*Privy Council Appeal No. 20 of 1989*

**Makeda Jahnesta Marley and 11 Others** *Appellants*

*v.*

**Mutual Security Merchant Bank and Trust Company Limited** *Respondent*

FROM

# THE COURT OF APPEAL OF JAMAICA

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## REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 26TH JULY 1990. DELIVERED THE 15TH OCTOBER 1990

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*Present at the hearing:-*

LORD BRIDGE OF HARWICH
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
SIR ROBIN COOKE

*[Delivered by **Lord Oliver of Aylmerton**]*

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The appellants in this appeal are the widow and the eleven children of the late Robert Nesta Marley, who are between them beneficially entitled to the whole of his estate under the provisions of the Intestates' Estates and Property Charges Act of Jamaica. They appeal from an order of the Court of Appeal of Jamaica (Rowe P. and Forte and Downer JJ.A.) of 9th March 1989 whereby that court sanctioned the conclusion, with certain modifications imposed by the court, of a conditional contract for the sale by the respondent of the principal assets of the estate.

The deceased, commonly known as Bob Marley, died intestate in Jamaica, (where he was both domiciled and resident) on 11th May 1981. During his lifetime he had enjoyed a world-wide reputation both as a composer and as a performer of Reggae music and his songs and recordings remain extremely popular to this day. His estate, which was and is of great value and not a little complication, consisted primarily of the musical rights relating to his songs and recordings and some valuable real estate in Jamaica.

[44] On 17th December 1981 letters of administration to his estate were granted to the respondent, the Mutual

Security Merchant Bank and Trust Company Limited, together with Mr. Marley's widow and another individual who has since retired. The widow having been removed as an administrator on 3rd February 1987, the respondent is and has been at all times material to this appeal the sole administrator of the estate. The Intestates' Estates and Property Charges Act of Jamaica contains no express provision for the assets of an intestate's estate to be held upon trust for sale. Accordingly, in October 1987 the administrators applied to the court for directions as to whether it was their duty to sell the musical rights and, if and so far as necessary, for authority to retain them unsold. On that application Morgan J. declared that it was their duty to sell the rights but directed their retention until further order of the court.

Following this order the respondent sought the assistance of a Mr. Reid Bingham, a member of the New York and Florida Bars, who had been appointed by the courts of those States as ancillary administrator of the estate, to assist in negotiating and arranging a sale of the assets. Negotiations ensued and on 27th April 1988 the respondent entered into a form of conditional contract for the sale of the bulk of the estate assets to Island Logic Inc., a New York corporation, at a price of US$8,200,000 together with an amount for the majority of the tangible assets in Jamaica to be arrived at by valuation. This agreement was executed pursuant to a written offer from the purchaser which, among other things, imposed a condition that the binding effect of the agreement was to be dependent upon the prior approval of the court. Clause 5 of the contract accordingly provided for completion to take place on 30th June 1988 or 21 days after the court's approval of the terms, whichever should be the later.

A valuation of the tangible assets of the estate comprised in the sale has been carried out and has produced overall figures of J$5,300,000 for the real estate in Jamaica (other than the deceased's personal residence) and US$419,000 for the equipment and furnishings contained therein.

Accordingly on 5th May 1988 the respondent issued an originating summons seeking an order that the conditional contract for the sale of these assets be confirmed subject to such modifications (if any) as the court might think fit and as might be agreed and that the respondent be at liberty to carry the same into effect. To this summons all the beneficiaries (nine of whom were infants) were made parties.

The summons was heard by Wolfe J. at various dates between 21st June 1988 and 30th December 1988. The relief claimed was unanimously opposed by the widow and such of her children as were of full age and by the guardians *ad litem* of the infant beneficiaries. A

prolonged hearing took place between 21st and 25th November 1988 when the arguments of the parties were fully deployed and an alternative offer from a French source was put in evidence. Nevertheless Wolfe J., on 30th December 1988, overrode the objections of the appellants on the ground that the conditional contract represented the best offer reasonably obtainable and he authorised the respondent to carry it into effect.

