Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 14 of 1990

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

IN THE MATTER of the Estate of ROBERT NESTA MARLEY late of 56 Hope Road in the Parish of St. Andrew, Musician and Entertainer, deceased, intestate.

BETWEEN	RITA MARLEY	1ST APPELLANT
AND	CEDELLA ANITTA MARLEY	2ND APPELLANT
AND	DAVID NESTA MARLEY	3RD APPELLANT
AND	STEPHEN ROBERT NESTA MARLEY (AN INFANT)	4TH APPELLANT
AND	STEPHANIE SARI MARLEY (AN INFANT)	5TH APPELLANT
AND	MAKEDA JAHNESTA MARLEY (AN INFANT)	6TH APPELLANT
AND	ROHAN ANTHONY MARLEY	7TH APPELLANT
AND	KYMANI RONALD MARLEY	8TH APPELLANT
AND	ROBERT NESTA MARLEY (AN INFANT)	9TH APPELLANT
AND	JULIAN-RICARDO MARLEY (AN INFANT)	10TH APPELLANT
AND	DAMIAN ALEXIS ROBERT NESTA MARLEY (AN INFANT)	11TH APPELLANT
AND	KARMI SOPHIA MICHELLE MARLEY (AN INFANT)	12TH APPELLANT
AND	MUTUAL SECURITY MERCHANT BANK AND TRUST COMPANY	RESPONDENT

Michael Hylton and Debbie Fraser
for appellants nos. 1-5, 7, 9, 10 & 12

D. E. Frankson for appellant no. 6

Appellants nos. 8 & 11 not represented

R. N. A. Henriques, Q.C. and D. Batts, instructed by Douglas Brandon of Messrs. Livingston, Alexander & Levy, for respondent

November 30, December 1 & 2, 1992 and July 29, 1993

WRIGHT, J.A.:

This is an appeal against an order made by Theobalds, J. on January 25, 1990, by which he sought to resolve issues raised by the respondent as Administrator of the Estate of the late Robert Nesta Marley. The deceased had died on May 11, 1981, and the respondent's appointment was by Letters of Administration on December 17, 1981. The two points in the appeal may be summarised as follows:

1. The learned trial judge did not go far enough in the order and as a result there is (made) a shortcoming which this court is asked to rectify by making the appropriate order; and

2. The order for costs out of the estate is wrong.

The respondent has cross-appealed citing several errors of law and wrong exercise of discretion as follows:

"1. For an Order that the said Order be set aside and that an Order be made approving the investment of the Estate funds by the Respondent as Administrator by way of deposit with Mutual Security Bank and Trust Company Limited, Bank of Jamaica and Government Local Registered Stock be approved;

2. That the Respondent as Administrator may be at liberty to invest the estate funds by way of deposit with 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 investments;

3. That costs of the said Application and this Appeal by the Respondent be paid out of the Estate

AND TAKE NOTICE that the grounds on which the Respondent intends to rely are as follows:

1. That the Learned Judge erred as a matter of law when he failed to make an Order under Paragraph 1 of the Originating Summons as there was ample evidence on which to found such an Order;

"2. That the Learned Judge erred as a matter of law when he of his own motion amended the Originating Summons and purported to make an Order thereon;

3. That the Learned Judge erred as a matter of law when he failed to exercise his discretion and make an Order in accordance with Paragraph 2 of the Originating Summons;

4. That the Learned Judge erred as a matter of law when he failed to properly exercise his judicial discretion in failing to appreciate that it was to the advantage of the Beneficiaries as was clear from the evidence before him to have the funds vested with, among others, the Respondent;

5. That the Learned Judge erred as a matter of law when he failed to appreciate that the Order which he has made was to the disadvantage of the Beneficiaries in that it involves increased administration expenses and consequently reduced the sums which the Beneficiaries would receive;

6. That the Learned Judge failed to appreciate that having regard to his Order made under Paragraph 2 of the Originating Summons and purporting to make the Order as he did under Paragraph 3 as being in the administration of the estate was confused as there could be no profits to be accounted for but only income from the deposits;

7. That the totality of the Order made by the Learned Judge was not in the best interest of the Beneficiaries and clearly indicated that the Learned Judge failed to exercise his discretion on the well established judicial principles that such discretion should be exercised in what was the best interest of the Beneficiaries and made an Order which was to their disadvantage;

8. That the Learned Judge erred when he failed to appreciate that depositing money with a Bank or Trust Company is not considered or deemed to be an investment for the purposes of the Application of the equity principal (sic) of a conflict of interest and further erred when he amended the Originating Summons and made the Order thereon pursuant to his amendment;

"9. That the Learned Judge erred as a matter of law when he held that there was not ample evidence before him to make an Order under Paragraph 1 of the Originating Summons as at no time during the hearing did he so indicate so as to give Counsel an opportunity of dealing with same, and further, as no point was raised in this regard by the Appellants;

10. That the Learned Judge erred as a matter of law when he made the Order as he did under Paragraph 3 of the Originating Summons in respect of the rendering of quarterly accounts, as no submission was made to him in this regard nor was any opportunity given to Counsel to deal with same, and the Judge on his own volition made the said Order."

Resort to the court became necessary because the respondent had involved the Estate Funds in transactions outside prescribed Trustee Investments. Section 3 of the Trustee Act (the Act) specifies those investments thus:

> "A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say-
>
> (a) in any investment authorized by any Act of Parliament of the United Kingdom;
>
> (b) in any securities, the interest of which is for the time guaranteed by any enactment of this Island or the Government of this Island;
>
> (c) on real securities in this Island,
>
> and may also from time to time vary any such investment."

By section 41 of the Act, a trustee is at liberty to apply to the court for an option, advice or direction on any question respecting the management or administration of the Trust. Hence a trustee in the position of the Administrator is enabled to seek the court's sanction for his acts. Accordingly, the respondent brought the Originating Summons in which the following reliefs were sought:

"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."

This summons was supported by the affidavit of George Louis Byles dated 29th February, 1988, which states as follows:

"1. THAT my true place of abode is at 4 Hopefield Avenue in the Parish of Saint Andrew, my postal address is Post Office Box 622, Kingston Post Office and I am Managing Director of MUTUAL SECURITY MERCHANT BANK AND TRUST COMPANY LIMITED (hereinafter called 'the Trust Company').

2. THAT the HONOURABLE ROBERT NESTA MARLEY, O.M. (hereinafter called 'the Deceased') died on the 11th day of May, 1981. Letters of Administration in his estate were granted to the Trust Company and to Rita Marley and George Desnoes by this Honourable Court on the 17th day of December, 1981. Both Rita Marley and Mr. George Desnoes are no longer Administrators in the case of Mrs. Marley on the ground that she has to account to the Estate for funds coming to her hands belonging to the estate and Mr. George Desnoes on the ground of ill-health.

3. THAT during the course of administration of the estate, large sums of money 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."

