

CLAIMS RESOLUTION TRIBUNAL

In re Holocaust Victim Assets Litigation
Case No. CV96-4849

Certified Award

to Claimants Flora Ben-Nun¹ and Esriel Emil Baer
also acting on behalf of Bilha Baer and Kitti Baer

in re Accounts of *Frl.* (Miss) Flora Baer

Claim Numbers: 003521/LK; 004364/LK

Award Amount: 175,920.00 Swiss Francs

This Certified Award is based upon the claims of Esriel Emil Baer (“Claimant Baer”) and Flora Ben-Nun, née Baer, (“Claimant Ben-Nun”) (together the “Claimants”) to the accounts of Samuel and Ida Baer² and Flora Baer. This Award is to the accounts of Flora Baer (the “Account Owner”) at the Basel branch of the [REDACTED] (the “Bank”).

All awards are published. Where a claimant has not requested confidentiality, as in this case, only the name of the bank has been redacted.

Information Provided by the Claimants

Claimant Baer submitted a Claim Form and an Initial Questionnaire identifying the Account Owner as his sister, Flora Ben-Nun, née Baer, who was born on 15 September 1913 in Halberstadt, Germany, and was married to Jonah (Herbert) Ben-Nun in September 1943 in Tel Aviv, Palestine. Claimant Ben-Nun also submitted a Claim Form identifying herself as the Account Owner. The Claimants stated that Flora Ben-Nun, née Baer, who was Jewish, was a student in Germany and lived with her family on Spiegelstrasse in Halberstadt until 1935, when she fled to Palestine. Claimant Ben-Nun further stated that she had a great-uncle, Max Baer, who was her paternal grandfather’s brother and who traveled to Switzerland regularly, where he opened an account in her name. Claimant Ben-Nun explained that her uncle, who perished in the Holocaust on 23 November 1942, was unmarried and lived with her family in the large Baer family home. The Claimant noted that her uncle was particularly fond of her, as she was the only daughter of her parents, Samuel and Ida Baer, who also had three sons. In support of their claims, the Claimants submitted documents including family trees, family photographs, and a photograph of the Baer family home in Halberstadt. Claimant Baer stated that he was born on 23 November 1922 in Halberstadt. Claimant Baer is also representing his sister-in-law, Bilha Baer,

¹ Claimant Ben-Nun died in Israel on 15 October 2002. This claim is assumed by her Estate.

² The CRT will treat the claims to these accounts in separate decisions.

who was born on 18 June 1925 in Essen, Germany, and his sister-in-law, Kitty Baer, who was born on 14 July 1922 in Rotterdam, the Netherlands.

Claimant Baer previously submitted an Initial Questionnaire with the Court in 1999, asserting his entitlement to a Swiss bank account owned by Samuel and Ida Baer, who might have given Power of Attorney to Flora Ben-Nun, née Baer.

Information Available in the Bank Records

The bank records consist of two extracts from the Bank's ledgers and printouts from the Bank's database. According to these records, the Account Owner was *Frl.* (Miss) Flora Baer, who had resided in Basel, Switzerland. The bank records indicate that the Account Owner held two savings/passbook accounts, one numbered 913728, which had a balance of 58.85 Swiss Francs on 24 June 1946, and the other numbered 3432, which had a balance of 57.80 Swiss Francs on 24 June 1946. The savings/passbook accounts were transferred to suspense accounts on, or before, 24 June 1946 and remain open.

The bank records also indicate that the Account Owner held a custody account, numbered 10041, which remained open until at least December 1937. The bank records do not show when the custody account was closed, to whom it was paid, or the value of the account. The auditors who carried out the investigation of this bank to identify accounts of Victims of Nazi Persecution pursuant to instructions of the Independent Committee of Eminent Persons ("ICEP" or the "ICEP Investigation") did not find the custody account in the Bank's system of open accounts, and they therefore presumed that it was closed. These auditors indicated that there was no evidence of activity on any of these accounts after 1945. There is no evidence in the bank records that the Account Owner or her heirs closed the custody account and received the proceeds themselves.

The CRT's Analysis

Joinder of Claims

According to Article 37(1) of the Rules Governing the Claims Resolution Process, as amended (the "Rules"), claims to the same or related accounts may be joined in one proceeding at the CRT's discretion. In this case, the CRT determines it appropriate to join the two claims of the Claimants in one proceeding.

Identification of the Account Owner

The Claimants have plausibly identified the Account Owner. Claimant Baer's sister's name and Claimant Ben-Nun's name match the published name of the Account Owner. Claimant Ben-Nun identified that she was unmarried until 1943, which is consistent with published information about the Account Owner's marital status contained in the bank records. There was one other claim to this account which was disconfirmed due to inconsistencies in marital status.