From this order the appellants appealed to the Court of Appeal, the order of Wolfe J. being stayed pending the hearing of the appeal. That court, whilst clearly of the view that Wolfe J. had wrongly concluded that the terms proposed were the best reasonably obtainable, nevertheless were prepared to sanction the proposed transaction subject to two modifications which, if accepted, would have the effect of substantially increasing the value of the consideration. Whilst therefore the order of Wolfe J. was varied to the extent necessary to give effect to the modifications imposed by the court, the appeal was nevertheless dismissed. This seems to their Lordships a curious procedure because it could not be predicated at that stage whether or not the proposed purchasers would agree to the modifications which the court had proposed. The logical course would have been to adjourn the hearing for the agreement to be re-negotiated and to direct the restoration of the summons when it has been ascertained whether or not the suggested new terms can be agreed - a course which would have had the additional advantage of enabling the alternative offer to be properly investigated and considered. In the event, however, the purchasers did agree to the modifications proposed by the court, albeit, so their Lordships have been informed, with a degree of reluctance.

From that order the appellants have now appealed to Her Majesty in Council. Their Lordships have been told that pending the hearing of the appeal the contract has been provisionally carried into effect subject to the outcome of this appeal and that the purchase price has been placed on deposit to abide the result. On the hearing of the appeal before the Board and having regard to the pressing need of all parties that the uncertainties surrounding the future disposition of the assets of this very substantial estate should be dispelled without further delay, their Lordships indicated that they would humbly advise Her Majesty that the appeal should be allowed and the matter remitted to the Supreme Court of Jamaica for further consideration with liberty to all parties to file such further evidence as they might be advised, and that they would order the costs of all parties of the hearing before their Lordships' Board to be paid out of the estate of the deceased in due course of administration. Their Lordships then indicated that they would give their reasons subsequently. This they now do.

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

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

Their Lordships have thought it appropriate to preface a consideration of the merits with these observations because a perusal of the judgment of

Wolfe J. and of the three careful judgments of the Court of Appeal indicates that the hostility with which the respondent's application was received by the beneficiaries has led, perhaps inevitably, to the application being approached more as one involving the resolution of issues of misconduct and breach of fiduciary duty rather than an in-depth consideration of the sufficiency of the evidence required to enable the court to give fully and properly informed directions to the respondent trustee. This appears most clearly in the judgment of Wolfe J. who, although rightly stressing at the outset that the guiding principle must be to ensure that whatever order was made was in the best interest of the beneficiaries, concluded 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 satisfied that they have discharged this burden."

This, as Mr. Jonathan Parker Q.C. has submitted on behalf of the appellants, was a fundamental misdirection which vitiated the judge's exercise of discretion. It is, however, not now contended in any event that the judge's exercise of discretion can be upheld because, as a result of the substantial and accepted modifications of the terms of the conditional contract in the Court of Appeal, his conclusion that the agreement which he was asked to approve was in the best interests of the beneficiaries has already been demonstrated to be incorrect. This also has the incidental effect of disposing of the submission made on behalf of the respondent that the Board is confronted by concurrent findings of fact in the two courts below.

Although this criticism of the judge's approach was advanced before the Court of Appeal and was clearly grasped by that court, the judgments nevertheless revealed a similar approach. Rowe P., having rightly held that the court had the duty, if necessary, to override the views expressed on behalf of the infant beneficiaries if it was convinced that the sale negotiated was in their best interests, nevertheless approved the judge's view that there rested what he described as an evidentiary burden, to be resolved on the ordinary principles applicable in civil cases, to displace the *prima facie* case made by the respondent; and he appears to have accepted the respondent's submission, advanced in the course of the argument, that the principles applicable to the approval by the court of the conditional contract were the same as those applicable in a case where the conduct of the trustee is impeached by the beneficiaries.

