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IN THE PRIVY COUNCIL

No.32 of 1970

ON APPEAL
FROM THE JAMAICA COURT OF APPEAL

BETWEEN:

WILLOUGHBY ARTHUR VICKERS DAVIS Appellant

- and -

THE ADMINISTRATOR GENERAL (Trustee of the
Estate of Charles Benjamin Vickers deceased) Respondent

IN THE MATTER of the Estate of CHARLES BENJAMIN VICKERS
Deceased late of Mount Edgecombe in the Parish
of Westmorland

- and -

IN THE MATTER of the ADMINISTRATOR GENERAL'S LAW, CAP.1.,
Section 41

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from a decision and Orders of the Jamaica Court of Appeal (Moody, Shelley and Luckhoo, J.J.A.) given and made on the 7th March, 1969 and followed by a supplementary ruling given on behalf of the Court by Luckhoo, J.A., on the 11th March, 1969 dismissing with costs the Appeal of the Appellant from certain orders made in the course of a judgment given by the Supreme Court of Jamaica (Douglas, J.,) in favour of the Appellant, on the 29th July, 1965. The orders of the Jamaica Court of Appeal varied the orders of Douglas J.
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2. Charles Benjamin Vickers ('the Testator') was the owner of a cattle estate of some 1,750 acres, known as Mount Edgecombe, and situate in the South West of Jamaica. The Testator died on the 14th January, 1923. By his will he devised Mount Edgecombe to his two natural children, Alfred and Catherine Vickers for their
- 30
- pp.64-106
pp.107-109
pp.15-44
pp.111-113

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joint lives and, on the death of one, for the life of the survivor. Alfred Vickers, who was the Testator's Executor and proved the Will, died on the 18th April, 1945. The title to Mount Edgecombe then passed to Alfred's Executor and later to the Executor's Executor. Catherine Vickers died on the 9th August, 1960. Upon the death of Catherine, further provisions of the Testator's Will came into effect. He devised Mount Edgecombe to the Administrator General for the time being, as Trustee, on trust to sell and divide the proceeds equally between the members of a named class, this being the lawful children of the Testator's three brothers. The Testator, in his Will, expressed the wish that Mount Edgecombe should be retained in the family, and to this end he directed the Administrator General not to sell the property until at least six months after the death of the survivor of Alfred and Catherine Vickers, unless, before the expiry of that period, the beneficiaries jointly directed earlier sale. If the beneficiaries desired to retain Mount Edgecombe, the Administrator General was to transfer it to them or to such other person as they might direct.

3. The members of the named class comprised two persons, viz: Miss Alice Maud Vickers, an elderly lady living in New South Wales, and Mrs. Hilda Margaret Davis, who lived in England, and was the mother of the Appellant. On the 25th October, 1960, Mrs. Davis severed her joint interest in the Testator's Estate by mortgaging her share to the Appellant. On the 9th November, 1960, she conveyed to the Appellant a two-thirds undivided share of her one-half share in the Estate. On the 19th November, 1962, she died, testate, her Will being proved (Probate later being re-sealed in Jamaica) by the Appellant, who was one of the Executors named therein. Notice of these facts was duly given to the Respondent.

4. As was found by the Jamaica Court of Appeal, the Respondent did not trace the beneficiaries; it was left to them to apprise him of their identity and whereabouts. Further, he did not tell the beneficiaries of the option given to them by the Will of the Testator; indeed, as

was found by both Courts below, he failed throughout, despite numerous requests, to give information to the beneficiaries. In the event, neither beneficiary wished to retain Mount Edgecombe, and in 1963 the Appellant, not being apprised of the condition of the Estate, its value, or of any offers to purchase which might have been made, and acting with the consent of the Australian beneficiary, instructed Messrs. Hamptons, Estate Agents of London, to cause enquiries to be made as to the nature and value of the Estate, and to offer it for sale. Messrs. Hamptons instructed their Jamaica Agent, Lord Ronald Graham, to make enquiries, and it was not until the beneficiaries received a report from Lord Ronald Graham, dated the 26th April, 1963, that they were aware of the condition and value of Mount Edgecombe. pp.114-116

5. The principal events of the Respondent's Trusteeship during the period commencing with the death of Catherine Vickers and the date of sale of Mount Edgecombe, in July, 1964, were as follows. The Respondent "entered into possession" of Mount Edgecombe on the 8th September, 1960. He then appointed an agent to manage the property, arming the latter with:- "A document of authority quite inappropriate to his position" (Douglas, J.). In February 1961 the Respondent gave his agent authority to collect rents. On the 31st October, 1961 the Respondent requested, of a Mr. Kirkham, a valuation of the Estate. On the 5th January, 1962 Mr. Kirkham submitted his agricultural valuation of the property, this being in the sum of £50,370. The valuation was lost by the Respondent, who obtained a copy from Mr. Kirkham in September, 1962. In the meantime, on the 12th July, 1962, the Respondent took a conveyance of Mount Edgecombe from the person to whom, upon the death of Alfred Vickers' Executor, the title to the Estate had devolved. On the 16th July, 1962 the Respondent advertised the sale of Mount Edgecombe in a Jamaica Newspaper. He called for sealed tenders to be submitted by the 1st September, 1962. Six tenders were submitted, one being in the sum of £90,000, which tender was reduced to £50,000 on the 6th September, 1962. On the 11th September, 1963 the Respondent sent purported pp.121-122
Corr.p.22
Corr.pp.25/
26
pp.125-128
Corr.p.39
p.129
pp.128-129

