

IN THE SEYCHELLES COURT OF APPEAL

In the matter Between

Rhodes Trustees Limited
Represented by its Managing Director, Mr. Alessandro
Pagano of Caravel house, Manglier Street, Victoria, Mahe

APPELLANT

And

Mrs. Dena Kay Gamble
And
Mrs. Phyllis Mary Gamble
And
Craig Daniel Bester
And
Jayson Alexander Bester
(All of the Plaintiffs have elected their domicile for service
at their Attorney's Chambers, Suites 5 & 6,
Trinity House, Huteau Lane, Victoria, Mahe, Seychelles)

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

4th RESPONDENT

C. A. No. 11 Of 2012

BEFORE: Fernando, Twomey, Msoffe, JJA

COUNSEL: Mr. R. Erriah with Mr. D. Sabino for the Appellant
Mr. A.G. Derjacques for the Respondents

Date of Hearing: 3rd April 2014

Date of Judgment: 11th April 2014

JUDGMENT

A. F. T. FERNANDO. JA

1. The Appellant appeals against the judgment of the Supreme Court finding it “liable to make good British Sterling Pounds 402,869.62 or the equivalent in rupees at the going rate at the time of payment, to the plaintiffs (*Respondents*) together with interest at court rate from the date of filing of this suit till payment in full” and the award to the plaintiffs, costs of the suit. It is to be noted that any reference to the ‘Appellant’ in this judgment is also a reference to the ‘Defendant’ in the suit before the Supreme Court, the judgment of which is appealed against; and any reference to the ‘Respondents’ is a reference to the ‘Plaintiffs’ in the said suit.
2. The four Respondents above had brought this suit before the Supreme Court as Plaintiffs, against the Appellant as Defendant, as beneficiaries of an International Trust, namely LGA Gamble succession Trust, dated 15th November 2008; that was registered on the 29th of December 2008, under the International Trust Act of 1994, hereinafter referred to as the ‘ITA’.
3. According to the Plaint “two co-trustees were appointed to the said trust instrument, namely Valinger Trustees Ltd, presently of an unknown address and not registered within the jurisdiction of Seychelles, and Rhodes Trustees Ltd”, the Appellant in this case. The Appellant in its Amended Statement of Defence had stated that “The original Trust Instrument appointed only Valinger Trustees Limited (“VTL”) as Trustee. VTL later appointed the Defendant (*Appellant*) as a co-trustee. It was agreed that that the Defendant would act as statutory Trustee and that VTL would handle the management of the purported Trust property.” It had further denied the existence of the purported Trust on the basis that it had ceased to be an international trust as per the ITA, for lack of a resident trustee and that, because the Appellant was no longer a co-trustee of the purported

Trust, as per date of Plaintiff. It is a requirement under section 4 of the ITA that “at least one trustee shall be a company licensed under the International Corporate Service Providers Act to provide trustee services, at all times.”

4. According to the Plaintiff: “The initial property in reference to the said International Trust was paid, transferred and delivered and placed under the control of the said Trustees including the Defendant (*Appellant*), upon the signing of the said LGA Gamble Succession Trust instrument, on the 15th of November 2008 and that the Trust Fund, as at the 31st of August 2009, totaled in the sum of British Sterling Pounds 812,869.92....” The Appellant in its Amended Statement of Defence denying the said averments of the plaintiff had stated: “No property, intended to form part of the purported international Trust or otherwise, was ever delivered or placed under the control of the Defendant (*Appellant*) before, upon or after signing of the LGA Trust Deed. Any monies were placed in the control of an entity associated with the co-trustee VTL, namely Valinger Trade Services, into an Isle of Man bank account, of which the Defendant has no control or access.” The Appellant in defence had further taken up the position that “Although certain funds were transferred to Valinger Trade Services, funds were never deposited into the pre-arranged trust accounts, and so no monies were actually deposited into the “Trust Fund” per se”.
5. Thus this case rests entirely on the issue whether there was a properly constituted Trust and whether the purported trust property was ever deposited with the co-trustees. This was the main thrust of the arguments of the Appellant in its appeal before us. This had been the basis of a Plea in Limine Litis raised in the Amended Statement of Defence, but we do not find on record that this matter had been argued upon or ruled upon at the commencement of the trial.
6. It is trite law that for an existence of a ‘Trust’ 5 essential elements must be satisfied, namely there must be a Settlor, a Trustee, a Beneficiary, Trust Assets and a Trust Document. The ‘Settlor’ is the trust grantor who forms the trust and supplies its assets. The ‘Trustee’ is a party named in the trust document who administers the trust in accordance with the terms of the trust document and state trust law. Duties of trustees are set out in Part V of the ITA. A trust must have at least one ‘Beneficiary’. A Settlor may name as many beneficiaries as he chooses and he may even include unborn beneficiaries. There must be a property schedule listing ‘Trust Assets’ and notices of assignment transferring