Thus the question before the court appears to have been regarded as simply that of determining whether the trustees had exercised due diligence in their

approach to their duty to sell rather than that of considering whether the evidence was such as to enable the court properly to exercise its discretion by directing a sale on the proposed terms. A similar approach appears in the reasons for judgment of Forte J.A. who expressed himself as satisfied that the respondent had behaved responsibly and who spoke of the examination of the conduct of the paid trustee in relation to the sale. He appears in addition to have approached the case on the footing that there was a subsisting contract which it was the duty of the court to maintain, if fairly made, and that it should not be interfered with unless some plain necessity for doing so was demonstrated. Downer J.A., although he himself expressed the question as being whether the contract of the respondent could be "impeached", was disposed to agree that the judge's approach would have amounted to a misdirection in the case of a jury but considered that it was to be regarded as mere surplusage in a case where a judge had made a valid finding. Whether or not this is sustainable, it overlooked the fact that, on the court's own reasoning, the finding of the judge that the unamended terms of the conditional contract were in the best interests of the beneficiaries was not a valid finding.

Inevitably, of course, a judge hearing a contested application for directions is faced with assessing the strength and validity of the arguments presented to him and discussion about the burden of proof becomes, in many cases, largely semantic. Their Lordships are, however, unable to resist the impression that in the instant case the sustained attack by the beneficiaries, much of it based upon grounds which were clearly untenable, has led to the obscuration of the essential questions which require to be answered before the court could be satisfied that it was in a position to give directions to the respondent trustee in a matter which was crucial to the whole future of the trust which it was called upon to administer. Thus the conclusion came to be dictated not so much by a consideration of whether the court had before it the evidence which it would normally require on a trustee's application of this nature as by a consideration of whether the beneficiaries had been able to demonstrate that better terms were available.

In these circumstances it was the argument of Mr. Parker that the approach not only of Wolfe J. but of the Court of Appeal was in this respect flawed and that the exercise of discretion requires to be reviewed.

The question whether the trustee has demonstrated that the contract submitted for approval is in the best interests of the beneficiaries reduces, in such a case as this, to whether the trustee can satisfy the court that it has taken all the necessary steps to obtain the best price that would be taken by a reasonably diligent professional trustee. The question may equally well be

expressed as whether the trustee has shown that it has fully discharged its duty. That question may appear to be very similar to the question whether to enter into the contract without taking further steps and without seeking the directions of the court would justify an action by the beneficiaries for misconduct justifying the removal of the trustee. Nevertheless there is an essential distinction in that, in such an action, the beneficiaries would be required to assume the positive burden of demonstrating a breach of fiduciary duty. A failure to do so does not demonstrate the converse, namely that the transaction proposed, because not proved to be a breach of fiduciary duty, is therefore one which is in the interest of the beneficiaries.

It may well be that this was fully appreciated in the courts below, but for the reasons already given, it is not entirely clear that it was. Although, therefore, their Lordships do not find it necessary to rest their decision upon any fundamental misconception by the learned judges in Jamaica of the elements of the issues which had to be determined, they have felt justified in reviewing the matter. For the reasons about to be given, their Lordships are not satisfied by the evidence as it stands that the respondent has shown that the terms so far proposed represent the best that are reasonably obtainable and on this crucial matter of fact they must respectfully differ from the courts below.

The estate which the respondent has been called upon to administer is one of very considerable value and not a little complication and one which, because of its unusual composition, requires a degree of expert guidance. The tangible assets of the estate in Jamaica with which this appeal is concerned consist of the Bob Marley Museum at 56 Hope Road, Kingston, a recording studio at 220 Marcus Garvey Drive, Kingston and the deceased's private residence at Stuart Place, St. Mary. These assets may be expected to have a commercial value additional to their intrinsic value as real estate by reason of their association with a local celebrity. The museum and recording studio contain furnishings, fittings and equipment and machinery of considerable value. The principal assets of the estate, however, are intangible and consist of copyrights, royalties and the benefit of publishing and recording agreements. They fall under five main headings to which it will be convenient to refer by descriptive titles. These are:-

(a) "The Bob Marley Music Limited Catalogue", consisting of copyrights in recordings administered by Almo Music Inc. ("Almo") and royalties derived from them;

(b) "The Cayman Music Inc. Catalogue", consisting of royalties derived from copyrights assigned to Cayman Music Inc.;

(c) "The ASCAP Royalties", consisting of royalties payable by the collection agency ASCAP for the exploitation of compositions in the Bob Marley Music Limited Catalogue and the Cayman Music Inc. Catalogue in the United States;

(d) "The Island Records Royalties", being the royalties arising from the exploitation of recordings made by the deceased for companies in the Island Records Group ("Island Records"); and

(e) "The Name and Likeness Rights" consisting of the right to use and license the use of the name Bob Marley, his likeness, signature, image and biographical material in connection with merchandising, motion pictures, television performances, video cassettes and the like.

