

15, 1951

P. C. Appeal No. 82 of 1945.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

12 NOV 1956

INSTITUTE OF ADVANCED
LEGAL STUDIES

CASE FOR ARTHUR BALDERAMOS
and HUBERT HILL CAIN

ON APPEAL

FROM THE SUPREME COURT OF BRITISH HONDURAS.

30843

BETWEEN

ARTHUR BALDERAMOS, and
HUBERT HILL CAIN, as Executors of ISAIAH EMMANUEL
MORTER, deceased. (Defendants) - - - - - *Appellants,*

AND

10 JOHN CLAUDE THOMSON (Receiver),
WOLDRICH HARRISON COURTENAY,
UNIVERSAL NEGRO IMPROVEMENT ASSN. INC.,
and
ERNEST JOHNSTON HOFIUS, original Plaintiff now
pro forma - - - - - *Respondents,*

AND BETWEEN

UNIVERSAL NEGRO IMPROVEMENT ASSN. INC. - *Appellant,*

AND

20 JOHN CLAUDE THOMSON (Receiver),
WOLDRICH HARRISON COURTENAY,
ARTHUR BALDERAMOS,
HUBERT HILL CAIN, and
ERNEST JOHNSTON HOFIUS (*pro forma*) - - - - - *Respondents.*

**Case for Arthur Balderamos and Hubert Hill Cain,
The Executors of Isaiah Emmanuel Morter, deceased.**

RECORD.

30 1. These are two Appeals from the Judgment of the Supreme Court
of British Honduras, the one by Arthur Balderamos and Hubert Hill
Cain, the Executors of Isaiah Emmanuel Morter, deceased, on behalf of
whom this Case is presented, the other by the Universal Negro Improve-
ment Association Inc. Throughout this Case these Appellants will be
described as "the Executors" and the Universal Negro Improvement

p. 98. .1

RECORD. Association Inc. as "the Association." The Executors have no observations to make on the appeal by the Association.

p. 1.
p. 4.

2. The Judgment under appeal was delivered on the 18th September, 1944, in two actions for the administration of the estate of one Isaiah Emmanuel Morter, deceased, against the Executors commenced respectively by the Association on the 21st June, 1939 (Action No. 11 of 1939), and by the Respondent Hofius on the 2nd October, 1942 (Action No. 7 of 1942). No formal order for consolidation of these actions ever appears to have been made, but from the time that the second of the two actions was commenced the two appear to have been heard together and to have been treated as though they had formally been consolidated. 10

3. The questions raised by the Executors' appeal concern a number of matters more particularly set out in paragraph 8 below, referred to the Court by the Receiver on which the Chief Justice delivered Judgment adverse to the Executors and on which he made findings gravely to their detriment. The Association in its Appeal objects to directions being given for the sale of the real or personal property left by the deceased or for its being further dealt with by the Receiver.

p. 149.

4. The main facts giving rise to this appeal may be summarized as follows. On the 15th February, 1924, Isaiah Emmanuel Morter executed the will printed at page 149 of the Record, and appointed the Executors as his Executors and Trustees. He named as residuary beneficiaries "the Parent Body of the Universal Negroes Improvement Association for African Redemption Fund." Morter died on the 7th April, 1924. Probate was granted to the Executors on the 8th September, 1924. Litigation followed, two appeals reaching His Majesty's Privy Council. On the 15th August, 1935, final Judgment was delivered by the Judicial Committee, declaring which of several bodies incorporated in the United States of America was the true residuary beneficiary under the will. 20

p. 1.

5. On the 21st June, 1939, the Association commenced the action No. 11 of 1939 asking for an order for:— 30

- (1) Administration of the real and personal estate of the deceased.
- (2) Conveyance to the Plaintiff of the residuary real and personal property of his estate.

p. 8.

This action came before Sir Arthur Agar, the then Chief Justice, who on the 14th September, 1939, ordered the Executors to file accounts and to hand over the residue of the real and personal estate to the Association or to their representative on the Association executing a bond to secure the repayment of whatever sums which might become payable in respect of the estate debts. The real estate and the bulk of the personal estate was duly conveyed to the Association. 40

6. On the 2nd October, 1942, the Respondent Hofius, a creditor of the estate, commenced the action No. 7 of 1942, asking for an order for the administration of the said estate. This action came before His Honour The Honourable Carleton George Langley, the Chief Justice, on the 16th October, 1942, when he made an order in the terms asked by the Summons and also ordered that the Executors should "file their final account to the date of this order." He also directed that his Order should be served on the Association and on the Respondent Courtenay as Attorney and Trustee of the Association and on one Dr. Lionel Francis, also as Attorney of the Association, and that all these parties should be added as Defendants in the action. On the 25th November, 1942, the Executors filed their accounts to the 16th October, 1942, as ordered.

p. 14.

p. 19.

p. 19, l. 16.

p. 19,
ii. 18—25.

p. 166.

