

Joseph Hayim Hayim and George Isaac Hayim

Appellants

v.

Citibank N.A. and Hong Kong Bank Trustee
Limited

Respondents

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 5TH MAY 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH

LORD TEMPLEMAN

LORD OLIVER OF AYLMEYTON

LORD GOFF OF CHIEVELEY

SIR ROBERT MEGARRY

[Delivered by Lord Templeman]

In the year 1959 the testator, Ellis Hayim purchased a house for his residence at 41 Island Road, Deep Water Bay, Hong Kong. The testator had two sons Joseph Hayim and the appellant George Hayim who were then about 40 years of age. The Hong Kong house was occupied by the testator, his wife who died in 1966, his mother who also died in 1966, his brother Albert, his sister Maisie and Maisie's husband Reubin Abraham who died in 1970. By his American will dated 13th July 1972 the testator disposed of his American estate defined as all his property in the United States of America and:-

"... all property which, pursuant to any *inter vivos* or any other testamentary disposition, shall at any time be added to and become a part of my American estate."

The testator appointed the first respondent, Citibank N.A., to be the executor and trustee of his American will and directed Citibank to divide the residue of his American estate into two equal moieties, one to be held upon protective trusts for

the benefit of his son Joseph during his life and the other upon protective trusts for the benefit of his son George during his life. Subject to these dispositions and to legacies bequeathed to the sons' widows the residue of the American estate was given by the American will to the American Jewish Joint Distribution Committee Inc. in furtherance of its charitable purposes. Clause 10 of the American will was in these terms:-

"At the time of my death I may be the owner of a residence in Hong Kong. If either of my brother, Albert Joseph Hayim, and my sister, Maisie Ruby Abraham, shall survive me, then I direct that my Executor and Trustee shall have no responsibility or duty with respect to such property, including, without limitation, any duty to take title to such property, to collect the proceeds from its sale or to collect any rent from said property; and my Executor's and Trustee's only duty and responsibility with respect thereto shall arise upon its receipt of the proceeds of said residence or upon the death of the survivor of my said brother and my said sister, whichever shall first occur, and shall extend only to such property as it exists at the time of the death of such survivor or to the proceeds thereof."

By his Hong Kong will dated 25th April 1975 the testator appointed the second respondent, Hong Kong Bank Trustee Limited, to be the executor and trustee of his Hong Kong will and gave all the residue of his property outside the United States of America to the Hong Kong Bank:-

"UPON TRUST to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof so long as my Trustee shall in its absolute discretion think fit without being liable for loss UPON TRUST to pay or transfer the proceeds of such sale calling in and conversion to (Citibank) or other the executor or trustee for the time being of my American Will to be held by such executor or trustee upon the trusts of my American Will or such of the same as shall then be subsisting and capable of taking effect."

The testator died on 6th June 1977 possessed of considerable wealth and his American will and his Hong Kong will were duly proved by Citibank and the Hong Kong Bank respectively. The Hong Kong residue included the Hong Kong house which became vested in the Hong Kong Bank upon trust for sale with power to postpone sale and to hold the net proceeds of sale and rents and profits until sale upon trust for Citibank to be held by Citibank upon the trusts of the American will. Albert who was about 92 and Maisie who was about 87 in 1977 when the testator

died remained in occupation of the Hong Kong house at first with the consent in writing of Citibank, the testator's sons and the Jewish charity. On 1st June 1981 however the testator's sons by their legal advisers directed the Hong Kong Bank to sell the Hong Kong house because the house was providing no income for the testator's sons and the value of the house, which had been valued at HK\$3,000,000 at the date of the testator's death in 1977 and had risen to HK\$18,000,000 in 1981, was likely to diminish having regard to the uncertainties in 1981 of the future of Hong Kong real estate. It was argued that the Hong Kong Bank had no right to postpone the sale of the Hong Kong house in order to provide a home for Albert and Maisie who were not beneficiaries interested in the trusts of the house. The testator's sons offered to find alternative accommodation for Albert and Maisie where they would be better looked after. Albert was however opposed to any move and Citibank took the view that it would be cruel to Albert and possibly fatal to Maisie whose health was declining to require them to leave the house. The Jewish charity on being apprised of the views of Citibank was content to rely on the discretion of the trustees. The Hong Kong Bank was instructed by Citibank not to sell the house. The testator's sons protested that the Hong Kong Bank owed a duty to the testator's sons and was not entitled to obey the instructions given by Citibank.

