

CLAIMS RESOLUTION TRIBUNAL

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

Certified Award

to Claimant Dr. Otto Fleming

in re Account of R. Fleischner

Claim Number: 200176/MBC

Award Amount: 203,400.00 Swiss Francs

This Certified Award is based upon the claim of Dr. Otto Fleming (the “Claimant”) to the account of Emil Fleischner. The Award is to the accounts of R. Fleischner (the “Account Owner”) at [REDACTED] (the “Bank”).

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

Information Provided by the Claimant

The Claimant submitted a Claim Form and an Initial Questionnaire identifying Emil Fleischner as his father’s brother. In his Claim Form the Claimant indicated that Emil Fleischner was born on 18 August 1877 in Durrmaul, Bohemia, and was married to Rosa Fleischner née Weissenstein in Berlin, Germany. The Claimant stated that his uncle, who was Jewish, was a retired banker and that he escaped to London after the Nazis came to power, but had to return to Berlin to help his wife, Rosa Fleischner, dispose of their real estate. According to the Claimant’s submissions, his aunt and uncle lived at 55 Mommsenstrasse, Berlin-Charlottenburg, Germany. The Claimant stated that his aunt and uncle were childless and that they were deported to a concentration camp where they perished. In support of his claim the claimant submitted a document issued by the German government in 1976 which lists him as one of the family members of Emil Fleischner rightfully entitled to receive compensation from the German government concerning his uncle’s persecution. The Claimant was born on 25 August 1914 in Vienna, Austria.

Information Available in the Bank Records

The bank records consist of a ledger of accounts, an account registry card, correspondences from the various banks to the German government regarding the German government’s decree that

certain foreign held assets be repatriated to Germany,¹ and printouts from the Bank's electronic database. According to these records, the Account Owner was Frau R. Fleischner and the Power of Attorney Holders were Emil Fleischner and Zahn Fleischner. The bank documents show that the Account Owner used an address at 13 Mommsenstrasse Berlin-Charlottenburg, Germany. According to these records, Emil Fleischner had the authority to withdraw money from the account. The bank records indicate that the Account Owner held two accounts: a custody account that was opened in 1935 and an account of unknown type that was opened no later than 1935. The records show that following a decree by the German government, 2,000.00 Swiss Francs were transferred from the custody account to a bank in Germany on 4 December 1936. However, the value of the accounts cannot be ascertained from the bank records. There is no evidence in the bank records that the Account Owner, the Power of Attorney Holders or their heirs closed either account and received the proceeds themselves.

The accounts were closed on 15 October 1937. The amounts in the accounts on the date of their closure is unknown.

The CRT's Analysis

Identification of the Account Owner

The Claimant has plausibly identified the Account Owner. His aunt's name matches the published name of the Account Owner and his uncle's name matches the published name of the Power of Attorney Holder. Further, the Claimant provided a street address for the Account Owner. The address given by the Claimant substantially matches the unpublished address contained in the bank records. In support of his claim the Claimant submitted a copy of a letter from the German government stating that his father was an heir of the Power of Attorney Holder.

The CRT notes that the Claimant filed an Initial Questionnaire with the Court in 1999 asserting his entitlement to a Swiss bank account owned by Emil Fleischner prior to the publication in February 2001 of the list of accounts determined by ICEP to be probably or possibly those of Victims of Nazi Persecution (the "ICEP List"). This indicates that the Claimant has based his present claim not simply on the fact that an individual identified on the ICEP List as being Power of Attorney Holder for a Swiss bank account bears the same name as his relative, but rather on a direct family relationship that was known to him before the publication of the ICEP List. It also indicates that the Claimant had reason to believe that his relative owned a Swiss bank account prior to the publication of the ICEP List. This supports the credibility of the information provided by the Claimant.

Status of the Account Owners as a Victim of Nazi Persecution

The Claimant has made a plausible showing that the Account Owner was a Victim of Nazi Persecution. The Claimant stated that the Account Owner was Jewish, lived in Germany during the Second World War, and was deported to a concentration camp where she perished.

¹ Seventh Implementation Order to the Law of Foreign Exchange Control of 19 November 1936 ("Siebente Durchführungsverordnung zum Gesetz über die Devisenbewirtschaftung vom 19. November 1936"). These foreign currency restriction measures mandated that German owners of foreign securities must deposit their securities at a German bank or, if in a bank outside Germany, into a German bank account there.

The Claimant's Relationship to the Account Owner

The Claimant has plausibly demonstrated that he is related to the Account Owner by submitting evidence demonstrating that Rosa Fleischner was his aunt. There is no information to indicate that the Account Owner has other surviving heirs.

The Issue of Who Received the Proceeds

The bank records indicate that some of the proceeds of the custody account were transferred to a German bank in 1936 and that both accounts were closed on 15 October 1937. Based on its precedent and the Rules, the CRT applies presumptions to determine whether Account Owners or their heirs received the proceeds of their accounts. These presumptions are contained in Appendix A.² The CRT concludes in this case that one or more of these presumptions applies and it is therefore plausible that the account proceeds were not paid to the Account Owner, the Power of Attorney Holder or their heirs.

Basis for the Award

The CRT has determined that an Award may be made in favor of the Claimant. First, the claim is admissible in accordance with the criteria contained in Article 23 of the Rules. Second, the Claimant has plausibly demonstrated that the Account Owner was his aunt, and that relationship justifies 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, though the bank records indicate that on 4 December 1936, following a decree by the German government, 2,000.00 Swiss Francs were transferred from the custody account to a German bank, there is no evidence in the bank records of the total value of the account at that time. Thus, the CRT determines that it is appropriate to use the average value of Article 35 of the Rules for the custody account. Pursuant to Article 35 of the Rules, when the value of an account is unknown, as is the case here, 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 ICEP Investigation, in 1945 the average value of a custody account was 13,000.00 Swiss Francs and the average value of account of unknown type was 3,950.00 Swiss Francs, resulting in a total 1945 value of 16,950.00 Swiss Francs. The present value of this amount is calculated by multiplying it by a factor of 12, in accordance with Article 37(1) of the Rules, to produce a total award amount of 203,400.00 Swiss Francs.

In cases where the value of an account is based on the presumptions of Article 35 of the Rules, or where the CRT has determined that an account may be subject to later competing valid claims, claimants shall receive an initial payment of 35% of the total award amount. After all claims are processed, subject to approval by the Court, claimants may receive a subsequent payment of up to the remaining 65% of the total award amount. In this case, the value of the accounts at issue is based on the Article 35 presumptions and there is the possibility of other competing claims. In this instance, 35% of the total award amount is 71,190.00 Swiss Francs.

² An expanded version of Appendix A appears on the CRT II website -- www.crt-ii.org.

Scope of the Award

The Claimant should be aware that, pursuant to Article 25 of the Rules, the CRT will carry out further research on his claim to determine whether there are additional Swiss bank accounts to which he 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

APPENDIX A

In the absence of evidence to the contrary, the Tribunal presumes that neither the Account 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, and before 1945 or the year in which the freeze of Accounts from the country of residence of the Account 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 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 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 was a child at the time of the Second World War;
- h) the Account 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 and heirs because of the banks' concerns regarding double liability;²
- i) the Account 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 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).