J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 2/89

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	MAKEDA JAHNESTA MARLEY	1ST APPELLANT
A N D	KYMANI RONALD MARLEY	2ND "
A N D	ROHAN ANTHONY MARLEY	3RD "
A N D	ROBERT NESTA MARLEY	4TH "
A N D	JULIAN RICARDO MARLEY	5TH "
A N D	RITA MARLEY	6TH "
A N D	CEDELLA MARLEY	7TH "
A N D	DAVID MARLEY	8TH "
A N D	STEPHEN ROBERT NESTA MARLEY	9TH "
A N D	STEPHANIE SARI MARLEY	10TH "
A N D	DAMIAN ALEXIS ROBERT NESTA MARLEY	11th "
A N D	KAREN SOPHIA MICHELLE MARLEY	12TH "

A N D

MUTUAL SECURITY MERCHANT BANK AND TRUST COMPANY LIMITED — RESPONDENTS

F.B. Frankson, Q.C. and Dr. Bernard Marshall instructed by B.E. Frankson and Co. for 1st and 2nd Appellants

Colin Henry for 3rd Appellant

Winston Spaulding, Q.C. and Colin Henry for 4th and 5th Appellants

Michael Hylton and Garth Patterson instructed by Myers Fletcher and Gordon, Manton and Hart for 6th Appellant

Dennis Morrison and Miss Pauline Findlay instructed by Dun, Cox and Orrett for 7th, 8th, 9th, 10th and 11th Appellants

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913

Sylvester Morris for 12th Appellant

R.N.A. Henriques, Q.C. instructed by Douglas Brandon of Livingston, Alexander and Levy for Respondents

February 13-17 and April 25, 1989

ROWE P:

Letters of administration of estate of the Hon. Robert Nesta Marley, O.M. deceased, was granted to the respondents, Rita Marley and George Desnoes on December 17, 1981. By Order of the Court, Rita Marley ceased to be an Administrator on February 3, 1987 and George Desnoes retired as an Administrator on November 9, 1987. The respondents wished to know how to proceed and so they applied to the Court for directions. Morgan J. answered questions raised by the Administrators in an Originating Summons in Suit E. 575/87 as under:

"Q. 3: Whether it is the duty of the Personal Representatives to sell the said Copyrights and Royalties and the benefits of the Agreements unsold:

A: It is the duty of the Personal Representatives to sell the said Copyrights, Royalties and benefits of Agreements unsold;

Q. 4: Whether if so, the Personal Representatives might in their discretion be authorised to retain the Copyrights and the benefits of the Agreements unsold:

A : The Personal Representatives are Hereby Authorised to retain the Copyrights, Contracts and Benefits of the Agreements until further ordered by the Court.

Q: 6: What is the fair capital value of the life interest of the widow, Rita Marley, for the purchase or redemption under the provisions of Section 7 of the Intestates' Estates and Property Charges Act:

"A : The question raised at Paragraph 6 of the Originating Summons be and is HEREBY DEFERRED for further affidavits."

Pursuant to the Order of Morgan J. that the personal representatives had a duty to sell the Copyrights, Royalties and Benefits of the unsold agreements, the respondents in late 1987, in conjunction with Mr. J. Reid-Bingham, Ancillary Administrator of the estate appointed by the Courts of New York and Florida in the United States of America to admini the estate in those jurisdictions, commenced efforts to procure offers for the purchase and sale of the said assets.

The respondents allege that they lost no time in making it known to the Industry in general that offers would be entertained to purchase the total assets of the estate. Serious offers were received from Almo/Irving Music Corp. and Music Sales Ltd. both of which, although considered financially capable to complete, if their offers were accepted, declined to make an offer that included the estate's Jamaican Assets or the income stream from the Island Records Recording Royalties. Mr. George Louis Byles, Managing Director of the respondent company, swore in his affidavit of July 8, 1988 that "Many other expressions of interest were received from a wide cross-section of the Industry in and outside of the United States of America, but the only three who pursued their enquiries and could demonstrate financial ability to purchase the Assets were the above three Companies."

Negotiations between the respondents and the Island Entertainment Group Inc. culminated in the signing of a Conditional Contract for sale on April 27, 1988. Application was made to the Court by the respondents seeking an Order for the approval of the Conditional Contract in the following terms:

"That a Conditional Contract dated the 27th April, 1988 and entered between the Plaintiff of the ONE PART and ISLAND LOGICS INC. of 14 East 4th Street, New York in the United States of America of the OTHER PART, for the sale to the said Island Logics Inc. of Assets specified in the Schedule hereto at the price of U.S. $8,619,400.00 and J$5,300,000.00 to be confirmed with certain modifications (if any) as the Court shall think fit and the said parties shall agree, and that the Plaintiff shall be at liberty to carry the same into effect.

SCHEDULE

	ASSETS	PRICE
(i)	Estate Song Catalogue	US $5,200,000.00
(ii)	Record Royalties and Record Distribution Rights	US $3,000,000.00
(iii)	Equipment	US 419,000.00
		US $8,619,000.00
(iv)	Real Estate:	
(a)	No. 56 Hope Rd., Kgn. 6 including Furnishings therein	J. $1,600,000.00
(b)	No. 222 Marcus Garvey Drive Kingston 11	J. $3,700,000.00
		J. $5,300,000.00 "

On December 30, 1988 Wolfe J. approved and confirmed the said Conditional Contract and gave liberty to the respondents to carry the same into effect. The twelve appellants who are the sole beneficiaries of the estate have

appealed against the Order of the Court. Nine of the appellants are minors who have each appeared throughout by a guardian ad litem and represented by an Attorney-at-Law. One appellant is the widow of the deceased.

The trial judge held that the Court has the duty to determine what is the best interest of the beneficiaries and consequently he was not bound to give effect to the unanimous opposition of the beneficiaries to the Conditional Contract, although they and their legal advisers maintained that the contract was not in their best interests. This approach of the learned trial judge has been attacked in various ways. The appellants contend that the respondents do not have an absolute right to sell the property but must consult with the beneficiaries and obtain their consent before application to the Court for approval of the sale. They say too, that the beneficiaries are entitled to the estate in specie and consequently once the Administrators have completed the process of administration, that is to say, have paid all the debts, liabilities and administration expenses of the estate, the Administrators cannot sell the assets for purposes of distribution without the consent of the beneficiaries.

Section 4(1)(b) of the Intestates' Estates and Property Charges Act provide that if an intestate leaves issue, then subject to the rights of the surviving spouse, the residuary estate is to be held on "the statutory trusts" for the issue of the intestate. Mr. Frankson submitted that the position in Jamaica is similar to the position in England since 1925 and he relied upon a passage from Halsbury's Laws of England 4th Ed. Vol. 17 at para. 1191. He submitted that since 1926 personal representatives have, inter alia, all the powers, discretions and duties conferred or imposed by law on trustees holding land on effectual trusts for sale and all powers conferred by statute on trustees for sale. Halsbury's notes that

> "One of these duties would appear to include the obligation of personal representatives, as trustees for the sale of land, to consult the wishes of the beneficiaries and, so far as is consistent with the general interest of the trust, to give effect to the wishes of the beneficiaries or the wishes of the majority, according to the value of their combined interests, in the exercise of their trust and powers. This duty, however, only applies where the trust for sale arises by statute (eg. on total or partial intestacy. ....."

Mr. Frankson relied further on the decisions of the Court in Re Birchall (1880) 16 Ch. D. 81; Re Barbour's Settlement Trusts (1974) 1 All E.R. 1138 and Re Taylor's Application (1972) 2 All E.R. 673. All three cases dealt with applications to approve compromises where infant beneficiaries were concerned. In Re Birchall the guardian of an infant opposed a proposed compromise and his Counsel also refused to assent. The trial judge ordered that the matter be adjourned into Chambers for him to determine whether the compromise was for the benefit of the infant. After enquiry the Court decided that the proposed compromise was for the benefit of the infant. From both Orders, the infant appealed. The Court of Appeal could find no parallel for the Judge's action. Jessel M.R. in his judgment said that:

> "The Court can approve of a compromise on behalf of infants but it cannot force one upon them against the opinion of their advisers."

Jessel M.R. in argument had opined that if the Court saw that a guardian was acting improperly and against the infant's interests in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him or them and to substitute some other person. This was exactly what the respondents attempted to do in Re Taylor's Application, supra. Hundreds of children in England, born with different degrees of handicap, sought damages from a Company which marketed the drug thalidomide. The defendant company made an offer to settle all the outstanding cases. This offer was accepted by all but five of the guardians of the children and these refusals threatened to scuttle the whole elaborate settlement scheme. Hinchcliffe J. made an Order removing the four fathers and one mother as next friend of the five objectors and appointing the official Solicitor as next friend in their place. This Order was set aside by the unanimous decision of the Court of Appeal. Lord Denning M.R. said that if the father who was entitled in the first place to look after the interests of his child and to consider whether or not a proposed settlement was for his child's benefit, was to be removed, "it should only be done if the proposed settlement is so clearly beneficial to his child that he is acting improperly in refusing it."

There is no reference in the Report of Re Barbour's Settlement, supra, that either Re Birchall or the Taylor's Settlement was cited to Megarry J. (as he then was). The approach of Megarry J. shows that a Court when asked to approve a compromise does not act in an automatic or robotic manner. There is room for the Court to give full consideration to all the matters placed before it and to call upon the

parties to furnish additional information if the justice of the case warrants such action. In Re Taylor's Settlement, Counsel for the infants had been asked to give an opinion as to whether certain proposed increases in the remuneration of the trustees was for the benefit of the infants. He advised the guardians to leave the question for the determination of the Court, reminding them at the same time that the trustees had the burden of making out the case for the increased fees. Each of the guardians nevertheless filed an affidavit saying that based on Counsel's advice and his own considered opinion, the increased proposed by the trustees would be for the benefit of the minors. Megarry J. refused to act upon those consents. He ordered that further affidavits be filed and a further opinion of Counsel be obtained. In the course of the adjourned hearing the Bank abandoned its claim for increased remuneration. This all came about because of the strong enquiry set in motion by the trial judge. Megarry J. made it plain that guardians ad litem do not have the privilege of adult beneficiaries who may do as they please with their property and that guardians ad litem cannot extend sympathy to anyone at the expense of those whose interests they are charged with protecting.

Mr. Frankson submitted that five essential steps ought to have been undertaken by the trustees (the respondents) to obtain the approval of the Court. Firstly, the trustees should determine the wishes of the guardians ad litem; secondly, the trustees should cause their Attorneys-at-Law to collect all the relevant evidence for the consideration of Counsel and then to submit the same to leading Counsel acting on behalf of the trustees for advice; thirdly, to ascertain the opinion of leading Counsel; fourthly, to submit leading

Counsel's advice to the guardians ad litem and to ensure that the said guardians understand Counsel's advice; and lastly, then and only then to submit the proposal for the approval of the Court.

Although Ground 11 of the consolidated grounds of appeal upon which Mr. Frankson's submissions were grounded was framed to highlight the necessity for the prior approval of the adult beneficiaries and of the guardians ad litem of the infant beneficiaries, in argument, Mr. Frankson concentrated upon the requirement for consultation. That did not deter him from submitting that since the unanimous opinion of Counsel for all the beneficiaries was that the Conditional Contract was not beneficial to the beneficiaries the duty of the trial judge was to give effect to that unanimous view and not to seek to impose his own views of the effect of the contract upon the beneficiaries.

In Re Jones, Jones v. Cusack-Smith (1930) All E.R. Rep. 515 Bennett J. held that Section 26(3) of the Law of Property Act 1925 imposed a duty on Trustees to consult the beneficiaries not only in the exercise of powers of trust for sale but also in the exercise of all other trusts and powers arising under the Settled Land Act, the Law of Property Acts of the United Kingdom and also of any additional or larger powers conferred by the settlement. This case and the note in Vol. 17 of the 4th Ed. of Halsbury's Laws to paragraph 1191 is based upon English statutory provisions which find no counterpart in Jamaican legislation and is of no value in interpreting relevant Jamaican statutes.