The Cayman Music Inc. Catalogue is the subject matter of pending litigation in the courts of New York and is of conjectural value only at the present stage.

It may readily be appreciated that an administrator faced with the prospect of realising such assets is presented with the making of a number of informed preliminary decisions. He has, to begin with, to determine whether they would best be sold piecemeal or as one single package; whether the intangible and tangible assets should be sold together or in separate lots; and in any event what is the likely value of that which he has to sell, for without this he has no means of assessing whether any price that he is offered is a fair one. In a case in which what he has to offer is essentially the benefit of a future fluctuating income, the value of which inevitably has to be assessed by reference to a number of years' purchase, he must ensure, if necessary by appropriate auditing procedures, that he has accurate figures for ascertaining the multiplicand to which he is to apply the appropriate multiplier. Moreover, the more difficult the task of accurate valuation, the greater is the necessity that the market be properly tested. In this case the respondent did not - at any rate so far as appears from the evidence - conduct any preliminary audit or seek any expert opinion as to the value of the assets or the most appropriate method of exploring the market or of marketing them, save that it appears to have obtained appraisals, which were not put in evidence, of the real estate in Jamaica.

The evidence filed in support of the summons consisted of an affidavit of Mr. Reid Bingham, who makes no claim to any expertise save that of being an attorney-at-law in the United States, and an affidavit of Mr. Byles, the managing director of the respondent. From this evidence it appears that the only expert advice received before the conditional contract was entered into was that of the well-known firm of

accountants, Messrs. Cooper and Lybrand. This firm orally advised Mr. Bingham in January 1988 that the common practice in the music industry was, as might indeed have been surmised, to base the price for a sale of a musical catalogue on an average of the net publisher's share of revenue over a specimen period (usually the most recent five years) and to apply to it a multiplier which would normally be expected to range from five to ten. They went on to point out, what is in fact obvious, that the appropriate multiplier would inevitably be affected by risk factors affecting the individual property which they had not been called upon to consider in the particular case.

Armed with this advice, which was confirmed in a letter addressed to Mr. Bingham after the conclusion of the conditional contract, the respondent entered into negotiations with three prospective purchasers, Almo, Island Records and a United Kingdom company, Music Sales Limited. An affidavit of Mr. Bingham sworn on 1st June 1988 contains an account of the course of the negotiations. The first offer was in October 1987 and was received from Almo, who offered to purchase the copyrights and publisher's share of income from the Bob Marley Music Limited Catalogue for US$2 million, an offer subsequently raised to US$2,600,000 (to include the writer's share of income) plus an additional US$900,000 to US$1,100,000 if the ASCAP Royalties were included. That offer was topped in early 1988 by an offer of US$5,100,000 from Music Sales Limited which, in turn, prompted an offer of US$5 million from Almo. At the same time negotiations were proceeding with Island Records which was prepared to consider a purchase of the estate assets as one lot. These negotiations culminated in the conditional contract of 27th April 1988. The principal terms of that contract may conveniently be summarised as follows:-

(1) The purchaser was to be Island Logic Inc., a company in the Island Records Group incorporated in New York.

(2) The purchaser agreed to purchase for a sum of US$5,200,000 the whole of the estate's song catalogue (that is to say the rights administered by Almo and the ASCAP Royalties), including writer's royalties and name, likeness and biographical rights, and to purchase from the estate for a sum of US$3 million the future record royalties and distribution rights administered by Island Records.

(3) The price of US$5.2 million was to be payable at once but that for the record rights (that is to say, Island Records' commutation of the royalties which would otherwise be payable by it to the estate) was to be paid as to US$1 million on completion and as to the balance by ten annual instalments of US$200,000 without interest.