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Corr.p.119	estate accounts to the solicitors then acting for the Appellant in Jamaica. These accounts were described by Douglas, J., as: "a set of figures so sketchy as to be almost worthless." On the 16th November, 1963, the Respondent re-advertised the Estate in the Jamaica Newspaper.	
Corr.pp.146-147 and p.149	6. In May, 1964, Messrs. Hamptons found a purchaser (the "Carlyle-Clarke Syndicate") in the sum of £57,000, and they took a deposit from the Syndicate. The beneficiaries requested the Respondent to accept this offer, but he declined to do so, although the Jamaica solicitor to the Carlyle-Clarke Syndicate attempted to continue negotiations with the Respondent. Early in August, 1964 the Appellant's English solicitor heard rumours to the effect that the Respondent has sold Mount Edgecombe elsewhere, and he cabled for information. On the 13th August the Respondent wrote to the Appellant's solicitor stating that the property had been sold for £57,200. He declined to name the purchaser. On the 1st December the Appellant, having ascertained that the purchaser was one James Williams, and having sought but failed to obtain an undertaking by the Respondent not to complete the sale to Mr. Williams, commenced proceedings. The Australian beneficiary was content with a sale at £57,200, and took no part in the action.	10
Corr.p.180		
Corr.pp.184-186		20
pp. 1-2		
pp.3-7	7. The Appellant, by his Statement of Claim, alleged thirteen breaches of trust, including: failing to take any or any adequate steps for the maintenance or preservation of the Estate; failing to obtain an adequate price for the Estate; and, in any event, selling at a price lower than the Respondent would have obtained had he not committed the alleged breaches of trust. The Appellant sought: accounts and enquiries; an injunction restraining the Defendant from completing the sale to Mr. Williams; an order directing the Respondent to sell the property to the Carlyle-Clarke Syndicate; and, an order for the Respondent to restore to the Trust such sums as the Court should conclude that the Trust would have received had it not been for the alleged breaches of trust. The Respondent, by his Defence, denied the breaches of trust alleged, and asserted that, if there had been breaches of trust, he had acted honestly and reasonably and ought to be excused.	30
p.10		40
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8. On the 17th December, 1964 the Appellant sought an interim injunction to restrain the Respondent from completing the sale to Mr. Williams. Upon the hearing of the application, the Respondent gave an undertaking not to complete the sale. He broke this undertaking. p.11
pp.12-13
9. The hearing of the action, in respect of which an order for speedy trial had been made, commenced on the 25th May, 1965. Orders for further and better discovery were made against the Respondent. In the course of the hearing the Appellant sought and obtained leave to amend his Statement of Claim to include an allegation of equitable fraud, in that he alleged the Respondent had wrongfully paid the sum of £2,860 by way of sale commission to one Abrahams. p.13
pp. 7-8
10. The relevant statutory provisions are as follows:
- 20 The Administrator General's Law, Cap. 1 of the Laws of Jamaica, revised edition 1953;
- The Trustee Law, Cap.393 of the Laws of Jamaica, revised edition 1953;
- The Registration of Titles Law, Cap.340, of the Laws of Jamaica, revised edition 1953;
- "Section 22, The Governor-General may appoint persons to be Valuers under this Law, and at pleasure annul the appointment of any such person".
- 30 "Section 48. When any contract shall have been made for the sale and purchase of any land, then unless the person agreeing to sell such land shall have stipulated to the contrary, it shall be lawful for the purchaser at any time before the completion of the purchase to require that the vendor shall instead of making a conveyance of such land, cause him to be registered as proprietor of the land, the subject of the contract, under the provisions
- 40 of this Law, with an absolute title, in cases where the land has been agreed to be sold without any special conditions as to title, or with a title subject to such qualifications as may be in accord with the conditions under which

RECORD

"the land was agreed to be sold.

"Provided that nothing herein contained shall
"deprive any vendor of any right which may arise
"out of such contract for sale by reason of any
"rule of law and equity ..."

The Judicature (Civil Procedure Code) Law Cap.
177 of the Laws of Jamaica, revised edition
1953;

"Section 686. Where no other provision is
"expressly made by this Law or by Rules of Court 10
"the procedure and practice for the time being
"of the Supreme Court of Judicature in England
"shall, so far as applicable, be followed, and
"the forms prescribed shall, with such variations
as circumstances may require, be used."

11. Evidence was given for the Appellant as
follows :

- Ev.pp.1-16 (a) William Vickers, the son of Alfred Vickers.
William Vickers, with his brothers, held 20
a registered title to 40 acres of land
situate in the middle of Mount Edgecombe.
He and his brothers had managed the estate
during the lifetime of their Aunt, Catherine
Vickers;
- Ev.pp.17-51 (b) Stewart Green, the Appellant's English
Solicitor;
- Ev.pp.51-85 (c) Lord Ronald Graham, who spoke of facts
within his knowledge and also gave expert
evidence of land values;
- Ev.pp.86-102 (d) Archibald Calder, a neighbouring land owner; 30
- Ev.pp.102-122 (e) Richard Pinsent, a farmer and a member of
the Carlyle-Clarke Syndicate (which
eventually purchased approximately one- half
of the Estate from Mr. Williams);
- Ev.pp.122-132 (f) James Williams (under subpoena); the
purchaser of the estate;
- Ev.pp.134-144 (g) Clinton Nunes, a partner in Messrs. Price
Waterhouse & Co., in Jamaica, who, at the

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instance of the Appellant, had inspected the Respondent's accounts relating to the Estate; and,

(h) Babe Forbes (under subpoena) who had bought mangrove lumber from the Estate

Ev.pp.145-151

12. Evidence was given by the Respondent and for him by :

Ev.pp.175-210
pp.230-379
pp.427-446

10 (a) Andrew Abrahams, to whom the Respondent paid £2,860, purporting to be commission at 5% on the sale of Mount Edgecombe;

Ev.pp.152-174

(b) Herman Smith, the agent appointed by the Respondent to manage the Estate; and,

(c) Samuel Spence, the head-man appointed by Herman Smith.

Ev.pp.211-229

13. The learned trial Judge, after first rejecting a contention by the Respondent that the Appellant was not a beneficiary of the Trust and thus was not entitled to sue, turned to the merits of the action and considered the evidence. He held that the Respondent was in clear breach of his duty to give information to the beneficiaries, this being conduct on the part of the Respondent which the learned Judge described as "appalling", in the circumstances. He found that the Respondent was in breach of trust in that he failed to supply the beneficiaries with any adequate accounts relating to the Estate. Contrary to the provisions of the Administrator-General's Law, amounts were recorded in gross, without dates, and in the words of the learned Judge, "no beneficiary interested in discovering the annual income of the property could derive any enlightenment from them." Further, the Respondent's agent, Mr. Smith, had kept no proper records, indeed, his account books were still in his possession at the date of trial instead of being with the Respondent. However, the learned Judge felt that, because of the paucity of accounts and the unsatisfactory manner in which they had been kept, nouseful purpose would be served in ordering the taking of an account; he thought it unlikely that any