There is a valid distinction between a compromise of an infant's claim and the exercise of a genuine power of

sale under a statutory trust. In the first case there is either a dispute or litigation, the outcome of which is not wholly predictable. In those cases, Counsel's opinion and a thorough understanding of the same by guardians ad litem are essential and the Court will not act upon such proposed compromises without the informed consent of the guardians ad litem. It seems to me to be otherwise, as in the instant case, where the trustees are authorised both by statute and by Order of the Court to proceed to sell. Even so, however, the trustees do not have an unrestricted power to sell at any price. The guardians ad litem can attack any sale where the best price obtainable for the property in the open market has not been realized whether through negligence on the part of the trustees or failure to follow the most recognised procedure for the sale of such an asset. Wise trustees would consult with the guardians ad litem before concluding a binding agreement for sale. But it is the Court, in the final analysis which has the duty, as parens patriae, to determine whether a sale such as the one negotiated in the instant case is in the best interests of the beneficiaries and this the Court may do notwithstanding the objection of all the beneficiaries and their legal advisers.

I agree with the contention of Mr. Henriques that there was some consultation with the beneficiaries and the Attorneys-at-Law for the guardians ad litem after the signing of the Conditional Contract. The respondents provided them with copies of the Conditional Contract and with all the supporting documents required by them or requested by their expert witness Mr. Leo Strauss. It seems to me, however, that to be really efficacious consultation should

precede the signing of the contract. At the pre-contract stage the views of the beneficiaries and their legal advisers could be useful in arriving at the terms of the contract. After contract, the role of the trustees would be to provide explanations and justifications for their action, a far cry from what would be required if they intended to have in contemplation the express wishes of the beneficiaries at the time of the negotiation and completion of the contract. As I find that the law does not place a duty upon the trustees to consult the beneficiaries prior to the conclusion of a Conditional Contract, I can find no merit in the complaint contained in Ground II.

The judgment of Wolfe J. was challenged on the basis that the respondents had no right to sell the assets of the estate free of the life interest of the widow conferred by Section 4 of the Intestates' Estates and Property Charges Act without first redeeming the same or without obtaining the widow's consent.

Several provisions of the Intestates' Estate and Property Charges Act are relevant. Section 4(1)(b) thereof provides:

> "The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely:
>
> (a) .....
>
> (b) if the intestate leaves issue, upon trust, as to one-half for the surviving husband or wife during his or her life, and, subject to such life interest, on the statutory trusts for the issue of the intestate; and, as to the other half, on the statutory trusts for the issue of the intestate, but if those trusts fail or determine in the life-time

of a surviving husband or wife of the intestate then upon trust for the surviving husband or wife during the residue of his or her life."

Section 6 defines "statutory trusts" to mean:

> "... upon trust to sell the same and to stand possessed of the net proceeds of sale. ....."

Section 7(1):

> "Where a surviving husband or wife is entitled to a life interest in the residuary estate or any part thereof the personal representative may, either with the consent of any such tenant for life (not being also the sole personal representative) or, where the tenant for life is the sole personal representative, with the leave of the Court, purchase or redeem such life interest (while it is in possession) by paying the capital value thereof (reckoned according to tables selected by the personal representative) to the tenant for life or the persons deriving title under him or her and the costs of the transaction, and thereupon the residuary estate of the intestate may be dealt with or distributed free from such life interest."

The appellants relied upon several sections of the Settled Land Act and it is convenient to set them out here.

Section 2(2) provides:

> "Any deed, will, agreement for a settlement or other agreement, covenant to surrender, Act of the United Kingdom Parliament, or enactment of this Island or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments, any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement and is in this Act referred to as a settlement or as the settlement as the case requires."

Section 2(6):

"The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

Section 3(6):

"A tenant for life -

.....

where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition."

Section 62:

"(1) Nothing in this Act shall take away, abridge or prejudically affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

(2) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act the provisions of this Act shall prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act."

Grounding themselves upon the provisions of the Intestates' Estates and Property Charges Act and the Settled Land Act, the appellants contended that as the residuary estate is comprised of personalty and realty, in relation to the realty the surviving spouse is a tenant-for-life within the meaning of the Settled Land Act and by virtue of Sections 3, 62(1) and 62(2) of the Settled Land Act where the trustees purport to exercise any power of sale in respect of the land settled upon the widow, the consent of that widow is expressly required. It was argued that Section 4 of the Intestates' Estates and Property Charges Act made an important distinction between property held "upon trust" for the surviving spouse and property held "on the statutory trusts" for the issue of the intestate. Further that the assets forming the residuary estate could not be dealt with or distributed free from the widow's life interest unless and until the life interest was purchased or redeemed by the trustees and that this purchase or redemption could only be done with the consent of the widow.

These arguments were extended to state that in the instant case the respondents had no power in law to sell the assets as the widow was entitled in specie to one-half of the residuary estate. It was submitted that any power which the respondents would have had to sell assets for the purposes of administration of the estate, that is to say, to pay debts, liabilities, death duties, administration expenses, had been spent at the time of the conditional duty at which time their sole duty was one of distribution of assets.

Wolfe J. had heard similar arguments and unimpressed by them, held that upon a sale of the assets the interest of the life tenant was converted from a thing in specie to an interest in the proceeds of the conversion.

The statutory provisions in the United Kingdom as to the powers of the personal representatives when dealing with property of the intestate are explicit. Section 33 of the Administration of Estates Act, 1925 provides that on the death of a person intestate the real property shall be held by the personal representatives upon trust to sell the same and the personal property upon trust to call it in and sell and convert into money such part thereof as does not consist of money. No similar statutory provision exists in Jamaica and this difference in the statute law of the two countries fuelled the debate on this ground. I find that in the end this difference is not decisive of any of the issues to be decided.

The learned editor of Williams on Executors and Administrators, 16th Ed. at p. 692 states that:

> "It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate ....."

Nothing in the Intestates' Estates and Property Charges Act has any direct bearing upon that general statement of the law.

In Re Cohen, dec'd National Provincial Bank Ltd. v. Katz and Others (1960) 1 Ch. 179, there was a will in which the testator made two specific bequests as opposed to residuary devisees and it was held that the executors were entitled in the course of administration to sell any of the properties the proceeds of sale of which were required for the payment

of the testator's debts but as between several beneficiaries under the same will equity would attempt to do justice between them on the basis of equality so that all the beneficiaries would bear rateably the burden of the debts.

This case is authority for the proposition that the trustees have an absolutely free hand as to which properties they ought to sell in the course of the administration of the estate but it is no authority for the further proposition that the trustees' power to sell real estate is limited to the administration process and does not extend to the distribution section of their duties.

Cooper v. Cooper (1874-80) All E.R. Rep. 307 is a decision of the House of Lords. A lady with a power of appointment over a trust fund, by deed appointed the fund to her three sons in equal shares. One son died in her life-time leaving children who would be entitled to that son's share upon the death of the appointer. By her will the lady purported to appoint the whole of the trust fund to her eldest son but by the same will she also bequeathed property of her own to the children of her deceased son. The Court held that the children were put to their election as to whether to insist upon their share under the trust deed or to take under the will. In the course of his speech Lord Cairns said at p. 310:

> "If the Statute of Distribution is regarded as a will made by the legislature for the intestate, and the case is looked at from that point of view, the residuary legatee had an interest in specie in the Pain's Hill Estate, just as the second brother had."

Lord Cairns went on to ask the rhetorical question:

> "Can your Lordships doubt that any one of the next of kin might, before action, have released to the others, or assigned to a third party his interest in any specific portion of the intestate's estate, or in any specific item subject to that item bearing its proportionate share of the administrator's expenses?"

Cooper v. Cooper was followed in Blake v. Gayne (1890) A.C. 371, a decision of the Privy Council. Three sisters were the sole beneficiaries of their mother's estate which consisted of valuable real property. Two adult twin-sisters agreed for their eldest sister to be the sole administratrix of the estate. She entered into an administration bond. Debts due by the estate were promptly paid and the three beneficiaries entered into the enjoyment of the property, with the eldest sister acting as the manager thereof. Years passed and due to unprofitable investments by the eldest sister the estate suffered severe losses. The two younger sisters sued their eldest sister and the sureties to the administration bond, claiming the loss was due to misconduct on the part of the administratrix and that the sureties were liable under the bond to the extent of the penalty therein.

Lord MacNaghten in delivering the opinion of the Privy Council said:

> "It is important to note the position of the estate when the deed of indemnity was signed. All the debts had been paid. There was no liability outstanding. The mother's estate was clear. The three sisters were equally entitled to it and every part of it in the actual state and condition in which it was. Without the consent of her two sisters it was neither the duty nor the right of the administratrix to convert

> "the estate into money for the purpose of division or investment."

The two younger sisters in Blake v. Bayne had put forward an unmeritorious claim. They had given their full consent to the administratrix to manager the property in the manner in which she did, had enjoyed the benefits arising therefrom, had participated fully in the ruinous speculations which followed. It was a perfectly good decision for the Court to hold that after the payment of the intestate's debts the three sisters were entitled to the residue of the estate in equal undivided shares, had consented so to enjoy it, and were jointly responsible for the mode in which it was dealt with and lost. But as the later cases show this case cannot be relied upon for the proposition that as a general rule the beneficiaries are entitled to the residuary estate of the intestate in specie.

In Commissioner of Stamp Duties (Queensland) vs. Livingston (1964) 3 W.L.R. 963, the Privy Council considered the decision in Cooper v. Cooper, supra and explained the limited area for which that case is authority. Viscount Radcliffe quoted with approval a portion of the speech of Viscount Cave in Dr. Barnardo's Homes v. Special Income Tax Commissioners (1921) 2 A.C. 1:

> "When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue, as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any special investment forming part of the estate or in the income from any such investment, and both corpus and income are the

> "property of the executors and are applicable by them as a mixed fund for the purposes of administration....."

Referring to the decision in Cooper v. Cooper, supra and to the speech of Lord Cairns, the Privy Council said:

> "In their Lordships' opinion the truth of the matter is that Lord Cairns speech in Cooper v. Cooper cannot possibly be recognised today as containing an authoritative statement of the rights of next of kin or residuary legatees in an unadministered estate. His language is picturesque, but inexact, and while it was no doubt sufficient to enforce the point with which he was concerned to deal, a beneficiary's right or duty of election, and the decision of the case remains an authority on that point, it would be idle to try to set it up as an expression of the general law in opposition to what was said and laid down in the Sudeley and Barnardo cases."

If there is a single adult beneficiary entitled to the entirety of the residuary estate of the intestate for practical purposes it does not matter whether that sole beneficiary is said to be entitled to the assets in specie or not. Where, however, as in the instant case there are adult beneficiaries and infant beneficiaries, there is a widow with a life interest over a portion of the residuary estate and a large slice of the property consists of intangibles, it would be physically impossible to administer the estate if any one or more beneficiaries claimed to have a right in specie over any portion of the residuary estate. The respondents must sell the portion of the property invested with the trusts for sale. If the portion of the estate over which the widow has a life interest could not be sold and converted into money without the widow's consent, this would

effectively transform the widow as beneficiary into an administratrix. I accept the statement of the law as set out in Dr. Ferreira's case, supra, that until the ascertained portion of the residuary estate is paid to the beneficiary he has no property in any specific item of property or the income therefrom.

Section 7(2) of the Intestates' Estates and Property Charges Act empowers the personal representatives to raise the net sum due to the widow on the security of the whole or any part of the residuary estate except the personal chattels which are the widow's absolutely. This would further support the conclusion that the widow is not entitled to any portion of the residuary estate in specie where there are other beneficiaries to whom the statutory trust apply.