On 4th November 1982 the testator's sister Maisie died aged about 92. On 15th January 1983 the testator's sons began proceedings in the High Court of the Supreme Court of Hong Kong against Citibank and the Hong Kong Bank for an order that the house be sold and for damages to be awarded against the Hong Kong Bank for breach of the trusts of the Hong Kong Will by the delay of the Hong Kong Bank in selling the house since June 1981. No relief was sought against Citibank. The testator's son Joseph died on 14th October 1984 aged 65 and the action was continued by George and by the personal representatives of Joseph. On 16th January 1985 Deputy Judge Barnett made the order sought by the testator's sons against the Hong Kong Bank. The testator's brother Albert died in May 1985 aged about 99. On the 26th July 1985 the Court of Appeal of Hong Kong (Sir Alan Huggins V.-P., Cons and Fuad J.J.A.) allowed an appeal by the Hong Kong Bank, set aside the orders made by Deputy Judge Barnett and dismissed the action brought by the testator's sons on the grounds that the Hong Kong Bank had not committed any breach of trust. The house was sold on 18th September 1985 for HK\$10,000,000. George and the personal representatives of Joseph now appeal to Her Majesty in Council to restore the order made by Deputy Judge Barnett for the assessment and payment by the Hong Kong Bank of damages for breach of trust

in postponing the sale of the house between 1981 and 1985.

For the purposes of these proceedings the laws of the United States applicable to the American will and the laws of Hong Kong applicable to the Hong Kong will are assumed, in the absence of any evidence to the contrary, to be of the same effect as the laws of England.

The first question is whether the Hong Kong Bank owed a duty to the beneficiaries interested under the American will not to obey the instructions of Citibank to postpone the sale of the Hong Kong house in the interests of Albert and Maisie. Subject to the payment of or provision for the funeral and testamentary expenses and debts of the testator, administration costs and remuneration, the Hong Kong Bank held the residue of the testator's property in Hong Kong and elsewhere outside the United States of America and the proceeds of sale upon trust for Citibank. The power of Hong Kong Bank to postpone the sale was also held in trust for Citibank and could only be exercised by the Hong Kong Bank in accordance with the lawful directions of Citibank. The interests and powers of Citibank relating to the Hong Kong property were held by Citibank upon the trusts and with and subject to the powers and provisions of the American will including clause 10 and the beneficiaries interested under the American will were the testator's sons and the Jewish charity. The residue of the Hong Kong property consisted of the Hong Kong house valued at HK\$3,000,000 and stocks shares and other investments valued at HK\$10,000,000. The Hong Kong Bank had no power or duty to decide whether any of the Hong Kong property should be sold or retained in the interests of Citibank. It was for Citibank to decide whether having regard to the trusts powers and provisions of the American will the Hong Kong property held by the Hong Kong Bank in trust for Citibank should be retained or sold. In the case of Hong Kong investments to which clause 10 of the American will did not apply Citibank owed a duty to the beneficiaries interested under the American will to take advice and to decide whether the investments should be sold or retained in the best interests of the beneficiaries without regard to the interests of Albert and Maisie. Citibank was under a duty to the beneficiaries interested in the American will to communicate its decisions to the Hong Kong Bank and to ensure that those decisions were carried out even if necessary by obtaining the removal of the Hong Kong Bank as trustee of the Hong Kong will or by obtaining a transfer of the Hong Kong property from the Hong Kong Bank to Citibank or as Citibank directed. The Hong Kong Bank had no power or duty to interfere in the administration of the trusts of the American will. The Hong Kong Bank was