p.36 L.6

p.39 L.41

p.40 L.17

p.40 p.23

p.40 L.30

RECORD

Further information would be gained. Next, he found there to have been a lamentable failure on the part of the Respondent in regard to his duty to maintain and preserve and manage the property. Having held that, on the evidence, the Estate was in decline by the time Catherine Vickers died in 1960, he found that the Respondent had done nothing by way of attempting to arrest the decline. Further, he had failed to ensure that his agents were sufficient in number and quality to protect the trust estate; there had been wholesale theft. On the matter of the allegations that the Respondent had failed to take proper and adequate steps to advertise the sale of the property, the Respondent had advertised only in Jamaica, and had declined, notwithstanding requests, to advertise abroad. The learned Judge found that the Respondent had advertised the sale of the property in an adequate way. He held that there had been equitable fraud by the Respondent in paying £2,860 to Mr. Abrahams and, concluding that the value of the services rendered by Mr. Abrahams was no more than £50, he ordered the Respondent to repay to the Estate £2,810 overpaid commission. The learned Judge also held that the Respondent had failed to act as a prudent trustee remunerated for the performance of his duties ought to have acted, and ordered the Respondent to repay to the Trust £90.12.8., being the commission charged by the Respondent, at the statutory rate, on receipts, on the basis that the Respondent's remuneration was for his time and responsibility, and, so far as concerned these receipts, he had applied neither time nor responsibility. Both sums were ordered to be repaid by the Respondent "out of his own pocket". Then, reviewing the failures of the Respondent to perform his duties as a Trustee, he rejected the defence that the Respondent had acted honestly and reasonably and ought fairly to be excused. He remarked that the Respondent seemed "to have adopted an attitude of indifference as to whether frustration or loss was occasioned to each aged and impecunious beneficiary. In any trustee, so many failings would be deplorable - in a public trustee for remuneration, they constituted unreasonable conduct and are inexcusable!"

p.19 L.44

p.42 L.4

p.41 L.8

p.18 L.43

p.39 L.35

p.43 L.38

p.43 L.35

p.42 L. 8

14. Breaches alleged by the Appellant which

the learned trial Judge found not to have been made out were the allegations that: the Respondent had failed to perfect his title or alternatively obtain a registered title to the land; that he had failed to act upon the beneficiaries' directions as to the sale of the property; that he had failed to obtain an adequate price by selling subject to depreciatory conditions; and, that he had failed to sell at the best price. As to the first of these allegations, Douglas, J., held that the Respondent had acted honestly and reasonably in not obtaining a registered title or vacant possession. As to the second allegation, the rights of the beneficiaries, being both sui juris and entitled to the corpus, was to terminate the trust. There was no direction by the beneficiaries so to terminate, so that the trust still subsisted. As to the third and fourth allegations, the learned Judge held that there was no obligation upon the Respondent to probe a lower offer (the Carlyle-Clarke offer) in the hope of obtaining an increase. When the Respondent eventually sold, he did so at a price which represented the "full value for the property and more, and which was much in excess of anything he could have received earlier when the property market was depressed." The learned Judge continued that, in his view, the price of £57,200 was very good indeed and he said that there was nothing before him which would lead him to conclude that the price would have been enhanced in any measure had the Respondent maintained the property in the condition it was when he took it over. As a result of these last mentioned findings, the learned Judge declined to set aside the sale to Mr. Williams. In the course of argument, at the trial, it had been urged upon the trial Judge, for the Appellant, that if the learned Judge was minded not to set aside the sale, he ought to order the Respondent to indemnify the Appellant against the possibility of any claim made against the latter by the Carlyle-Clarke Syndicate. The learned trial Judge did not deal with this point in his judgment. Finally, having found that there was no capital loss to be restored to the Estate, the learned trial Judge concluded that there was no loss of income

p.38 L.40

p.36 L.40

p.42 L.30

p.42 L.37

p.42 L.38

p.39 L.13

RECORD

- p.42 L.42 which ought to be restored. He regarded the receipt of further income if more and better agents had been employed and more money spent on maintenance, as problematical. He took the view that it would have been necessary to raise capital to do these things, and he was not convinced that the increased maintenance cost and interest would not have swallowed up any additional income which might have accrued to the property. The learned trial Judge concluded his judgment by ordering the Respondent to wind up the trust; pay the beneficiaries the sum to which each was entitled, and "personally" pay the Appellant's costs 10
- p.43 L.2
- p.43 L. 40
- p.44 L.1
- pp. 44-45 15. On the 18th August, 1965, the learned trial Judge gave the Appellant leave to appeal against his order that the costs awarded to the Appellant be assessed on a party and party basis. On the same day the learned Judge further ordered that there be a stay of execution for six weeks of his order to wind up the Trust, this order being upon terms that : 20
- pp. 45-46
- (a) The Respondent forthwith pay £20,000 to the Australian beneficiary and £18,000 to the Appellant; and,
- (b) That the Appellant undertake not to appeal against the refusal of the learned trial Judge to grant an order setting aside the sale of the property to Mr. Williams.
- The Appellant gave and observed the undertaking required of him, and the Respondent duly paid out the two sums. Contrary to the terms of the order, the Respondent did not wind up the trust after six weeks and he still has not done so. From accounts submitted by the Respondent to the Appellant after the date of the appeal, it would appear that the Respondent has dealt wrongfully with monies held by him for the Appellant, and that the Appellant has thereby suffered loss. 30
- pp. 46-49
- pp.49-50 16. From this decision the Appellant appealed on the grounds set out in his Notice of Appeal. The Respondent cross-appealed generally. Upon the appeal coming on for hearing, leave was granted to the Appellant to add the following additional ground of appeal: 40

10 "That the learned Judge erred in law in his
"approach to the loss suffered by the Estate.
"The true measure of loss was the difference
"between the amount actually realised on
"sale and the amount that would have been
"realised on the sale, effected on the date
"of judgment, alternatively the date that the
"sale actually took place, and with the
"property in no worse condition than it was in
"on the death of Catherine Vickers, that is to
"say with the property in the condition it
"would have been in had there been no breaches
"by the Defendant."

It would appear that the Record has not been amended to show this additional ground of appeal.