A power is given to personal representatives in Section 7 (1) of the Intestates' Estates and Property Charges Act to purchase the life interest of a surviving spouse, but this can only be done with the consent of the tenant-for-life, or where the sole personal representative is also the tenant-for-life, with the leave of the Court. The intendment of this provision is to enable the personal representatives to make a complete distribution of the assets if all the beneficiaries are adults and in the process to capitalize the life interest of the tenant-for-life. That section has no bearing upon the question as to whether or not a beneficiary has an entitlement in specie to an undistributed asset of the estate. It merely facilitates the earlier distribution of all the assets to the beneficiaries and the early winding-up of the estate.

Elaborate arguments were presented by the appellants in support of their contention that as the residuary estate is comprised of residuary personalty and residuary realty, the widow is a tenant-for-life of the realty under the Settled Land Act and has all the powers and privileges conferred on a tenant-for-life. Under that Act (Section 3) the tenant-for-life has the power of sale and by Section 62(1) the express consent of the tenant-for-life is required for the trustees to exercise a power of sale under that Act. If therefore the Settled Land Act applies, a sale of the residuary realty could only be validly made by the respondents with the express consent of the widow as tenant-for-life in one-half of the said real estate. I do not think that the Settled Land Act is applicable. There is no Settlement within the meaning of Section 2(2) in that there is no land for persons limited by way of succession. The widow is not entitled in specie to any asset of the estate so that until the administration is complete and assignment of residue is made, there cannot be said to be any land of which the widow is tenant-for-life. I agree with the respondents' contention that the Settled Land Act is dealing with situations where there is a life interest in land followed by a remainderman who takes the land in specie and in whom it is vested absolutely. In the instant case when the widow's life interest determines, a trust for sale immediately arises, and consequently there is no trust by way of succession.

Mr. Hylton sought to draw a distinction between the trust for the surviving spouse, and that for the issue beneficiaries, created by Section 4(1)(b) of the Intestates' Estates and Property Charges Act. In the one case the

statute speaks of "upon trust" and in the other "on the statutory trusts" which latter term is defined to mean primarily a trust for sale and then for distribution of the net proceeds. It would lead to absurdity to suggest that the trustees could sell one-half of the estate which is impressed with the statutory trusts but must retain the other half in specie. Every part of the estate is impressed with the statutory trusts and not just some definable or identifiable half. Since no beneficiary is entitled in specie to any part of the estate, it is only when the property is sold and converted into money that the division can, as a practical matter, be made, and the one-half portion of the net proceeds are then held on trust for the surviving spouse, in this case, the widow. The sale does not extinguish or in any way interfere with the life interest of the widow.

Having determined that the respondents had the right to sell the residuary estate without the consent of the widow as tenant-for-life of one-half of the residue, and without the consent of the guardians ad litem of the infant beneficiaries and their Attorneys-at-Law, I turn now to consider whether the learned trial judge applied correct legal principles in the exercise of his discretion to approve the Conditional Contract.

It was contended by the appellants that the trial judge erred in law in holding that the burden of proof was on the beneficiaries to prove that the purchase price was too low. Wolfe J. said in the course of his judgment:

> "I take the view that if the beneficiaries seek to impeach the price agreed on in the conditional contract the onus would be on them to satisfy me that a better price is available. I am not satisfy that they have discharged this burden."

Having said this the learned trial judge examined the terms of the contract and concluded:

> "Looking at the agreement as a whole, is it in the best interest of the beneficiaries?
>
> I take the view, having examine the clauses complained of as well as the other clauses to which no objections have been taken, that the agreement is a fair one and that Administrators in negotiating the contract have acted in the best interest of the beneficiaries."

The respondents filed a multiplicity of affidavits setting out in great detail the method by which they arrived at what they considered to be a good price. An affidavit was put in by the appellants which while confirming the principal bases upon which the respondents proceeded in negotiating the price referred to additional matters which could have been taken into consideration to enhance the price. There was before the Court information concerning a French Company which had an interest in acquiring the assets of the estate at a sum in excess of the negotiated price in the Conditional Contract. As to this particular proposal, I will say more later.

The learned trial judge was well aware that the burden of proof to satisfy the Court that the respondents had secured the best price obtainable for the assets of the estate lay upon the Administrators. When evidence which would satisfy him on the balance of probabilities was produced by the respondents, an evidentiary burden then lay upon the appellants to adduce evidence to destroy that prima facie situation. It is to this evidentiary burden that Wolfe J. was referring, as is made clear, from the whole context of his judgment quoted herein. Having considered the terms of the contract and upon finding evidence which would satisfy him

that the price was right, it became the turn of the appellants to disabuse his mind by evidence. In my opinion the trial judge applied the ordinary principles applicable to Civil cases and expressed in Phipson on Evidence 13th Ed. at para. 4-02 to 4-07.

Two incidents of particular importance occurred during the hearing of the application for the approval of the Conditional Contract both of which are said had considerable bearing upon the negotiated contract and ought to have been taken into consideration by the trial judge. One concerned correspondence between the Attorneys-at-Law for the appellants and the respondents. The appellants' Attorneys-at-Law had been supplied with unaudited accounts of the estate for the year ended May 11, 1988. They wished certain explanations in relation to one particular item and wrote to the respondents:

> "We note that during the first three months of the relevant period, you received royalty payments totalling J$2,755,795.72, while during the following nine months you only received J$70,313.19. This is no doubt due in part to the 'cut-off date' provisions in the Island Records contract. Please let us know what is the total which has not been paid to the estate because of these provisions."

On November 14, 1988 the respondents replied:

> "Your deductions are correct. We will not be able to ascertain the amount due to the estate in respect of the 'cut off' period until the Court decides whether or not to approve the sale of the assets to Island Logic Inc."

Two weeks later on November 28, the respondents wrote to the Attorneys for the appellants correcting the information contained in their letter of November 14.

They said:

> "In actual fact the amount received by us from Hughes, Hubbard and Reed during the nine month period totalled $600,029.79 not $70,313.19. ..... During the nine month period the total amount of royalties paid to Hughes, Hubbard and Reed from all sources was U.S. $1,327,749.35. In addition they received interest on the money market account held in the Royal Bank of Canada and other miscellaneous payments which were brought to account. ....."

From the point of view of the appellants these letters contained important information which would affect the price of the assets of the estate as the correction letter showed that considerably more revenue came to the estate than was shown in the unaudited accounts. Wolfe J. refused to take any notice of an affidavit containing the above information which was put before him near the end of the hearing. Mr. Henriques says the trial judge was perfectly correct to take that course as the information in its original and in its corrected form was irrelevant to any issue which the Court had to decide, as two quite separate things were being confused. In the first place the price for the royalties was calculated using the amounts actually earned in a particular year. On the other hand the accounts were reflecting the amounts paid to the estate during a particular accounting period. The accounts showed upon examination that earnings from royalties were paid sometimes as advances and more often in arrears. Annual receipts could consist of current earnings and of amounts earned in the past which had been outstanding known as accounts receivable. I agree with the respondents that had the learned trial judge considered Mr. Henry's

affidavit which exhibited the correspondence set out herein, he could not have been assisted in any way in determining any of the relevant issues in this case as the amounts paid into the estate in any accounting period bore no direct relationship to the amount earned as royalties in that accounting period.

On November 24, 1988 an offer for the purchase of the intangible intellectual property of the estate was sent to the respondents by Banque de Participations et de Placements of Paris, France, acting as agents for a "French Company in the process of formation constituted of Mrs. Booker, European private investors and the French Record Company TREMA". The offer price was stated to be U.S. $8,700,000 payable as follows:

(a) U.S. $1,000,000.00 to be held in escrow for 6 - 9 months while an audit is conducted to confirm the conformity between the purchase contract and the availability of the items purchased;

(b) U.S. $5,000,000.00 on December 31, 1989;

(c) U.S. $2,700,000.00 on July 31, 1990.

The learned trial judge held that the assets were susceptible to waste and it was therefore imperative that the respondents act with alacrity, but prudently, to sell now at the best available price. He concluded that it would be unwise of the respondents to pass up a good offer in the pursuit of something marginally better which might never materialize.

All the authorities maintain that paid trustees owe a higher standard of diligence in the performance of their duties than unpaid trustees.

In Re Waterman's Will Trusts, Lloyds Bank Ltd. v. Sutton and Others (1952) 2 All E.R. 1054, Harman J. said:

> "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 advertises itself largely in the public Press as taking charge of administrations is under a special duty."

Brightman J. in Bartlett vs. Barclays Bank Trust Co. Ltd. (1980) 1 All E.R. 139 expanded upon the statement of the law in Waterman's Will Trusts, supra. He said:

> "I am of opinion that a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management. A trust corporation holds itself out in its advertising literature as being above ordinary morals. With a specialist staff of trained trust officers and managers, with ready access to financial information and professional advice, dealing with and solving trust problems day after day, the trust corporation holds itself out, and rightly, as capable of providing an expertise which it would be unrealistic to expect and unjust to demand from the ordinary prudent man or woman who accepts, probably unpaid and sometimes reluctantly from a sense of family duty, the burdens of a trusteeship. Just as, under the law of contract, a professional person possessed of a particular skill is liable for breach of contract if he neglects to use the skill and experience which he professes, so I think that a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have."

It was common ground that the respondents owed this higher duty of care to the management of the Marley estate. In the discharge of this duty, were the respondents under an obligation to seek an adjournment of the case before Wolfe J. so as to pursue the offer of November 24, 1988? It was pointed out to Mr. Frankson in the course of the argument that the entity

purporting to make the offer was not then a legal entity and could not enter into a contract with the respondents, and he then elected to describe the initiative as an invitation to treat. The appellants relied upon the decision of Wynn-Parry J. in Buttle et al v. Saunders et al (1950) 2 All E.R. 193. Trustees were negotiating for the sale of a house. All the terms had been agreed, the contract had been prepared, and had been signed by the purchaser and by one of the trustees, when a competing purchaser offered a higher price. The trustees felt in honour bound to complete with the first purchaser. Some of the beneficiaries sought an injunction to prevent the trustees from selling at the lower price. In finding for the beneficiaries Wynn-Parry J. said:

> "It is true that persons who are not in the position of trustees are entitled, if they so desire, to accept a lesser price than that which they might obtain on the sale of property, and not infrequently a vendor, who has gone some lengths in negotiating with a prospective purchaser, decides to close the deal with that purchaser, notwithstanding that he is presented with a higher offer. ..... Trustees, however, are not vested with such complete freedom. They have an overriding duty to obtain the best price which they can for their beneficiaries. It would, however, be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and resile from the existing offer. For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. I can see no reason why trustees should not pray in aid the commonsense rule underlying the old proverb: 'A bird in the hand is worth two in the bush.'

The trial judge ordered that all the costs involved were to be paid out of the proceeds of sale of the house and as the first purchaser had increased her offer to become the higher bidder, the house was sold to her. In the end there was less for division amongst the beneficiaries. Wolfe J. in his judgment adopted a passage from the 27th ed. of Snell on Equity, which appears to have been taken from Buttle v. Saunders, supra.

These trustees were not merely in the negotiation stage in respect of the assets of the Marley estate. They had entered into contractual arrangements and in keeping with the terms of the contract had applied to the Court for approval of the terms of that contract. The respondents had bound themselves to sell and could not unilaterally withdraw from that contract. It is not beyond the realm of possibility that if the respondents had sought to sell to other would-be purchasers they could have become liable for breach of the terms of the Conditional Contract. I do not regard the instant case as on all fours with the situation in Buttle v. Saunders and I doubt very much whether the respondents had any discretion in December 1988 to probe a competing offer for the sale of the residuary estate.