Status of the Account Owner as a Victim of Nazi Persecution

The Claimants have made a plausible showing that the Account Owner was a Victim of Nazi Persecution. The Claimants stated that the Account Owner was Jewish and fled Germany in 1935.

The Claimants' Relationship to the Account Owner

Claimant Baer has plausibly demonstrated that he is related to the Account Owner by submitting documents demonstrating that he is Claimant Ben-Nun's brother. Claimant Ben-Nun identified herself as the Account Owner.

The Issue of Who Received the Proceeds

Regarding the custody account, given that the Account Owner had two other accounts which the Bank still holds in suspense accounts and the application of Presumptions (f), (h) and (j), as provided in Article 28 of the Rules (see Appendix A), the CRT concludes that it is plausible that the account proceeds were not paid to the Account Owner or her heirs. Based on its precedent and the Rules, the CRT applies presumptions to assist in the determination of whether or not Account Owners or their heirs received the proceeds of their accounts.

The savings/passbook accounts were transferred to suspense accounts on or before 24 June 1946 and remain open and dormant.

Basis for the Award

The CRT has determined that an Award may be made in favor of the Claimants. First, the claim is admissible in accordance with the criteria contained in Article 18 of the Rules. Second, the Claimants have plausibly demonstrated that the Account Owner was Claimant Ben-Nun and Claimant Baer's sister, and those relationships justify an Award. Finally, the CRT has determined that it is plausible that neither the Account Owner nor her heirs received the proceeds of the claimed accounts.

Amount of the Award

In this case, the Account Owner held two savings/passbook accounts and one custody account. Pursuant to Article 29 of the Rules, when the value of an account is unknown, as is the case here regarding the custody account, the average value of the same or a similar type of account in 1945 is used to calculate the present value of the account being awarded. Based on the investigation carried out pursuant to the instructions of the ICEP Investigation, in 1945 the average value of a custody account was 13,000.00 Swiss Francs.

The bank records also indicate that the values of the savings/passbook accounts as of 24 June 1946 were 58.85 Swiss Francs and 57.80 Swiss Francs. According to Article 29 of the Rules, if the amount in a savings/passbook account was less than 830.00 Swiss Francs, and in the absence of plausible evidence to the contrary, the amount in the account shall be determined to be 830.00

Swiss Francs. Therefore, the total value of the Account Owner's custody account, and the two savings/passbook accounts is 14,660.00 Swiss Francs. The present value of the amount of the award is determined by multiplying by a factor of 12, in accordance with Article 31(1) of the Rules, to produce a total award amount of 175,920.00 Swiss Francs.

Division of the Award

According to the 23 of the Rules, because Claimant Ben-Nun is claiming her own account, her estate is entitled to 100% of the total award amount.

Scope of the Award

The Claimants should be aware that, pursuant to Article 20 of the Rules, the CRT will carry out further research on their claims to determine whether there are additional Swiss bank accounts to which they might be entitled, including research of the Total Accounts Database (consisting of records of 4.1 million Swiss bank accounts which existed between 1933 and 1945).

Certification of the Award

The CRT certifies this Award for approval by the Court and payment by the Special Masters.

Claims Resolution Tribunal
April 1, 2003

**ARTICLE 28 OF THE RULES GOVERNING THE CLAIMS RESOLUTION PROCESS
(AS AMENDED)**

In the absence of evidence to the contrary, the Tribunal presumes that neither the Account Owners, the Beneficial Owners, nor their heirs received the proceeds of a claimed Account in cases involving one or more of the following circumstances:¹

- a) the Account was closed and the Account records show evidence of persecution, or the Account was closed (i) after the imposition of Swiss visa requirements on January 20, 1939, or (ii) after the date of occupation of the country of residence of the Account Owner or Beneficial Owner, and before 1945 or the year in which the freeze of Accounts from the country of residence of the Account Owner or Beneficial Owner was lifted (whichever is later);
- b) the Account was closed after 1955 or ten years after the freeze of Accounts from the country of residence of the Account Owner or Beneficial Owner was lifted (whichever is later);
- c) the balance of the Account was reduced by fees and charges over the period leading up to the closure of the Account and the last known balance of the Account was small;
- d) the Account had been declared in a Nazi census of Jewish assets or other Nazi documentation;
- e) a claim was made to the Account after the Second World War and was not recognized by the bank;
- f) the Account Owner or Beneficial Owner had other Accounts that are open and dormant, suspended, or closed to profits, closed by fees, or closed to Nazi authorities;
- g) the only surviving Account Owner or Beneficial Owner was a child at the time of the Second World War;
- h) the Account Owners, the Beneficial Owners, and/or their heirs would not have been able to obtain information about the Account after the Second World War from the Swiss bank due to the Swiss banks' practice of withholding or misstating account information in their responses to inquiries by Account Owners, Beneficial Owners, and heirs because of the banks' concerns regarding double liability;²
- i) the Account Owners, Beneficial Owners, or their heirs resided in a Communist country in Eastern Europe after the War; and/or
- j) there is no indication in the bank records that the Account Owners, Beneficial Owners, or their heirs received the proceeds of the Account.³