20 17. Upon the appeal coming on for hearing on the 6th November, 1967, the Court of Appeal (Henriques, P., Moody and Luckoo, JJ.A.), stated that the question arose in limine as to whether, upon the true construction of the Administrator General's Law, Section 41, the orders of Douglas J., that the Respondent restore money to the trust "out of his own pocket", and "personally" pay the Plaintiff's costs, were directed against the Office of the Administrator General, or against the individual who was the incumbent of that office at the time the orders were made. Further, as to whether or no an order ought to issue from the Court making the personal representative of
30 Mr. Tomlinson, (the deceased Administrator-General) who had died between the date of the judgment and the appeal, a party to the appeal. It was submitted by both the Appellant and the Respondent that, on a true construction of Section 41, the orders lay against the Office and not against the individual. Further, it was submitted on behalf of the Appellant that
40 the Court had no power to order the joinder of a party; they could order that the personal representative of the late Mr. Tomlinson be notified of the appeal and given the opportunity of seeking leave to join as a party, but the Appellant, by his solicitors in Jamaica, had already given such formal notification to the said personal representative.

18. On the 1st March, 1968, the Court of Appeal,

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p.51 by Henriques, P., delivered a brief judgment ordering the Appeal to continue in its existing form. In an appendix to his main judgment given on the 8th March, 1969, Luckhoo, J.A., gave his view on the significance of the phrase: "out of his own pocket." He had reached the conclusion that, by reason of the Crown Proceedings Law, 1958, Section 38 (5) the Crown was liable to pay any money by way of damages or otherwise and any costs awarded against the Administrator-General, and that the individual liability under Section 41 of the Administrator General's Law was not saved. 10

pp. 64-94 19. The hearing of the appeal commenced on the 1st August, 1968. The decision of the Court of Appeal were delivered on the 8th March, 1969, the first judgment being given by Luckhoo, J.A., His Lordship accepted generally the findings of fact made by the learned trial Judge, but disagreed with the orders made. Having regard to the nature of the property the subject matter of the trust, and the Respondent's omission to advise the beneficiaries of the option given to them by the Will, he took the view that the Respondent ought to have sold the property within a year of taking possession, and that the Respondent therefore fell in breach of trust, in this regard, in September, 1961. The trust was one for conversion into money, with the Respondent having "an inherent power" to maintain the property until the time arrived at which he must sell. Thereafter, he could only maintain, without "increasing" (sic) liability for loss occasioned thereby to the Trust, if he obtained either the sanction of the court of the concurrence of all beneficiaries being sui juris. This he had not done. In the view of the learned Justice of Appeal, there was no duty cast upon the Respondent to maintain the property after September 1961, the trust being one for conversion into money. The question therefore was as to the date when conversion, in equity, took place. The terms of the Will, giving, as it did, a six months option to the beneficiaries, precluded a conversion in equity until the six months option period had expired. Although the beneficiaries were not made aware of the existence of the option until after the period 20 30 40

p.85 L.25

p.88 L.23

p.88 L.27

p.88 L.42

RECORD

- was determined, they had never wished to retain the property without sale. He concluded that, in these circumstances, an equitable conversion took place on the 9th February, 1961 (that is, six months after the death of Catherine Vickers). As from this date, the beneficiaries had ceased to be entitled to the property as land, and thereafter had become entitled to the property as money. They could have called upon the Respondent to convey the property to them, and there then would have been a re-conversion into real estate, but they did not so call. It was not until the 8th September, 1961, that is after there had been an equitable conversion, that the Respondent fell in breach of trust by reason of his failure to carry out the direction to sell. Although the Respondent had failed to maintain the property up to September 1961, there was no evidence of any loss to the Trust by reason of his failure to do so. The date at which any loss was occasioned to the Trust Fund by reason of the Respondent's breach in failing to sell was the 8th September, 1961, but at that date what vested in possession of the beneficiaries was money, not land. As from the 8th September 1961 they became entitled to receive interest on their unpaid shares in the property until such amounts had been fully paid, as well as such profits that were received or receivable by the Respondent from the property until actual conversion took place, together with interest on such profits. The learned Justice of Appeal would allow simple interest at the rate of 5% per annum and not compound interest, because he would not see that either compound interest or interest at a rate higher than 5% was justifiable having regard to the circumstances of the case or the principles under which compound interest is awarded.
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20. The next task, in Luckhoo J.A., view, was to determine what the notional proceeds of sale would have been as on the 8th September, 1961, and in order to determine this, it was necessary to ascertain the market value of the property at that time. In the absence of any better evidence as to the value of the land on the 8th September, 1961, he would use Mr. Kirkham's valuation of £50,370, made in early 1962, and
- p.89 L.20
- p.89 L.24
- p.89 L.3
- p.89 L.28
- p.88 L.46
- p.89 L.36
- p. 89 L.38
- p.89 L.45
- p.90 L.3

RECORD

p.90 L.20 he would regard the property strictly as an agricultural property, adding nothing to Mr. Kirkham's valuation figure for development potential.

p.91 L.10 21. Having thus dealt with the Appellant's claim for the restoration of capital loss, the learned Justice of Appeal turned his attention to the claim for loss of income. He rejected the submission that the Respondent was required by law to maintain and manage the property until a sale was effected, and was therefore accountable not only for any profits he received, but also the profits he ought to have received up to the time he actually sold. As, in the view of the learned Justice of Appeal, there was no duty upon the Respondent to maintain and manage the property after the 8th September, 1961, it followed that the Respondent was not accountable for any profit he did not receive after that date. 10

p.91

p.91 L.21

p.91 L.19

p.91 L.45 22. The learned Justice of Appeal rejected the prayer for an indemnify against risk of action by the Carlyle-Clarke Syndicate on the basis that, four years having passed from the sale to Mr. Williams without there being any suggestion that the Carlyle-Clarke Syndicate contemplated any Action against the Appellant, it seemed to His Lordship that it was very unlikely that any such action would be brought against the Appellant. As to the claim for costs to be allowed on a common fund as opposed to the party and party basis, no authority had been cited where an order on the common fund basis had been made against a Trustee, and His Lordship saw no good reason for departing from what appeared to him to be the general rule. Next, His Lordship would uphold the order of Douglas, J., requiring the Respondent to restore to the Trust £2,810 commission overpaid to Mr. Abrahams, but would disallow the order requiring the restoration of the Respondent's commission, in the sum of £90.12.8., on receipts for pasturage, produce, salvage material and rental. The Respondent's commission was remuneration for time and responsibility expended, but there was no sliding scale of remuneration and no account therefore was to be taken of the amount of time spent or degree of responsibility displayed. In the view 30 40