If indeed the respondents had such a discretion, then they were entitled to take into consideration the fact that (i) they had absolutely no knowledge about the financial ability of the proposed purchasers, and (ii) that if the Court did not approve the Conditional Contract before December 31, 1988 the purchasers were at liberty to withdraw therefrom. It was not a situation in which the Court could say to the new offeror: "Enter into a binding contract before December 31, 1988 with the respondent. If you fail so to do,

the Conditional Contract under consideration will be confirmed." When would the formation of the French Company be completed and would the company be still interested in the purchase? Prudent trustees would have to consider these eventualities and could not turn their backs upon a negotiated and completed contract in pursuit of such a nebulous, speculative invitation to treat. In my opinion Wolfe J. correctly exercised his discretion in not refusing to fully consider the Conditional Contract so as to allow the respondents to pursue an initiative which might never ripen into a contract.

It was contended by the appellants that there was a legal duty on the respondents to cause the assets to be valued by a qualified valuator and to advertise those assets for sale prior to entering into negotiations for their disposal. By their failure to advertise and to obtain a valuation, it was argued that their action fell below that degree of diligence and knowledge which a specialist in trust administration must display. The respondents answered those submissions by inviting the Court to say that the principles applicable to the approval of a Conditional Contract are the same as those which apply to the impeaching of a contract. The respondents say that a contract cannot be impeached unless the Court is satisfied that the price realized for the asset has in some way been depreciated by the failure or omission to do an act which ought to have been done. On this line of reasoning, in the consideration of price, valuation simpliciter is not the criterion on which price is based, but rather it is a guide and a negotiating tool. The criterion for price is market value. A sale, they say, even if it is below the valuation, cannot be impeached, unless it falls below market price.

The learned author of Lewin on Trusts states the general duty of trustees with regard to sales at page 580:

> "A trustee for sale .... is bound to sell the estate under every possible advantage to his beneficiaries ..... Trustees if ..... they fail in reasonable diligence in inviting competition, or in the management of the sale or if they contract under circumstances of haste and improvidence ..... whereby a reduction of the contract price is necessitated, may be personally liable for the loss to the suffering party....."

Underhill on Trust in dealing with the effect of depreciatory conditions of sale says:

> "Trustees for sale ought not to do any act which will depreciate the property. No sale by a trustee can be impeached on the ground that any of the conditions was unnecessarily depreciatory unless the beneficiaries prove that the consideration was thereby rendered inadequate."

He continued:

> "If trustees for sale, ... fail in reasonable diligence in inviting competition, or if they contract to sell under circumstances of great improvidence they will be personally responsible; and the onus of proving that they acted reasonably is upon them. It is therefore the duty of trustees for sale to inform themselves of the real value of the property and to fix a reserve price, and for that purpose to employ if necessary, some experienced person to value it.

In Oliver v. Court 146 Exchequer, 1152, the trust property was sold at a gross undervalue to the person who had conducted the valuation. The sale was set aside notwithstanding the fact that there had been such a valuation.

Trustees put up certain lands for sale at public auction with a condition full of warnings and conditions, suggesting traps and pitfalls in the vendors title where there were none. The Court held that the condition was calculated to frighten away potential buyers and would not countenance the argument of the trustees that they had got a good price, when in the view of Bowen L.C., the question was "whether it might not have been a better one." Here the depreciatory conditions clearly affected the price. See Dunn v. Flood 28 Ch. D. 586.

Dance v. Goldingham (1872) L.R. 8 Chancery Appeals 902 was decided in similar fashion. The trustees negligently failed to produce the correct root of title of certain lands which were put up for sale at public auction. The description of the title was grossly depreciatory and the Court held that the beneficiaries were entitled to have the property sold without anything being done which was calculated to depreciate the property.

Thomas v. Williams (1883) 24 Ch. 558 provides an example of a situtation where expert evidence can be quite useless. A tenant-for-life requested the trustees to sell certain property. The remainderman objected to the sale on the ground that if the sale was postponed for a time a larger price could be obtained. Evidence was tendered to the effect that if a Bill then before Parliament was passed, and a proposed railway line was built then minerals on the trust lands could be profitably worked if a large investor showed interest. If all those eventualities materialized then the value of the property would be greatly increased. Bacon V.C. was not impressed with the expertise of the remainderman's witnesses. He made it plain that on some matters any intelligent

person can form an opinion and that unless the so-called expert witness was relying upon experience and knowledge in coming to an opinion, that opinion would be quite worthless.

Trust property which had been valued for £4,050 was eventually sold for £2,400 by private contract. The trustees had great difficulty in negotiating for the sale of the property which negotiations adversely affected the value of the property. Kindersley V.C. said:

> "The test of value was the sum offered at the sale. ... It is true that there was a great difference between the valuation and the sum ultimately obtained; but the opinion of a person valuing could not be put in competition with the result of marketable value."

This was a case in which the Court found that the trustees had conducted the transaction in the fairest manner - Wilton v. Hill 4 Weekly Reporter 66.

In Grove v. Search 22 Times Law Reports 290, Kekewich J. held that trustees for sale were under no obligation to communicate with the solicitors for the beneficiaries before they embarked upon sale of trust property, neither was there a duty on them to have the property valued by a qualified valuator if they acted upon the advice of solicitors who were qualified to inspect and report on the condition of the property.

The last case relied upon by Mr. Henriques on this aspect of the appeal was that of Harper v. Hayes 45 E.R. 731 where the Lord Chancellor held that the fact that a trustee for sale who had power to sell either at auction or by private treaty did not promote competition by asking one of two persons proposing to purchase to bid higher before closing with the rival bidder, was not a ground for setting aside or cancelling the contract.

A report in the Times Newspaper of February 3, 1989 drew attention to the necessity to avoid costly valuations. In P. v. P. Anthony Lincoln J. said:

> "In financial proceedings following divorce, legal advisers considering the valuation of capital in a private company should adopt the broad general approach enunciated by Lord Justice Dunn in Potter v. Potter (1982) 1 W.L.R. 1255, and should strain to adopt any viable alternative compatible with the interests of clients to avoid costly valuations which incurred high legal costs and reduced the amount of capital available to the wife and, particularly to the children."

Mr. Leo Strauss an admitted expert in the valuation of intellectual property, such as was the subject matter of the estate in this appeal, gave three normal means of offering musical rights for sale as:

(a) Advertising in 'Billboard Magazine' (United States) and 'Music Week' (United Kingdom);

(b) Informing legal and accounting firms active in the music business who may represent clients interested in acquisition and;

(c) Direct contact with executives at record companies and/or music publishers.

The respondents say that they adopted methods (b) and (c) and in the process attracted three serious and financially viable offers, together with several other enquiries. I adopt the argument of Mr. Henriques that when an artist has been prominent for some time the people in the trade know with whom he has recording contracts and his mode of operation. If one is going to sell intellectual property

the likely purchasers are those already in the very specialized and limited field. Mr. Reid-Bingham has not been specific as to the persons with whom contact was made other than the three companies whose offers were considered but I do not think that should detract from his otherwise full and frank affidavits. Mr. Louis Pyles although not calling names said:

> "Many other expressions of interest were received from a wide cross-section of the industry in and outside of the United States of America."

I do not accept that failure to advertise in the media recommended by Mr. Strauss is misconduct on the part of the respondents and that that failure inhibited offers and in any way depressed the price. A portion of the assets of the estate was royalties from Island Records and as I will demonstrate later, it was not easy of disposal upon the open market. Mr. Strauss admits that the respondents had all the relevant technical, expert and financial data on which to compute the price but he said they failed to take into account some relevant matters in the computation process. If indeed, the central and most important question is whether the best price obtainable has been received, the route by which that price is negotiated, if in good faith, is insignificant. Strauss said:

> "Messrs. Byles and Bingham used an accepted industry formula in determining the appropriate price for selling the Bob Marley Music Ltd. Catalogue and the ASCAP royalties and it appears that they had all the relevant historical data which were available."

In the process of negotiating the respondents determined the multiples which they could possibly hope to obtain having regard to the variables set out in the advice

from Coopers and Lybrand, certified public accountants and recognised experts for that purpose. They indefatigably negotiated the price upwards in respect of each and every offer received, promoted competition between the rival bidders and only agreed to sell when they received a comprehensive offer for all the assets of the estate. In my view therefore, even if an expert had been asked to apply his mind to the criteria set out by Coopers and Lybrand to the actual facts of the Marley estate, that would not have materially affected the valuation. Likely purchasers know the method by which music royalties are fixed and neither valuation nor advertisement would lead to a higher price once the annual earnings are accurately determined. The one area in which expert advice was necessary, viz., the fixing of the criteria for valuation, such expert opinion was obtained and was used by the respondents.

Mr. Spaulding submitted that Wolfe J. was in error when he held that the purchaser did not have a fiduciary relationship with or duty to the estate. He said that there was a burden on the respondents to establish to the Court that he had discharged all trusteeship obligations in respect of the Conditional Contract including ensuring that the purchaser had not acted in conflict with any duty of trust or confidence owed to the estate and had indeed acted in good faith, with full disclosure of all material and relevant facts at arms length and had not derived any unfair advantage in the transaction, and this the respondents had failed to do. In his submission the consequence was that the Court erred in approving the Conditional Contract. The appellants sought to show that a fiduciary relationship existed between the purchaser and the estate by reference to the terms of the contract between the deceased intestate and the purchaser. They said that it was

the duty of the purchaser to promote sale of the Marley records; to ensure receipts of funds from which payment to the estate were derived; to account properly for royalties due to the estate for record sales; to keep current and updated accounts; to pay over royalties generated by such income promptly and not to use such fund for its own purpose; to avoid conflict with interest of the estate and to display good faith in acting under that contract; to act with due diligence and use its best endeavours in carrying out its duties on behalf of the estate and to make full disclosure in all dealings with or in respect of the estate.

I accept that a fiduciary relationship extends beyond the strict trust relationship and that the categories of fiduciary relationships which give rise to a constructive trusteeship should not be regarded as falling into a limited number of strait-jackets or as being necessarily closed. O'Sullivan and Another v. Management Agency and Music Ltd. and Others (1984) 3 W.L.R. 448 was a case in which a young and unknown composer and performer of popular music wholly inexperienced in business matters entered into an exclusive management agreement with an internationally recognised manager, producer and performer. The young composer etc. achieved considerable success and signed several subsequent contracts prepared and presented to him by agents of his exclusive manager, without first obtaining independent advice. The Court held that the exclusive manager and his associated companies were in a fiduciary relationship with the young composure, and as a consequence the agreements were voidable. On the facts the trial judge found that both Mills and Smith (of the management company) knew that it would be unjust and unfair to expect O'Sullivan (young composer etc.) to know where his best interests lay without independent legal and

professional advice. They did not advise him to seek such advice because they knew that they would not have been able to tie O'Sullivan so firmly to their organization and to get his services on such bargain basement terms if they had. O'Sullivan never asked about the documents before he signed them and was never told he ought to have independent legal advice. There was no appeal from those findings of fact and the Court of Appeal was only concerned with the consequential orders upon rescission of the contracts.

In the instant case there was a series of contracts between the deceased Marley and his associated companies on the one hand and Island Records Entertainment Group on the other hand spanning a period of some twenty years. Under these contracts Island Records would record Marley songs etc. and the Master Tapes would become the sole property of Island Records. Island Records would promote Marley music and sell records etc. From each record sold Marley would be paid a royalty. There is absolutely no suggestion that there was any impropriety in the formation or performance of those contractual obligations in the life-time of Marley or until this day. Not a single fact was placed before the trial judge or before us during the hearing of the appeal to indicate that a question had ever been raised with Island Records as to their promotion of Marley music or accounting for moneys payable as royalties.

In my judgment the relationship between the deceased Marley and Island Records was wholly governed by the contracts between them and there is no room for imputing equitable principles into that contractual relationship. I am of the view that the relationship between the estate and Islands Records is contractual only and that Island Records was in no position

to exert undue influence upon the respondents in the negotiations for the Conditional Contract. The peculiar nature of the contract between Marley and Island Records inhibited other purchasers from wanting to purchase that income stream over which they would have no practical control for development. the respondents are a reputable Trust Company who had the assistance of Mr. Reid-Bingham, an Attorney-at-Law and of his law partner of the legal firm of Hughes Hubbard and Reed. It is inconceivable that these administrators could be put in the same position as the inexperienced pop-star in O'Sullivan's case and entitled to similar protection from the Court.