7. On the 15th December, 1942, the Chief Justice made an order appointing the Respondent Thomson Receiver of the estate and directed him to take and make, *inter alia*, the following accounts and inquiries:—

p. 21.

- (1) An account of what was due and owing to the Plaintiff and all other the creditors of the deceased.
- (2) An Account of the personal estate of the deceased come to the hands of the Defendants or to the hands of any other person or persons by or for their order or use which may be required by the Receiver.
- (3) An inquiry what parts (if any) of the deceased's personal estate were outstanding or undisposed of.

He further ordered:—

- (a) That the deceased's personal estate be applied on payment of his debts and funeral and testamentary expenses and any other necessary expenses in due course of administration.
- (b) In case the deceased's personal estate should be insufficient for the payments referred to in (a) an inquiry what real estate the deceased was seized of or entitled to at the time of his death and that the deceased's real estate or a sufficient part thereof to make good the deficiency of his personal estate should be sold with the approbation of the Chief Justice and the money arising from the sale of the deceased's real and personal estate applied by the Receiver in payment of all debts.

He adjourned the further consideration of the action with liberty to all parties to restore the same to the Chief Justice for further hearing and consideration.

8. On the 21st September, 1943, the Receiver submitted a report to the Supreme Court setting out the position of the estate and the claims that he had received and asked for the Court's direction as to a number of items. He also asked for permission to sell the properties comprising the real estate to meet outstanding debts. Among the claims for which he specifically asked for the Court's direction were those forming the

p. 62.

RECORD. subject matter of the Executor's appeal to His Majesty in Council. They are four in number:—

p. 66.	(1) A charge by the Executors for commission at the rate of 5 per cent on the gross value of the estate, namely \$150,003.01	\$7,500.15	
	(2) A charge by the Executors for a book-keeper and general clerk from the 17th April, 1924, to the 16th August, 1939, at \$240 per annum	\$3,680.00	
	(3) A similar charge for a book-keeper and general clerk from the 17th August, 1939, to the 16th October, 1939—2 months at \$20.00 per month	\$ 40.00	10
	and from October 17, 1939, to October 17th, 1942—36 months at \$10.00	\$ 360.00	
	(4) Arrears of rent from the Executor Cain amounting to	\$1,382.75	

p. 71. 9. The further hearing of the action was fixed for the 29th September, 1943, on which date the Chief Justice ordered the Receiver to sell three of the properties of the estate and to apply the proceeds in payment of the undisputed debts.

pp. 73—80. 10. The consideration of Items 1 to 4 in paragraph 8 above referred to took place on the 11th, 13th and 29th October, 1942, when evidence was led and arguments heard. The hearing of other points raised by the Receiver took place also on the 29th October, 1942, and on the 4th and 10th November, 1942. Judgment on all points was reserved and was delivered on the 18th September, 1944.

p. 98. 11. In his Judgment the learned Chief Justice dealt with the points in issue in the Executors' appeal as follows:—

p. 101, l. 27. " 1. The Executors claim a commission of 5 per cent. on the alleged gross value of this estate which for this purpose is alleged to be \$150,003.01. . . . Mr. Phillips submitted two principles of law in support of this claim. Firstly, that where a will directs that real property shall be realised, it must be treated as so converted. . . . The question here is are the Executors entitled to an extra 5 per cent. commission on moneys which have not reached their hands, as part of the gross value of the estate. Such commission to be remuneration for their services as Executors. Had the Executors obeyed the express instructions of the testator and converted the whole of the real property of this estate into cash as soon as possible, under the local practice of this Court, which has been in force for nearly one hundred years, they would have been entitled to a commission of 5 per cent. on the moneys obtained from the sale of such properties, when it reached their hands. . . . Unlike England—except in unusual cases—where work is done by Executors in this Colony they may receive remuneration. In

my opinion that is the principle which supports the practice in this Colony. A practice too long established to be disturbed except for strong reasons. I agree with Mr. Phillips that this practice of paying Executors for their services is within the control of the Court. It could certainly be withheld by the Court for good and sufficient reason.

RECORD.

