

GAMBLE v RHODES TRUSTEES LTD

(2012) SLR 51

Lucy Pool for the plaintiff
Divino Sabino for the defendant

Judgment delivered on 23 March 2012 by

EGONDA-NTENDE CJ:

Plaintiffs no 1 to no 4 bring this action in their capacities as beneficiaries to a trust registered under the International Trust Act 1994. The name of the trust is the LGA Gamble Succession Trust, hereinafter referred to as the Trust, and the plaintiffs are named as beneficiaries therein. The Trust Deed is dated 15 November 2008. The plaintiffs contend that two co-trustees were appointed, Valinger Trustees Ltd, presently of an unknown address and not registered within the jurisdiction of Seychelles, and Rhodes Trustees Ltd, the defendant in this matter.

The plaintiffs further contend that the initial property in reference to the said Trust was paid, transferred and delivered and placed under the control of the said trustees, including the defendant, upon the signing of the LGA Gamble Succession Trust instrument on 15 November 2008.

The Trust Fund, as at 31 August 2009, totaled British Sterling 812,869.92. The plaintiff contends that the defendant was obliged under law to preserve the said trust property, control the trust property, enhance its value and keep accurate accounts and records of the trusteeship. Further the defendant was obliged to provide full and accurate information upon request by the beneficiaries, execute the trust, jointly with any co-trustee, and with all due diligence, care and prudence and to the best of its ability and skill.

The plaintiffs have repeatedly requested the defendant to do the following: To provide an updated and accurate account of the trust funds; to preserve and protect the trust funds; and to wind-up the trust fund and pay and distribute the proceeds to the plaintiffs and other beneficiaries.

In breach of the Trust, the defendant on 23 August 2010 stated to the plaintiffs' attorney that it had resigned as co-trustee of the Trust on 28 January 2010. As at 17 November 2010, the defendant failed to inform the Registrar of International Trusts as to its purported resignation.

Further it is contended for the plaintiffs that the defendant in breach of trust unlawfully, failed to distribute the Trust Fund to the plaintiffs, failed to render any accounts, failed to

deliver a report on the administration of the Trust Fund and has failed to communicate further with the plaintiffs for which the defendant is liable in law.

In the alternative the plaintiffs aver that the defendant has fraudulently misappropriated the Trust Fund and property and by reason of the foregoing, the plaintiffs have been put to loss and damages. The loss is established to be the loss of the Trust Fund and property of British Pounds Sterling 812,869.92 as well as moral damages of R 1 million.

The plaintiffs therefore pray to this Court for judgment against the defendant ordering the defendant to pay to the plaintiff the total sum of R 16,607,102.46 plus interest and costs.

The defendant opposed this action. Firstly it set up a plea *in limine litis* to the effect that no trust existed as the purported trust was not completely constituted. The purported trust property was never deposited with the co-trustees. The defendant cannot therefore be in breach of trust as there is no trust. The plaint is therefore bad in law and must be dismissed against the defendant.

On the merits of the claim the defendant contends that the names of the beneficiaries as per the Third Schedule of the LGA Gamble Succession Trust are not the names of the plaintiffs. The defendant further contends that as the defendant is no longer co-trustee the purported trustee ceased to exist as an international trust for lack of a resident trustee.

The defendant denies what is set out in paragraph 3 of the plaint and states that the original trust instrument appointed only Valinger Trustees Limited as trustee. Valinger Trustee Limited later appointed the defendant as a co-trustee. It was agreed that the defendant would act as statutory trustee and that Valinger Trustees Ltd would handle the management of the purported trust property.

The defendant further contends that no property intended to form part of the purported international trust or otherwise, was ever delivered or placed under the control of the defendant before, upon or after the signing of the Trust Deed. Any monies were placed in the control of an entity associated with co-trustee VTL, namely Valinger Trade Services, into an Isle of Man bank account, of which the defendant has no control or access.

The defendant further contends that although funds were transferred to Valinger Trade Services, those funds were never deposited into the pre-arranged trust accounts, and so no monies were actually deposited into the "Trust Fund" per se. The defendant denies that it was ever in control of the so-called trust property. The defendant resigned as a co-trustee on 6 November 2009 and ratified the resignation by way of formal notification on 28 January 2010. The Registrar of International Trusts was formally informed on 13 August 2010. The defendant's resignation as a co-trustee is not a breach of trust. Furthermore, the defendant has never received any consideration for its role as co-trustee.

The defendant states that it was never in a position to distribute any funds to the plaintiffs and the defendant is not liable in law to the plaintiffs, as the defendant could not have breached any of its duties to the plaintiffs as a trustee. The defendant denied that it ever controlled any funds or property of the Trust and could not therefore have misappropriated any funds or property as alleged.