p.94 L.34

p.94 L.42

p.93 L.15

of the learned Lord Justice, obviously some amount of time was taken and some degree of responsibility was displayed in the matter of receipts and, save that the Respondent's commission should be limited to receipts taken up to the 8th September, 1961, commission on receipts ought to be allowed. By the same argument, Luckhoo, J.A., rejected the submission that the Respondent ought to be deprived of his commission on the sale to Mr. Williams. He said that there could be no doubt that the Respondent did expend time and responsibility in making the sale to Mr. Williams, even though it might be said that the stimulus for Mr. Williams' offer came from the Carlyle-Clarke Syndicate. Finally, Luckhoo, J.A., rejected the Appellant's claim for exemplary damages. He said that a breach of trust did not give a remedy in damages; the remedy was restoration of loss to the trust. The power of the Court, derived from Section 41 of the Administrator-General's Law: "to make such order as the Court thinks fit", related to the remedy of restoring loss to the trust. There was therefore no warrant for an award of damages, exemplary or otherwise, and His Lordship could see no distinction in principle in this regard between a private trustee and the Administrator General. In the result, Luckhoo, J.A., would dismiss the appeal with costs, and vary the order made by Douglas, J., by deleting the direction that the Respondent restore to the Trust the sum of £90.12. 8. commission.

23. The second judgment was delivered by Shelley, J.A., As to capital loss, the learned Justice of Appeal did not expressly adopt the reasoning of Luckhoo, J.A., that there had been a notional conversion in equity six months after the death of Catherine Vickers, and that the Respondent was not liable for any loss which might have flowed from mismanagement after September, 1961, but he appears impliedly to have accepted this reasoning. After considering the comments of Douglas, J., on the adequacy of the price eventually obtained, His Lordship said that this matter called for no further comment except to make it plain that had the property been sold for less than what it might have got at the time "when the duty to sell ripened" then

p.93 L.20

p.93 L.11

p.87 L.4

p.87 L.13

p.94 L.41

pp.91-106

p.100 L.1

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p.100 L.17 the Trustee would have been liable for the difference. As to income, there must be a real and demonstrable loss to the Trust Fund, before restitution could be ordered. Douglas, J., had found loss of income problematical. A defaulting Trustee would not be charged with imaginary values; in his Lordship's view much that had been said about income in this case was imaginary. He thought the approach of Douglas, J., was realistic, and that on the evidence his conclusion was justified. Next, dealing with the matter of deprivation of remuneration, his Lordship remarked that the Respondent "has been found to have acted wisely in the sale of the property". In his Lordship's view, to deprive the Respondent of his remuneration in respect of a sale in which he had acted wisely and well would be to visit punishment upon him for breaches of trust from which no loss flowed. He thought that Douglas J., was right in refraining from depriving the Respondent of this remuneration. 10

p.101 L12

p.101 L.19 20

p.102 L.32 24. His Lordship agreed with the order of Douglas J., in the matter of restoration of £2,810 commission overpaid to Mr. Abrahams, but as regards deprivation of commission on rents and profits collected, these sums were collected because some time and responsibility was applied to their collection. He therefore did not think the finding of Douglas J., that the Respondent should be deprived of his commission on income received was supported by the evidence. As regard the claim that interest should be allowed on a compound, instead of simple basis, his Lordship was of view that, on the authorities, compound interest would be ordered only where there was fraud or other wilful default. In his Lordship's view the breaches of trust by the Respondent fell squarely within the category of cases in which money belonging to a beneficiary was paid improperly but without any sinister intent, in which case simple interest, at 5% only, would be awarded. On the matter of the claim for costs to be assessed on a common fund basis, the learned Justice of Appeal, found it significant that there was no case cited in which a court had ordered common fund costs against a trustee. Costs were in the discretion of the trial judge, and his Lordship saw no reason to interfere with the conclusion reached by Douglas, J. Indeed, he thought 50

p.102 L.44 30

p.102 L.47

p.105 L.22 40

p.105 L.33

p.108 L.21

p.106 L.23

- Douglas J., was generous to the Appellant in the matter of costs. He rejected the claim for an indemnity, regarding the danger of an action by the Carlyle-Clarke Syndicate as being minimal. He was influenced also by the fact that the Appellant had persisted in his arrangement with Messrs. Hampton and Sons in the face of a clear stand by the Respondent that only a person introducing a purchaser would be paid commission. He agreed with the order proposed by Luckhoo, J.A.
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25. Moody, J.A., did not deliver a separate judgment. He said he agreed with the judgments of Luckhoo and Shelley, JJ.A.
26. Upon the Court of Appeal giving their decision, it was submitted to them, for the Appellant, that their order for dismissal of the appeal with costs to the Respondent ought to be varied to the extent that costs should be for the Appellant, alternatively that such side should bear its own costs. The basis of this submission were that £50,370 plus simple interest at 5% per annum, taken over the period 8th September 1961 to August, 1964, considerably exceeded the £57,200 sale figure. Further, that if, from the 8th September, 1961 the beneficiaries were entitled only to the notional proceeds of a conversion, then they ought not to be charged, as they had been, with charges related to the land after that date (for example, annual taxes, commission on a sale at £57,200 etc.). In the result, on the Court of Appeal's judgment, a sum of several thousands of pounds fell to be restored to the trust by the Respondent.
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27. In a supplementary judgment given on the 11th March, 1969, Luckhoo, J.A., rejected this submission. He said that this was not a ground of appeal argued before the Court. Further, it was inherent in the order of Douglas, J. that the trust should be wound up at once and the beneficiaries paid "the sum to which each is entitled", that interest was payable on undistributed shares from the date of sale onwards. Finally, in his view it would be unjust to deprive the Respondent of his costs having regard to the very considerable repetitions
- 40
- pp.107-109
p.107 L.28
p.108 1.17
p.109 1.1

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and irrelevant arguments adduced by counsel for the Appellant.