(4) The sale included all monies receivable after what was described as "the effective date" and also monies earned prior to the effective date but not then paid. In relation to sums due from Almo and from Island Records the effective date was 31st December 1987. As regards any other receipts it was to be 31st December 1988.

(5) The figures upon which the purchase price was based were unaudited and clause 4.5 of the agreement provided for the estate to carry out audits both of the books of Almo and of those of Island Records. Such audits were, however, to have only a very limited significance in relation to the purchase price. If either audit disclosed an understatement during the year 1987 (but only during that year) of US$100,000 or more, then the price for the Almo rights or the recording rights (as the case might be) would be increased, in the case of the Almo rights by a multiple of eight times the amount of the understatement and in the case of the recording rights by a multiple of five times the amount of the understatement. Alternatively, the purchaser was to be entitled to withdraw from the contract at any time before completion. Clause 4.6 contained similar provisions for a reduction of the price in the case of overstatement, but without an equivalent right of withdrawal in the seller.

(6) The closing date for the contract was 30th June 1988 or as already stated, 21 days after the approval of the agreement by the court.

The evidence filed in support of the summons set out the process by which the contract was negotiated and the efforts which had been made by Mr. Reid Bingham to better the offers which he had received. It has not been suggested, nor indeed could it be suggested, that either the respondent or Mr. Bingham acted otherwise than in perfect good faith and in a conscientious effort to obtain what was seen by them as a fair and reasonable bargain to the estate. Nevertheless there were, as was pointed out in the course of the argument before their Lordships, a number of significant omissions.

Any court which is called upon to consider whether a bargain which has been negotiated is the best reasonably obtainable in the interests of the beneficiaries will normally, as a minimum, require to be satisfied by evidence on a number of matters. It will need to have at least an approximate assessment of the value of the property of which it is intended to dispose. Where that value depends upon accounts, it will need to be satisfied of the accuracy of the accounts upon which the value has been based. It will need to have an informed professional assessment of whether any

proposed sale has been effected under the most favourable conditions. Particularly in a case where there is scope for divergent views regarding the value of the property sold, it will normally need to know what efforts have been made to explore the market and what advice has been received with regard to the marketing of the property to the maximum advantage.

First, as regards the terms upon which the property was offered for sale, Mr. Byles' evidence was that he and Mr. Bingham came to the conclusion that the estate would be able to obtain a better price if all the assets were sold to a single purchaser. This may very well be a perfectly correct conclusion, but a court called upon to sanction the sale is concerned to understand why. Clearly it was not a decision reached as a result of professional advice. Mr. Bingham says in his affidavit that the conclusion:-

> "... was based upon the fact that the songs comprising Bob Marley Music Limited Catalogue continued to be performed or recorded by other artists and the royalty income could in the hands of a music publishing or promotion company be actually increased if the songs were properly promoted."

That hardly seems in itself an adequate reason to account, for instance, for a decision to offer the tangible assets to a purchaser of musical rights without exploring the local market, although it may very well be that a purchaser of musical rights might be more interested in exploiting those assets for promotional or advertising purposes. Neither Mr. Byles nor Mr. Bingham claims any particular expertise in or familiarity with the world of popular music and their Lordships would have expected an important decision of this sort to be backed by expert advice.

Then as regards the exploitation of the market, Mr. Bingham says simply that it was determined by him and Mr. Byles that the two most likely buyers were Almo and Island Records who had respectively been administering the catalogue and recording rights. This, again, may very well be correct although it is not self-evident and it is to be observed that Almo's original offer was a low one and was increased only as a result of the appearance on the scene of a third party prepared to pay a substantially greater sum. But whether or not correct, it does not account for the omission to invite offers by advertisement or public tender - a possibility which does not appear even to have been considered.

