Marley & Ors v Mutual Security Merchant Bank & Trust Co Ltd.

[1995] C.L.C. 261

JUDGMENT

(Delivered by Lord Griffiths)

Robert Nesta Marley, known professionally as Bob Marley, died intestate on 11 May 1981 leaving a widow and 11 children. The Mutual Security Merchant Bank & Trust Co Ltd, the respondent bank, the deceased's widow and George Desnoes were appointed administrators of the estate on 17 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 s. 3 of the Trustee Act. In breach of this limitation on their power of investment the bank had between 1 November 1986 and 30 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 3 March 1988:

'(1) That the investment of estate funds by the plaintiff as administrator by way of deposit with Mutual Security Merchant Bank & Trust Co Ltd, 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 per cent 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 15-18 per cent 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 & Trust Co Ltd 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 8 June

1987 at 17.5 per cent and $500,000 deposited with Bank of Jamaica for one year on 10 September 1987 at 18 per cent; and holdings of $4,000 Government of Jamaica 15 per cent local registered stock redeemable 1 April 1991 and $58,840 Government of Jamaica 11 per cent local registered stock redeemable I May 1999.

In his judgment in the Court of Appeal, Downer JA 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 s. 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 s. 3(b) of the Trustee Act.'

The deposits with the Bank of Jamaica were yielding 18 per cent and 17.5 per cent 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 per cent. 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 2 May 1988, the summons was adjourned because three of the infant beneficiaries were not represented. On 21 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 2 August 198& 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, Med an affidavit sworn on 27 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 30 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:

(1) No penalties for encashment of deposits prior to maturity dates which normally attract payment of penalties of between one per cent and two per cent.

(2) No interest payable on overdraft balances on accounts.

Finally the affidavit stated that the question of investing funds in the bank had been discussed with attorneys representing the beneficiaries and one of the mothers of an infant beneficiary, and notes of those meetings on 16 and 21 September and 27 October 1987 were exhibited.

On 4 January 1990 a summons was issued on behalf of the seventh, eighth and tenth appellants for an order that:

(1) There be an enquiry as to the profits made by the plaintiff from the investment of trust funds belonging to the estate of Robert Nesta Marley with itself. The plaintiff do pay over to the said estate all such profits.

(2) The plaintiff do pay the costs of these proceedings on a solicitor and client basis.

The bank's summons was heard by Theobalds J on 22, 23 and 25 January 1990. The beneficiaries all opposed the order in so far as it sought to sanction and permit investment of the estate funds in the bank's own deposit accounts. The judge was not prepared to approve the deposits already made with the bank or to permit it to make such deposits in the future, and made the following order:

'(1) Order in terms of the originating summons date 3 March 1988 with the deletion of para. I which reads:

"That the investment of estate funds by the plaintiff as administrator by way of deposit with Mutual Security Merchant Bank & Trust Co Ltd, Bank of Jamaica and in Government of Jamaica local registered stocks be approved."

In my view there is not sufficient material on which the order sought in para. I could be made with retroactive effect.

(2) There will be an order in terms of para. 2 of the originating summons, with addition of the words “other than the plaintiff” at the end of line 5 of the summons. It would read, therefore:

“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 other than the plaintiff which yield a higher rate of interest than that which would be obtained by way of ordinary trustee investments.”

(3) Under para. 3 and bearing in mind the section of the Trustee Act referred to by me above, I order that quarterly returns be submitted by the plaintiff to each defendant week ending (sic) from I February, next giving full particulars of each current investment and the profits derived therefrom, such profits to be for the account of each defendant, less appropriate charges for commissions, remuneration and other expenses.

(4) Under para. 4, costs of application and order to be paid to the plaintiff and defendants on a solicitor and client basis out of the estate. Certificates for counsel.

(5) Leave to the parties to appeal granted, if necessary.’

From this order the beneficiaries appealed on the ground that the judge should have ordered the bank to account to the beneficiaries for all profits it made from the estate funds placed on deposit with the bank; and against his order that costs be paid out of the estate. The bank cross-appealed on the ground that the judge erred in not approving the investment by the bank in its own deposits and not approving future investment in its own deposits. The bank also cross-appealed against the judge's order that the bank should submit quarterly returns to the beneficiaries.

The Court of Appeal by a majority dismissed the appeal and allowed the cross-appeal. The order of the judge was set aside save as to costs, and an order made in the terms of the bank's summons which sanctioned the deposits already made with the bank and permitted them in the future.

In the opinion of their Lordships the judge was right to refuse to approve the conduct of the bank in placing estate funds on yearly deposit with itself, and to refuse to permit them to do so in the future.

It is a rule so well established that no authority need be cited that a trustee in the absence of specific permission in the trust instrument or given by the beneficiaries is not entitled to make a profit for itself out of trust funds. A bank makes profits by taking money on deposit and then lending that money at a higher rate of interest than it pays on the deposit. This raises an immediate conflict of interest between the duty the bank owes to the beneficiaries which is to obtain the highest rate of interest on the deposit, and the duty to its shareholders to pay the lowest rate of interest on the deposit and thus maximise its profit when it]ends the deposit to other customers.

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 seventh, eighth and tenth 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 para. 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.

(Appeal allowed)

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