28. The Appellant does not dissent from the findings of the Court of Appeal: that the Respondent fell in breach of his duty to sell in September, 1961, and; that £2,810 commission overpaid to Mr. Abrahams be restored to the Trust. Further, more than six years having passed from the date of the agreement with the Carlyle-Clarke Syndicate, he does not seek to appeal against the refusal of the Court of Appeal to grant an indemnity against the consequences of any action which might be brought by the Syndicate. 10

29. The Appellant appeals against the remaining findings of the Court of Appeal and, respectfully, seeks the following reliefs upon the grounds hereinafter set out:

(a) Restoration to the Trust of Capital Loss.

It is respectfully submitted that Luckhoo, J.A., erred in holding that there was a conversion in equity on the 8th February, 1961, and that on that date the interests of the beneficiaries crystallized as an interest in cash, either in the sum of £50,370 or any other sum. Further, it is respectfully submitted, Luckhoo, J.A., erred in holding that, until the Respondent fell in breach of his trust to sell, he had an implied power to maintain the Estate, and that, thereafter, he was under no duty to maintain the Estate. It is submitted that, for the first year, the Respondent was under a duty to maintain the Estate in the condition in which he found it; further, that on the expiry of the year, the Respondent, not having sold, assumed a duty to the beneficiaries to continue to maintain the Estate in like condition. 20 30

It is respectfully submitted that, if the Court of Appeal had not held that there was a notional conversion on the 8th February, 1961, and if they had applied what the Appellant submitted to them and now submits is the correct rule, then, it is submitted, 40

they would have held that the Respondent was bound to restore to the Trust the difference between the price at which the Respondent actually sold and the price the Estate would have realised if it had been sold at the date of sale, or alternatively the date of judgment, in the condition it was in at the date the Respondent took up his Trusteeship. Further it is submitted, the Court of Appeal would have held, on the uncontradicted evidence and on the findings of the learned trial Judge, that higher offers had been made, and that Douglas, J., had erred in holding:

- (i) that £57,200 represented the full value of the property in the condition it was in when it was sold; and,
- (ii) that there was nothing before him which would lead him to conclude that this price would have been enhanced if the Respondent had maintained the property in the condition it was in when he took it over.

Further, that if the Court of Appeal had directed their attention to the finding of the learned trial Judge that the Estate was already in decline when the Respondent took over, they would have concluded, on the evidence, that there was not such decline as would materially have reduced the value of the property as at the date of takeover. In this context it is respectfully submitted that there was no finding by Douglas, J., much less any evidence such as would support the opening words of the judgment of Shelley, J.A., viz.: 'In September, 1960, the Administrator-General took over a large run-down property.'

It is submitted further, respectfully, that on the uncontradicted evidence as to values, the capital loss to the Estate by reason of the Respondent's breaches of trust was in the order of £28,000.

In the premises the Appellant respectfully seeks an order that the Respondent do restore to the Trust the sum of £28,000, alternatively such other sum as may be found to represent

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capital loss, and that the Respondent be ordered to pay out such sum forthwith to the beneficiaries.

(b) Restoration to the Trust of Loss of Income.

It is respectfully submitted that Luckhoo, J.A., having erred (as is submitted above) in holding that the Respondent was under no duty to maintain the Estate, after the moment that he fell in breach of his trust to sell, erred further in holding that the Respondent was not accountable for the profits he ought to have received, but did not receive, up to the time of sale. 10
Further, that his Lordship erred in holding that there was no evidence of any loss to the Trust by reason of the Respondent's failure to maintain the property during the first year of the Trust. Further, Shelley, J.A., erred in saying that much of what had been said about income was imaginary. The learned trial Judge had held that there was heavy loss by theft, which finding was accepted by Luckhoo, J.A. The uncontradicted evidence showed a failure to attempt to produce income by selling what was available to be sold (for example standing timber and mangrove) and also a failure to exploit the other income potential of the Estate. It is respectfully submitted that, had the Court of Appeal correctly directed themselves on the law and the facts, they would have dissented from the conclusions of the learned trial Judge that it would have been necessary to raise capital in order to spend 'more' on maintenance, and would not have felt, as he felt, that any additional income that might have accrued to the property would have gone upon increased maintenance costs and interest. 30 40

It is respectfully submitted that, on the evidence, income received, taken together with income which ought to have been received but was not, would have provided more than sufficient than was required properly to maintain the Estate and meet

essential outgoings. The Appellant respectfully submits that, on the evidence, such excess of income over expenditure would have left £1,000 per annum, more or less.

10 In the premises the Appellant respectfully seeks an order that the Respondent do restore to the Trust the sum of £4,000 alternatively such other sum as may be found to represent loss of income, together with income lost to the estate (being interest charged upon death duties which, as appears below, were left unpaid for a protracted period, and that the Respondent be ordered to pay out such sum forthwith to the beneficiaries.

(c) Deprivation of Remuneration

20 It is respectfully submitted that there was no finding of fact, much less any evidence, that would support the conclusion that Shelley, J.A., that the Respondent had acted 'wisely and well' in the matter of the sale to Mr. Williams.

30 It is further submitted, respectfully, that Luckhoo J.A., erred in his interpretation of Section 48 (1) of the Administrator-General's Law when he held that, because (as he held) there had been some time and responsibility given and shown in the administration of the Estate, and because there was no sliding scale of remuneration, the Respondent must be entitled to remuneration at the statutory rate. Shelley, J.A., agreed with Luckhoo, J.A., and, it is submitted, similarly erred. It is respectfully submitted that, in the context of the Administrator-General's Law, 'responsibility' must mean the
40 responsibility to be expected of a paid, professional trustee and officer of the Court. It is submitted respectfully that, on the totality of the evidence (and in particular, the correspondence) the Respondent showed no such responsibility, alternatively no sufficient amount of such

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responsibility as would entitle him to any remuneration. It is submitted that the learned trial Judge was right in his conclusion that the Respondent could be deprived of his remuneration, but that he erred in concluding that only in connection with the receipt of rents and the like was there lack of devotion of time and responsibility. It is further submitted that, if the Court had correctly directed themselves on the matter of deprivation of remuneration, they would so have held.

