Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M-044 of 1989

BETWEEN	MUTUAL SECURITY MERCHANT BANK AND TRUST COMPANY LIMITED (as Administrator of the Estate of ROBERT NESTA MARLEY, deceased)	PLAINTIFF
A N D	RITA MARLEY	DEFENDANT

Mr. Michael Hylton, Q.C., Miss Debbie Fraser and Miss Shanti Harjani Williams, Attorneys-at Law of Myers, Fletcher & Gordon for the Defendant/Applicant

Mr. Allan Wood and David Batts, Attorneys-at-Law of Livingston, Alexander & Levy for Plaintiff/Respondent.

Heard: 2nd, 3rd, and 4th April, 1997

NOTE OF ORAL JUDGMENT

COOKE J.

THE BACKGROUND TO THE SUMMONS

In December 1986 an action entitled **J. Reid Bingham as Ancillary Administrator of the Estate of Robert Nesta Marley vs Marvin Zolt et al**, commenced in the United States District Court ofr the Southern District of New York (hereinafter referred to as the New York action). This action concerned the Estate of Robert Nesta Marley. Mr. J. Reid Bingham acted in the capacity of Ancillary Administrator. The Administrator is Mutual Security Merchant Bank and Trust Company Limited in Jamaica.

The Estate's claim in New York which I take from Mr. Robert Brundige's Affidavit dated 11th March, 1997 was asserted against (i) David Steninberg and the law firms with which he was associated namely Bluestein, Rustein & Mirachi, P.C ("Bluestein") and Greenstein, Gorlick Price, Silverman & Laveson, P.C.; and (iii) tax attorney Martin Oliner and his

law firms Coudert Brothers and Martin Oliner, P.C. These eight (8) persons and entities were the only defendants in the New York action against whom claims were asserted by the Estate. No claims were ever asserted by the Estate in the New York action against Rita Marley, and she was never made a defendant by the Estate.

I wish to add that the estate's claim included charges of violations of the RICO ACT, conversion, fraud, breach of fiduciary duty and gross negligence. Rita Marley and the Plaintiff herein were joined to the New York action as third party defendant to the action by four of the defendants - Coudert Brothers, Martin Oliner, Martin Oliner, P.C. and Bluestein (hereinafter referred to as the "Defendants/Third Party Plaintiffs). Each of the Defendants/Third Party Plaintiffs claimed if they were found liable to the Estate for any of the common law claims, then Rita Marley and the Plaintiff herein were liable to them for some or all of the damages assessed against them because of their own conduct.

Steinberg and Zolt were found liable for RICO and other claims called the common law claims. In respect of Martin Oliner and his law firms Coudert Bros. and Martin Oliner P.C. the jury found there was no liability.

In February 1989 a Suit C.L. M-044 of 1989 was filed in Jamaica, (the Jamaican action) by Mutual Security Merchant Bank and Trust Company lImited against Mrs. Rita Marley. The claim is as follows:-

1. The Plaintiff is the Administrator of the Estate of ROBERT NESTA MARLEY, deceased who died on the 11th day of May, 1981.

2. The Defendant has appropriated to her own use, the sum of US$16,811,361.53 from the Estate of ROBERT NESTA MARLEY and other moneys and property belonging to it from the date of his death to the date hereof.

3. The Plaintiff claims the sum of US$16,811,361.53 from the Defendant with interest at such rate as the Court may order pursuant to the Law Reform (Miscellaneous Provisions) Act, and also:-

(i) An Order that an account be taken to all other moneys and property coming to her hands to which the Estate of Robert Nesta Marley is entitled;

(ii) An Order that the Defendant do repay to the Plaintiff all sums expended by it in the course of administering the estate of Robert Nesta Marley in order to discover the misappropriation by the Defendant of the assets of the estate and other expenses incurred as a result of same, with interest at such rate as the Court deems fit;

(iii) Further or other releif;

(iv) Costs.

(The sum of US16,811,361.53 is equivalent to J$92,462,485.00 at J$5.50 to US$1.00).