the assets to the trustee. If trust property consists of cash it should be placed in a trust bank account opened in the name of, for example, "Valinger Trustees Ltd for the LGA GAMBLE SUCCESSION TRUST". The International Trust Act, defines a trust as follows:

"trust" means a legal relationship which arises where property is vested or deemed to be vested in, or is held by or deemed to be held by, but does not form part of the estate of, a person known as trustee –

(a) For the benefit of another person known as a beneficiary, whether or not yet ascertained or in existence;....."

7. The Declaration of Trust of LGA Gamble Succession Trust dated 15th November 2008 produced by both the Appellant and the Respondents, respectively as D9 and P8 in its preamble states:

"THIS DECLARATION OF TRUST is made on the 15th day of November 2008 by

Valinger Trustees Limited, whose registered office is situated at Olivier Maradan Building, Olivier maradan Street, Level 2, Suites 1-4, Victoria, Mahe, Seychelles

(the "Original Trustee")

WHEREAS

(A) The Original Trustee being desirous of making such irrevocable Declaration of Trust as is hereinafter contained have declared **that the initial property specified in the Second Schedule hereto has been paid, transferred and delivered to them or otherwise placed under their control.**

(B) It is contemplated that further property may be transferred or otherwise placed under the control of the Trustees by way of addition to the Trust Fund hereby constituted.

(C) The Trust created by this Declaration of Trust shall be irrevocable.” (emphasis by us)

8. In the interpretation section of the Declaration of Trust, in defining the words “the Trust Fund”, starts off by saying “the property specified in the Second Schedule hereto;...”
9. We see at the Second Schedule of the Declaration of Trust the following:

**“THE SECOND SCHEDULE
hereinbefore referred to: (Initial Property)**

UD\$_____”

10. The Respondents have failed to explain why the Second Schedule in regard to the “Trust Property” remains blank nor shown any cogent evidence to prove that the initial trust property had been paid, transferred and delivered to the “Original Trustee”, namely Valinger Trustees Limited (Seychelles) for the LGA GAMBLE SUCCESSION TRUST or otherwise placed under their control for the LGA GAMBLE SUCCESSION TRUST. Mr. Pagano, testifying for the Appellant, reiterated the fact that no funds whatsoever were ever received into the joint hands of the trustees. The 1st Respondent had failed to come up with any plausible explanation and there had been no evidence forthcoming either from Valinger Trustees Limited (Seychelles) or Valinger Trustees Limited (Nevis) or its representative Marc Craig Veitch.
11. Valinger Trustees Ltd (Seychelles) had retired on the 10th of December 2008 appointing Valinger Trustees Ltd (Nevis) as the new trustee.
12. In the Deed of Appointment dated 18th December 2008 (D10) wherein the Appellant was appointed as a co-trustee by Valinger Trustees Limited (Nevis); with effect from the 18th of December 2008, there is no mention of the trust property having been paid, transferred and delivered to the “Original Trustee”, namely Valinger Trustees Limited or otherwise placed under their control, or of the said trust property having been paid, transferred and delivered to the “New Trustee”, namely Valinger Trustees Limited (Nevis) or otherwise placed under their control; despite its declaration:

“ 1. This Deed is supplemental to: - a declaration of Trust known as the LGA GAMBLE SUCCESSION TRUST (hereinafter called the “Trust”) dated the 15th day of November 2008 made by Valinger Trustees Ltd (Seychelles) **wherein trusts were declared concerning property therein described (the “Trust Deed”)**.

