

15, 1951

P.C.A. No. 82 of 1945.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF BRITISH HONDURAS. 12 NOV 1956

UNIVERSITY OF LONDON W.C.1.
12 NOV 1956
INSTITUTE OF ADVANCED LEGAL STUDIES

30842

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
ASSOCIATION, INC.
ERNEST JOHNSTON HOFIUS, original
Plaintiff and now pro forma Respondent - - - *Respondents*
(Action No. 7 of 1942)

AND BETWEEN

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

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AND

JOHN CLAUDE THOMSON (Receiver)
WOLDRICH HARRISON COURTENAY
ARTHUR BALDERAMOS
HUBERT HILL CAIN
ERNEST JOHNSTON HOFIUS (pro forma) - - - *Respondents.*
(Action No. 11 of 1939)

Case

FOR UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION, INC.,
Respondents in the main Appeal and Appellants in the Cross-Appeal.

RECORD.

30 1. This is an appeal by Arthur Balderamos and Hubert Hill Cain p. 99, l. 3.
against an interim judgment of the Supreme Court of British Honduras
dated the 18th day of September, 1944, given in action No. 7 of 1942 on p. 137.
the file of the said Court. There is also a cross-appeal by Universal Negro
Improvement Association Incorporated against the said interim judgment,
given in action No. 11 of 1939. There has been no formal order for

CASE FOR UNIVERSAL NEGRO
IMPROVEMENT ASSN., INC.

p. 16, l. 24.

consolidation of both appeal and cross-appeal either in the said Supreme Court or in His Majesty's Privy Council, but the Universal Negro Improvement Association Incorporated were added as defendants to action No. 7 of 1942 and both actions were heard together and disposed of in the Supreme Court by one judgment dated the 18th September, 1944.

2. The facts in the following paragraph are, it is thought, not in dispute :—

p. 140.

On the 15th February, 1924, Isaiah Emmanuel Morter of Belize, British Honduras, made his Will appointing Arthur Balderamos and Hubert Hill Cain as his Executors and Trustees and after providing for 10 payment of his debts funeral and testamentary expenses and certain legacies, he directed a sale of all his properties and devised and bequeathed the residue of his real and personal estate to the Parent Body of the Universal Negro Improvement Association for the African Redemption Fund.

p. 99, l. 25.
p. 11, l. 30.

The testator died on the 7th April, 1924. The Executors above named filed their Petition for Probate on the 28th April, 1924, and Probate was granted to them on the 8th September, 1924.

Before the Grant of Probate a Caveat had been filed by Ann Rebecca Morter, the widow of the testator, on the 10th April, 1924, and her 20 subsequent action to set aside the Will on the ground of an intestacy and, alternatively, for a declaration that certain of the devises and bequests in it were void, was eventually dismissed by the Privy Council (as appears from page 56 of the Record in Privy Council Appeal No. 33 of 1932) on the 24th February, 1928.

p. 99, l. 40.

On the 15th August, 1935, the Privy Council dismissed the Appeal No. 33 of 1932 of Charles Wright and Ethel Collins against the judgment of the Supreme Court of British Honduras of the 26th February, 1931, declaring that Universal Negro Improvement Association Incorporated (the present Respondents to the appeal of Arthur Balderamos and Hubert 30 Hill Cain) were the beneficiaries entitled to the residuary bequest and devise under the Will of the late Isaiah Emmanuel Morter. (See previous Privy Council Appeal Record in Appeal No. 33 of 1932.)

p. 1.

3. On the 21st day of June, 1939,

THE PRESENT PROCEEDINGS

were commenced by an originating summons taken out by Universal Negro Improvement Association Incorporated (hereinafter called "U.N.I.A.") in the Supreme Court of British Honduras claiming as against Arthur Balderamos and Hubert Hill Cain, the aforesaid Executors of the late Isaiah Emmanuel Morter, administration of his estate and a 40 conveyance by the Executors to U.N.I.A. of the residuary real and personal property of the said Estate.

p. 8.

4. On the 31st August, 1939, the Supreme Court made an Order in favour of U.N.I.A. directing the taking of accounts of the personal estate, not specifically bequeathed, come into the hands of the said

Executors or either of them, an account of the testator's debts, funeral expenses, legacies and annuities (if any) given by the testator's Will, giving the formal consequential directions and ordering the Executors to convey and hand over to U.N.I.A. the residue of the real and personal property of the testator then in their hands not later than the 25th day of September, 1939.