With respect to the Defence it is only necessary to state that the Defendant, Rita Marley admitted that the sum of US $7,941,501.00 came into her hands and at paragraph 40 it is averred that in respect of these sums the Defendant acted reasonably and honestly. The Defendant sets out with great particularity the basis upon which that averment was made.

At all times there was agreement between the parties that litigation in Jamaica should await the outcome of the New York litigation.

litigation.

Before me now is a Summons for an Order that the action should be struck out as an abuse of the process of the court. The Defendant's argument is two fold. Firstly the Defendant argues that the concept of issue estoppel operates in her favour and on that basis she should succeed. Alternatively, that even if she is not availed of issue estoppel the action should be struck out as an abuse of the process of the court.

Issue Estoppel:

As between both sides there is no conflict in the way the law was put forward. I use the formulation in **Carl Zeis-Stiftung v Raynor** No. 2 [1966] 2 AER 536 at 565(g). The essential elements are that:-

1. The same question has been decided;
2. The Judicial decision which is said to create the estoppel was final;
3. The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

It is the view of this court that there is an interrelation between criterion (1) and (2) because if it can't be determined that the same issue has been decided then it can't be determined that there is sufficient finality.

It is quite clear that the critical issue or a critical aspect of this case is to determine whether the same question settled in New York is the same question to be decided in Jamaica.

I am guided by the extract from the speech of Lord Wilberforce in **Carl Zeiss No. 2 (supra)** emphasised in the Defendant's submissions:

> **"As a matter of principle.. whether the the recognition of judgments is based upon a recognition of vested rights, or upon considerations of public interest in limiting relitigation, there seems to be no acceptable reason why the recognition of foreign judgments should not extend to the recognition of issue decisions ... the right to ascertain the precise issue decided by examination of the court's judgment, of the pleadings and possibility of the evidence, may well ... make it difficult ... to establish the identify of issue there decided with that attempted here to be raised, or the necessity for the decision. And I think it would be right for a court in this country, when faced with a claim of issue estoppel arising out of foreign proceedings, to receive the claim with caution in circumstances where the party against whom the estoppel is raised might not have had occasion to raise the particular issue. But... where after careful examination there appears to have being a full contestation and a clear decision on an issue, it would in my opinion be unfortunate to exclude estoppel by issue decision from the sphere of recognition. If that is so, in this case where an explicit statement is available of the decision of the Federal High Court, of the reasons for it, and of the issue as defined between the parties to it, and where the English court has the assistance of expert witnesses to explain the foreign decision, the difficulty should not be too great in acertaining whether the same issues as were there decided are involved in the present action."**

In this I wish to highlight aspects of this extract where Lord Wilberforce speaks of the right to ascertain the precise issue determined by examination of the court's judgment, the pleadings and possibly the evidence.

I ask myself what is the precise issue decided in the New York action? There are no pleadings to assist, there is no evidence. There is the court's judgment. That is my only source. I say, Zolt & Co. were liable. Coudert Bros., Martin Oliner P.C. and Bluestein were found not liable consequently neither Rita Marley nor the Plaintiff could be faced with indemnifying them. This is quite understandable because in the direction of District Court Judge, Kenneth Conboy, he told the jury, "If you do not find that defendant Coudert, Martin Oliner, Martin Oliner P.C. or Bluestein committed common law wrongs, then you should not

go on to consider the claim that these defendants have made against Mutual Security Merchant Bank and Trust Company and Rita Marley". Of the verdict of the jury, the most I can say is the jury exonerated Rita Marley. I have not a little difficulty in determining from what she was exonerated.

I next move to a post trial Motion. It would appear this motion was brought by Coudert Brothers, Martin Oliner, Martin Oliner, P.C. and Bluestein. It is a matter of some curiosity as to why but I won't let that detain me. On this Motion the court ruled,