This affidavit was later amplified by another dated 30th November, 1989, which sought to meet objections which had been raised pertaining to the rate of interest paid by the respondent. There is no other evidence in the record. The court made the folowing order:

"1. THAT there will be an Order in terms of the Originating Summons dated 3rd March, 1988 with the deletion of paragraph 1 of the Summons which reads as follows:

'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 there will be an Order in terms of Paragraph 2 of the Originating Summons with the addition of the words 'other than the Plaintiff' at the end of the fifth line of Paragraph 2 of the Summons so that same shall read as follows:

'2. That the Plaintiff as Administrator of the abovenamed ROBERT NESTA MARLEY, deceased may be at liberty to invest funds by way of deposit with reputable Commercial Banks and Trust Companys 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 Investment.'

3. THAT the costs of the Originating Summons and this Order be paid out of the Estate on a Solicitor and Client basis with Certificate as to costs.

4. Quarterly returns to be submitted by the Plaintiff to each Defendant week-ending from the 1st February, 1990 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 commission, remuneration and other expenses.

Liberty to the parties to appeal, if necessary."

The first limb of the appeal complains that:

"The learned judge having properly found that the investments made by the respondent were improper and not permitted under the law and that any profits made should enure to the benefit of the estate, erred in not ordering the respondent to account for its investments from the date it first made the investment."

The oral judgment delivered is a brief one and deals almost exclusively with the question of self-dealing which is not really a finding by the court since it is patent from the summons and the supporting affidavit. It is precisely because the investments are not within the prescribed ambit of investments by trustees why the approval of the court had to be sought. If the court dealt with the extenuating circumstances prayed by the respondent it is not apparent from the record of the judgment.

The record discloses that at the time the summons was brought nine of the twelve beneficiaries were infants and at the hearing of the appeal four were still infants. The plea in misericordia by the respondent is that it was necessary to have ready moneys to meet, on a monthly basis, the requirements for the maintenance of the infants and to meet other recurring expenses which it would be both difficult and costly to do if the funds were invested in Trustee Investments. Hence the need

to place money on deposit with itself which yielded a higher rate of interest than Trustee Investments which yield only 11% per annum. Further, the respondent pleaded, the investments which had been made both by deposit with itself and other commercial banks were in the best interest of the estate because of the higher interest received.

A second consideration is the nature of the Estate Fund. It consists of large sums of moneys produced from royalties earned from the sale of the deceased's recordings and musical works. The investments disclosed are as follows:

"Amount	Date of Investment	Where Invested	Interest Rate	Date for Payment of interest	Maturity Date
$ 284,725.00	1.11.86	Mutual Security Merchant Bank & Trust Co. Ltd.	16.50%	Quarterly	1.11.87
1,376,500.00	17.12.86	-do-	16.25%	-do-	17.12.87
840,948.00	19.2.87	-do-	15.75%	-do-	19.2.88
161,576.20	15.5.87	-do-	16.75%	On maturity	15.11.87
5,000.00	2.6.87	-do-	15.00%	Quarterly	2.6.88
5,000,000.00	8.6.87	Bank of Jamaica	17.50%	On maturity	7.12.87
519,000.00	23.7.87	Mutual Security Merchant Bank & Trust Co. Ltd.	16.00%	On maturity	23.1.88
90,500.00	8.9.87	-do-	16.75%	-do-	8.3.88
150,000.00	10.9.87	-do-	15.75%	-do-	10.8.88
500,000.00	10.9.87	Bank of Jamaica	16.00%	On maturity	9.12.87."

In addition, there are accounts in the names of each infant in the amount of $325,000 with interest rate at 16.75% payable monthly. These accounts are one-year deposits with the respondent and were due for maturity on 30th September, 1988. Additionally, the account of Karen reflects an amount of $35,200 with interest at the rate of 16.50% payable on maturity (8th December, 1987) and the account of Damian has two further credits: $4,000 Government of Jamaica 15% Local Registered Stock due for redemption the 1st April, 1991, and $58,840

Government of Jamaica 11% Local Registered Stock due for redemption on 1st May, 1999. The spread of the investments were, therefore, as follows:

With the respondent	$6,405,449
With the Bank of Jamaica	5,500,000
Local Registered Stock	62,000

Interest rates paid by other banks were put before the court. They do not appear to have been referred to and could be but of little use for want of particulars as to amounts and the periods for which the deposits had to be held. However, a table of composite rates furnished by the respondent was more enlightening:

" COMPANY	AMOUNT OF INVESTMENT	YEAR	LOW	HIGH
JCB Trust & Merchant Bank Ltd.	$1,000,000 and over	1987	15.50%	18%
		1988	14%	18%
CIBC Trust Ja. Ltd.	500,000 and over	1987	14%	15.50%
		1988	14%	16%
Bank of Nova Scotia Trust Co. Ltd.	500,00 and over	1987	14%	16%
		1988	14%	16%
NCB Mortgage & Trust Co. Ltd.	500,000 and over	1987	15%	16.50%
		1988	13%	15.25%
Mutual Security Merchant & Trust Co. Ltd. (Marley Estate)	500,000 and over	1987	15.75%	16.25%
		1988	16.25%	17.50% "

What do these figures show? That for 1987 the low rate paid by the respondent was the highest of the five banks in question. Further, that for that same year the respondent's High Rate compared favourably with the High Rates of three of the other banks while for 1988 it paid the highest rate of 17.50% for a similar amount of $500,000 being lower only by one half percent than the eighteen percent which JCB paid for a deposit twice as large. These would be investments in the same category as investments with the respondent, viz. non-trustee investments. The trustee investments are shown to give a return of eleven percent. So clearly the rate paid by the respondent on the infants' accounts was better by 5.75% and on the other deposits by 4% - 5.75%. In money terms

there is a clear advantage to the beneficiaries. The big question, therefore, is whether there are any exceptional circumstances which can excuse the respondent for having made the investments in question. In this regard, a fact of no little significance is that in his submissions before us Mr. Hylton conceded the validity of the respondent's need to have ready moneys to meet the maintenance requirements of the infants. But even so, there was no guidance from the court which might have been done under the third relief sought on the Summons as to how that need should be met nor did Mr. Hylton, while vigorously opposing self-dealing by the respondent, have any practical suggestions on the matter.