5. By an Indenture dated the 30th September, 1939, made between the Executors and U.N.I.A. certain scheduled properties in British Honduras were conveyed to U.N.I.A. By an Indenture dated the 3rd November, 1939, made between U.N.I.A. and Woldrich Harrison Courtenay, as their trustee, certain other property of the Estate was conveyed to the latter to sell and convert into cash. On the 16th November, 1939, eleven other properties of the Estate were conveyed to the latter by U.N.I.A. On the 22nd November, 1939, U.N.I.A. appointed the said Woldrich Harrison Courtenay as its Attorney with the usual wide powers to act on its behalf. By a deed poll dated 24th June, 1941, the last-mentioned Power of Attorney was revoked and Lionel Athanase Francis was appointed Attorney for U.N.I.A. in the place of the said Woldrich Harrison Courtenay.
6. On the 2nd October, 1942, Ernest Johnston Hofius (carrying on business under the name of Hofius & Hildebrandt) claiming to be a creditor of the Estate of Isaiah Emmanuel Morter took out a summons in the Supreme Court for an order for the administration of the real and personal estate of the said Isaiah Emmanuel Morter and on the 16th October, 1942, a preliminary order for administration was made and it was ordered that Woldrich Harrison Courtenay and Lionel Athanase Francis as Attorneys of U.N.I.A. be joined as parties to the said application. (Action No. 7 of 1942.)
7. On the 15th December, 1942, it was ordered by the said Court that John Claude Thomson, a Respondent to the present Appeal, be appointed Receiver to take and make certain accounts and enquiries, and that in case the testator's personal estate should be insufficient for the payment of his debts, funeral and testamentary expenses, the testator's real estate or a sufficient part thereof to make good the deficiency of his personal estate be sold, and on the 29th September, 1943, it was further ordered that the Receiver should sell by private sale certain properties and that the conveyances should be signed by the said Courtenay and the said Francis.
8. On the 21st September, 1943, the Receiver appointed by the Court submitted his statement of claims received, his report thereon, his statement of the real estate and the mortgages outstanding and his cash account, showing a balance in hand of \$1,277.19. The claim of Messrs. Hofius and Hildebrandt and certain other claims totalling \$3,004.59 (all of which had come into existence since the Grant of Probate) were agreed by the Receiver and all parties, and the Receiver applied to the Court for directions *inter alia* as to the claims of the Executors totalling \$10,994.33 and of the said Woldrich Harrison Courtenay totalling \$11,174.75.

p. 71, l. 1.
 p. 73, l. 12.
 p. 73, l. 45.
 p. 77, l. 1.
 p. 78, l. 25.

9. The Supreme Court thereupon fixed the 29th September, 1943, for the further hearing of the Action No. 7 of 1942. *Viva voce* evidence was taken by the Court from Arthur Balderamos on the 11th October, 1943, and he filed an affidavit by himself on the following day. The Court also called as a witness one Percy Trejo on the 13th October, 1943, as to items included in the claim of the Executors, and the hearing by the Court continued until the 10th November, 1943.

p. 103, ll. 4-35.

10. The Supreme Court (Sir Carleton George Langley, C.J., K.C.) delivered judgment on the 18th September, 1944. Dealing with the claim of \$7,500.15 by the Executors for a commission of 5 per cent. on the alleged gross value of the Estate, i.e., \$150,001.00, the learned Chief Justice, after reviewing the authorities, came to the conclusion that as the Executors are paid a commission by way of remuneration for their services and that should they not perform those services and cause the Estate to pass through their hands, they do not earn it, said as follows :—

“ The Court disallows the claim of \$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 the record. For over fifteen years the Executors mishandled this estate. They regularly credited themselves with the 5 per cent. commission—which the practice allows—on cash of the estate received by them. From the evidence given at the hearing it appears that no verbal claim was made by them to this extra 5 per cent. until after Mr. Courtenay was given a Power of Attorney (dated the 22nd November, 1939—Deeds Book No. 34, pp. 380-382) and the Court had ordered the Executors to hand over to him the estate. The 13th, 14th and 15th Estate Accounts, as required by statute, were filed by the Executors after that date, but this very large claim now made was not included in them.