Island Records were not in possession of confidential information, the property of the estate, from which Island Records could derive a benefit. Island Records were on the contracts, in business for themselves, with a contractual duty to make correct and prompt returns to the estate. Under the contract the estate had the power to audit the accounts of Island Records to verify its entitlement to royalties. In agreement with Wolfe J. I am of the view that there is no factual basis for the complaint that the purchasers stand in a fiduciary relationship with the estate and so ought not to be permitted to purchase the trust property.

The final ground with which I must deal is that which complained that the terms of the Conditional Contract were not in the the best interest of the beneficiaries and that the trial judge erred in law in holding to the contrary. It was said that the sale was at an undervalue because no consideration was given for the sale of the "Name, Likeness and Biographical Rights," no account was taken of the possible movie rights on the life of Bob Marley, no account was taken of fluctuations in the value of the U.S. dollars on the

international market, that the figures used by the parties in the negotiations were supplied by the purchaser and were neither subject to independent verification nor were audited and that "pipeline" money which ought to be the property of the estate was contracted to be the purchasers if the contract was approved. I have already dealt with the questions raised concerning the valuation and advertisement for sale of the assets.

The valuation base was given by Mr. Reid-Bingham. He said he and his partner Mr. Brundige analysed the royalty statements from Almo and ASCAP, that Mr. Brundige met with representatives of ASCAP and they were provided with data from which he was able to verify royalty payments to Bob Marley Music Ltd. and to the estate, since 1983. Almo administered the songs in the Bob Marley Music Ltd. Catalogue which included the worldwide copyright interests of the estate in the said songs and the songwriter and publishing royalties generated from the interests in these songs. ASCAP royalties are generated from the writer and publisher performance royalties paid by American Society of Composers, Authors and Publishers for songs in the Bob Marley Ltd. Catelogue and writer performance royalties paid by ASCAP for songs in the Cayman Music Catalogue. The analysis showed a decline in the average earnings over a 5 year, 3 year and 2 year period. The respective averages were:

ALMO:	5 year period	-	US $530,000.00
	3 " "	-	US $527,000.00
	2 " "	-	US $453,000.00
ASCAP:	5 year period	-	US $159,000.00
	3 " "	-	US $149,000.00
	2 " "	-	US $145,000.00

Using these figures the respondents calculated that the maximum sum obtainable for the sale of these assets was US$5.5m. and could be as low as $4.2m. After negotiations they agreed to sell for the amount of US$5.2m. using a multiplier of approximately 8 in a scale of 1-10. For these assets Almo had offered US$5m and Music Sales Corporation US$5.1m. Neither of these two companies made an offer for Island Records royalties or for the real estate in Jamaica.

At first blush, the arguments that no consideration had been given for the sale of the "Name and Likeness etc." rights seemed attractive. It was revealed, however, in the 7½ years since the death of Bob Marley, earnings from this asset averaged US$27,000.00 per annum and in the last 2½ years the average was only US$3,600.00 per annum.

The respondents say that it was unnecessary to detail a specific amount for the "Name and Likeness" right conveyed but that it was one of the considerations which bolstered their arguments for a very high multiplier. In so far as the prior relationship between Bob Marley and Island Records was contractual, those contracts already conferred upon Island Records the right to use the name, likeness and biographical details of Bob Marley in their promotions. Consequently, Island Records was not purchasing a new and additional asset, nominated as name, likeness etc. It was doing no more than

incorporating into this contract a right which it already possessed by way of contract, for the sake of completeness. I am satisfied that the omission to bargain specifically for movie rights does not detract from the sufficiency of the negotiated price, as the possibility of income from such a source is highly speculative.

I entirely agree with the respondents that there was great difficulty in arriving at a true value for the Island Records Royalties. As far as everyone knows there are no unpublished works of Bob Marley and the projections are that royalty from this income stream will steadily decline. Mr. Henriques listed what he termed risk factors affecting those assets which risk factors he said cannot be controlled in any way by the estate. Everything depends upon the willingness of Island Records to promote the sale of the records etc. so that a multiple of past earnings in a declining market is not of practical value. Between 1983, when the "Legend Album" was issued, and 1986, royalties fell from US$1.2m. in 1983 to US$6m. in 1986. Mr. Henriques, however, over-stated the position when he submitted that in effect, to sell the Island Records royalties, the estate is not so much selling an asset, as it is asking the purchaser to pre-pay royalties to be due in the future when records are sold. Given the uncertain future of the Island Records royalties stream, I am firmly of the view that the present worth of US$3m. to which the parties arrived is a fair one and is in the best interests of the beneficiaries.

There are conditions in the contract which deal with fluctuations in the purchase price and consequential adjustments. Mr. Strauss criticized the high level of discrepancy which must exist before it can trigger an adjustment in the price.

However, I do not think that a sum of US$100,000.00 or just over 1% of the purchase price is so high as to give an undue benefit to the purchasers.

By Clause 2.4.3 of the Contract the "Effective Date" with respect to "receipts obtained from the audits ..... no matter when received, and Record Royalties" was fixed at the accounting period ending December 31, 1987. It was expressly provided that "the Island Group shall have no obligation to account to or pay the Estate for any periods thereafter." I have found this provision disturbing. The Conditional Contract was signed on April 27, 1988 when fully four months of 1988 had already passed. Why should royalties earned by the estate between December 31, 1987 and the date of the contract not be for the benefit of the estate? However convenient it may be for the purchasers to close off their books at December 31, 1987 and for the other royalty paying bodies to do likewise, it is important that money due to the estate at the time of the contract be garnered in and placed to the benefit thereof. I would only approve of Clause 2.4.3 if it is amended to permit the estate to retain "pipeline" money due to the estate immediately prior to the date of the Conditional Contract.

The appellants were much incensed at the decision by the respondents contained in Clause 4.2 of the Contract to accept payment of the US3m. for the Record Royalties, the Record Distribution rights and the Marley Recordings as to US$1m. on the closing of the transaction and the balance of US2m. "by delivery to the Seller at the Closing of a non-negotiab interest-bearing promissory note .... in such amount which shall be payable at the rate of two Hundred Thousand U.S. Dollars (US$200,000) per year commencing one (1) year after the closing and each year thereafter until fully paid, unless accelerated, as set forth below."

The acceleration clause is immaterial because of the decision to which I have arrived herein. The deferred payment was attacked on the basis that there was no real security given therefor and the interests of the beneficiaries would be greatly prejudiced by the non-payment of interest. I have come to the clear view that a sale on these terms would be guaranteeing to the beneficiaries something much less than they presently have under the terms of the royalty agreements and would be therefore to their grave disadvantage. What the beneficiaries wish is to get their money now rather than await the uncertainties over a protracted number of years. Once the respondents had concluded that the best price available for these assets would not exceed US$3. then having regard to what was being sold and the reasons for selling, they should have demanded a total cash payment on completion. This Conditional Contract can only be approved if the purchaser agrees to pay cash in full upon completion.

Accordingly on March 6, at the conclusion of the hearing I concurred in the decision that the Conditional Contract entered into between the respondents and Island Logic Inc. should be approved with modifications. Wolfe J. gave adequate weight to the requirement that the Court should have regard to the welfare of the infant beneficiaries as the first and paramount consideration in deciding whether or not to approve the Conditional Contract. See Section 18 of the Children (Guardianship and Custody) Act. He applied the correct legal principles in interpreting the Contract except as I have indicated in respect of paragraphs 2.4.3 and 4.2 thereof.

The Order of the Court is that the appeal should be dismissed and that the Contract should be varied as follows:

" (i) Clause 2(4) of the conditional contract of 27th April, 1988 between Mutual Security Merchant Bank & Trust Co. Ltd., and Island Logics Inc., 14 East 4th Street, New York in the United States of America, approved by the Supreme Court be amended to the effect that monies from all sources earned by the estate prior to the signing of the conditional contract on 27th April, 1988 to be the property of the estate.

(ii) The said conditional contract approved by Supreme Court be varied so that Clause 4(2) be amended to make the sum of THREE MILLION U.S. DOLLARS ($3,000.000) for the Record Royalties, Record Distribution Rights and the Marley Recordings, be payable by bank or certified cheque upon the closing of the transaction."

FORTE, J.A.

This matter comes to this Court by way of an appeal against the Order of Wolfe, J. confirming a conditional contract entered into by the respondent, as Administrator of the estate of the Hon. Robert Nesta Marley (of which the appellants are the beneficiaries) and Island Logic Inc., for the sale of certain assets of the estate, the details of which have been clearly set out in the judgment of Rowe, P., which I have had the opportunity of reading in draft. As the circumstances leading up to the Court proceedings are admirably set out in the judgment of Downer, J.A. I will not summarize them and will be content to refer to them only in so far as relevant to the matters to be dealt with in this judgment.

There were eleven grounds of appeal filed and argued, but in my opinion the following are the material issues which arose for determination:

1. Is the conditional contract in the best interest of the beneficiaries.

2. Can the assets be sold without the consent of the surviving spouse who has a life interest in 50% of the residuary estate.

3. Was there a fiduciary relationship existing between the estate and Island Logic Inc., so as to void the conditional contract.

Before addressing those specific issues however, some comments on the general powers of a Trustee is of significant relevance. An unpaid trustee, in administering a trust, must exercise such diligence and care as an ordinary prudent businessman would use in the management of his own affairs. However, a paid trustee who is in the business of administering trust property implies by that very fact that he has the experience and knowledge to protect the interest of the cestuis

There is nothing in the evidence to suggest that any undue influence was exercised upon the Admiral Nimitz. On the contrary the affidavit evidence disclosed serious "arms length" negotiations with the Island Group before the conditional agreement was concluded.

In all the circumstances, I am of the view that no fiduciary relationship existed and in any event the conditional contract with the amendments forming part of the decision of this Court is a fair one and in the best interest of the beneficiaries.

One other matter, however, before leaving this appeal, and that is, to emphasize the order of this Court that Clause 3.4 of the contract be amended to the effect that monies from all sources earned by the estate prior to the signing of the conditional contract on the 27th April, 1933 be the property of the Estate. In my view that date is more relevant and certainly fairer to the beneficiaries and I consequently acquiesced in the decision.

I end, cognizant of the fact that other grounds were argued, but those relate to complaints which to my mind had no merit, and consequently are not dealt with.

For these reasons I agreed with the dismissal of the appeal, and the confirmation of the approval of the conditional contract by Wolfe J., with the stated amendments.

DUKE, J.A.:

Robert Marley the celebrated exponent of reggae music died intestate in May 1981. His estate was considerable and because much of it consists of intellectual property which provides a continuing stream of income, it was not an easy task to determine the exact value of his legacy. The Administrator of the estate is Mutual Security Merchant Bank & Trust Company Limited and they went before Morgan, J., on 5th October, 1987 on an Originating Summons and sought specific directions pertaining to the administration of the estate. That learned judge ruled that "it was the duty of the personal representatives to sell the Copyright Royalties and the benefit of the Agreements unsold and that the Personal Representatives are hereby authorised to retain the Copyrights Contracts and Benefits of the Agreement until further order by the Court."

The effect of that order was that the Respondent whom I shall refer to as the Bank or the Trustees, entered into a conditional contract with Island Logic Inc., of New York to sell the Estate Song Catalogue, Record Royalties and Record Distribution Rights together with equipment for U.S.$8,619,000.00 and the Real Estate in Jamaica for Ja.$5,000,000. The Bank then took this conditional contract before Wolfe, J., on an Originating Summons for the Court's approval which he gave despite the determined opposition of the beneficiaries. The beneficiaries include the widow Rita Marley and two adult children together with nine infant Marleys.