The rationale of the learned trial judge's decision was stated thus:

> "I have considered the Plaintiff's Attorney's submissions that this rule is not inflexible. The exceptions cited by him do not fall within the scope of this case.
>
> The principle is designed to avoid argument or the possibility of argument arising over interest rates paid to beneficiaries. One has to bear in mind that the trust company's duties or business involves receiving trust funds in order to re-invest them. In the case of customers whose patronage is invited by advertisements, they are bound by the trust company's rates, as offered. For example if 19% is offered by advertisements the most expected by the customer is 19%. They (the customers) have no business or interest in what the trust company does with their money.
>
> However in the case of a trust company appointed by the court particularly where infants are concerned different considerations apply. The rule is that whenever a trust company holds capital on trust for beneficiaries it is accountable to the beneficiaries for all the profits made out of the capital vested in the company.
>
> There is no suggestion nint or possibility that the principle is based on dishonesty or misuse of trust funds. The principle is to avoid arguments over interest rates offered. In these circumstances, a trustee ought never to invest trust funds in its own company unless done with the acquiescence and

> "approval of beneficiaries and at higher rates or on better terms than those available elsewhere."

The contention of the appellants under consideration interprets the learned trial judge's decision as reflecting a total discountenancing of self-dealing; **hence** the complaint of error by the learned trial judge and the prayer for the order:

> "3. The Respondent within thirty days submit returns to each Appellant, giving full particulars of each investment and the profits derived therefrom with effect from November 1, 1986, such profits to be for the account of each appellant less appropriate charges for commissions, remuneration and other expenses;
>
> 4. The Appellants be at liberty to apply to the Registrar for an enquiry into such accounts;
>
> 5. The Respondent personally pay the costs of the application, order and this appeal, without recourse to the funds income or assets of the Estate of Robert Nesta Marley."

Authority cited for these claims are statements in the judgment of Harman, J. in **Re Waterman's Will Trusts** (1952) 2 Ch. D. 1055 at letters C and G:

1055C: "I say I must assume that, but I do not forget that a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee, and that a bank which advertise itself largely in the public press as taking charge of administration is under a special duty."

1055G: "I want to make it clear that I am only dealing with a very narrow matter, and that is not whether this was a proper investment of trust money - it is conceded that it was not. I am not deciding that a bank can ever invest money, assuming that it is investment of money to put it on deposit, by depositing it with itself. I am merely dealing with moneys which I assume are moneys which would not have been invested by a prudent trustee."

That case had to do with a trustee bank depositing the bulk of the trust funds with itself at a very low rate of interest but upon inquiry it resulted that though the estate had suffered the manner in which the funds had been handled

was permissible under the trust instrument. At page 1055B Harman, J, after setting out the facts of the case, said:

> "In those circumstances the bank, through its manager at Brighton, who was in charge of this administration, filed an affidavit explaining, or seeking to explain, why, over this long period, no investment had been made. In the upshot no beneficiary before me desired to attack the bank on the basis that there was a breach of trust in failing so to invest, and it seemed to me impossible, on an administration suit started, not by writ, but by summons, to charge these trustees with wilful default as would have been necessary to raise the question of breach of trust. I must, therefore, assume, in spite of all appearance, that there was nothing more than such a want of judgment shown as the court would excuse."

I accept Mr. Henriques' submission that this case is irrelevant to the appellants' case.

I agree that in deciding as he did the learned trial judge was in error but not the error claimed by the appellants. Rather the error results from a failure to apply the principle which he enunciated:

> "In these circumstances, a trustee ought never to invest trust funds in its own company unless done with the acquiescence and approval of beneficiaries and at higher rates or on better terms than those available elsewhere."

But before examining this aspect of the case, it is pertinent to note what Mr. Henriques submitted, that the respondent is not here answering to any charge of breach of trust which could not arise on an originating summons since such charges must be particularised to enable the trustee to plead to them. See **Waterman's Will Trusts** (supra) at 1055B per Harman, J. If that had been done, he submitted, the respondent would have been able to plead acquiescence, the very exonerating factor instanced by the learned trial judge.

I return now to deal with the error identified. Mr. Henriques informed the court that each beneficiary is supplied with an annual statement which would disclose the nature and location of the investments. No objection was

ever raised regarding the deposits in question. Then, there are exhibited to the second affidavit of George Louis Byles two documents (exhibits "D" & "E") which must have been overlooked or their significance not fully appreciated. Exhibit "D", bearing dates September 16, 1987, September 21, 1987 and October 7, 1987, is a record of conversations with Mrs. Cindy Tavares-Finson, the legal guardian of Damian, who sought to ascertain the possibility of the trustee paying to her the sum of $135,000 standing in Damian's name. On being advised that that money could not be released until Damian was eighteen years of age but that the income could be paid out she proceeded to open an account with the respondent bank and supplied the account number so that the income could be lodged thereto. As far as she is concerned the question of acquiescence is beyond dispute. Exhibit "E" reflects the events at a meeting on October 27, 1987, attended by G. Louis Byles and Mrs. Elaine Waite, Mr. Melvin Carey, representing the respondent, Mr. Reid Bingham, representing Hughes, Hubbard and Reid, Mr. Peter Millingen, Mr. Donald Chin See, Mr. Douglas Brandon, Mr. R. Henriques, Miss Pauline Findlay, attorney-at-law and Miss Cedella Marley. Item 1(b) on the agenda was "**Investments of funds held for children**". The record reads:

> "This matter was discussed and Mrs. Waite gave the meeting particulars of the investments held and it was agreed that for the time being investments in certificates of deposit should continue as they produced a higher yield and more flexibility for the use of the funds, but further consideration should be given to the matter later on."

To my mind, this is uncontroverted evidence which decisively settles the question of acquiescence in favour of the respondent. It is manifest, therefore, that the basis for approval of the trustee's conduct has been established. In my opinion, then, the respondent is correct in its complaint about the learned trial judge's decision on the inadequacy of evidence the moreso that that issue was never raised so as to allow for ampler treatment.

There are certain peculiarities in the order made which give rise to the several grounds of appeal in the respondent's cross-appeal:

1. Exclusion of investments in Mutual Security Merchant Bank & Trust Co. from the non-trustee investments which were approved.

2. Tacit approval of such investments between 1986 and 25.1.90

3. The ordering of Quarterly Returns reflecting profits.

4. Amendment of the Originating Summons.

As to (1) the examination of the evidence regarding the deposits made with Mutual Security Merchant Bank and Trust Company Limited discloses a judicious husbanding of the funds which can only redound to the credit of the trustee who has clearly acted with due regard to the best interest of the beneficiaries with their acquiescence paying the while a rate which was higher than the rates obtainable from Trustee investments and higher, too, than the rates paid by the other commercial institutions with which the court has approved investment of the Estate Funds. There is no apparent justification for the exclusion of the respondent from the approved commercial institutions when, in addition to meeting the criteria stated by the learned trial judge, the respondent gave added concessions, viz:

(a) No penalties for the encashment of deposits prior to maturity dates which normally attract penalties between 1% and 2%; and

(b) No interest was payable on overdraft balances on accounts which is normally in the region of 19%.

Then, there is the responsibility already referred to, of finding moneys on a monthly basis for the maintenance of the infant beneficiaries.