Very late in the proceedings there was filed by the appellants what, in the event, was the only expert evidence before the court in the form of an affidavit by a Mr. Leo Strauss, an accountant and attorney specialising in music publishing and allied fields. Mr. Strauss's view, which was never contradicted, was that

the normal means of offering musical rights for sale was by advertising in two named magazines circulating in the United States and in the United Kingdom as well as by informing legal and accounting firms representing clients in the music business and making direct contact with record companies or publishers. It was never contended by the respondent that any public offer of the rights was ever made and the evidence of exploitation of the market is jejune in the extreme, consisting as it does of two general unparticularised statements. Mr. Byles, in an affidavit of 8th July 1988, says that after October 1987 the respondent and its legal advisers "lost no time in making it known to the Industry in general that offers would be entertained" and that "many other expressions of interest were received from a wide cross section of the Industry in and outside the United States of America". He condescends, however, to no details from which a court could possibly draw any inferences as to the degree of publicity attendant upon the receipt of such expressions of interest or as to the efforts made to interest anyone other than the three identified potential purchasers.

The approach of the Court of Appeal to Mr. Strauss's evidence indicates an underlying assumption that, because the respondent had instigated competition between the three known potential purchasers in order to negotiate the price upwards, it followed that all that was necessary had been done to satisfy the court that the bargain was in the best interests of the beneficiaries. Rowe P., whilst noting the lack of specificity in the respondent's evidence, expressed himself as satisfied that the failure to advertise did not constitute misconduct or inhibit or depress the price. But these were not the questions which required to be answered. There was simply no material upon which the possible results of the adoption of the normal procedure of public advertisement could be judged. Equally, there was no evidence before the court to justify Rowe P.'s finding that "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". Forte J.A. expressed the view that the respondent could not "be faulted in respect of their efforts in disseminating information in respect of the sale of the property". But there was no evidence before the court of what efforts had been made upon which this could be based except the single and wholly inadequate statement of Mr. Byles that the respondent "lost no time in making it known to the Industry in general that offers would be entertained". Downer J.A. thought advertisement unnecessary because the death of Bob Marley would be known in the English speaking world and beyond. This, however, is, with respect, a *non sequitur*, for there is no discernible reason why the death of the deceased in 1981 should lead anyone to conclude in 1987 that his musical rights were being offered for sale.

The significance of the omission to provide any details of the efforts made to publicise the availability of the assets for sale is, perhaps, best illustrated by the trial judge's dismissal of the beneficiaries' argument against the acceptance of the terms of the conditional contract as "speculative" and his comment that no evidence had been adduced to show that a better offer was available. In the absence of clear evidence from the respondent of what efforts had been made world-wide to publicise the sale, both the beneficiaries and the court were necessarily put in a position of being compelled to speculate. It was not for the beneficiaries to advertise or to invite offers, but for the respondent to place bef re the court sufficiently comprehensive evidence that proper steps had been taken to invite offers from the public likely to be interested.

Despite the evident care which was taken by the Court of Appeal to consider the many submissions, both tenable and untenable, advanced on behalf of the beneficiaries, there are a number of other features of the case which were, in their Lordships' opinion, less than satisfactory. In the first place, although the advice tendered by Cooper and Lybrand indicated the application of a multiplier which would range from five to ten, Mr. Byles interpreted this as meaning a multiplier from five to eight "and possibly as high as ten". His reason is not explained. The respondent in fact selected, in relation to the musical catalogue, a multiplier of eight. This, of course, is at the higher end of the suggested scale and it may very well be correct. It was, however, not satisfactorily explained in the evidence and the court has given no real guidance as to the basis for its selection. The reasons given by Mr. Bingham were (a) that seventy-five percent of the royalties were derived from non-US sources and (b) that the income figures for 1985 were inflated by the release of a particular album which was not likely to be repeated. But no explanation is tendered of why, for instance, earnings from Europe, Canada, Australia and Japan should be considered less dependable than earnings from the United States. Nor was it self-evident that the earnings for 1985 were inflated by the non-repeatable release, since it appears from an affidavit by the widow, which has never been contradicted, that the particular album referred to is still very popular and has now sold over 1 million copies. Moreover, the inference that the estate was faced with a declining scale of income does not appear to be justified by Mr. Bingham's own figures, which show that both musical receipts and record receipts in 1987 exceeded, even in a nine month period, the receipts of the previous year. In fact the purchase price for the Almo and ASCAP rights under the conditional contract represents a multiplier not of eight but of 7.55. Similarly in relation to the recording rights, although the provisions of clause 4.5 might be thought to indicate a multiplier of five, the purchase