As the beneficiaries were aggrieved by the order of Wolfe, J., they sought a stay of execution of the Order made below. They also sought what was necessary and logical, i.e., to consolidate their appeal. Both requests were granted by

Forte, J.A., in Chambers. It was in those circumstances that the beneficiaries whom I shall call the Appellants presented a formidable attack on the order made in the Supreme Court. It therefore falls to this Court to say whether the appellants are right in law for if they are the order approving the contract must be set aside, and a new contract entered into on their behalf, or whether in the circumstances of this case, a variation of the terms of the contract would meet the justice of the case.

Did the Trustees establish that they obtained the best price and conditions for the beneficiaries?

From the very beginning the estate has been embroiled in legal disputes. Letters of Administration were granted by the Supreme Court on 17th December, 1981 to the Bank, Rita Marley the wife of the deceased who is also one of the appellants, and George Desnoes. By a subsequent order of the Supreme Court, Rita Marley was removed as an Administrator and George Desnoes retired because of ill health.

The presentation of the appeal reflected the underlying disputes in this case. Although the appeal was rightly consolidated and the settled rule as laid down in Sweesby v. Lancashire Yorkshire Rand Co. [1875] 1 Q.B.D. 42 at 44; Re Ailesbury's Settled Estates 1 Ch. 506 at 526; and Iles v. Assessment Committee of West Ham & Another [1882] Vol. 46 L.T. 149 at 150 is that there should be addresses from two counsel only from each side, because there were nine infant beneficiaries and the issues were complex, this court was persuaded to permit two juniors to follow the two leaders in presenting the case for the appellants. It is arguable

that if the principles enunciated in Lewis v. The Daily Telegraph (No. 2) [1964] 2 Q.B. 601 as regards the number of speakers permitted, there might have been a saving of time and costs below and in this Court. The initial task on the merits of the case is to determine whether the price arrived at was the best attainable, so there must be an enquiry as to how the Trustee went about negotiating the conditional contract.

In retailing this story, it is pertinent to commence with the Copyrights, which consist of Bob Marley Music Catalogue Limited which was the most valuable asset. It was a catalogue of songs being administered by Almo Music Inc., and included the world-wide copyright interests of the estate of those songs and the songwriter and publisher royalties generated from publishing these songs.

Secondly, there is the Cayman Music Inc., Catalogue which were songwriter royalties generated from other songs written by Bob Marley and assigned to Cayman Music Inc. The royalties from the sale of recordings made for Cayman Music Inc., were also included under this heading. This property is the subject of litigation between the estate and Cayman Music Inc., and is not part of the conditional contract, but may be sold to Island Logic Inc., in the future if the estate is successful in its law suits. It is also worth mentioning that there are other law suits to recover money for the estate which also do not form part of the conditional contract.

Thirdly, there were the A.S.C.A.P., writer and publisher performance royalties paid by American Society of Compares, Authors and Publishers for songs in the Bob Marley Music Limited Catalogue and the writer performance royalties paid by A.S.C.A.P. for songs in the Cayman Music Catalogue.

Fourthly, Island Records Royalties which were generated from recording contracts between Bob Marley and Island Records; and fifthly, rights to use and licence other to use Bob Marley's name, likeness, and image to promote the assets being put up for sale. Finally, the Bob Marley Museum of 56 Hope Road, together with equipment, machinery, inventory and furnishings located there and at the Tuff Gong Recording Studios. These two parcels of real estate and equipment were also part of the conditional contract. There was also a property in Saint Mary which was to be put on the market.

George Louis Byles, the Managing Director of the respondent Bank recalled that in conjunction with J. Reid Bingham, the Ancilliary Administrator of the Estate appointed by the Courts of New York and Florida, they decided that the Bob Marley Catalogue was the most valuable asset in the estate and that the most profitable way of disposing of the assets was to try to sell them to a single purchaser. They also sought the services of Coopers and Lybrand an international accounting firm to give a valuation of the assets which was done orally and confirmed in writing. How ought Bob Marley rights to be valued in the opinion of Coopers and Lybrand? Here are their own words:

> "It is a common practice in the music industry to base the price of a particular music catalogue upon a typical multiple of its net publishers share (hereinafter referred to as "NPS"). NPS includes the publisher's share of all revenues (including those from domestic and foreign performance, mechanical, synchronization and other fees) less any payments to third participants (such as writers and co-publishers). Based upon our familiarity with the music publishing industry and our knowledge pertaining to several transactions that have occurred recently (or are in the process of being negotiated), we believe that a typical price multiple for catalogues of music publishing rights ranges from five to ten.

> "Traditionally, the average MPS over the most recent five year period is used as the multiplicand."

They continued -

> "In regards to the factors which might cause the price of any particular transaction to fall at either the higher or lower end (or outside) of the typical range, it is generally recognized that the value of intellectual intangible assets (such as music publishing rights) is predicated on the perceived future earnings potential available to the owner, discounted to present worth at a rate which reflects the time value of money and related financial risks."

After setting out some of the factors which could affect the price they stated that -

> "provided the price falls within the parameters set out above, this would conform with customary industry norms for determining the price of music publishing catalogues."

It was in this light of the expert opinion that Trustee together with the Ancilliary Administrator set to negotiate the best price obtainable in the market.

It was acknowledged on both sides that Bob Marley had an international reputation. The knowledge of his death would be known in the English speaking world and beyond. It was therefore not necessary to advertise the selling of the musical rights in the trade magazines "Billboard Magazine" of the United States and "Music Week" in the United Kingdom as contended by the beneficiaries. Their own expert Leo Strauss reported that two other methods of sale were normal in this area. They were, by "informing legal and accounting firms outside the music business and who may represent clients interested in acquisition" and by "Direct contact with executives at record companies and for music publishers." Furthermore, the law recognizes that for different markets there are different appropriate modes of

bringing buyers and sellers face to face. In Harper v. Hayes 45 L.R. 731 where the trustees had a power to sell either by public auction or by private treaty. Campbell, L.C., at page 733 ruled that -

> "By the deed creating the power, Hayes was authorized to sell by private contract, or by auction, as to him should seem most expedient, and an attempt to sell this property by auction would have been most inexpedient, because there was a fatal flaw in the title, which an abstract must disclose, and which would be cured by lapse of time in six years, and the attention of bidders must have been attracted to this defect by a special condition in the articles of sale."

Wilton v. Hill [1853] 4 W.R. p. 66 was also a case where the contract which embodied a sale by private treaty was approved by Vindersley, V.C. Moreover, Section 13 of the Trustee Act contains sale by private treaty.

It was in the light of these provisions and the particular facts of this specialized market that it was appropriate for the Trustee to invite firstly, Almo Music Inc., who administered the Copyright, to make an offer in writing for the estate. They at once stated that they were not interested in any asset save for the Music Catalogue and offered US$2,000,000. There were further negotiations but it should be noted that the highest offer was $3,7000,000. which included the purchase of the A.S.C.A.P. royalties. This offer was rejected.

The next stage of the negotiations were with Music Sales Corporation and they offered US$5,100,000. for the entire estate save that they were not interested in any of the assets situated in Jamaica. Almo also came back into the picture and made an offer of US$5,000,000.

It was in these circumstances that Christopher Blackwell of the Island Records Group entered negotiations with the Trustees. His first offer was for $4,000,000. for the entire

estate. Be it noted that they used the same method of valuation as Coopers and Lybrand. Noteworthy also was that the beneficiaries expert Leo Strauss used the same method. He also admitted, at page 190 of the record, that "the selling price in the agreement is approximately mid-price in the range given by Cooper and Lybrand." As the initial offer was rejected by the Trustees, it is clear that the trustees were acting as prudent men of business and were attempting to get the maximum price.

During the March 8-12, 1988 inclusive the bargaining between the trustee with J. Reid Bingham assisting on one side and Island Records on the other, a price was reached which was the best the trustee could get. It was US$5,200,000 for music catalogue, US$3,000,000 for the Record Royalties and US$419,000 for the equipment. For the assets in Jamaica J$1,600,00 was offered for 56 Hope Road inclusive of furnishings and J$3,700,000 for Marcus Garvey Drive. Island Records was not interested in Stuart Place. No serious challenge was made as regards the price arrived at for the assets in Jamaica. As for the Copyrights, Royalties, Name, Likeness Rights, there was a sustained challenge by the counsel on behalf of the appellants. They also contended that the name and likeness rights were not taken into account, while emphasising that the price for the copyrights and royalties was not the best price. Their submissions and authorities must be examined to determine whether the order of Wolfe, J., was justifiable as regards these issues.

The trustee was criticised for not probing the offer made through Banque de Participations et de Placements on behalf of a French company in the process of formation. Those who were to form the company were Mrs. Booker, the mother of the deceased, unnamed European private investors and the

Trade record company Treme. They were not interested in the Jamaican assets but suggested they would pay US$8,700,000 for the intellectual property. The suggested terms were such that a prudent trustee was bound to give them scant regard. They proposed to pay $1,000,000. in escrow at the Banque de Participations de Placements while an audit was to be conducted. They would then pay US$5,000,000. on 21st December, 1989 and $2,700,000. on 21st July, 1990.

Another aspect of this offer to note is that it was presented to the Trustee on 21st November during the course of hearing the summons in the Supreme Court and it was sought to rely on the sage observations of Wynn-Parry, J., in Buttle & Ors. v. Saunders & Anor. [1951] 2 All E.R. 193 at 195 where he said -

> "It is true that persons who are not in the position of trustees are entitled, if they so desire, to accept a lesser price than that which they might obtain on the sale of property, and not infrequently a vendor, who has gone some lengths in negotiating with a prospective purchaser, decides to close the deal with that purchaser, notwithstanding that he is presented with a higher offer. It redounds to the credit of a man who acts like that in such circumstances. Trustees, however, are not vested with such complete freedom. They have an overriding duty to obtain the best price which they can for their beneficiaries. It would, however, be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and resile from the existing offer.
>
> For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. I can see no reason why trustees should not pray in aid the common-sense rule underlying the old proverb: 'A bird in the hand is worth two in the bush'. I can imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer. Each case must, of necessity, depend on its own facts."

To my mind, Wolfe, J., was correct in approving of the Trustees' conduct that they refused to explore the imprecise offer of the French consortium at that late stage of the proceedings. The method of payment suggested was highly unsatisfactory. Furthermore, it might have jeopardised the conditional contract which had reasonable time limits fixed for completion.

In his formidable attack on the Trustees' conduct, Mr. Frankson submitted that there was no valuation report nor was there a proper assessment of the price by experts as is required by law. The cases, however, suggest a more limited role for valuers. That a report should be sought is undeniable and one was sought and secured. The method of valuing has already been adverted to but the price at which the asset is to be sold must be the best that is obtainable in the market.

The Courts have acknowledged the specific experience of a bank as a Trustee and this was adverted to by Harman, J., in Re Waterman's Will Trusts, Lloyds Bank, Ltd. v. Sutton and Others [1953] 2 All E.R. 1054. That learned judge said at page 1055:

> "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 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 advertises itself largely in the public Press as taking charge of administrations is under a special duty."

Further, in conducting a sale of the assets either by private treaty or by public auction a trustee must not depreciate the property. Dance v. Goldingham [E.R. Vol VIII] Ch. A. 903 was an instance where the trustees depreciated the property and the court restrained the sale. The trustees were unable to find a deed of 1819 through which the parties to the deed of

1953 derived their title and the land was put up for sale on the basis that the title was to commence with the deed of 1954. Further, it was a term that no earlier date should be called for except at the purchaser's expense. Some time after the institution of the suit the deed was found. The ratio of the case is to be found in the following passage of James, L.J., at page 911:

> "The cestuis que trust have a right to have this property sold without anything being done which is calculated to depreciate it; and whether the effect which this condition was calculated to produce was or was not produced, it is impossible for the Court satisfactorily to determine, because the Court cannot know how many people were deterred by such a clause as this from bidding or attending the sale. No doubt this clause would absolutely preclude one class of persons from attending the sale, namely, that class of purchasers who had trust moneys for investment in the purchase of land. It is quite clear that this is a condition which was calculated to depreciate the value of the property in the auction room, and that it was inserted without any reasonable ground for so doing."