bound to give effect to the lawful decisions of Citibank in relation to Hong Kong property. The Hong Kong Bank was not however entitled or bound to give effect to any decision of Citibank which constituted a breach of the duty owed by Citibank to the beneficiaries interested under the trusts of the American will. In the absence of clause 10, the decision of Citibank to direct postponement of the sale of the Hong Kong house in the interests of Albert and Maisie and contrary to the interests of the beneficiaries interested under the American will would have been a breach of the duty owed by Citibank as trustee of the American will to the beneficiaries under the American will and would have been unlawful. The Hong Kong Bank knew that Albert and Maisie were not beneficiaries and knew that the decision made by Citibank to direct postponement of the sale of the house was taken in the interests of Albert and Maisie and against the interests of the beneficiaries. In the absence of clause 10, the Hong Kong Bank would have known or should have known that the instructions by Citibank to postpone sale of the house were unlawful. The Hong Kong Bank would have been liable to the beneficiaries under the American will for unlawfully complying with the unlawful decision of Citibank. But if clause 10 entitled Citibank to ignore the interests of the beneficiaries under the American will in the Hong Kong house and to make a decision in the interests of Albert and Maisie then Hong Kong Bank was bound to accept that decision and comply with the directions given by Citibank to postpone the sale of the house.

The second and crucial question therefore is whether Citibank in giving directions to the Hong Kong Bank to postpone the sale of the Hong Kong house in the interests of Albert and Maisie was in breach of the duty owed by Citibank to act in the best interests of the beneficiaries interested under the American will. Without clause 10 Citibank would have owed a duty to the beneficiaries to decide whether the house should be sold or retained in the interests of the beneficiaries. Citibank would have been under a duty to ignore the interests of Albert and Maisie.

Clause 10 did not deprive Citibank of the power to decide and direct the Hong Kong Bank to sell or retain the house. Clause 10 did not extinguish or modify the duty of the Hong Kong Bank to give effect to any lawful decision of Citibank in respect of the house. Clause 10 relieved Citibank of any "responsibility or duty with respect to" the house. The only responsibilities and duties of Citibank under the American will were responsibilities and duties owed to the beneficiaries interested under the American will. Clause 10 relieved Citibank of any responsibility or duty owed to the beneficiaries in respect of the house. Citibank, relieved of any

responsibility or duty to the beneficiaries, was entitled to decide to direct the Hong Kong Bank to postpone the sale of the house in the interests of Albert and Maisie. In considering whether to decide to direct the Hong Kong Bank to postpone sale Citibank was entitled to consider the beneficiaries but owed no duty to the beneficiaries under the American will to consider them or decide in their favour and accordingly as against those beneficiaries Citibank committed no breach of trust. If Citibank made a decision to direct the sale of the house to be postponed in the interests of Albert and Maisie this was a decision which Citibank was entitled to make by clause 10 of the American will and it was a decision to which the Hong Kong Bank holding the house and the proceeds of the house and the power to postpone sale of the house in trust for Citibank was bound to accept and implement. It is of course unusual for a testator to relieve the trustee of his will of any responsibility or duty in respect of trust property, but a testator may do as he pleases and in the present case the provisions of clause 10 are explicable and understandable.

When the testator made his American will in 1972 and when the testator made his Hong Kong will in 1975 it was plain that if (as happened) the Hong Kong house remained a home for the testator and for Albert and Maisie and if the testator pre-deceased Albert and Maisie, someone must decide whether and when Albert and Maisie, who were in the event about 92 and 87 years of age respectively at the death of the testator, should be obliged to leave the house. There were several courses of action open to the testator if he did not wish to give an interest in the house to Albert and Maisie. First the testator could have conferred on his two sons power to decide whether and when Albert and Maisie should be dispossessed. By his American will or his Hong Kong will the testator could have directed that the house be not sold without the consent of his sons or of one of his sons. The testator did not confer any power of decision on both or either of his sons. Secondly the testator could have allowed any decision with regard to Albert and Maisie and the house to be made by the beneficiaries interested in the American estate. If the testator had not inserted clause 10 of the American will, Maisie and Albert could have been allowed to remain in the Hong Kong house rent free with the consent of all the beneficiaries namely the testator's sons and the Jewish charity. There would have been no need to exonerate Citibank from any responsibility or duty in respect of the house. Clause 10 is inconsistent with any intention on the part of the testator to leave Albert and Maisie to the mercy of the beneficiaries. Thirdly the testator could have allowed the decision with regard to Albert and Maisie and the house to be made by the Hong Kong