> **"The Court also denies defendants' motions to dismiss the claims against third-party defendants Rita Marley and the Mutual Security Merchant Bank and Trust Company ("Mutual Security") as moot rather than on the merits. The defendants maintain that because the jury found no common law liability against Oliner, Oliner P.C., Coudert or Bluestein, the questions with respect to the liability of the third-party defendants became moot.**
>
> **The court disagrees. Although it appears that the jury may have failed to strictly adhere to the Court's instructions, we are satisfied that on the basis of the full record, the jury properly resolved the matter on the merits with respect to Rita Marley and Mutual Security. Furthermore, by concluding otherwise, we would inflict upon the third-party defendants, largely as a consequence of technicality, the possible prospect of protracted, expensive, and unnecessary further proceedings. Rita Marley, in particular, was on the stand for eleven days and was exhaustively examined and cross-examined. Indeed, it is entirely plain from the record that she was the central figure in the trial and her role in the controversy became the principal subject of contention in a litigation which dragged on at immense expense for seven years. Accordingly, we deny defendants' motions to dismiss the claims against Rita Marley and Mutual Security as moot rather than on the merits."**

This court does not have the benefit of expert evidence from any competent lawyer to explain the full meaning of the term moot which is foreign to our jurisprudence. I take it that it is or must mean something that is the antithesis to

merits. Judge Conboy makes the terse, bold statement that "Jury properly resolved the matter on the merits with respect to Rita Marley and Mutual Security Trust and Merchant Bank Company". I am at a loss to determine what it was that was dismissed on its merits. I am equally at a loss as to what she was exonerated from. I do not know the context in which the case was argued or how battle lines were drawn. All this is covered by a pall of vagueness.

The New York case was brought to determine liability of named Defendants. Mrs. Marley and Mutual Security were only added in respect of indeminification. This court does not know what questions were asked of Mrs. Marley or the nature of her answers. This court does not know the extent of pre-trial discovery or the procedure involved.

In the Jamaican action she is essentially being asked to account. I do not know if this accounting was done in the New York action. I cannot say if accounting has been adjudicated upon. Conceivably, the estate's funds could have come into her hands in a way as to be outside of any taint of disapproval legal or moral. The submission as to the first limb of issue estoppel therefore fails.

It is therefore unnecessary to consider the other criterion but I deal with them en passant. Criterion (1) and (2) are inter-related. If the court cannot say what the issues were, it cannot say if determination was with finality. As to the criterion in relation to parties, I have no difficulty in saying the parties are the same.

Abuse of Process

There appears to be a blurring of the demarcation between issue estoppel and abuse of the process of the court. So in **Greenhalgh v Mallard [1947] 2 AER 255** at 257, Sommevell J stated,

> **"... res judicata for this purpose is not confined to the issues which the court is actually askekd to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of the."**

It is my view that it is preferable to keep these concepts separate. As to issue estoppel the approach is strict. The party putting it forward must satisfy established legal criteria. As to abuse, the court bases it decision on all the circumstances which prevail at the time of the decision making. These circumstances are varied per Lord Diplock in **Hunter v Chief Constable of the West Midlands Police** [1982] AC 529 at 536.

> **"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."**

What are the circumstances? The main thrust of the Defendant's submission was that issues could have been conveniently dealt with in New York. Both Counsel say this was possible. It was always the understanding that the Jamaican action would await the outcome of the New York action. This seems contradictory to the stand that the Defendant is now adopting.

The vagaries and vicissitudes of life sometimes make strange bedfellows. The Plaintiff and Defendant in New York were in an enforced embrace, joined as Third Parties in respect of issue

of the indemnity. There was a community of interest no matter how transitory. It would have been unwise to be jabbing at each other.

I would not and could not fault the Ancillary Administrator for not joining the Defendant. The focus of the New York action was clearly defined and understood. Joining the Defendant may have made it cumbersome and unwieldy and would not assist to maintain the focus of the New York action.

In all this I must consider the interest of the beneficiaries. The Defendant has admitted the receipt of US$8 Million. The interests of Justice demands that she be made to account.

Right thinking people would agree that the Jamaica action should be heard for otherwise the administration of justice would be brought into disrepute. For these reasons I would dismiss the Summons with costs to the Plaintiff to be taxed, if not agreed.

I wish to thank and commend Counsel for both sides in their presentation of this case. The fact that I was provided with bundles and written submissions has been of great assistance. The hearing could not otherwise have been completed in a relatively short time. This approach will assist tremendously in reducing delay.