Had there been a lack of competence on the part of the persons who, in my opinion, have been shown to have acquiesced then the strict principle enunciated by Viscount Dunedin in **Wright v. Morgan** (1926) A.C. 788 at 797 would apply:

> "It would be profitless to quote the many cases which have risen to illustrate the doctrine. They may all be referred to the same root idea, that equity will not allow a person, who is in a position of trust, to carry out a transaction where there is a conflict between his duty and his interest."

However, it is my view that the facts assuage the severity of this rule. Relevant to this conclusion is the evidence showing acquiescence which would preclude the beneficiaries from challenging what had been done. See **In re Thompson's Settlement** (1985) 1 Ch. 99 per Vinelott, J. at page 115:

> The transaction cannot stand if challenged by a beneficiary..."

Accordingly, the conduct of the respondent, though not initially undertaken with the approval of the beneficiaries, has been ratified by them and recourse to the court may be seen as an effort to put the matter beyond doubt.

The order made on 25th January, 1990, refusing a continuance of investments with the respondent, tacitly endorsed such investments as had been made between 1986 and 25th January, 1990, and although the evidence of acquiescence appears to have been overlooked, approval of such investments would reflect a proper exercise of the learned trial judge's discretion. The refusal to continue those investments where no impropriety has been shown presents a difficulty, the answer to which is not apparent.

The ordering of the Quarterly Returns reflecting profits was obviously done by the learned trial judge suo moto without the parties having been given an opportunity to express their views. The respondent complains that this step taken by the learned trial judge involves not only the amending of the Originating Summons with which I will deal later but, as well, the imposition of an additional burden on the estate fund, which is certainly not in the interest of the beneficiaries, and also an error in thinking that the trustee can be made to account for both income and profits.

Regarding the last point, it must be borne in mind that there is no consideration here of any breach of trust. Accordingly, the rules relating thereto are not relevant. Further, it is patent from the nature of the transaction that what is involved are deposits producing interest which is already disclosed in the annual statements of account about which there have been no complaints.

Concerning the quarterly returns, it is agreed between the parties that the court was not requested to make any such order; that the costs of providing such returns would be a drain on the estate funds and, consequently, the interest of the beneficiaries would not thereby be served; that it would be impracticable, having regard to the dispersal of the investments and the varying banking calendars of the various banks, to comply with such an order and, finally, that they are not necessary. There is no need to say anything more on that aspect of the matter.

Apart from the question of costs which was raised by the appellants, the only matters remaining for consideration are as reflected in ground 8 of the respondent's grounds of appeal, one of which matter is the fourth peculiarity referred to above, viz. the amending of the Originating Summons. The ground of appeal reads:

> "(8) That the Learned Judge erred when he failed to appreciate that depositing money with a Bank or Trust Company is not considered or deemed to be an investment for the purposes of the Application of the equity principal (sic) of a conflict of interest and further erred when he amended the Originating Summons and made the Order thereon pursuant to his amendment."

The other matter complained of is the status of the deposits, consideration of which to my mind is purely of academic interest. Mr. Henriques submitted that the deposits in question are not investments such as to attract the application of the equity principle of conflict of interest. True it is that there are occasions when deposits

do not rank as investments. Such is the case when the deposits are made while the trustee is seeking investments. See **Price v. Newton** (1905) 2 Ch. 55. But that is clearly not the case here. It appears sufficiently clear from the evidence presented that no further investments were contemplated beyond the deposits in question and that it is the interest from those deposits which were being primarily utilized for the maintenance of the infant beneficiaries. Where there are deposits with the respondent bank it is obvious that conflict of interest could possibly arise in determining the rates to be paid as against rates which the bank needs to make in its own interest and it is only because the respondent has shown from the rates of interest paid and the securing of the acquiescence of the beneficiaries that it was careful to act justly in the circumstances why I am of the view that it has escaped the rule against self-dealing. But at any rate, it seems to me to be too late in the day for the respondent to question the status of the deposits when the matter came before the court at its instance with the deposits designated as "**Investments by way of deposits**". If such a submission were to succeed then such a volte face would render the whole proceedings an exercise in futility and would justify visiting the respondent personally with the costs of the proceedings. But I hesitate to attribute such intentions to the respondent. Rather it seems to me that in the effort to annihilate the offending order this submission, unworthy I should think of counsel, appeared attractive enough to be included in his weaponry without the danger of it exploding in his own armoury being appreciated. It is relevant to note that in the definition of **investments**, cited earlier, there is included:

> "(a) any investment authorised by any Act of Parliament of the United Kingdom."

By the Trustee Investments Act, 1961, (an Act of Parliament of the United Kingdom) deposits in the National Savings Bank

are permitted as trustee investments. Therefore, the idea of investments by way of deposit is not novel.

The question of the amending of the Originating Summons by the learned trial judge, implicit in the making of orders not sought in the summons, need not occupy much time: Order 7/1-7/12 of the 1988 White Book, reflecting earlier provisions, permit considerable freedom of amendment before a final order is made thereon. But after such an order the summons is not kept alive unless the order so provides, for example, by standing over with liberty to restore some question raised or relief prayed thereby. See **Re Pattman's Will Trusts** (1965) 1 W.L.R. 728; (1965) 2 All E.R. 191. Implicit in this provision is the fact that the questions raised in the Originating Summons are the only ones which the court hearing the matter can competently deal with. And even though it is thought that in its inherent jurisdiction the court may amend the Originating Summons (See **Punton vs. Ministry of Pensions** [1963] 1 W.L.R. 186; [1963] 1 All E.R. 275) it would be eminently unfair for the court to proceed, in any event where new issues are involved, to act upon such amendment without hearing the parties thereon. The impugned order appears to owe its genesis to such an exercise of inherent jurisdiction by the court of which the parties were ignorant. For that reason alone it should not be allowed to stand.

The final consideration concerns the question of costs. In opposition to the order of the court that:

> "the costs of the Originating Summons and this order be paid out of the Estate on a Solicitor and Client basis."

the appellants pray that:

> "the respondent personally pay the costs of the application order and this appeal, without recourse to the funds, income or assets of the Estate of Robert Nesta Marley."

On the other hand, the prayer of the respondent is:

> "that costs of the said application and this appeal by the respondent be paid out of the Estate."

The contention of the appellants is based on the allegation that the learned trial judge properly found that the investments made by the respondent were improper and not permitted under the law and that he erred, in those circumstances, in ordering that the estate bear the cost of the action. I have a difficulty with that contention when it is borne in mind that the very investments which have been labelled impermissible, with the exception of investments with the respondent, which were all non-trustee investments have been authorized to continue by the order of the court. Obviously, the appellants have lost sight of the fact that the investments with the respondent, which the court did not approve, are not the only investments which necessitated the suit. But that is not all. The court must obviously have been satisfied that the non-trustee investments made by the respondent which the court has adopted and authorized to continue are in the best interests of the estate. The evidence in that regard is uncontroverted. How then in those circumstances could the respondent be expected to personally absorb the cost of enhancing the value of the estate?

