JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 36/91

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	MUTUAL SECURITY MERCHANT BANK AND TRUST CO. LTD.	PLAINTIFFS/ APPELLANTS
A N D	RITA MARLEY CEDELLA ANITA MARLEY DAVID NESTA MARLEY STEPHEN ROBERT NESTA MARLEY STEPHANIE SAHI MARLEY (AN INFANT) MAKEDA JAHNESTA MARLEY (AN INFANT) ROHAN ANTHONY MARLEY KYMANI RONALD MARLEY (AN INFANT) ROBERT NESTA MARLEY JULIAN RICARDO MARLEY (AN INFANT) DAMIAN ALEXI ROBERT NESTA MARLEY (AN INFANT) KAREN SOPHIA MICHELLE MARLEY	DEFENDANTS/ RESPONDENTS
A N D	ASTON BARRETT) ALVIN BARRETT) DONALD H. M. KERR) Trading as TYRONE DOWNIE) "The Wailers" EARL LINDO) AL ANDERSON)	APPLICANTS/ RESPONDENTS

R.N.A. Henriques, Q.C., Dr. L.G. Barnett and David Batts for Plaintiffs/Appellants

Gordon Robinson for Applicants/Respondents

Michael Hylton, Colin Henry, Miss Sonia Mitchell, Barrington Frankson, Mrs. Priya Levers, Anthony Levy and Miss Maxine Gordon for Defendants/Respondents

November 18 and December 20, 1991

CAREY P. (AG.):

On 18th November 1991, we allowed this appeal and set aside the order of Edwards J. dated 12th November 1991 joining "The Wailers", a band which accompanied the late "Bob Marley", the famous International Singer and Composer, as defendants in proceedings seeking certain directions which I will set out hereafter. We ordered that the appellants' and the defendants/respondents' costs be borne

by the applicants/respondents and promised to put our reasons in writing. We now fulfil that promise.

The appellants applied to the Court by summons, seeking the following directions:

> "1. Whether, to whom, and at what price the Administrator should seek to enter into contracts for the sale of the assets specified in the First and Second Schedules hereto, the terms of which contracts shall be subject to the approval of this Honourable Court;
>
> 2. If no sale be approved, further or other Directions as to the future administration of the Estate of the late ROBERT NESTA MARLEY as this Honourable Court may deem necessary;
>
> 3. Further or other directions as this Honourable Court may deem necessary;
>
> 4. An order as to how the costs of the negotiations for and on the contract referred to in Paragraph 1 hereof and of this Application and Order herein should be borne.
>
> **FIRST SCHEDULE**
>
> **ASSETS**
>
> (a) Estate Song Catalogue;
>
> (b) Record Royalties and Record Distribution Rights.
>
> **SECOND SCHEDULE**
>
> **EQUIPMENT & REAL ESTATE:**
>
> (a) Equipment;
>
> (b) No. 56 Hope Road, Kingston 6 including furnishings therein;
>
> (c) No. 222 Marcus Garvey Drive, Kingston 11."

The Applicants (The Wailers) on that summons sought an order to be joined as defendants in the matter and other consequential orders which need not be rehearsed. In the affidavit filed in support thereof, Donald Kerr, a member of the group deposed to the fact that the group had filed an action in the Supreme Court C.L. 1980/B063 against the administrators, (the appellants) claiming the following relief:

"2. That the Applicants herein have filed an action against the Plaintiff in Suit No. C.L.B. 003 of 1989, claiming -

1. A declaration that during the lifetime of the deceased, the late Robert Nesta Marley, the Plaintiffs were Partners with the deceased in the business of recording, producing, retailing and performing certain musical and other works.

2. A declaration that the said Partnership was entered into on a 50/50 basis between the deceased on the one hand entitled to a 50% share of the assets, liabilities, income and expenditure of the said Partnership and the Plaintiffs on the other hand entitled to the remaining 50% share.