price offered by Island Records involves the application of a multiplier of between three and four (i.e. about 3.65). There may be very good reasons for this but there is nothing at all in the evidence which would enable the court to judge whether the selection of such a multiplier is proper or correct. All that is said is that it is anticipated that the annual income will diminish substantially in future years and that "depending upon the assumptions used of future recordings sales, we placed the present value on the Island Records royalties of between US$2 million to a maximum of US$3 million". In fact Mr. Bingham's own figures show that the income in the last year falling to be considered (1987) represented an increase of over 10% over the previous year.

Secondly, the provisions of the agreement as regards the audit highlight the difficulties of valuation. It cannot be satisfactory to negotiate a price based upon a multiple of an annual average if the average itself is subject to falsification as a result of inaccurate figures. It would seem almost elementary, in their Lordships' view, that figures should be properly audited before negotiations are concluded and the provisions of clause 4.5 of the agreement, which treat an accounting error of US$99,000 as *de minimis* and which are, in any event, restricted to the one year 1987, are no substitute for accurate starting figures. Indeed, as their Lordships have been informed, it has now come to light that there are substantial discrepancies in favour of the estate in years prior to 1987 and for which no compensation is provided in the terms of the agreement. That these sums have, as their Lordships understand, now been paid to the estate does not meet the point because their inclusion would clearly have affected the annual average and might, indeed, have affected the appropriate multiplier by falsifying the assumption upon which it was based. The discrepancies indicated by Mr. Henriques Q.C. on instructions are substantial and it has to be borne in mind that even an increase in each of two years of the "*de minimis*" amount of US$100,000 would result in an increase in the price payable (on the basis of a multiplier of 8) of a sum of US$320,000.

Thirdly, the evidence of Mr. Strauss, albeit filed at a very late stage, was nevertheless the only expert testimony which was before the court and represented the considered opinion of an admitted expert with extremely impressive qualifications. Mr. Strauss raised a number of criticisms of the conditional contract which appear less than substantial, but he also raised a number of points of considerable importance which deserved more attention than they received and which were never answered. For instance, the conditional agreement purports to assign all the image and likeness rights, including movie rights, without any additional consideration being assigned to them. This point was

swept aside by the Court of Appeal on the basis of evidence from Mr. Byles that all purchasers of the musical rights required, as part of the deal, the right to exploit the name and image of Bob Marley in connection with the promotion of the works. In the case of Island Records these rights were owned already under its existing agreements. All this is, no doubt, true, but it does not account for the assignment of all rights (for instance movie rights and film synchronisation rights) which, on Mr. Strauss's evidence, have an independent revenue-producing value which may be considerable.

Rowe P. dismissed this consideration on the ground that Island Records was merely purchasing what it had already under its subsisting agreements. He appears however to have overlooked the fact that these agreements granted the rights only within the territory and only "in connection with your business and products". But the conditional contract purports to assign the rights world-wide and quite independently of the purchaser's business of publishing records, so that it would have included, for instance, the exclusive right (which their Lordships have been given to understand has an independent value under the laws of the United States) to make a motion picture based on the life of Bob Marley. Similarly both Forte and Downer JJ.A. drew the inference that this item was taken into account in ascertaining the multiplier and was therefore reflected in the price. Mr. Strauss's evidence was unanswered however and there was no evidence from which this inference could properly be drawn.

Further points which were raised by Mr. Strauss and which clearly merited serious attention were the effect on future dollar earnings of the weakening dollar - a matter of considerable importance having regard to the fact that seventy-five per cent of sales were outside the United States - and the effect of inflation in increasing the price of records and sheet music and, accordingly, the royalties earned as a percentage of sales. There was no evidence from Mr. Bingham or Mr. Byles that these factors had been taken into consideration in their calculations or that they entered in any way into the negotiations with the purchaser. They may well have done, but there was ample opportunity for Mr. Strauss's evidence to be answered and it was not. The court was left uninformed and was put in a position of determining on no material whether Mr. Strauss's criticisms were or were not well founded.