Section 47(1) of the Judicature (Supreme Court) Act provides (so far as is material) that:

> "In the absence of express provision to the contrary the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the court, but nothing herein contained shall deprive a trustee... of any right to costs out of a particular estate or fund to which he would be entitled according to the rules acted upon in a Court of Equity before the commencement of this Act."

The basic principle, therefore, is that except in cases where Court of Equity would disallow a trustee his costs he is entitled to have those costs borne by the estate. Several cases relating to the award of costs in cases of breach of trust by trustees were submitted by the appellants as intended guide to the court's decision but for obvious reasons they must be regarded as unhelpful since breach of trust is not

involved in the present considerations.

In 4 Halsbury's Laws of England Vol. 48 at paragraph 783 the liability of trustees for costs is dealt with as follows:

> "**Liability of trustee for costs.** A trustee will not be allowed to charge against the trust property the costs of unnecessary proceedings **Norris v Norris** (1785) 1 Cox Eq Cas 183 or of elaborate proceedings where he might have obtained his object by a simpler and less expensive procedure **Thomas v Walker** (1854) 18 Beav 521. Accordingly, where a trustee incurs or by his conduct occasions excessive or unnecessary costs in respect of the trust estate, he is deprived of his costs **Re Knight's Will** (1884) 26 Ch D 82, CA and may be held personally liable to pay the costs of the proceedings so far as they are excessive or unnecessary **Campbell v Campbell** (1837) 2 My & Cr 25. Counsel's opinion does not always and necessarily justify a trustee in bringing or defending an action **Devey v Thornton** (1851) 9 Hare 222 at 232, per Turner V-C.
>
> Where a trustee institutes or defends proceedings in order to have a point relating to his private interest decided at the expense of the trust estate, he will be ordered to pay the costs of them **Henley v Phillips** (1740) 2 Atk 48.
>
> The costs of legal proceedings occasioned by the misconduct of a trustee are in the discretion of the court, which will generally order the trustee to pay them **Dawson v Parrot** (1791) 3 Bro CC 236."

Even on the basis of the decision of the court below in excluding the respondent from among the commercial institutions in which the Estate Funds may be invested (which decision has been shown to have been in error) while otherwise approving the investments made by the respondent it cannot be maintained that the proceedings were unnecessary or elaborate or that unnecessary costs have been incurred by the respondent so as to deprive the respondent of the right to have the costs borne by the estate. Examples of cases where a trustee in a case not involving a breach of trust was deprived of his costs will suffice to confirm the view herein expressed:

"**Re Chapman. Freeman v. Parker** (1895-9) All E.R. Rep. 1013

In this case a trustee who was held to have acted unreasonably in refusing to accept evidence of identity which should have satisfied a reasonable person was held personally liable for the costs of the action which his conduct necessicated."

"**In Re Knox's Trusts** (1895) 2 Ch. 483:

Trustees who held a residuary estate upon trust, in events which had happened, to divide the same amongst three sets of beneficiaries, were requested in writing by all such beneficiaries to transfer to them the various funds of which the residue consisted according to an arrangement which they had entered into. It appeared that there was sufficient cash in the hands of the trustees to pay any outstanding costs which they might have to pay, but one of the two trustees refused to transfer for twenty-eight days after the request.

The Court of Appeal dismissed his appeal against the decision of the court ordering him to pay the costs because of his obstinacy, there being no justification for his refusal."

Final reference is to **Buckton v. Buckton** (1907) 2 Ch. 406 in which to facilitate the determination of the question of costs in cases involving trustees Kekewich, J. classified the cases thus:

1. Cases brought by trustees asking the court to construe the instrument of trust for their guidance and in order to ascertain the interests of the beneficiaries or else to ask to have some question determined which has arisen in the administration of the trusts.

2. Cases brought not by trustees but by some beneficiaries as a matter of convenience seeking the resolution of some difficulty of construction or administration which would have justified an application by the trustees. This class differs in form but not in substance from the first.

3. This class differs in form and substance from the first, and in substance, though not in form, from the second. Into this class fall applications brought by a beneficiary who makes a claim adverse to other beneficiaries and really takes

> advantage of the convenient procedure by originating summons to get a question determined which but for this procedure would be commenced by and would strictly fall within the description of litigation.

The third class is really adverse litigation inasmuch as the issue before the court is a determination of rights between adverse litigants and the rule as to costs is that the unsuccessful party pays the costs. However, Kekewich, J. concluded that in cases falling under (1) and (2) (supra) costs are necessarily incurred for the benefit of the estate and are to be taxed on a solicitor and client basis and paid out of the estate. In my opinion, the instant case falls within the first class and accordingly, the costs are to be dealt with on that basis.

Conclusion

The appeal is dismissed and, save for the order as to costs, the judgment of the court below is set aside. The cross-appeal succeeds and the orders sought are granted. Costs of the appeal and cross-appeal to be taxed on a solicitor and client basis and to be paid out of the estate.

DOWNER J.A.

In the court below the respondent Bank sought by way of an originating summons dated March 3 1988 pursuant to section 41 of the Trustee Act, directions which requested:

> "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 Comercial 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 necessary, administration of the estate of the said Robert Nesta Marley, deceased;
>
> 4. That provision may be made for the costs of this Application.

It must be emphasised that the first request is for approval of funds previously invested and that the second is for directions as to the future deployment of funds. An important aspect to note is that at the commencement of the administration of the estate most of the beneficiaries were infants. Some were still infants at the hearing of this appeal. The estate has been subject to considerable litigation within and without this jurisdiction. One aspect has been before Their Lordships' Board, see Makeda Jahnesta Marley and 11 others v. Mutual Security Merchant Bank and Trust Company Limited P.C. Appeal No. 20 of 1989 delivered 15th October, 1990. Despite this, it is useful to recount that Marley died on 11th May 1981, and his estate is being administered under the rules of intestacy, see Intestate's Estate and Property Charges Act. Letters of Administration were

granted to the respondent Bank from 17th December 1981.

Ought the investment of trust funds undertaken by the respondent Bank be approved?

In attempting the answer to this question, it is important to recall the gloss by the Privy Council in Marley (supra) on section 41 of the Trustee Act. Lord Oliver said at p. 4:

> " Secondly, it should be borne in mind that in exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties. That is not always easy, particularly where, as in this case, the application has been conducted as if it were hostile litigation; but it is essential that the primary purpose of the application - indeed, its only legitimate purpose - be not lost sight of in academic discussion regarding the discharge of burdens of proof. Where beneficiaries oppose a proposal of a trustee with a host of objections of more or less weight, the court is, of course, inevitably concerned to see whether these objections are or are not well founded, but that must not be permitted to obscure the real questions at issue which are what directions ought to be given in the interests of the beneficiaries and whether the court has before it all the material appropriate to enable it to give those directions."