3. An Order that the Defendant accounts to the Plaintiffs for their 50% share of any royalties or other income received by the Defendant and due to the Plaintiffs as a result of the said Partnership as well as the proceeds of any sale by the Defendant of the assets of the said partnership.

4. Alternatively a declaration that the Plaintiffs are entitled to a one-third share of the said royalties and other assests accrued by way of recorded or live performances by the said Partnership pursuant to the an (sic)agreement entered into between Rita Marley as executrix of the Estate of the said deceased and the Plaintiffs and dated the 2nd day of December 1981.

5. An Injunction restraining the Defendant whether by itself, its Directors, servants, and/or agents from disposing of any of the assets of the deceased's Estate affected by the Plaintiff's claim.

6. An Injunction restraining the Defendant whether by itself, its Directors, servants and/or agents from distributing to the beneficiaries of the Estate any proceeds of any prior or subsequent sale of any assets of the the deceased's Estate affected by this claim."

He swore as well at para. 3 as follows:

"That the applicants claim to be the owners of an interest of any Royalties received by the Defendant and other assets of the estate of the late Robert Nesta Marley, deceased."

He mentioned further that Chester Orr J. had granted a Mareva injunction restraining the appellants from dealing with any portion of the assets also that an injunction was granted by Ellis J. restraining the appellants from disposing of 50% of the proceeds of any sale of record royalties.

The learned judge delivered an ex tempore judgment in which he set out in a succinct form the reasons for his decision. He held that the applicants have "an interest in the outcome of what will be determined in that action as regards record royalties." He alluded to the grant of the two injunctions and concluded that the Court had thereby demonstrated that the applicants have "an interest." They were entitled therefore to assist "in determining what the royalties will be."

It seems to me plain, with all respect to the learned judge, that he acted on wrong principles. The question was whether the applicants' presence was necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause - see Section 100 of the Civil Procedure Code. Both Mr. Henriques, Q.C. and Mr. Gordon Robinson accepted that this was the true rule and both argued on that footing. The provision states as follows (so far as is material):

> "The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that, the names of any parties, whether plaintiffs or defendants who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

Mr. Henriques, Q.C. referred to the injunctions granted to the applicants on their writ and argued that their interest (if any) in the assets of the estate, were fully protected. The applicants'

claim was as to a 50% share of the assets which was a claim as to quantum. In the suit in which the application for joinder was being made, the appellants were seeking approval by the Court of the sale of certain assets in the estate. The intervention of the applicants to protect their limited interest would not put an end to their claim and could be futile, if, in the result, their claim for declarations etc. were dismissed. The joinder would inevitably cause delay and engender expense to the estate. The applicants had never sought to put a value on their interest.

The Court in approving any sale, he maintained had to be satisfied that the best price had been obtained. In that regard, the applicants were not a necessary party to enable the Court to settle all matters. There was no dispute between parties in the suit; any dispute lay in their separate action for declarations etc. He thought that the Court should adopt a strict interpretation of the section contrary to the view expressed by this Court in Jamaica Citizens Bank Ltd. v. Dyoll Insurance Co. Ltd. & Anor. (unreported) C.A. 14/91 31st July, 1991. He noted graciously that the Court had followed Re. Vandervell Trusts [1969] 3 All E.R. 496 and certain dicta of Lord Denning M.R. at p. 499 but that authority had been reversed in the House of Lords in that case, sub nom - Vandervell Trustees Ltd. v. White [1970] 3 All E.R. 16.

Mr. Gordon Robinson in reply, submitted that the object of the exercise was to settle issues in the case in which joinder was sought. The contract which the Court below was being asked to approve contained warranties relating to the very litigation between the applicants and the appellants. The applicants' assistance was necessary because the appellants as vendors would provide self serving evidence. The question of price was a material consideration and if the applicants were absent, then that issue would not be completely resolved because it would be open to the applicants to argue at a later date that the sale was at an undervalue. There was, he ended, no requirement in the rule that joinder of parties was prohibited in non-contentious matters.