10 " The Court disallows this claim for \$7,500.15 which has been made without the shadow of right or precedent to support it. The Court deems it essential that another aspect of this claim should be set out in this record. For over fifteen years the Executors mishandled this estate. . . . Reluctantly I am forced to the conclusion that this wholly fictitious claim, which has no precedent or authority to support it was made in the 16th Estate Account solely to cover a deficiency of cash which should have been in the hands of the Executors. p. 103, l. 17.

20 " 2. Justification for the employment of a book-keeper rests on several considerations. . . . This authority (*Henderson v. McIver*, 56 E. R. 510) helps but little, excepting that it does support Mr. Phillips' submission that the Court does have a discretion in the matter. . . . p. 103, l. 37.
p. 103, l. 47.

" I am of opinion that with a paid rent collector, the work involved in accounting for this estate did not justify the employment of a book-keeper. . . . In this case Mr. Balderamos has told the Court that he was the accountant in a solicitor's office for twenty years. With that experience the accounts for this estate would provide little difficulty to him. p. 104, l. 36.

30 " I think that the real issue here is was there sufficient bulk of work connected with the estate to justify the employment of a clerical staff. The books produced show the accounts to have been kept on a receipt and payment system, the most simple form of accounts. There can be no doubt that any ordinary clerk could have kept these accounts, under the supervision of Mr. Balderamos—with his special training—at much less cost than that paid to Mr. Trejo. The justification, if any, was the quantity of house property, with many rents, repairs and maintenance items, which meant that the book-keeping did not constitute all the clerical work involved.

40 " This matter has a personal aspect. Mr. Trejo was employed by Mr. Balderamos, in his personal practice, as clerk in his office at a wage of \$15.00 monthly. It appears that this was much less than a clerk of Mr. Trejo's standing would have been paid, except in the earlier years of this employment. In addition Mr. Trejo earned approximately \$20.00 monthly for collecting the rents of this estate. Further he was paid \$20.00 monthly as book-keeper of the estate. He was so well paid, in fact for his condition in life, that he could afford to draw his

RECORD.

wage as book-keeper (\$240.00) annually, Surely a state of financial beatitude to which few of us attain. I am of opinion that Mr. Balderamos, had he used an honest discretion could have arranged far more economical terms for doing this estate work. I should consider it reasonable for the Executors to employ a rent collector and pay him a commission basis, as that would provide an inducement for him to be diligent in his work. The cases give authority for this system. . . .

p. 106, l. 1.

"I wish to make this matter quite clear. For the Executors to credit themselves with 5 per cent. commission on gross rentals, when paying Mr. Trejo 10 per cent. commission for collecting them and paying him \$20.00 monthly for keeping the books of the estate—of which the items for rentals formed the bulk of the entries—was an unjustifiable overcharge. If Mr. Trejo kept and furnished the Executors with proper accounts of his rent collections—and there are many charges for rent books—Mr. Balderamos with his extensive experience must have been capable of carrying out his obvious duty of either keeping the accounts himself or employing a low grade clerk to do so at a small wage under his supervision. . . . The Court will record no decision on the claim until the full facts of that matter are available. 10 20

p. 106, l. 26.

p. 106, l. 32.

"3. The reason for these two periods being shown is that the Executors handed over the estate to Mr. Courtenay in August, 1939, but there were a few matters outstanding which were completed by the 16th October, 1939. There were a few financial transactions dealt with by the Executors during that period of one month.

"Item (A) \$40.00 is disallowed as an unnecessary payment for services which could and should have been performed by the Executors. The special employment of a book-keeper was unjustified. 30

p. 108, l. 8.

"Item (B) \$360.00 need not be considered on the basis of justification for employment of a book-keeper. A far more serious aspect was disclosed during the hearing of the case. There is certainly *prima facie* evidence that both Executors have been guilty of filing, and supporting by their affidavit, an account which to their certain knowledge was false and fraudulent. . . . On the 13th October, 1943, Mr. Trejo appeared and gave sworn evidence. He supported the accounts up to the handing over of the properties to Mr. Courtenay. He then said 'I have not been paid anything since October, 1939, in respect of the Morter estate.' It should be noticed that by inference he accepted item \$56 (*sic*) which the Court has disallowed on the grounds already set out. Mr. Phillips, representing 40

Mr. Balderamos, Mr. Balderamos and Mr. Cain were then present but did not question this statement, although they had ample opportunity. The Court queried this evidence and Mr. Trejo confirmed that he had had no such sum paid since October, 1939. . . .

RECORD.

" I am forced to the conclusion that this is yet another attempt to fill the gap in the cash balance of the estate which should have been available to hand over to Mr. Courtenay, but was not.

p. 108, l. 33.