Although in that aspect of the case the respondent Bank sought approval for its contemplated action the initial general proposition stated by Lord Oliver, with the necessary adaptations, are pertinent in instances where approval is sought for prior action. As regards that initial proposition, His Lordship on the said page stated:

> "... In the first place, there has always to be borne in mind the position and duties of a trustee who applies to the court for directions. A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court. If, however, he seeks the approval of the court to an exercise of his discretion and thus surrenders his discretion to the court, he has always to bear in mind that it is of the highest importance that the court should be put into possession of all the material necessary to enable that discretion to be exercised. It follows that, if the discretion which the court is now called upon to exercise in place of the trustee is one which involves for its proper execution the obtaining of expert advice or valuation, it is the trustee's duty to obtain that advice and place it fully and fairly before the court, for it cannot be right to ask the judge in effect to assume the burdens of a trustee without the information which the trustee himself either has or ought to have to enable him to carry out his duties personally. The court ought not to be asked to act upon incomplete information and, if it is so asked, the proper course is either to dismiss the application or to adjourn it until full and proper information is provided."

Also, be it noted that this initial principle is of direct relevance to the solution of the second request of the respondent Bank, for approval of its contemplated course of action.

The other essential factor to take into account is the provisions governing the deposit or investment of trust funds. That is to be found in section 3 of the Trustee Act. It reads:

> "3. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say—

> (a) in any investment authorized by any Act of Parliament of the United Kingdom;
>
> (b) in any securities, the interest of which is for the time guaranteed by any enactment of this Island or the government of this Island;
>
> (c) on real securities in this Island,
>
> and may also from time to time vary any such investment."

Also relevant is section 3 of the Trustees, Attorneys and Executors (Accounts and General) Act. In recognising the successor to the Government Savings Bank and that the Accountant General performs the duties of the public trustee, that section reads:

> "3. Executors, administrators, and trustees may invest any sum or sums of money not exceeding, as to any estate or trust in any one year, the sum of ten thousand dollars, and not exceeding in the whole the sum of twenty thousand dollars by depositing the same in the Workers Savings and Loan Bank and the Accountant General is hereby authorized to receive the same any law or rule to the contrary notwithstanding."

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.

How did the respondent Bank approach its duties? That is best ascertained from citing the initial affidavit of G. Louis Byles, the Managing Director of the respondent Bank. He is also an attorney-at-law. The relevant parts of his affidavit read 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."

A curious omission in paragraph 4, is Certificate of Deposits issued by the Bank of Jamaica. The interest on these certificates are no doubt guaranteed by the Government. Also omitted are Treasury Bills issued by the Central Bank on behalf of the Minister of Finance. Since we were told that one or more of the infant beneficiaries reside abroad then trustee investments in the United Kingdom could have been considered. At one period permission from the Bank of Jamaica might have been necessary, but this is not so now. These two financial instruments set the basic rates which other financial institutions follow. It should also be pointed out that counsel for the beneficieries also overlooked these aspects of Trustee Investments. These instruments will be of vital importance when deciding whether to grant approval to the respondent Banks contemplated course or prior actions. By what warrant then did the respondent Bank deposit considerable sums in its own account? It is true that deposits in commercial banks were advantageous as they paid higher rates of interest than some Trustee Investments. But there is the corresponding disadvantage of greater risks.

If a trust deed permits deposits in commercial banks then as Space Investments Ltd. v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas Ltd.) [1986] 34 W.I.R. 8 decided no complaint can be made against the Trustee.

The respondent Bank has sought to justify the departure from its legal obligations by stating that there was agreement by one of the mothers as well as the attorneys for the beneficiaries, that the trust funds should be invested in the respondent Bank. Here are the Bank's minutes for September 21 1987 which have not been challenged:

> "After checking the rate of interest being paid by the Bank, I telephoned Mrs. Tavares Finson and advised her that the Bank was only paying 15 3/4% whilst we were paying 16 3/4%. She said Eagle was paying 19% but I told her that as Trustees we could not agree to placing funds with Eagle. She said we should go ahead and deposit the funds with ourselves for one year."

The relevant minutes of September 27 1987, at a meeting of the parties read:

> "This matter was discussed and Mrs. Waite gave the meeting particulars of the investments held and it was agreed that for the time being investments in certificates of deposit should continue as they produced a higher yield and more flexibility for the use of the funds, but further consideration should be given to the matter later on."

These explanations ignore the position of the infant beneficiaries, nor was there any attempt to explain the consequences to the adult beneficiaries.

Be it noted that amongst counsel present, were Mr. Hylton and Mr. Henriques, who presented the case for the beneficiaries and the respondent in this appeal. It is pertinent at this stage to note that the schedule exhibited, shows investments commenced as at November 1 1986, so it would have been appropriate to seek counsel's opinion and directions from the court early in 1987 for such a tremendous undertaking. The schedule of

investments which shows that of twenty-two investments made on behalf of the beneficiaries, three were with the Bank of Jamaica, presumably in Certificates of Deposit, and two in Local Registered Stock. The remaining deposits were all in accounts with the respondent Bank. It is also interesting to note that the constant complaint below and on appeal, on behalf of the beneficiaries, concerns the failure of the respondent Bank to seek out the highest rate of interest without due regard to the trustee's obligations in law. Here is the evidence of Michael Hylton:

> " As I heard nothing further from them on the issue, and did not receive the promised Affidavit, I wrote to the Jamaica Citizens Bank and National Commercial Bank enquiring what were the highest rates paid by them during the relevant period. Exhibited hereto marked 'C' and 'D' respectively are copies of my letter dated January 9th to those institutions, and marked 'E' and 'F' respectively, copies of their replies dated January 13th and February 15th."

In this regard, he presented the rates obtainable from Jamaica Citizens Bank and those from National Commercial Bank. Arthur Kitchin another attorney-at-law, submitted Stock Market Reports, the returns on investment from the Jamaica Unit Trust, The Eagle Merchant Bank and Mutual Security Bank. None of these institutions provide authorised trustee investments.

It is against this background that the authoritative principles laid down by Lord Templeman in Space Investments ought to be cited. It reads at pp. 9 - 10:

> " On the other hand a trustee has no power to use trust money for his own benefit unless the trust instrument expressly authorises him so to do. A bank trustee, like any other trustee, may only apply trust money in the manner authorised by the trust instrument, or by law, for the sole benefit of the beneficiaries and to the exclusion of any benefit to the bank trustee unless the trust instrument otherwise

> provides. A bank trustee misappropriating trust money for its own use and benefit without authority commits a breach of trust and cannot justify that breach of trust by maintaining a trust deposit account which records the amount which the bank has misappropriated and credits the interest which the bank considers appropriate. The beneficiaries have a chose in action, namely an action against the trustee bank for damages for breach of trust, and in addition they possess the equitable remedy of tracing the trust money to any property into which it has been converted directly or indirectly."