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The Respondent alleged that he had acted honestly and reasonably and, in all the circumstances, ought to be excused the results of his breaches of trust. Both the learned trial Judge and the Court of Appeal correctly, it is submitted, rejected this defence. The Respondent attributed his admitted neglect of the Estate and, by implication, the long delay in selling to his assertion that he was without means. In the context of deprivation of remuneration, as well as in the context of other reliefs sought, it is relevant, it is submitted, to consider not only the findings of Douglas J., of breaches of trust and unreasonable behaviour, but also to consider the other instances of unreasonable conduct which were disclosed by the evidence. The Appellant instances, as examples: the failure of the Respondent to appreciate the nature of the title to the Estate, and thus his failure to advertise and advise prospective purchasers of the nature of such title; his failure to accept the offer of £90,000; his failure to advise the beneficiaries of the later offer of £60,000; his failure to ascertain the boundaries of the estate (he was unaware that there was a holding of 45 acres, with registered title) within the perimeter of the estate; his failure to consult those who had managed the estate during Catherine Vickers' lifetime, or to seek out the estate books; his admitted destruction of an important letter.

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In the premises the Appellant respectfully seeks orders that the Respondent be deprived of the totality of his remuneration, and that such remuneration as has been withdrawn from the trust be restored to it and paid out forthwith to the beneficiaries.

(d) Interest

10 It is respectfully submitted that both Luckhoo and Shelley, J.J.A., misdirected themselves on the matter of interest. Luckhoo, J.A., stated that he could not see that the award of compound interest or interest at a rate higher than 5 per centum per annum was justifiable having regard to the circumstances of the case and to the principles under which compound interest is awarded. He did not state what those principles are. Shelley, J.A., it is 20 submitted, misdirected himself in holding that compound interest is considered only in cases of wilful default. He thought that the Respondent's breaches fell: "squarely within the category of cases in which money belonging to the beneficiary was improperly paid, i.e. without any sinister intent." It is submitted: that interest is awardable at a rate higher than 5 per centum per annum, and assessed on a 30 compound basis, where there has been a gross breach of trust; that Douglas, J.'s findings, upheld by the Court of Appeal, amounted to a finding that the Respondent had been guilty of gross breaches of trust; and, that the Court of Appeal, had they correctly directed themselves as to those findings of fact and to the principle applicable, would have awarded interest at the rate sought by the Appellant (that is $7\frac{1}{2}$ per centum per 40 annum, this being the rate said by the Respondent to be the going rate in Jamaica) and assessed on the compound basis.

In the premises the Appellant respectfully seeks orders that the Respondent do pay to the trust and forthwith distribute to the beneficiaries interest upon such sums as may be found to have been due to them, from

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such date or dates as may be appropriate until the date of payment out, at the rate of 7½ per centum per annum, assessed on the compound basis.

(e) Costs

It is respectfully submitted that Douglas, J., who found that the conduct of the Respondent left the Appellant with no choice but to sue, but who awarded costs on a party and party basis, misdirected himself upon the principles which determine the appropriate scale of costs. Further, that the Court of Appeal similarly misdirected themselves. Luckhoo, J.A., saw no good reason for departing from what appeared to him to be the general rule, but he did not state this general rule. Shelley, J.A., said that he was unable to find any reason for disturbing the decision of the learned trial Judge which, he said, was reached in the exercise of discretion. He thought that Douglas, J., had been generous to the Appellant in the matter of costs. 10 20

It is submitted, respectfully, that by reason of the provisions of the Judicature (Civil Procedure Code) Law, the law relating to costs and taxation in Jamaica is the law as it now relates to costs and taxation in England. Had Douglas, J., and the Court of Appeal so directed themselves, and had they further directed themselves as to the circumstances upon which an order is now made for taxation of costs upon the common fund basis they would, it is submitted, have made an order for such taxation. If, contrary to the Appellant's contention, the Jamaica law as to costs and taxation is not the present English law, then it is respectfully submitted that both Douglas, J., and the Court of Appeal failed to direct themselves as to the circumstances in which taxation is ordered on a solicitor and client basis. Had they so directed themselves they would, it is submitted, have ordered taxation upon this basis. In ordering taxation on a party and party basis, it is submitted further that both Douglas, J., 30 40

and the Court of Appeal overlooked the obligation upon a Court to protect the trust funds to the utmost.

In the premises the Appellant respectfully seeks an order that there be taxation of the costs of the trial on the common fund, alternatively solicitor and client basis.

(f) Exemplary Damages.

10 Shelley J.A., did not deal with the Appellant's claim for an award of exemplary damages. Luckhoo, J.A., it is respectfully submitted, misdirected himself as to the principles applicable to the making of such an award. It is submitted, respectfully, that the question for consideration was not whether or no a breach of trust gives a remedy for damages, but whether or no the Respondent was a servant of the Jamaica Government and, if he was, whether or no he acted oppressively or arbitrarily. It is 20 submitted that he was such a servant and that the findings of Douglas J., amount to a finding that his conduct was both oppressive and arbitrary. Further, it is submitted, the working of Section 41 does not preclude the making of such an award.

30 In the premises the Appellant respectfully seeks an order that there may be awarded to him, by way of exemplary damages, such sum as, in all the circumstances, may be thought fit. The Appellant submits further that the appropriateness of such an award is accentuated by the matters set out in the next following paragraph.

40 30. Purported final accounts, dated the 30th June, 1969, were submitted by the Respondent in July, 1969, that is, five years after the sale to Mr. Williams, nearly one year after the hearing of the appeal, and four months after the decision of the Court of Appeal. The accounts were not prepared in accordance with the judgment of the Court of Appeal, nor was interest at 5 per centum per annum given.