10 " 4. The accounts disclose that the Executors first paid rent on this property occupied by Mr. Cain in May, 1924, after the death of the testator, at the rate of \$10.00 monthly. In November, 1927, this rent was increased to \$20.00 monthly, and in November, 1929, to \$25.00 monthly. It remained at that rate until Mr. Courtenay terminated that lease in September, 1939. The Accounts showed that the Executors charged \$10.00 for August, 1925, twice (see Items 365/1925 and 196/1926). From such data as is available to the Court it seems that Mr. Cain, paid, or owed, approximately the amount of rent paid from the estate funds to the owners of this property. He paid no rent between the 28th February, 1935—when he was \$7.75 in arrear—andt he 30th September, 1939, when the lease was terminated. . . . Whilst Mr. Cain was living in this property without paying any rent on it, he was still receiving the 5 per cent. commission as Executor on other moneys paid into the estate funds. . . . Probably Mr. Cain has been receiving this 5 per cent. commission on his own rent during the period he paid such rent as was due from him. The Receiver must investigate that. There can be no question that both he and Mr. Balderamos should have seen that Mr. Cain's rent was paid punctually; and most certainly, if for some reason it was in arrear, they were both responsible for seeing that such arrears were set off against any payments accruing in respect of commissions due to this debtor of the estate.

p. 108, l. 41.

p. 109, l. 12.

p. 109, l. 18.

30 " Mr. Phillips submitted that in the event of there being no balance due to Mr. Cain from the estate he would have to settle as an ordinary debtor of the estate. This issue is not so simple as that. I am of opinion that Mr. Cain was dishonest when he paid himself or accepted payment from Mr. Balderamos of commission moneys due to him from the estate funds, well knowing that he owed the estate considerable sums in rent. At the least, it was the grossest negligence on the part of Mr. Balderamos, if not equally dishonest, to take part in or approve these transactions. The whole leasing of this property for the benefit of Mr. Cain, without any justification, would appear to have been a breach of trust. The accounts disclose

40

RECORD.

that during this rent-free occupancy by Mr. Cain, whilst his debt of \$1,382.75 was accruing, he was paid \$593.75 in commissions from the estate. Mr. Balderamos was a party to these wrongful payments and the wrongful leasing or continuance of the lease of this property for the benefit of Mr. Cain from the estate funds without any justification. I hold that both Executors are jointly and severally responsible for any loss the estate has sustained in this matter."

12. The Executors respectfully submit that the learned Chief Justice in dealing with the queries raised by the Receiver was not justified on the material before him or that appearing in the Record in proceeding to general conclusions as to the Executors' conduct or motives and that his doing so was gravely prejudicial to them, particularly having regard to the fact that in the learned Chief Justice's view further investigation would be required. It is submitted that these matters were not sufficiently investigated in these proceedings to justify any such conclusions. It is the Executors' submission that all of the matters of complaint against them were and are susceptible of satisfactory explanation upon a fuller enquiry.

13. As to the specific items the Executors make the following observations:—

1. Commission.—The substantial ground on which the Chief Justice based his refusal to allow this claim is the failure of the Executors to convert the real property. The Executors respectfully submit that an examination of all the facts would show that they were fully justified in the course they took and accordingly that they ought not to have been deprived of the remuneration ordinarily allowed in the Colony.

2 and 3. Charges for book-keeper and general clerk.—The Executors submit that the amount of work involved fully justified their incurring the modest expense of employing Trejo, who had had considerable experience of the estate and the business of the deceased. There was no evidence that adequate clerical staff could have been obtained more cheaply. Further as to 3, it is submitted that the Chief Justice erred in drawing inferences very adverse to the Executors from the fact that this sum had not been actually paid to the said Trejo but was still outstanding.

4. Rent.—It is respectfully urged on behalf of the Executor Balderamos that there were no grounds for holding him liable in these proceedings for money owed for rent by his co-Executor.

14. On the 7th October, 1944, the Association presented a petition for leave to Appeal to His Majesty in Council against that part of the Judgment of the Chief Justice as decided that:—

(1) The real and personal estate that was of Isaiah Emmanuel Morter,

deceased, or any part thereof shall be sold and converted into money. RECORD.

(2) The Receiver shall deal any further with the said real and personal estate.

15. On the said 7th October, 1944, the Executors presented a petition for leave to appeal to His Majesty in Council against so much of the said Judgment as decided against them:— p. 126.
p. 128.