Since I was responsible for the judgment in the case to which Mr. Henriques referred, I must say that the judgment was quite clearly per incuriam. Although the Court relied on dicta in the decision which was over-ruled, the decision nevertheless was not based wholly thereon. I cited with approval the view of Sachs L.J. in the same case that a factor to be considered in applying Sec.100 is whether the joinder will diminish a multiplicity of actions and the cost of litigation. I took the view that joinder was not permissible where the interest in the outcome was essentially commercial, divorced from the subject matter of the suit. It is only necessary to add that the decision cannot be of much assistance in the present matter: the facts and circumstances are plainly distinguishable.

This leads me to consider the nature of the proceedings in which the applicants seek to be added as defendants. That factor can be extracted from the judgment of the Board in Marley & Ors. v. Mutual Security Merchant Bank & Trust Co. Ltd. [1991] 3 All E.R. 198. That case was concerned with the same summons in respect of which joinder is sought. At p. 201, Lord Oliver of Aylmerton reminded as follows:

> "... 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 opposed 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."

I understand their Lordships to be making it abundantly clear that the proceedings are not in their nature adversarial; it is not the rights of parties that are being adjudicated. The interest of the beneficiaries under the trust is of paramount consideration. Plainly therefore, there are no issues to be determined. The Court is concerned to discover whether there is sufficient evidence before the Court to enable it properly to exercise its discretion. The applicants' interest is to protect their 50% share in the assets which they allege is theirs by virtue of a partnership agreement. Their presence guarantee, I venture to think, adversarial proceedings. In my opinion that is proof positive that their presence is altogether quite unnecessary to enable the Court effectually and completely to settle all the questions involved in the cause.

Mr. Gordon Robinson is plainly right when he stated that a purpose of the joinder was to settle questions involved in the matter. But a question which has to be determined in order to give the applicants any status at the hearing of the summons for directions would be a recognition of the rights they assert in their own action (Suit C.L. 1989/B003). Their right to be heard must widen the scope of the Court's duty as indicated by Lord Oliver and serve to alter the purpose of the hearing.

I think therefore that there is merit in the appellants' submission that the applicants' intervention could be futile as it would not put an end to their claim. It was suggested by Mr. Robinson that as the question of price was a material consideration, that question could not be completely resolved in the absence of the joinder sought. I am not attracted by that argument. The Court must be satisfied by the trustees that it has taken all the necessary steps to obtain the best price. In that exercise, as Marley & Ors. v. Mutual Security Merchant Bank & Trust Co. Ltd. (supra)

shows, the trustees surrender their discretion to the Court and the Court approves the trustees' action in the best interests of the beneficiaries. I am quite unable then to appreciate the necessity for the presence of alleged creditors.

I conclude therefore for the reasons I have given, that the applicants were not a necessary party and that the learned judge exercised his discretion on wrong principles. Shortly stated, he failed to appreciate the nature of the proceedings in which joinder was sought and focussed entirely on the applicants' alleged interest i.e. the best price, which could not settle the very important question of their entitlement to the assets, the best price for which, was the sole question before the Court. With respect to that question, the learned judge did not bear in mind that the joinder must enable the Court effectually and completely to adjudicate and settle all questions in the originating summons for directions by the appellants.

I would make a final comment. A deal of litigation has been spawned by this estate. This litigation has churned its way through the Superior Courts and as far as the Privy Council with all deliberate speed. But this appeal is not the end of this litigious tale. The applicants may have lost a battle but the war drags on. Their action against the appellants remains to be fought through the various Courts. Perhaps, one day, the infant beneficiaries especially may obtain some reasonable portion of their patrimony. It may be however, that they can be comforted by the words of their famous father in the song:

> "Don't worry 'bout a thing
> Cause every little thing is
> Gonna be alright."

FORTE J.A.:

I agree.

GORDON, J.A.:

I agree.