

J A M A I C A

IN THE COURT OF APPEAL

CAYMAN ISLAND CIVIL APPEAL NO. 11/71

BEFORE           The Hon. Mr. Justice Fox - Presiding  
                  The Hon. Mr. Justice Edun  
                  The Hon. Mr. Justice Graham-Perkins

BETWEEN           JOHN CLAYTON MERREN - Plaintiff/Respondent  
  
AND                EDGAR DUNCAN MERREN - Defendants/Appellants  
                  GEORGE ALDIN MERREN  
                  ELLERY BOOTH MERREN

Mr. Karl Brandon for Plaintiff/Respondent  
Mr. Horace Edwards, Q.C., for Defendants/Appellants

4th December, 1973.

FOX, J.A.:

The plaintiff is one of several sons of a testator who died on 27th October, 1951. The testator made a will dated 2nd October, 1951 in which he appointed as executors his three brothers, the defendants in the action.

At the time of the testator's death, the plaintiff was an infant. The plaintiff brought this action on the 23rd of November, 1963 in which he challenged the account of the assets of the estate which had been presented by the defendants. Inter alia, the plaintiff asked for 'an accounting by the defendants in respect to the full administration of the estate of (the) deceased'.

Subsequent to the filing of this claim, one executor died. The plaintiff then applied for an order to join the executors of that deceased executor as parties to the suit. The plaintiff also applied to add as plaintiffs in the action, five other children of the testator. These two applications, one to add defendants and the other to add plaintiffs, came up for hearing before the Judge of the Grand Court on the 22nd of August, 1968.

ATTORNEY GENERAL  
CHAMBERS  
GRAND CAYMAN B.W.I.

The record on appeal shows that there was a large measure of agreement in relation to the order which should be made pursuant to the applications. The record shows also that the question of the taking of accounts was extensively canvassed by the legal representatives of both parties. It should be observed that an application for the taking of accounts was not before the learned judge. Nevertheless, in addition to the orders on the applications, was one for 'an accountant to be appointed to go into the affairs of the estate and report to be filed in this court'. The judgment goes on to note that 'by agreement of counsel of the parties, the Government Auditors from Jamaica who audit the accounts of the Cayman Government be appointed if they are willing, if unwilling, parties and counsel to agree on an accountant'. The defendants appealed against this order.

In the discussion which took place before us, it was agreed that the order for the joining of the plaintiffs should remain. Mr. Horace Edwards, Q.C. conceded on behalf of the appellants that the order for the addition of the executors of the deceased executor as defendants could not be challenged. Accordingly, he advanced no submission in support of that ground of appeal which was intended to effect such a challenge. And then a curious position developed. Counsel for both parties agreed that the order for the accounts was not made as a result of any formal prayer for this purpose. Both counsel also insisted that the order for accounts was not by agreement of counsel at the proceedings before the judge of the Grand Court. Both counsel ask this court to set aside this part of the judgment. We comply. The taking of accounts is a matter to be eventually disposed of at the hearing of the action.

The order of the Grand Court dated 22nd August, 1968, therefore stands, with the exception of that portion of Paragraph 3 which orders accounts to be taken. That portion of Paragraph 3 which orders that the costs of the application are to be recovered from

the estate, and are to be agreed upon or taxed, remains. In relation to the cost of this appeal, the court orders that these costs shall be cost in the cause and shall be paid out of the estate.

The appeal is allowed. The order of the judge of the Grand Court is varied and an order for cost is made as indicated in this judgment.