Finally, there was - again at a very late stage- introduced on behalf of the beneficiaries an alternative offer to purchase all the musical rights for a sum of US$8,700,000. This was hedged about with a number of conditions, involving an audit to take place over a period of nine months and a postponed payment of five eighths of the purchase price over one year and two

eighths over two years. This was dismissed by Wolfe J. as not worth further investigation on the ground that the difference in price was only about US$81,000 which was *de minimis*. Having regard to the provisions of the conditional contract which comprehended in the sale all royalties earned or paid after 31st December 1987 and to the postponement of the payment of US$2 million of the consideration over a period of ten years, this was clearly a mistaken assumption.

In the Court of Appeal, Rowe P. regarded it as doubtful whether the respondent, having entered into the conditional contract, could even investigate an alternative offer, but regarded that offer in any event as unworthy of serious consideration because the respondent had no knowledge of the financial stability of the proposed purchaser and because, in postponing conclusion of the conditional contract whilst the matter was investigated, the respondent risked losing "the bird in the hand". Forte J.A. too considered the "bird in the hand" argument as being conclusive and further rejected consideration of the alternative offer because it did not demonstrate that the existing conditional contract did not represent the best terms reasonably obtainable. Downer J.A. regarded the terms proposed in the alternative offer as being "such that a prudent trustee was bound to give them scant regard". Why this should be so in the case of an offer which represented a substantial increase in value for the musical and recording rights, although leaving the estate to dispose separately of the tangible assets (whose value had already been appraised) is not clear to their Lordships. It was, apart from "the bird in the hand" argument, upon which Downer J.A. also relied, clearly an offer which merited proper investigation.

What the Court of Appeal appear to have overlooked entirely was that, having regard to the course which it was proposed to take as regards the obviously unsatisfactory features of the conditional contract - that is to say, the treatment of monies falling due to the estate up to the closing date and in the interest-free postponement of a substantial part of the consideration - the "bird in the hand" argument ceased to have any validity at all, for the effect of the order proposed and finally made was that the respondent had, in any event, to reject the conditional contract as it stood and to negotiate fresh terms with the purchaser if it proved willing to consider them.

It is the combination of all these features which has finally persuaded their Lordships that the order of the Court of Appeal sanctioning in advance the conditional contract as it was proposed to be amended ought not to be permitted to stand. It has to be borne in mind that the transaction proposed by the respondent as the one best suited to the interests of the beneficiaries was one which those same beneficiaries, to a man, opposed root

and branch. The Court of Appeal was, of course, perfectly correct in saying that, where infants' interests are concerned, this cannot be conclusive. Nevertheless, where *ex facie* responsible guardians *ad litem*, on professional and expert advice, are unanimous in their objections, those objections merit the most careful investigation and should not have been dismissed out of hand on the ground that, owing to a dearth of material available to the beneficiaries, they are "speculative" or "conjectural", much less that they fail to demonstrate conclusively that better terms are available.

It may very well be that the respondent will be able to meet all the points which have been made by Mr. Strauss in his evidence and that the alternative offer made (which their Lordships have been given to understand remains open) will, on investigation, prove to be less advantageous than it might at first appear. But it is far from clear that it is so on the evidence as it stands and their Lordships are unable, on that evidence, to express themselves as satisfied that the terms so far proposed by the respondent represent the best that could reasonably be obtained in the interests of the beneficiaries.

In these circumstances, their Lordships have been compelled to the conclusion that there is no acceptable alternative to tendering to Her Majesty their advice that the appeal should be allowed and that the matter be remitted to the Supreme Court of Jamaica for further consideration, on the basis of accurate and up-to-date figures, of expert advice and appraisals so far as necessary, and of sufficient evidence to demonstrate that the potential market for these very valuable assets has been fully and effectively explored. It should be stressed once again that there is no question whatever of the good faith of the respondent or its advisers and the appellants have not suggested that the costs of all parties of the proceedings before the Board and in the courts below should be met otherwise than out of the estate. Their Lordships so order.