This principle was enunciated in a case involving the insolvency of a trustee bank, but the principle is of general application. Lord Templeman in explaining the role of a bank continues thus:

> " A bank in fact uses all deposit moneys for the general purposes of the bank. Whether a bank trustee lawfully receives deposits or wrongly treats trust money as on deposit from trusts, all the moneys are in fact dealt with and expended by the bank for the general purposes of the bank. In these circumstances it is impossible for the beneficiaries interested in trust money misappropriated from their trust to trace their money to any particular asset belonging to the trustee bank. But equity allows the beneficiaries, or a new trustee appointed in place of an insolvent bank trustee to protect the interests of the beneficiaries, to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of an equitable charge over all the assets of the bank. Where an insolvent bank goes into liquidation that equitable charge secures for the beneficiaries and the trust priority over the claims of the customers in respect of their deposits and over the claims of all other unsecured creditors. This priority is conferred because the customers and other unsecured creditors voluntarily accept the risk that the trustee bank might become insolvent and unable to discharge its obligations in full. On the other hand, the settlor of the trust and the beneficiaries interested under the trust, never accept any risks involved in the possible insolvency of the trustee bank.

> On the contrary, the settlor could be certain that if the trusts were lawfully administered, the trustee bank could never make use of trust money for its own purposes and would always be obliged to segregate trust money and trust property in the manner authorised by law and by the trust instrument free from any risks involved in the possible insolvency of the trustee bank. It is therefore equitable that where the trustee bank has unlawfully misappropriated trust money by treating the trust money as though it belonged to the bank beneficially, merely acknowledging and recording the amount in a trust deposit account with the bank, then the claims of the beneficiaries should be paid in full out of the assets of the trustee bank in priority to the claims of the customers and other unsecured creditors of the bank. '... if a man mixes trust funds with his own, the whole will be treated as the trust property,... that is, that the trust property comes first;' per Sir George Jessel in Re Hallet's estate, Knatchbull v. Hallett [1880] 13 Ch D 696 at page 719 adopting and explaining earlier pronouncements to the same effect. Where a bank trustee is insolvent, trust money wrongfully treated as being on deposit with the bank must be repaid in full so far as may be out of the assets of the bank in priority to any payment of customers' deposits and other unsecured debts.
>
> Equity thus protects beneficiaries against breaches of trust. But equity does not protect beneficiaries against the consequences of the exercise in good faith of powers conferred by the trust instrument."

Theobalds J, in the court below grasped the essential duties of the trustee. Here is how he stated the position:

> " However in the case of a trust company appointed by the court particularly where infants are concerned different considerations apply. The rule is that whenever a trust company holds capital on trust for beneficiaries it is accountable to the beneficiaries for all the profits made out of the capital vested in the company.

> There is no suggestion hint or possibility that the principle is based on dishonesty or misuse of trust funds. The principle is to avoid arguments over interest rates offered. In these circumstances, a trustee ought never to invest trust funds in its own company unless done with the acquiescence and approval of beneficiaries and at higher rates or on better terms than those available elsewhere."

Then in ruling on the matter, he said:

> "In my view there is not sufficient material on which the order sought in paragraph 1 could be made with retroactive effect."

This ruling is correct.

Is there any guidance from the authorities as to what directions this court ought to give as regards this request for approval for the unauthorised investments? There is no insolvency here, no loss of capital. There was the consent by the attorneys and a parent. The beneficiaries have received a high rate of interest. The bank has been honest, gave concessions as regards waiver of overdraft fees, they paid interest monthly and did not impose a penalty for withdrawals before the due date. In reality, the beneficiaries have elected to take the interest and it is not now appropriate to go through the expense of taking accounts to determine profit: see Williams and Mortimer on Executors, Administrators and Probate being 15th edition of Williams on Executors and Mortimer on Probate at page 971; Heathcote v. Hulme [1819] 1 J. & W 122 and Wyse v. Foster [1872] L.R. 8 Ch. 309, 334 which are cited in favour of such a course. The foregoing was, in substance, the submission of Mr. Henriques for the respondent Bank. It is questionable whether it meets the ruling of Theobalds J that, there was insufficient material on which to grant approval. The fact that so many of the beneficiaries were infants is vital as the trustees are under greater obligations than those for adults. For the correct approach see Wright v. Morgan [1920] A.C. 788

at p. 797:

> " It would be profitless to quote the many cases which have arisen to illustrate the doctrine. They may all be referred to the same root idea, that equity will not allow a person, who is in a position of trust, to carry out a transaction where there is a conflict between his duty and his interest."

per Lord Dunedin. It should also be noted that infant beneficiaries can bring an action against trustees when they attain their majority, so this has to be borne in mind by the Bank.

The respondent Bank's duty in law, was to seek out trustee investments for its beneficiaries. Its commercial interest was to maximise its profits for its shareholders. There was a conflict of interest inherent in the course taken by the respondent Bank. I would say that it is necessary for the respondent Bank to present to this court the rates for Treasury Bills, Certificates of Deposit and Local Registered Stock (Variable Rate) since 1st November 1986 to 30th September 1987, as these are the high yield authorised trustee investments. I do not accept the argument that the respondent Bank could ignore the mandate of the law in a case where the trust arose by process of a statute. Nor could any agreement by attorneys or parents prejudice the rights of infants. The trust funds were used for the general purposes of the Bank and this was impermissible. The course I would take, is to adjourn this aspect of the case until the appropriate information is provided. It is on a resumed hearing that it would be appropriate to decide whether approval could be given in the circumstances which emerge. Such relief is permissible but not easily granted in terms of section 44 of the Trustee Act: see the important case of Re Pauling S.T. (No. 1) [1964] Ch. 303.

This factual aspect was never raised either below or on appeal, but, in fairness to Mr. Hylton he presented authorities which ran counter to those cited by Mr. Henriques for the respondent Bank. Cook v. Addison Vol.XX; The Law Times N.S. p. 212 suggests that if after trust funds are mixed up with the trustee funds, then if a loss occurs, the trustee will be liable for the entire trust property with arrears of interest. Equally important was In re Thompson's Settlement [1986] 1 Ch. 99 which contains a valuable review of the authorities.

Suppose the High Yield Trust Investments yielded more than the respondent Bank's interest rates - what would be the position? It is from these margins that Banks make a profit. Since financial institutions such as the respondent Bank, are purchasers of Treasury Bills, Bank of Jamaica Certificates of Deposit, and Local Registered Stock (Variable Rate) with depositors' funds, such a question is not farfetched when related to the facts of this case

It is clear that on the face of the affidavit of the respondent Bank, in law there was a breach of trust, but the remedy must be sought in appropriate proceedings by a writ of summons. I do not think the remedy of account sought by Mr. Hylton would be appropriate at this stage in an originating summons brought by the respondent Bank, I would require further submissions at the resumed hearing as I think such a remedy could only be granted in these proceedings with the consent of the respondent Bank.