¹ See Independent Commission of Experts Switzerland - Second World War, Switzerland, National Socialism and the Second World War: Final Report (2002) (hereinafter "Bergier Final Report"); see also Independent Committee of Eminent Persons, Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks (1999) (hereinafter "ICEP Report"). The CRT has also taken into account, among other things, various laws, acts, decrees, and practices used by the Nazi regime and the governments of Austria, the Sudetenland, the Protectorate of Bohemia and Moravia, the Free City of Danzig, Poland, the Incorporated Area of Poland, the *Generalgouvernement* of Poland, the Netherlands, Slovakia and France to confiscate Jewish assets held abroad.

² See Bergier Final Report at 443-44, 446-49; see also ICEP Report at 81-83.

³ As described in the Bergier Final Report and the ICEP Report, the Swiss banks destroyed or failed to maintain account transactional records relating to Holocaust-era accounts. There is evidence that this destruction continued after 1996, when Swiss law prohibited destruction of bank records. Bergier Final Report at 40 (stating "[i]n the case of Union Bank of Switzerland . . . , however, documents were being disposed of even after the Federal Decree [of 13 December 1996]"). The wholesale destruction of relevant bank records occurred at a time when the Swiss banks knew that claims were being made against them and would continue to be made for monies deposited by victims of Nazi persecution who died in the Holocaust and that were (i) improperly paid to the Nazis, see Albers v. Credit Suisse, 188 Misc. 229, 67 N.Y.S.2d 239 (N.Y. City Ct. 1946); Bergier Final Report at 443, (ii) that were improperly paid to the Communist controlled governments of Poland and Hungary, see Bergier Final Report at 450 -51, and possibly Romania as well, see Peter Hug and Marc Perrenoud, Assets in Switzerland of Victims of Nazism and the Compensation Agreements with East Bloc Countries (1997), and (iii) that were retained by Swiss Banks for their own use and profit. See Bergier Final Report at 446-49.

"The discussion on "unclaimed cash" persisted throughout the post-war period due to claims for restitution by survivors and heirs of the murdered victims, or restitution organizations acting on their behalf." Id. at 444. Nevertheless, the Swiss Banks continued to destroy records on a massive scale and to obstruct those making claims. ICEP Report, Annex 4 ¶ 5; In re Holocaust Victim Asset Litig., 105 F. Supp.2d 139, 155-56 (E.D.N.Y. 2000). Indeed, "[i]n May 1954, the legal representatives of the big banks co-ordinated their response to heirs [of account holders] so that the banks would have at their disposal a concerted mechanism for deflecting any kind of enquiry." Bergier Final Report at 446. Similarly, "the banks and their Association lobbied against legislation that would have required publication of the names of so called 'heirless assets accounts,' legislation that if enacted and implemented, would have obviated the ICEP investigation and the controversy of the last 30 years." ICEP Report at 15. Indeed, in order to thwart such legislation, the Swiss Bankers Association encouraged Swiss banks to underreport the number of accounts in a 1956 survey. "A meager result from the survey," it said, "will doubtless contribute to the resolution of this matter [the proposed legislation] in our favor." ICEP Report at 90 (quoting a letter from the Swiss Bankers Association to its board members dated June 7, 1956). "To summarize, it is apparent that the claims of surviving Holocaust victims were usually rejected under the pretext of bank secrecy . . . ", Bergier Final Report at 455, or outright deception about the existence of information, while wholesale destruction of bank records continued for over a half century. Under these circumstances, utilizing the fundamental evidentiary principles of United States law that would have applied to Deposited Assets claims had the class action lawsuits been litigated through trial, the CRT draws an adverse inference against the banks where documentary evidence was destroyed or is not provided to assist the claims administrators. See In re Holocaust Victim Asset Litig., 105 F. Supp.2d 139, 152 (E.D.N.Y. 2000); Reilly v. Natwest Markets Group, Inc., 181 F.3d 253, 266-68 (2d Cir. 1999); Kronisch v. United States, 150 F.3d 112, 126-28 (2d Cir. 1998).