Bank, but in that case something like clause 10 would have been inserted in the Hong Kong will. Fourthly the testator could have allowed the decision with regard to Albert and Maisie and the house to be made by Citibank. It was logical that Citibank should make a decision which must necessarily concern the testator's sons on the one hand and Albert and Maisie on the other hand. Citibank would know whether the income of the American estate was sufficient to provide for the testator's sons without calling in aid any income from the Hong Kong house or from the proceeds of sale of the Hong Kong house. The inevitable conclusion is that clause 10 was intended to enable Citibank to decide that although Albert and Maisie were not beneficially interested in the house nevertheless Albert and Maisie should be allowed to remain in the house. The testator gave effect to that intention by a provision which relieved Citibank from all responsibility and duty to the beneficiaries in respect of the house.

Mr. Nugee submitted that the only object and effect of clause 10 was to enable Citibank to wash its hands of any problems concerning the house so long as Albert or Maisie survived. But if the beneficiaries agreed, there was no need to relieve Citibank from responsibility. And if the beneficiaries did not agree then Citibank would have to decide. If one beneficiary wished Albert and Maisie to occupy the house free of rent while the second beneficiary wished Albert and Maisie to occupy the house but to pay a rack rent and the third beneficiary wished the house to be sold with vacant possession, then the Hong Kong Bank holding in trust for Citibank and only concerned under the trusts of the Hong Kong will would be entitled and bound to apply to Citibank for a decision. Clause 10 of the American will and the terms of the Hong Kong will are not apt to transfer from Citibank to the Hong Kong Bank power to decide whether the Hong Kong house should be sold or retained in the interests of the beneficiaries under the American will or otherwise. If the testator had wished to place responsibility for a decision on the Hong Kong Bank he would have provided by the Hong Kong will that the Hong Kong Bank should hold the proceeds of sale of the house in trust for the beneficiaries. In fact the testator by the Hong Kong will directed the Hong Kong Bank to hold the proceeds of sale of the house in trust for Citibank and it was for Citibank to decide when the house should be sold. Clause 10 relieved Citibank of any responsibility or duty with respect to the house and therefore authorised Citibank to make a decision that the sale of the house should be postponed without regard to the interests of the beneficiaries - an unusual but understandable provision if the testator wished Citibank and no one else to decide whether and when Albert and Maisie should be required to leave the

house. Citibank did not commit a breach of the trusts of the American will by directing the Hong Kong Bank to postpone sale. The Hong Kong Bank did not commit a breach of the trusts of the Hong Kong will in complying with the lawful directions of Citibank.

On behalf of the testator's sons, Mr. Nugee disputes these conclusions. He argues in the first place that Citibank committed a breach of trust of the American will by deciding to postpone the sale of the house. He says that clause 10 could not have been intended to absolve Citibank from any duty to the beneficiaries, because in that event Citibank could have used the house for its own purposes or allowed the Hong Kong Bank to commit a breach of duty with respect to the house, for example, the duty to insure. But clause 10 in express terms relieved Citibank from any duty in respect of the house. No doubt the testator was content to trust Citibank. If the Hong Kong Bank failed to insure or failed to implement any decision of Citibank then Citibank would have been entitled but not bound to take proceedings against the Hong Kong Bank. Clause 10 enabled Citibank to ensure that the house was retained by the Hong Kong Bank yielding no rent during the lives of Albert and Maisie though under the trusts of the American will Albert and Maisie were not beneficiaries. Clause 10 was in the circumstances designed to enable Albert and Maisie to remain in the house as long as Citibank thought fit. If clause 10 were exploited for any other purpose the beneficiaries could complain and the Court could find that Citibank had not properly exercised the discretion conferred on Citibank to postpone the sale of the house either in the interests of the beneficiaries or in the interests of Albert and Maisie; see *Re Hastings-Bass* [1975] Ch. 25 at 41. In the circumstances which prevailed at the date when the testator made his American will, clause 10 was intended to enable Citibank to be kind to Albert and Maisie without breach of any duty owed to the beneficiaries.