Reluctantly I am forced to the conclusion that this wholly fictitious claim, which has no precedent nor 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. Presumably it was not available. Possibly because it had been drawn in anticipation of costs claimed by Mr. Balderamos, which had not been taxed. In that case such costs were not a lawful debt due from the estate moneys. The Executors during the administration of the estate took over and made partial use of several Bank Accounts. The Pass Books indicate that all moneys received by the Executors were not paid directly into those accounts, as they should have been. Neither were all payments made directly from Bank or subsidiary accounts fully shown. In other words it is now difficult if not impossible to trace the actual cash transactions.

The Courts have indicated in many cases that this system is wrong. Such a defective system of accounting by an experienced accountant like Mr. Balderamos, which has the effect of depriving any investigator of these accounts of the all-essential check made possible by comparison with the independent Bank Accounts, in my opinion, is not without its significance.”

11. In regard to the claim of \$3,680.00 alleged to have been paid for the employment by the Executors of a book-keeper, a Mr. Trejo, the learned Chief Justice reviewed the authorities and came to the conclusion that the Executors could not, on those authorities, be allowed this item of \$3,680.00, and said as follows:—

“ Mr. Phillips [for the Executors] cited *Wroe v. Seed* (66 Eng. Reports, p. 773). In that case the executors misconducted themselves seriously. They were not educated and unable to keep accounts. 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. 38, to
p. 105, l. 35.

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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 bookkeeping did not constitute all the clerical work involved.

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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 bookkeeper of the estate. He was so well paid, in fact, for his condition in life, that he could afford to draw his wage as bookkeeper (\$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 on a commission basis, as that would provide an inducement for him to be diligent in his work. The cases give authority for this system.

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A primary duty rests on every Executor to perform any reasonable duty which may arise during the course of his administration of an estate for which he has accepted office. It is important to remember that that acceptance of office is optional as no one is compelled to accept an executorship. I have cited cases giving authority for the principle that when Executors pay other people to carry out duties they could and should perform—as they are justified in doing in some circumstances—they must not charge twice for the same work. That would be unjust. The Executors

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are entitled to 5 per cent. commission on funds of the estate which they may collect, but if they employ a rent collector to collect a part of those funds they must not claim their commission on those funds collected for them. Not only have the Executors done that in this case, but they have collected their commissions on the gross rentals paid to them by Mr. Trejo. This system has been employed from 1924 until 1939 and it will necessitate a complete rewriting of the accounts to remedy this matter and ascertain the true amount to which the Executors are entitled. It will be necessary for the Receiver to examine this position of the accounts.”

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12. Dealing with the further claim of the Executors for two items of \$360.00 and \$40.00 alleged by them to have been paid to the bookkeeper, Mr. Trejo, the learned Chief Justice said as follows :—

p. 106, ll. 37-45.

“ Item No. 56 \$40.00 is disallowed as an unnecessary payment which could and should have been performed by the Executors. The special employment of a bookkeeper was unjustified.

Item No. 57 \$360.00 need not be considered on the basis of justification for employment of a bookkeeper. 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 . . .

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p. 108, ll. 8-35.

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 which the Court has disallowed on the grounds already set out. Mr. Phillips representing 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 him since October, 1939.

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Mr. Balderamos later amplified his evidence and position of the employment of Mr. Trejo, but offered no explanation and did not offer further support for \$360.00. It might have been submitted in cross-examination of Mr. Trejo that he had been promised these amounts, but not paid them. In the same way it might have been submitted that the Executors were only claiming the \$7,500.15 referred to earlier, subject to the approval of the Court. Although the circumstances made it essential that some explanation should have been offered to the Court, in neither case was one forthcoming. These accounts filed should be a record of the cash position of the estate. Other outstanding accounts were stated to be so. These items were entered in the accounts as payments made on the 16th October, 1942. Had they not been entered a very substantial balance of cash would have been shown in the hands of the Executors, and the Court had ordered that balance to be paid to Mr. Courtenay.

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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."

13. With regard to a debt owed by Mr. Cain, one of the Executors, to the Estate for rent, viz., \$1,382.75, the learned Chief Justice said as follows :—

10 " Mr. Phillips [for the Executors] 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 that during this rent-free occupancy by Mr. Cain, whilst his debt of \$1,382.75 was accruing, he was paid 20 \$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."

p. 109, ll. 26-42.

