was content with the order of the judge that excluded its own deposits from future investments on behalf of the estate.

Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be allowed, the order of the Court of Appeal set aside and the order of the judge restored save for paragraph 3 relating to the submission of quarterly returns which shall be deleted.

There remains for consideration the question of costs. The principal contest in this appeal has been whether or not the judge should have approved the bank's conduct in investing the estate funds in its own deposits. On this issue the bank has failed, and it must pay the appellants' costs of the appeal and the cross-appeal in the Court of Appeal and before this Board. The judge's order that the costs of the summons and order be paid out of the estate will not be disturbed.