This case was followed in Dunn v. Flood (Vol. XXVIII) Ch. 586.

A case which demonstrates that the expert opinion of a valuer is a guide but not a mandatory direction to a Trustee is Grove v. Search (Vol. XXII) T.L.R. 280. The cardinal rule is that the Trustee must secure the best price in the market and this may be below a valuation but would not necessarily be regarded as a sale under a depreciating condition. For in this case, the Trustee sold below the probate value and the Court approved of the conduct of the Trustee. It is instructive to quote some passages from the judgment of Pekewich, J., at page 281, he said:

> "There was a direct trust for sale, followed, no doubt, by a power of postponement. According to his Lordship's experience in Chambers, when a trust was in this form it was very seldom for the advantage of the trust estate that the sale should be postponed. It was usually better that the sale should take place as soon as was reasonably possible."

Further on the same page he said:

> "It was said that the trustees had consulted the solicitors of the beneficiaries as to the value of this property for probate, and had accepted the valuation of the solicitors, and that they did not consult them again with reference to the sale; but in his Lordship's opinion there was no obligation on the trustees to communicate with the solicitors of the beneficiaries at all. Then it was said that the trustees never had a valuation of the property made at the time. What they did was to instruct Messrs. Debenham and Tewson, not to sell, but to report with a view to a sale. Adams, no doubt, was not a qualified valuer, but he was throughly qualified for the purpose for which he was employed—viz., to inspect and report. When the offer of the £3,000 was made the trustees at first would have nothing to do with it, seeing that the property was mortgaged for £3,590, and was valued for probate at £4,100, and they refused to consider the matter unless they had a report in writing under the signature of the firm. That report was duly written and signed by the firm, and the trustees acted upon it. There was some evidence at the trial that a little more might have been got for the property, but evidence of that kind ought always to be accepted with a large pinch of salt. There was certainly a depression in the market at the time of the sale, and that weighed very much with Debenham and Tewson. His Lordship was not convinced on the evidence that there was any market for a house of this kind at a large price or at any price, and it might have been in the market at the present moment."

In point of fact the courts here recognised that when it comes to the sale of an asset with a fluctuating market, there is risk and uncertainty which a purchaser must bear. This risk plays a part in determining price. The trustee

must rely on his prudence as a trust administrator as to what the market will bear and he cannot depend on expert opinion, except for guidance. Equity jurisprudence has recognised this divergence between value and price at the highest level, so in Commissioner of Stamp Duties v. Livingston [1964] 3 W.L.R. 963 Lord Radcliffe said at page 970:

> "Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realisation are very far from being interchangeable terms."

This is well illustrated in an earlier case of Thomas v. Williams (Vol. XXIV) Ch. 559 where Bacon, V.C., made some appropriate comments on the limitations of expert opinion when the subject matter involved speculation as to future income. The issue was the possible increase in land value as a result of the probable building of a railway line. The experts called by the remaindermen foresaw a tremendous increase in value over the market value which the tenant for life would receive at the current market price. Here is how the learned Vice Chancellor puts the issue at page 546:

> "I am asked to say, upon the evidence of what are called experts, that if the sale was postponed for a time a larger price could be obtained for the property than could be obtained at present. What right have I to rely upon the opinions of experts upon such a subject as that?'

In the face of the trustees evidence of the hard bargaining between themselves and Island Logic before the price was determined, all the appellants had resorted to was the Coopers and Lybrand formula which the trustees used. The rest of the opinion of Leo Strauss is largely conjectural as it concentrated on the possibility of continuous depreciation of the American dollar against other currencies; a continuous inflationary situation in the

markets for reggae music, an always favourable market for Marley's music and that there would be a larger market if there was more aggressive exploitation of Marley's music in the future. It was on the basis of these speculations that he anticipated that there ought to have been a higher price. There is no duty to rely on expert with regards to such conjectures.

The truth of the matter is that given the customary formula used in the industry, the expertise which is required of the Trustees is to bargain for the highest multiplier obtainable and this the trustees did. Their conduct, therefore cannot be impeached on this ground, despite the speculations of Mr. Leo Strauss. An attack was also made on the accuracy of some of the data relied on by the respondent in "determining the appropriate price of the said assets ..... because it has never been audited." This is an unwarranted allegation as Clause 4.5 of the contract makes provision for an audit and makes provision for adjustments by either party as a result of such audit. It is important to note that the audit of royalties of the Island Group is to be conducted by the estate's auditors. There was therefore no merit in this aspect of the appeal which stated that the determination of the best price was impossible because there was no independent verification of the figures.

There is yet another case to illustrate that even where a trustee sells at a price below valuation such conduct is not necessarily to be regarded as a sale under depreciatory conditions. In Wilton v. Hill [1855] 4 W.R. Ch. at p. 66, the estate was valued at £4030 and the trustee sold it for £2,400 by private contract. Kindersley, V.C., was emphatic that in the circumstances, there was a proper sale. At page 67 it reads thus:

> ..... it appeared to him the trustees had done all that they could in relation to the management of the estate, there appeared to have been a difficulty in negotiating with the bishop for a renewal, and that would no doubt take from the value of the property; at all events, the test of value was the sum offered at the sale, and it clearly appeared that every part of that transaction was conducted in the fairest manner, and there was no ground for saying that the sale was at an undervalue."

In the instant case the trustee was criticised that he sold at an undervalue as he did not take into account the value of the name, likeness, biographical rights as defined in the agreement. The evidence of Louis Eyles does not bear this out. In listing the main assets of the estate at p. 85 of the record, he stipulates this asset. Further, at page 147 of the record in referring to this asset he stated that "whether any of the other potential purchasers would purchase the asset without this right is speculative, but it is clear that the purchase price would be substantially less without the right attached." In the light of that, the necessary inference must be that this was a factor taken into account in fixing the multiplier and this in turn served to enable the trustee in getting the best price possible from Island Logic.

Another challenge by the beneficiaries to the effect that the trustees were not aware that the Master Recordings were to revert to the estate and consequently that was not factored into the price, was effectively refuted by Mr. Henriques who pointed out that there was no such challenge in the Court below. He then secured further affidavits from J. Reid Bingham which exhibited the contracts listed at page 91 of the record. Apart from the 'Confrontation Album' which was to revert to the estate after ten years, all recordings featuring Bob Marley and recorded by Island Records under such contracts are the

absolute property of Island Records. It ought also to be pointed out that the trustee made these contracts available to Mr. Leo Strauss the expert witness for the appellants.

The appellants have attacked Clause 24 at page 64 of the record of the conditional contract in that it makes the laws of New York applicable to agreements wholly to be performed in New York. The purchasers are incorporated in New York and by law it must be assumed that the laws of New York are similar to that in Jamaica unless there is evidence to the contrary. No such evidence was produced. Consequently, this cannot be said to be a depreciating condition of the sale. It was the duty of the trustee in the Court below to establish at the end of the day, that the best price had been obtained and the learned judge so found. This is evidenced in citation at page 269 of the record with approval of a passage from Snell on Equity 37th edition which begins thus:

> "Trustees are bound to sell at the best price reasonably obtainable, so that even if negotiations for a sale are so nearly complete that ordinary commercial morality precludes them from honourably withdrawing, they still must not reject a better offer without first probing it. Nevertheless they have a discretion and are not bound automatically to reject the lower offer: they may 'pray in aid the common sense rule underlying the old proverb: 'a bird in the hand is worth two in the bush'."

It is true that the learned trial judge also said that the onus was on the beneficiaries to satisfy the court that a better price was available and that they had not satisfied that burden. But the irrelevance of imprecise words is well illustrated in Lord Selborne's speech in Julius v. Bishop of Oxford [1874] All E.R. 43 at p. 54 he said:

> "The use of inexact language in the statement of reasons for judicial decisions, though nothing may turn upon it in particular cases determined upon sound principles, is sometimes liable to become a point of departure, in other cases, towards erroneous conclusions. This appears to me to have happened in the court of first instance in the present case."

Be it noted that this passage is pertinent in a trial by a judge without a jury. Mr. Morrison's submissions that the words purporting to put the onus on the beneficiaries that a better price was available amounted to a serious misdirection may well have been valid if they were used to direct a jury. But occurring in the learned trial judge's reasons where he had also made a valid finding, they are to be regarded as surplusage. In the light of all this, I find that the imprecise words relied on cannot upset the finding in the Court below that the trustees obtained the best price. Moreover, the method they used in negotiating that price was based on sound principles.

Could there be amendments to the terms of the conditional contract which would be advantageous to the beneficiaries?

Trustees must act in accordance with Section 3 of the Trustees Act with regards to the investments they may make and Mr. Frankson in reply took a point which was not argued before Wolfe, J. He criticised the term in the contract which sought to give the purchaser credit for the $[illegible],000 for Record Royalties and Record Distribution Rights. The term approved by the court below permitted the purchaser to pay this sum over a ten year period at $2000,000 per annum in addition to $1,000,000 cash. The substance of such an

agreement was to permit the trustee to make an unauthorised investment. This Court will not permit it. The trustee contended that $3 million is the best price and this must be paid as soon as the transaction is completed. Mr. Frankson helpfully referred to the Trustee Act which sets out the range of permitted investments. What is odd is that the French Consortium also sought credit for a larger sum albeit for a shorter period. It was in these circumstances that the Court amended the clause in the conditional contract so that $3. million becomes payable in cash.

There was another amendment which was implemented as a result of the submission made by counsel on behalf of the appellants. Clause 2(4) of the contract enabled Island Logic to benefit from income earned by the estate but not received by the estate before the signing of the conditional contract. This was to accrue to Island Logic. The amendment imposed by the Court would enable the estate to retain such sums.

Did the trustee err in law on the following issues?:

(a) the fiduciary relation between Island Group and the estate;

(b) on the special position of Rita Marley;

(c) on the necessity for consent by the beneficiaries before a sale was effected.

The point taken by Mr. Spaulding was that there was a fiduciary relationship between the Island Records Group and Marley during his life time and with the estate after death. It was stressed that when the contracts were examined the relationship was akin to that described by Lord Chelmsford, L.C., in Tee v. Williams [1866] L.R. 2 Ch. App. 55 at p. 61 where it was stated:

> "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other ..."

Furthermore, it was contended that Island Records sought to exert undue influence by warning in its offer letter at page 47 of the record that it would have no incentive to promote the Marley catalogue and the promotional expense would be assumed by the purchaser if the assets were sold to any other company. Further, it was submitted that the duty to promote Marley was the primary ground which established the fiduciary relationship. This was a formidable submission and well argued. It, therefore, required a serious response.

The submissions for the respondent was based on a detailed examination of the contracts which were exhibited in the Supplementary Record - It was acknowledged that there were contracts in this area of law where a fiduciary relation could exist. Such was the case of O'Sullivan v. Management Agency Ltd., and Music Ltd. & Ors. [1984] 3 W.L.R. 448 where O'Sullivan, when he entered into the contract, was young and unknown and entered into an executive management agreement with the third defendant, an internationally recognized manager, producer and performer. The instant case was markedly different. The agreement of 27th August, 1974 at page 20 of the supplementary record enabled Marley to appoint a lawyer or an accountant to audit the books of Island Records in respect of royaltics. By August 6, 1975 the Marley Contracts were now between Media Aides Limited, an off-shore Marley company in the British Virgin Islands, and this company is Licenced by Marley to receive his royalties. It was also at that time that he assigned his name, likeness, image etc., to Island Records as this was an intellectual asset protected by Performance Protection Act 1958-1972 (U.K.). The

disposition of this intellectual asset was therefore a familiar transaction between Marley and Island Records Company. An agreement of August 10 specifically states that the agreement between Media Aides Limited and Island Records in respect of Marley was not a partnership agreement.