- a Deed of Appontment and Retirement of Trustees dated 10th December 2008 made between Valinger Trustees Ltd (Seychelles) (Retiring Trustees) and Valinger Trustes Limited (Nevis) (New Trustees).

2. Under the terms of the Trust Deed the Trustees wish to exercise their power by appointing a Co-Trustee of the Trust.

3. The Appointee has agreed to act as Co-trustee of the Trust.” (emphasis by us)

13. The Appellant had retired as a Co-Trustee of LGA GAMBLE SUCCESSION TRUST with effect from the 6th of November 2009, in less than a period of one year from its appointment. On its retirement Marc Craig Veitch personally and on behalf of Valinger Trustees Limited (Nevis) issued an Indemnity to the Appellant dated 6th November 2009 (D12) to the effect:

“ IN CONSIDERATION of you ceasing to provide services to THE LGA GAMBLE SUCCESSION TRUST, a trust established under the law of the Seychelles and (subject always to the provisions contained in the Declaration of Trust) the Proper Law of Trust and in further consideration for your resignation as co-trustee of the trust and confirmation that no financial accounts have been prepared due to the simple nature of the Trust Funds, we as Valinger Trustees Limited, and I, Marc Craig Veitch, as sole director of Valinger Trustees Limited, as co Trustee, jointly and severally undertake and agree to irrevocably indemnify you and hold you harmless against all costs, claims, losses, expenses, damages and liabilities whatsoever (including without limitation legal costs and expenses) that may be incurred or suffered by any of you however arising (other than by reason of your fraud or dishonesty) in connection with the provision of your back office services and duties as co-trustees of the Trust. It being understood that at no time during the existence of the aforesaid Trust have you or any person under your control had signing powers or any control over the Trust Funds, such powers and control having vested in Valinger Trustees Limited at all times.”

14. It was the complaint of the Respondents that the Appellant, was obligated, as per the law to preserve the trust property, control the trust property, enhance the trust property, keep accurate accounts and records of the trusteeship, provide full and accurate information upon request by the beneficiaries, execute the trust, jointly with any co-trustee, and all with due diligence, care and prudence and to the best of its ability and skill. It was also their complaint that the Appellant, in breach of trust, unlawfully, failed to wind up the Trust Fund and pay and distribute out the proceeds to them, failed to render any accounts and failed to deliver a report on the administration of the Trust Fund. But these obligations on the part of the Appellant are dependent on whether there was a properly constituted Trust under the ITA and whether Appellant was ever in control of the Trust property. The answer of the Appellant to both these issues is in the negative. On the basis of the evidence and the documents placed before the Trial Court we conclude that the Appellant is right to make this assertion.
15. It is the position of the Appellant that the Respondents were always aware that the funds were in the control of the co-trustee, Valinger Trustees Limited and was held in an account of an entity, namely Valinger Trade Services, which was an associate of the co-trustee. Counsel for the Respondent at the hearing before us tried to argue that “Valinger Trustees Limited (Seychelles), Valinger Trustees Limited (Nevis), and Valinger Trade Services were one and the same person, by whatever name you called them” and that it was the duty of the Appellant, who was a co-trustee, to put pressure on Valinger Trustees Limited (Nevis) to make the funds available to the Respondents. In so arguing he not only ignored the concept of separate legal personality but conceded that the funds were not delivered or placed under the control of Valinger Trustees Limited or the Appellant for the LGA GAMBLE SUCCESSION TRUST, the co-trustees of LGA Gamble Trust that was registered in the Seychelles as an international trust. It is clear that the Respondents had decided to go against the Appellant due to their inability to go after Valinger Trustees Limited which according to their own averments in the Plaint is “presently of an unknown address and not registered within the jurisdiction of Seychelles”.
16. P12 bears out that a payment of GBP 410,000 had been made by Valinger Trade Services to the 1st Respondent through its account at HSBC Bank PLC, Halkett Street, Jersey on the 20th of July 2011. There is nothing in P12 to suggest that the