- “ (1) To disallow their claim for executors’ commission at 5 per centum on the gross value of the Estate of \$150,003.01.
- 10 “ (2) To disallow the amount of \$3,680.00 for accounting expenses.
- “ (3) To disallow their claim for further accounting expenses of \$40.00 and \$360.00.
- “ (4) That the Appellants are jointly and severally responsible for any loss in connection with the amount owing by Hubert Hill Cain one of the Appellants to the estate for rent.
- “ (5) That the Appellants were dishonest in their dealing with the estate.
- “ (6) That the Appellants have dealt dishonestly with the Assets of the estate.
- 20 “ (7) That the Appellants through the said Arthur Balderamos did not use an honest discretion in employing Percy Trejo.
- “ (8) That the Appellants inserted a false item (No. 57) for \$360.00 in the said 16th Estate account and swore to same on 25th November, 1942.
- “ (9) That the Appellants filed and supported by affidavit an Account which to their certain knowledge was false and fraudulent.
- “ (10) That the Appellants’ claim to commission in the said sum of \$7,500.15 was made to cover a deficiency in cash and that the said sum of \$7,500.15 had been used by them and should have been available assets in their hands and was in fact not so available.”
- 30

16. On the 17th October, 1944, the Chief Justice granted the Association Leave and the Executors Conditional Leave to Appeal to His Majesty in Council. Final leave to the Executors to appeal to His Majesty in Council was given by the Chief Justice on the 28th November, 1944. p. 132.
p. 131.
p. 137.

17. On the 22nd March, 1945, the Chief Justice addressed to the Registrar General of the Supreme Court, Belize, a document headed “Reasons for Judgment” which is printed at pages 140 to 144 of the Record in purported compliance with Section 17 of Chapter 155 of the Consolidated Laws, 1924, of British Honduras. Section 17 reads as follows:—

40

“Section 17.—The reasons of the Court, or in cases coming

RECORD.

under the Land Transfer Registration Ordinance of the Chief Justice, for or against any Judgment pronounced in the course of proceedings out of which the appeal arises shall by the Court or the Chief Justice (as the case may be) be communicated in writing to the Registrar General within two weeks after final leave to appeal shall have been given, or so thereafter as practicable, and shall by him be filed in the General Registry and form part of the Record."

18. The Executors have objected to the inclusion of this document in the Record and respectfully submit that Section 17 of Chapter 155 of the Consolidated Laws has no application where the Court has already given a reasoned Judgment. Moreover the document in question contains highly controversial matters and travels far beyond the points at issue in the actions No. 11 of 1939 and No. 7 of 1942. In it the Chief Justice makes many statements highly damaging to the Executors which they have had no opportunity of answering and which they submit are baseless. The document is otherwise objectionable in that it comments on the application to bring the matter before His Majesty in Council.

p. 98.

19. The Executors submit that that part of the Judgment of the Supreme Court of Honduras dated the 18th September, 1944, which is adverse to the Executors should be set aside for the following, among other,

REASONS:—

1. Because the items of \$7,500.15, \$3,680.00, \$40.00 and \$360.00 should have been allowed.
2. Because the Executor Balderamos should not have been held liable for the item of \$1,382.75.
3. Because the attacks on the Executors' integrity and conduct of the Estate of the deceased were not justified.
4. Because the said part of the Judgment is, having regard to the facts and law applicable, wrong and should be reversed.

PHINEAS QUASS.

BARROW ROGERS & NEVILL,
Whitehall House,
41, Whitehall, S.W.1.
Solicitors for the Executors.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF
BRITISH HONDURAS.

BETWEEN

ARTHUR BALDERAMOS,
and
HUBERT HILL CAIN,
as Executors of ISAIAH
EMMANUEL MORTER, deceased *Appellants,*

AND

JOHN CLAUDE THOMSON
(Receiver),
WOLDRICH HARRISON
COURTENAY,
UNIVERSAL NEGRO IM-
PROVEMENT ASSN. INC.,
and
ERNEST JOHNSTON
HOFIUS, original Plaintiff
now *pro forma* - - - *Respondents,*

AND BETWEEN

UNIVERSAL NEGRO IM-
PROVEMENT ASSN. INC. *Appellant,*

AND

JOHN CLAUDE THOMSON
(Receiver),
WOLDRICH HARRISON
COURTENAY,
ARTHUR BALDERAMOS,
HUBERT HILL CAIN, and
ERNEST JOHNSTON
HOFIUS (*pro forma*) - - *Respondents.*

**Case for Arthur Balderamos and
Hubert Hill Cain, The Executors of
Isaiah Emmanuel Morter, deceased.**

BARROW ROGERS & NEVILL,
Whitehall House,
41, *Whitehall, S.W.1.*
Solicitors for the Executors.