If Citibank did not commit a breach of trust of the American will by directing the Hong Kong Bank to postpone sale, nevertheless Mr. Nugee submits in the second place that the Hong Kong Bank committed a breach of trust by complying with those directions. The Hong Kong Bank, he said, was not absolved by clause 10 of the American will. Under the trusts of the Hong Kong will, it was submitted, the Hong Kong Bank owed a duty to administer the trusts of the house in the interests of the beneficiaries interested in the house under the American will; the Hong Kong Bank knew that those beneficiaries did not include Albert and Maisie. Their Lordships take the view that under the trusts of the Hong Kong will the

house was not held by the Hong Kong Bank on the trusts of the American will. The house was held by the Hong Kong Bank in trust for Citibank. If for example Albert and Maisie had pre-deceased the testator, the power to decide whether the sale of the house should be postponed would have been exercised by the Hong Kong Bank in accordance with the directions of Citibank. It would have been for Citibank as trustee of the American will to decide whether the house should be retained as an investment or sold and converted into cash available for re-investment. The trusteeship of the American will cannot be duplicated. The only trustee of the American will was Citibank. Hong Kong Bank owed a duty to Citibank and not a duty to the beneficiaries under the American will.

The authorities cited by Mr. Nugee only demonstrate that when a trustee commits a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances a beneficiary may be allowed to sue a third party in the place of the trustee. But a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner.

In *Travis v. Milne* (1851) 9 Hare 141 at page 150 Turner V.-C. observed that beneficiaries interested in the estate of a deceased partner can only sue the surviving partners in "special circumstances ... where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners". In that case the executors were accused of breach of trust in carrying on business in partnership with the surviving partners and with the capital of the deceased partner. The executors could not prosecute proceedings against the surviving partners without involving themselves in conflicts of interest and duty.

In *Sharpe v. San Paulo Railway Company* (1873) 8 Ch.App. 597 at pages 609 and 610 James L.J. said that:-

"... a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the *cestui que trust* was to file his bill against the trustee for the execution of the trust, or for the realisation of the trust fund, and then to obtain the proper order for using the trustee's name, or

for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action, or the proper suit in this court."

In *Yeatman v. Yeatman* (1877) 7 Ch.D. 210 it was held that a mere refusal by a personal representative to sue for the recovery of a debt owed to the estate would not, in the absence of special circumstances, justify a residuary legatee or next of kin in suing the debtor. At page 216, Hall V.-C. said that the court would have to be satisfied that "it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful, ...".

In *Beningfield v. Baxter* (1886) 12 App. Cas. 167 at page 178 Lord Selborne said:-

"When an executor cannot sue, because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty."

In *Meldrum v. Scorer* (1887) 56 LT 471 Kay J. at page 473 considered "it to be quite settled that a mere refusal to sue on the part of a trustee does not entitle a *cestui que trust* to sue in his own name". A beneficiary under a settlement *inter vivos* of a legacy of £8,000 was allowed to sue the personal representatives who, with notice of the settlement, paid the legacy, to one out of two of the settlement trustees and therefore did not obtain a good receipt from the trustees. The sole trustee who had been paid the legacy absconded.

In *Wong Yu Shi v. Wong Ying Kuen* (1957) Hong Kong Law Reports 420 the estate of a son included a share in the estate of his father. A beneficiary interested in the son's estate obtained an order for an account against the personal representatives of the father and against the personal representatives of the son on the basis of wilful default but only because both sets of personal representatives had been guilty of breaches of trust.

In *Re Field v. Firmenich & Co.* [1971] 1 All ER 1104 a plaintiff was allowed to sue on a cause of action vested in personal representatives where the personal representatives refused to sue and there was no one interested in the estate except the plaintiff and the widow of the deceased and the widow had a personal interest in the defeat of the action.

These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate. By the Hong Kong will the testator conferred on Citibank the power to give instructions binding on the Hong Kong Bank to sell or to retain the Hong Kong house. By clause 10 of the American will the testator relieved Citibank from any responsibility to the beneficiaries interested in the American estate in respect of the Hong Kong house. As a result of clause 10 Citibank did not therefore owe any duty to the beneficiaries. Citibank lawfully instructed the Hong Kong Bank to postpone sale and the Hong Kong Bank lawfully complied with those instructions. Mr. Nugee referred to principles which applied to trusts, bailments, contracts and torts respectively. In the view of their Lordships the principles relied upon are not inconsistent with the principles which their Lordships consider to be applicable to the present appeal. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