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Further, notwithstanding the strictures of Douglas J., dates of receipts and payments were not shown. Questions were asked about the accounts and the Respondent provided answers by a letter dated the 17th December, 1969. Copies of letters passing to and from the Jamaica Estate Duty Department were sent with the letter. The accounts and correspondence disclose, inter alia, further breaches of trust by the Respondent, in that :-

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- (a) Estate Duty on the estate of Catherine Vickers deceased was not assessed until the 21st November, 1966, apparently by reason of delay by the Respondent in providing the Jamaica Estate Duty Department with information. The assessed duty was £6,384, and interest thereon, to the 1st, November, 1965 (covering four years and nine months) was assessed at £1,810. 5. 5. At some date unknown to the Appellant, the Respondent had deposited £7,788. 9. 7d. with the Estate Duty Department. The sum demanded on the 21st November, 1966 was paid on the 30th January, 1967, but, from the accounts and correspondence, £100 remained due and still remained due on the 30th June, 1969. The Respondent was in funds to pay duty and interest by August, 1964 so that, in any event an excessive amount of interest was allowed to accrue, to the detriment of the beneficiaries. 20 30
- (b) Estate Duty on the estate of Hilda Margaret Davis deceased was payable in Jamaica as also in England. The English estate of Mrs. Davis had no funds with which to pay duty in England upon her Jamaica asset and the Respondent was so advised on the 9th July, 1963, when he was requested to pay the duty due in Jamaica to the Jamaica Estate Duty Department out of the Appellant's share in the estate. The said duty was £1,446. 7. 10d. and the interest due on the date payment was made, the 20th June, 1969 (being an accrual for six years and 42 days) was £530.18s. As in (a) above, the Respondent was in funds to pay duty and interest in August, 1964, so that 40

again, in any event, an excessive amount of interest was allowed to accrue to the detriment of the Appellant. Further, the failure of the Respondent to wind up the trust caused interest to continue to accrue on estate duty payable in England, this being a matter which was brought to the notice of the Respondent. The Respondent writing on the 23rd March, 1970, said:
10 "any delay which may have occurred in the remittance in settling estate duty was due to the necessary exchange of correspondence and verification of the estate duty." There is no such correspondence, not least between January, 1967 and July, 1969. Further, it would appear that the Jamaica Estate Duty Department was given an incorrect figure for the value of Mrs. Davis's asset.

- 20 (c) The Respondent paid £500 to his agent, Mr. Smith, as an honorarium, and £100 for travelling expenses, both sums to cover four years, debiting the same in equal proportions to each beneficiary, despite the facts that: Douglas, J., had found Mr. Smith to have unlawfully enriched himself at the expense of the estate; and, the Appellant had instructed the Respondent that he (the Appellant) was not prepared to
30 bear the burden of any such ex gratia payment.
- (d) The Respondent paid £120 for an unnecessary conveyance, to himself, of the title to the estate
- (e) The Respondent, as ordered, restored to the trust £2,810 commission overpaid to Mr. Abrahams, credited the trust with interest thereon, at 2½ per centum, from the date of payment of the commission (the
40 28th August, 1964) to the 30th June, 1969, (being £335.10. 10d.), and charged remuneration at 6 per centum on the £2,810 and the £335.10.10d.
- (f) The Respondent, contrary to the express provisions of the Administrator-General's Law,

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loaned £3,500 to another estate, received £223.12. 7d. by way of interest on such loan, and charged remuneration at 6 per centum thereon.

(g) As appears from paragraph 15 above, a distribution of £20,000 was made to Miss Vickers and £18,000 to the Appellant, these being made on the 19th October, 1965 and 24th September, 1965, respectively. Thereafter to the detriment of the Appellant, the Respondent continued to apportion income received equally between the two beneficiaries. 10

The Respondent, it is submitted, has ignored the findings of the learned trial Judge, accepted by the Court of Appeal, that there were breaches of trust in the manner of presentation of accounts and, in effect, inordinate delay by the Respondent; in addition to ignoring the orders to wind up the trust. Had the learned trial Judge suspected that these breaches of trust would continue and that his order would be disregarded he would not, it is submitted, have said that no useful purpose would be served in taking accounts, and would have ordered that accounts be taken. In the premises the Appellant respectfully seeks leave to put forward the accounts and correspondence herein referred to and requests, by way of further reliefs, an order under the Judicial Committee Act, 1833, Section 17, for accounts to be taken by the Registrar, and an order that there be paid out to the Appellant such sum as may be found due to him upon such accounts. 20 30

31. The Appellant respectfully submits that, subject to the findings of the Court of Appeal from which he does not dissent, and which are set out in paragraph 28 hereof, the judgment and orders of the Court ought to be set aside with orders for costs and the costs in the Court of Appeal to be taxed on the common fund basis and that he ought to be granted the reliefs sought herein, for the following among other 40

R E A S O N S

- (1) BECAUSE the Court of Appeal erred in holding that there was a conversion in equity on the 8th February, 1961.
- (2) BECAUSE the Court of Appeal erred in holding that the Respondent had a power to maintain the estate until the 8th September, 1961, and that thereafter he was under no duty to maintain.
- 10 (3) BECAUSE the Court of Appeal erred in holding that there was no capital loss to the estate and erred further in not ordering the restoration to the trust of the capital loss sustained
- (4) BECAUSE the Court of Appeal erred in holding that there was no loss of income, and erred further in not ordering the restoration to the trust of income lost.
- 20 (5) BECAUSE the Court of Appeal erred in holding that the Respondent had spent time and exercised responsibility about his trusteeship, alternatively had spent such time and exercised such responsibility as would entitle him to his remuneration, and erred further in not ordering that the Respondent be deprived of the entirety of his remuneration.
- (6) BECAUSE the Court of Appeal erred in their approach to the principles which govern the making of an order for taxation of costs to be on the common fund basis and erred further in failing to make such an order.
- 30 (7) BECAUSE the Court of Appeal erred in their approach to the principles upon which an award of compound interest will be made and erred further in failing to order interest to be assessed at the rate of $7\frac{1}{2}$ per centum per annum and on a compound basis.
- 40 (8) BECAUSE the Court of Appeal erred in their approach to the principles upon which

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exemplary damages will be awarded and erred further in failing to make such an award.

- (9) BECAUSE in the circumstances of the case, accounts ought to be taken and the amount found due to the Appellant upon such accounts ought to be paid out to him

GERALD DAVIES

No. 32 of 1970.

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE JAMAICA COURT OF APPEAL

B E T W E E N

WILLOUGHBY ARTHUR VICKERS DAVIS

Appellant

AND

THE ADMINISTRATOR-GENERAL
(Trustee of the Estate of
Charles Benjamin Vickers,
deceased).

Respondent

CASE FOR THE APPELLANT

MESSRS. CHARLES RUSSELL & CO.
Hale Court.
Lincoln's Inn,
London, W.C.2.