So considered I adhere to my view that on this aspect of the matter, the summons ought to be adjourned to await further evidence and submissions.

What directions are appropriate for the future investments of funds?

Theobalds J was persuaded to direct that future deposits ought to be made:

> "with 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 Investment."

From the schedule presented by the respondent Bank amounts of $5,000,000 and $500,000 were deposited with the Bank of Jamaica and the returns were 17.5% and 18% respectively. These would be trustee investments and the returns were higher than those obtained in the respondent Bank. This information was available to the learned judge. He should have ignored the submissions of counsel and applied the correct law regarding trustee investments. Further, it is common knowledge that Treasury Bills and Bank of Jamaica Certificates of Deposit give a high yield. It is from these securities that trustees should first choose. If there be a failure to secure those investments, it may then be appropriate in exceptional cases, to seek approval for investments to be made in reputable Merchant Banks and Trust Companies. I would not exclude the respondent Bank. As Mr. Henriques contended, it is a bank of high repute. It is the successor to the Royal Bank of Canada and its future seems to be with National Commercial Bank. That Bank also has an impressive reputation being the successor to Barclay's Bank. So the learned judge's ruling was incorrect in this regard, but it may protect the respondent Bank after the date of the order below and up to the delivery of this judgment. This indemnity is stipulated in section 41 of the Trustee Act and reads as follows:

> "... and the trustee, executors, or administrator acting upon the opinion, advice, or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject matter of the said application:..."

As for the learned judge's direction that there be quarterly returns, I am prepared to overrule that order. It is expensive and serves no useful purpose. Further, there was

no case made out to demonstrate that the statutory requirement for filing accounts pursuant to section 6 of the Trustee, Attorneys and Executors (Accounts and General) Act are not adequate. The important issue of costs ought to be reserved for the resumed hearing. I should add that the need to make advances to infants can never be used as an excuse to contravene the law and then seek approval for these contraventions. There would be a pool of funds available both from returns of trustee investments and income from royalties to make regular advances in any event, on the evidence presented in this case.

MORGAN, J.A.:

I have had the benefit of reading the judgments of Wright and Downer, JJA and, inasmuch as they are not ad idem, I will add a brief judgment.

This action was occasioned by the failure of the respondent/trustee to seek directions from the court after consultation and agreement with the attorneys for the infant beneficiaries with respect to investment of an unsettled trust fund on behalf of the infant beneficiaries prior to investing the funds. As the factual aspects have been recorded in both judgments, I will confine this to the salient points.

Section 3 of the Trustee Act defines those investments which are authorised for trustee funds. The statute, however, does not confer an absolute authority upon the trustee to invest money on those specified securities. A trustee must still exercise his discretion, although if a trustee invests in an authorised security the onus is on the beneficiary to prove that the investment was imprudent: [**Shaw v. Coates** (1909) 1 Ch. 389, 395]. His duty, however, is to preserve the trust fund for the benefit of persons entitled and that includes avoiding enterprises which are hazardous, and in the case of infant beneficiaries to seek the direction of the court. What is paramount is - what is good for the beneficiaries. It is on this basis that the respondent, a trustee, seeks an order to ratify, and for approval to invest the appellants' estate funds by way of deposit with the respondent bank. The appellants say that it is "self-dealing".

The "self-dealing rule" - to put it shortly - is that if a trustee sells the trust property to himself the sale is voidable by any beneficiary ex debitio justitiae, however fair the transaction. **Tito v. Waddell** (No. 2) [1977] Ch. 106.

It has not been said by the parties that this is a case of breach of trust, and that is cushioned by the fact that this action was commenced by way of an Originating Summons, whereas such an action must be commenced by writ. As is stated in the

records, there was a previous meeting of the trustees, their attorneys and the mother of a beneficiary. The minutes which are not in dispute indicate that there was an agreement by all the parties that the investments should remain with the trustee bank - at least for the time being. If the "self-dealing rule" applies, indeed the appellants, having been parties to the arrangement, could scarcely say that the act is voidable as they not only agreed but acquiesced in that arrangement. In these circumstances, I hold it cannot be so regarded.

The learned trial judge correctly enunciated the principle:

> "In these circumstances a trustee ought never to invest trust funds in its own company unless done with the acquiescence and approval of beneficiaries and at higher rates or on better terms than those available elsewhere."

Hidden in this principle is the point that what is important is - "what is best for the beneficiaries", taking into account all the factors and circumstances.

All twelve beneficiaries are paid maintenance on a monthly basis. A capital sum is allotted to each and separate accounts are kept. All accounts and deposits are under $500,000 and the beneficiaries are paid from the interest generated from each account. Rates of interest of several banks and other securities, no doubt considered viable, were submitted by both parties and examined. All are higher than trustee investments and the respondent bank though not the highest, ranked favourably with banks of high reputation. Additional favours are granted to the appellant by the respondent in that there are no penalties for withdrawals prior to maturity - in the region of 1% to 2%, there is a waiver of overdraft fees ordinarily in the region of 19% and rising, and the interest earned was readily available monthly for maintenance. This arrangement offered flexibility in ad hoc payments thus avoiding difficulties and disruption in distribution. The respondent bank enjoys a reputation of confidence, competence and honesty. There is no

doubt that the appellants enjoy significant terms from the respondent. Indeed, it is an agreed arrangement made by the representative of the appellants with the respondent to accommodate the beneficiaries until the estate is settled and was arrived at with consent. It must be borne in mind that the range of securities change from time to time and that the trustee is expected to exercise its discretion in the management of those funds in good faith.

It is my view that the respondent has exercised that discretion and for those reasons should be allowed to continue to do so. I would not exclude the respondent from the list of securities in which the trust funds can be invested. There is no necessity, in my view, for further information since what was emphasized and sought was approval to invest in unauthorised securities which both parties presented to the court.

Of the other investments, ten in all, it is observed that investments - akin to "self-dealing" - as they are not arranged as the other twelve for the convenience of the beneficiaries but yet generally approved by the parties, are heavily weighted on one side with the respondent having a greater percentage of the investments. In granting approval to include the respondent, it is my view that a greater percentage of the funds than as now exists should be invested in reputable trustee investments other than the large percentage now with the respondent.

The appellants urge that there is a liability to account for profits made from the investment. This must follow only where the investment is improper or where the respondent improperly employed trust money. To put money on deposit in a bank is a service ordinarily offered to all customers and not an investment. Assuming, however, that to put it on deposit is an investment, I am of the opinion that where there is agreement and the interest on that deposit goes to the beneficiary there ought to be no liability to account.

I agree with the order of Wright, J.A. as to costs and the reason for that order.

In the event, I would allow the appeal and grant the orders 1, 2 and 3 as sought by the respondent in his cross-appeal and refuse orders sought by the appellants.