An agreement of December 16, 1976 (p. 176 of the supplementary record) is instructive. In that agreement Marley stipulates conditions for the release of an album which Island Records accepts. It was written in a confident tone and indicates that there were two business entities striking a commercial bargain. There was no indication of a fiduciary relationship here. Then there was a tour, the financial arrangements of December 15, 1976 (p 79 of the supplementary record) for the tour whereby Island Records advanced US$100,000 and this was to be recovered from royalties. The arrangement is akin to that between publisher and an author or the author's agent and I see no good reason to import a fiduciary relationship, which would impose a constructive trust and prevent the implementation of the conditional contract - a situation which would not be in the best interests of the beneficiaries, most of whom are infants. On this aspect of the case, the appellants have failed. In this regard it is pertinent to stress that it has been recognised that straining circumstances to create a fiduciary relationship may be disadvantageous to the beneficiaries in a case like this. Here is how Lord Herschell puts it in Bray v. Ford [1896] A.C. 44, 51:

> " It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of

> morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services."

[emphasis supplied]

Rita Harley, the widow of the deceased has been accorded a special position by virtue of the Intestates' Estate and Property Charges Act 1937. This Act was amended in 1987 but the amendments do not affect the sections of the Principal Act which are relevant to this case.

Mr. Hylton contended that on the true construction of the relevant statutes and authorities, the trustee did not have the power to sell the assets without first redeeming the widow's life interest in one-half of the residue of the estate and without obtaining her consent. The foundation of the appellant's argument rested on a passage in the speech of Lord Cairns, L.C., in the case of Cooper & Anor. v. Cooper [1874-80] All E.R. Rep. 307. It is true that the deceased in that case died intestate but what was in issue was whether those interested in the intestate's estate had an interest sufficiently specific to elect. What is in issue in the instant case is whether the beneficiaries have an interest in specie and whether they must be consulted before the trustees can exercise their power to sell. So considered the following passage at page 307 in His Lordship's speech was obiter -

> "It has been urged at the Bar that the interest of the next of kin of an intestate is of an undefined and intangible nature, and is merely a right to have the residue converted into money after all debts have been discharged; and if so, it can only be ascertained by calling upon the administrator to do his duty, which may require that the estate should be so converted. But the rule of law and the statute which require this conversion into money were introduced for the benefit of creditors, and to facilitate its division as substantive property. The next of kin has a right to the whole subject to this paramount claim of the creditors."

This passage was approved of in Blake v. Bayne [1908] A.C. 371 at p. 383 but the correct position was stated by Lord Radcliffe in Commissioner of Stamp Duties (Queensland) v. Hugh Duncan Livingston [1964] 3 W.L.R. 963. The following passages from Lord Radcliffe's opinion clarifies the position. The first is at page 970 where he quoted from the authoritative position on this breach of the law. It reads:

> "In their Lordships' opinion the decision of the Sudeley case [1897] A.C. 11; 12 T.L.R. 224, H.L.(E)., is conclusive on this issue. It is sufficient to quote the words of Lord Herschell, which do no more than reflect the reasoning and views of all the members of the House who took part in the decision. 'I do not think', he said, [1897] A.C. 11, 18., speaking of Mrs. Tollemache's executors, 'that they have any estate, right, or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate."

Then on page 973 His Lordship continued thus:

> "The members of the House who decided Sudeley were dealing with a branch of the law that was familiar and well established, and they were dealing with it with the precision that they regarded as being required by the particular issue that was before them. The laws as they there stated it was reaffirmed by the House in the same terms in Dr. Barnado's Homes v. Special Income Tax Commissioners [1921] 2 A.C. 1; 37 T.L.R. 540, H.L.(E). It is sufficient to quote two short passages

"from speeches in that case. Viscount Finlay said [1897] A.C. 11: '... the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete'; while Viscount Cave says L.R. 7 H.L. 53, 64-65: "When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue, as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration." Similar explicit statements of the true position will be found in the judgments of Lord Sterndale M.R., when the Barnado case was in the Court of Appeal, [1920] 1 K.B. 468, 479; and of Sir Wilfrid Greene M.R. in Corbett v. Commissioners of Inland Revenue, [1938] 1 K.B. 567, 575-577."

When these passages are considered, it will be seen that until the trustee converts the assets the beneficiaries have no property which has been ascertained and implicit in these passages is that the trustee has the power to sell.

The statutory provisions reinforced this contention. Initial consideration must be given to Section 13(1) of the Trustee Act. That section reads:

"Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss."

Further, Section 2 defines Trustee to include a personal representative. See also In Re Marsden [1884] Ch. 783 at 789 where equity had arrived at the same position. Then Section 2 of the Intestates' Estate and Property Charges Act reads:

> "2. In this Act—
>
> (a) "residuary estate" means every beneficial interest (including rights of entry and reverter) of the intestate in real and personal estate, after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable thereout, which (otherwise than in right of a power of appointment) he could, if of full age and capacity, have disposed of by his will;"

Section 4(1) of that Act, so far as relevant, reads:

> "4.—(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely—
>
> (i) if the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of one hundred dollars or a sum equal to ten per centum of the net value of the estate whichever may be the greater free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of five per centum per annum until paid or appropriated, and subject to providing for such sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held.
>
> .....
>
> (b) if the intestate leaves issue, upon trust, as to one-half for the surviving husband or wife during his or her life, and, subject to such life interest, on the statutory trusts for the issue of the intestate; and, as to the other half, on the

"(b) statutory trusts for the issue of the intestate, but if those trusts fail or determine in the lifetime of a surviving husband or wife of the intestate, then upon trust for the surviving husband or wife during the residue of his or her life;"

Then in Section 6 the Act empowers the Trustees to sell. The material section reads:

"6. For the purposes of this Part the residuary estate of the intestate, or any part thereof, directed to be held upon the "statutory trusts" shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land."

Since residuary estate includes realty and personalty by virtue of Section 2 of the Act and Section 4 decrees that the residuary estate is to be held on trusts as defined by Section 6, which empowers the Trustee to sell, it is difficult to understand the contention that the Trustee cannot sell without consultation and with the consent of the widow or the guardians of the infants.

Section 6 of the Intestates & Property Charges Act continues thus:

"Where -

(a) an undivided share was subject to a settlement; and

(b) the settlement remains subsisting in respect of other property; and

(c) the trustees thereof are not the same persons as the trustees for sale,

then the statutory trust include a trust for the trustees for sale to pay the proper proportion of the net proceeds of sale or other

"capital money attributable to the share to the trustees of the settlement to be held by them as capital money arising under the Settled Land Act."

Since Rita Marley is entitled to hold the residue for life and the remainder for the children this part of Section 6 is applicable as realty and personalty are included in the residuary estate. Then the Trustee for sale must pay the proper portion of the net proceeds to capital for the benefit of the widow. It is in this sense that she has been accorded a specific position.

Section 7 reinforces Section 6, when the sale has been effected the Trustee may redeem the life interest of the widow with her consent or with leave of the court. But it must be emphasized that this life interest is in the proceeds of the sale and, the capital value as the section stipulates, makes it clear is to be reckoned according to tables selected by the personal representatives. For emphasis it is appropriate to set out Section 7 as far as is material. It reads:

"7.(1) Where a surviving husband or wife is entitled to a life interest in the residuary estate or any part thereof the personal representative may, either with the consent of any such tenant for life (not being also the sole personal representative) or, where the tenant for life is the sole personal representative, with the leave of the Court, purchase or redeem such life interest (while it is in possession) by paying the capital value thereof (reckoned according to the tables selected by the personal representative) to the tenant for life or the persons deriving title under him or her and the costs of the transaction, and thereupon the residuary estate of the intestate may be dealt with or distributed free from such life interest."

Apart from the reliance on the obiter dictum of Lord Cairn's speech in Cooper v. Cooper (supra) the appellants wrongly interpreted - In Re Birchall (Vol. XVI) Ch. 41. The headnote states the ratio which reads - "The court had no jurisdiction to enforce a compromise against infants against the opinion of their advisers."

Jessel, M.R., in the course of his judgment said at page 43:

> "The practice followed by myself, and by Lord Romilly before me, at the Rolls, has been to require not only that the compromise should be assented to by the next friend or guardian of the infant, but that his solicitor should make an affidavit that he believes the compromise to be beneficial to the infant, and that his counsel should give an opinion that he considers it to be so. If the opinion given is only that of the junior counsel and there is a leader, I ask the leader in Court whether he agrees with the junior's opinion, and this was also Lord Romilly's practice."

This decision was followed in Re Taylor's Application [1972] 2 All E.R. 873 where a parent, a special friend who had agreed to a settlement attempted to have the Official Solicitor replace the parents who refused to accept the settlement provided by Distillers Co. Ltd., for children who were deformed by thalidomide. The Court refused to accede to the request and in the course of his judgment at 877 Lord Denning, M.R., quoting Sir George Jessel, M.R., in Re Birchall said:

> "If the Court saw that a guardian or next friend was acting improperly and against the infants' interests in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute some other person, but I never heard of such a thing as the Court compromising without the consent of the next friend or guardian."

It was, therefore, not permissible to contend that the consultation and agreement necessary for compromise to a suit where infants property is concerned is to apply to the statutory power given to the trustee to sell the realty and personalty of an intestates' estate because infants are beneficiaries. The appellants therefore also failed on this aspect of the case.

CONCLUSION

Robert Marley was a complex genius who composed and recorded reggae music. His lyrics and the rhythms which accompanied them while rooted in the Jamaican cultural tradition has a universal appeal. Modern entertainment has become big business with a corps of specialists in law, accounting, public relations and entrepreneurs who take the risks of failure where the market fails to respond and are in return handsomely rewarded for success. Both the entertainers and the recording groups set up companies in off-shore islands as the Cayman and Virgin Islands which have liberal tax laws. The estates of modern popular artistes are large and intricate. Because of Marley's standing and wealth, the administration and litigation which surround his estate have attracted wide-spread interest by the media.

The courts have a specific role as ordained by Section 18 of The Children Guardianship and Custody Act when administering the property of infants and there are nine of them in this case. The Court must therefore regard the welfare of the child as the first and paramount consideration." Attorneys and counsel too have a special role in proceedings of this nature. Megarry, J., puts it thus in Re Barbour's Settlement [1974] 1 All E.R. 1188 at 1191:

> "The solicitors must see that all the relevant matters are put before counsel, that the right questions are asked, and that the guardian ad litem or next friend of the minor fully understands and weighs counsel's advice when it is given. Counsel has to discharge what in my judgment is one of the most important and responsible functions of the Bar, that of helping those unable to help themselves; and the guardian ad litem or next friend must understand the advice given and carefully weigh the advantages of the proposed compromise to the minor against the disadvantages."

Earlier in his judgment at page 1189 that learned judge emphasised the fiduciary relationship between the Bank as

Trustee and the beneficiaries. No doubt it was in recognition of its onerous responsibility that the Bank gave a detailed response to questions raised by those representing the beneficiaries and an acknowledgment of an error in a further letter of November 28, 1988. Yet one ground of appeal complains of the learned judge's failure to take note of this letter. I have specifically referred to this ground, so as to indicate that every ground has received the attention of this Court, although to my mind, there was a degree of repetition, but it was perhaps for emphasis. The letter merely concerns interim accounts rendered by the Trustees and the contract provides for auditing of these accounts.

The originating summons in the Court below sought "confirmation of the conditional contract, certain modifications (if any) as the Court shall think fit." On appeal, the appellants have sought to have the confirmation and approval set aside. This Court after listening to submissions of skill and subtlety, has modified the conditional contract approved by the Supreme Court. In substance, therefore, the appeal was dismissed and these are reasons for agreeing with the judgment and order of this Court delivered on March 6, 1989.