payment was made at the instance of Valinger Trustees Limited (Nevis) on behalf of LGA GAMBLE SUCCESSION TRUST or from a bank account opened in the name of "Valinger Trustees Ltd for the LGA GAMBLE SUCCESSION TRUST". P12 is a facsimile message transmitted to Mr. Marc Craig Veitch, of Valinger Trustees Limited (Nevis). The 1st Respondent had admitted in the course of her evidence that this was a payment from the moneys she was claiming in her Plaint. It had also been admitted by the 1st Respondent that she had received further payments. It is in acknowledgement of the payment of GBP 410,000 that the Learned Trial Judge had deducted this amount from the original sum of GBP 812,869.92 claimed in the Plaint by the Respondent and ordered the Appellant to pay the Respondents a sum of GBP 402,869.62.

17. The Respondents' claim, that the Appellant had fraudulently misappropriated the Trust Fund and Property, had been wholesale dismissed by the learned Trial Judge in his judgment by stating: "Nevertheless I should point out that there is no iota of evidence to show that the Defendant misappropriated the trust property." The fact that there was no misappropriation of the trust property by the Appellant, as concluded by the Learned Trial Judge, coupled with the payment of GBP 410,000 by Valinger Trade Services to the 1st Respondent through its account at HSBC Bank PLC as stated in paragraph 16 above, gives credence to the Appellant's assertion that the trust property was never deposited with the co-trustees.
18. It is of interest to note the basis upon which the Learned Trial Judge came to the conclusion that the trust property has been paid, transferred and delivered to the trust fund. According to the Learned Trial Judge: "It appears to me that much as the defendant (*Appellant*) has denied that any trust property was handed over to the trustees there is sufficient evidence to conclude that in spite of the failure to describe the trust property [as the initial property] in Schedule 2 of the deed Valinger Trustees Ltd the initial sole trustee had in fact received possession and control of the trust property. Mr. Veitch, the managing Director of the Valinger Trustees Ltd had directed how this money was to be transmitted to the trustees and this was complied with by the Plaintiff No.1. I have formed the impression from the amended defence and the testimony of DW1 coupled together that the defendant must have become aware of the transfer of funds much earlier than is admitted in the testimony of Mr. Pagano. I refer to the last line of paragraph 4 of the amended statement of defence which states, 'It was agreed that the

Defendant would act as statutory trustee and that VTL would handle the management of the purported trust property’.” (emphasis added by us). The phrases underlined shows an element of uncertainty in the mind of the Learned Trial Judge. To form an impression from a single averment in paragraph 4 of the Amended Statement of Defence and then conclude that the Appellant must have been aware that Valinger Trustees Ltd had in fact received possession and had control of the Trust property is not judicious, especially in view of the rest of the averments by the Appellant, in the Amended Statement of Defence making a specific denial that the Trust property was deposited with the co-trustees of LGA GAMBLE SUCCESSION TRUST. The word ‘purported’ in paragraph 4 of the Amended Statement of Defence may also mean ‘intended’ or ‘claimed’. This would not amount to an admission by the Appellant of the payment or transfer or delivery of funds to the co-trustees. We are not convinced that “there is sufficient evidence to conclude” in this case that Valinger Trustees Ltd the initial sole trustee, had in fact received possession and control of the trust property for the LGA GAMBLE SUCCESSION TRUST, as the Learned Trial Judge had stated. We are therefore of the view that the reasoning of the Trial Judge is flawed.

19. We therefore allow the appeal, set aside the judgment of the Learned Trial Judge and award costs to the Appellant.

A.F. T. FERNANDO
Justice of Appeal

I agree

M. TWOMEY
Justice of Appeal

I agree

J. Msoffe
Justice of Appeal

Dated this 11th of April 2014, Palais du Justice, Ile du Port, Seychelles