14. The Chief Justice then dealt with a claim by Mr. Courtenay for \$4,416.30 and his other claims totalling \$11,174.75 and came to the conclusion that no agreements between him and U.N.I.A. with reference to the services rendered by him to U.N.I.A. had been proved and ordered 30 Mr. Courtenay to prepare Bills of Costs. U.N.I.A. respectfully submits that the learned Chief Justice erred in directing a taxation of Mr. Courtenay's costs after finding that there was no agreement between U.N.I.A. and him, and in any case there could be no taxation, in the circumstances, of any items which did not, and do not, come solely within the purview of his professional activities. p. 117, ll. 24-28.

15. On the 17th October, 1944, conditional leave to appeal to His Majesty in Council was granted to the Executors against the judgment of the Supreme Court of British Honduras dated the 18th day of September, 1944, and security was fixed at \$2,500. Final leave to appeal was granted 40 to them on the 28th November, 1944, and they were allowed three months within which to prepare the record. p. 131. p. 137.

16. On the 17th October, 1944, conditional leave to appeal to His Majesty in Council was granted to U.N.I.A. against the judgment of the Supreme Court of British Honduras dated the 18th day of September, p. 132.

p. 139.

1944, and on the 13th March, 1945, the learned Chief Justice entered the following in his Court Notes of that date :—

“ Dragten
Thomson Receiver
Francis
Courtenay
Hassock

Mr. Balderamos, Mr. Phillips & Mr. Cain were notified but have not appeared.

Final leave to appeal.

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Three months to prepare the Record.

Costs of Courtenay waived.”

p. 148, l. 26.

17. Mr. Courtenay also appealed against the judgment of the Supreme Court of British Honduras dated the 18th day of September, 1944, but abandoned his appeal. The expression “ Costs of Courtenay waived ” is ambiguous and U.N.I.A. assume that it still leaves the position as set out in paragraph 14 above unaltered, and that they are entitled to prosecute their cross-appeal not only against the Executors, but as against Mr. Courtenay.

p. 140, l. 25.

18. In accordance with the provisions of Section 17 of Chapter 155 20 of the Consolidated Laws of British Honduras, the learned Chief Justice, on the 22nd March, 1945, stated his Reasons for having arrived at the decisions embodied in the said judgment.

19. These Respondents respectfully submit that the decision of the Supreme Court of British Honduras dated the 18th day of September, 1944, to the extent that it is in their favour, is right, and that the appeal of the Executors should be dismissed with costs for the reasons given by the learned Chief Justice and for other good reasons, but they respectfully submit that their cross-appeal should be allowed and the judgment of the 18th day of September, 1944, should be varied in their favour for the 30 following, among other,

REASONS.

- (1) THAT the learned Chief Justice, having found, as a fact, that the Executors dishonestly delayed the administration of the Estate for their own benefit, should have held that they were not entitled to any remuneration, whether by way of commission or otherwise, after the 30th day of July, 1935, the date when the Privy Council held that U.N.I.A. were the rightful residuary legatees.
- (2) THAT the learned Chief Justice, having found that there 40 was no agreement between U.N.I.A. and Mr. Courtenay, should have disallowed all the professional charges of

the latter, except to the extent that U.N.I.A. impliedly took the benefit thereof or by its conduct is now estopped from disputing his authority, and should have disallowed *in toto* all his charges based on commissions and percentages.

- (3) THAT, in any case, the costs of Mr. Courtenay ordered to be taxed by the learned Chief Justice, whatever might be the position as between himself and these Respondents, were not properly a liability of the Estate, and ought not to figure in the present administration proceedings.

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C. S. REWCASTLE.

GILBERT DOLD.

In the Privy Council.

ON APPEAL

*from the Supreme Court of
British Honduras*

BETWEEN

BALDERAMOS and CAIN

AND

**UNIVERSAL NEGRO IMPROVEMENT
ASSOCIATION INCORPORATED
and Others**

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Case

for UNIVERSAL NEGRO IMPROVEMENT
ASSOCIATION, Respondents in the
main Appeal and Appellants in the
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A. L. BRYDEN & WILLIAMS,
53 Victoria Street,
S.W.1,
Solicitors for
UNIVERSAL NEGRO IMPROVEMENT
ASSOCIATION INCORPORATED.