In conclusion the defendant states that any loss or damage suffered by the plaintiffs was not caused by the defendant and prays that this suit should be dismissed with costs.

At the hearing of the case the plaintiffs called one witness from SIBA Ms Karen Auguste and Mrs Dena Kay Gamble, plaintiff no 1. The defendant called the Managing Director Mr Pagano as its witness and then each side closed its case. From the evidence on record I can gather the following facts. Prior to the registration of LGA Gamble Succession Trust there had been a first trust established by plaintiff no 1's father. At some point plaintiff no 1 and in discussion or advice with her accountant and advisers and with Valinger Trustees Ltd agreed on the creation of a new trust. Plaintiff no 1 mobilized funds from the first trust and forwarded them to an account in the Isle of Man in the names of Valinger Trade Services. This was prior to the formation of the LGA Gamble Succession Trust. Transfer of such funds started in August 2008. On 15 November 2008 a deed named the LGA Gamble Succession Trust dated 15 November 2008 was executed by Valinger Trustees Limited whose address is stated to be the Wharf Hotel and Marina, Providence, Mahe, P O Box 882, Victoria, Seychelles. This declaration of trust was admitted in evidence as exhibit P8 and D9. This Trust Deed indicates that the trust property is the initial property, set out in the Second Schedule to the Deed, and the Second Schedule has no information whatsoever or no description whatsoever describing the initial property; whether it was a sum of money, immovable property, shares or whatever.

The initial trustee was Valinger Trustees Limited of Seychelles as at 15 November 2008. On 10 December 2008 Valinger Trustees Limited of Seychelles retired as trustees and appointed Valinger Trustees Limited of Nevis as the new trustee and 8 days later on 18 December 2008 Valinger Trustees Limited of Nevis appointed the defendant as co-trustees. After being appointed as a co-trustee, Rhodes Trustees Limited Managing Director Pagano applied for registration of an international trust on 18 December and it was received on 29 December 2008 at the Seychelles International Business Authority. The names of the co-trustees are stated to be Rhodes Trustees Limited and Valinger Trustees Limited.

It would appear that after some time the beneficiaries decided to wind-up this trust. They wrote on 24 September 2009 to Valinger Trustees Limited a letter to that effect to which was annexed an account. They requested that this money be immediately distributed to the beneficiaries. That was not done. They engaged lawyers in Switzerland who eventually contacted the defendant and were informed by the defendant that they had resigned as co-trustees on 6 November 2009 and that the

person to contact was the remaining trustee Valinger Trustees Limited. On the advice of her lawyers she decided to bring this action against the defendant.

After filing this action she received some 410,000 pounds remitted to her by Valinger Trade Services. Mr Pagano testifying for the defendant reiterated the facts that no funds whatsoever were ever received into the joint hands of the trustees and no trust accounts were established for that purpose. Basically there are two causes of action, one in the alternative, that have been brought against the defendant in this case. The issue is whether on the evidence before me either action stands proved.

The first action is for breach of trust. It was contended for the plaintiffs that the initial property in reference of the said international trust was paid, transferred, delivered and placed under the control of the said trustees including the defendant upon the signing of the LGA Gamble Succession Trust instrument on 15 November 2008. It appears to me that much as the defendant 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 Valinger Trustees Ltd had directed how this money was to be transmitted to the trustees and this was complied with by plaintiff no 1.

I have formed the impression from the amended defence and the testimony of the 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 of 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.'

The aforementioned agreement with regard to the management of trust property and the role of each trustee was an agreement between the trustees, that is the defendant and Valinger Trustees Ltd. The defendant was therefore aware at the stage it commenced its statutory duties in December 2008 that Valinger Trustees Ltd was in possession of the trust property, and consented to the management of the said property by Valinger Trustees Ltd. It is only when Rhodes Trustees Ltd became aware that the beneficiaries were claiming termination of the Trust and distribution of trust property that it was galvanised into action and decided to resign as a trustee as the day of reckoning had arrived.

Mr Pagano described in great detail how they would manage trustee property by setting up trust accounts in the control of third parties. He did indicate that there were several other trusts that the defendant and Valinger Trustees Ltd were trustees of and that this was the protocol followed to protect the trust funds. Clearly this was not done in this case. For Rhodes Trustees not to have insisted that this was done as it was done in all the other cases was a dereliction of duty. The defendant was aware of the breach and

chose to do nothing about it, contrary to section 44(2) of the International Trusts Act. On account of this failure the beneficiaries are seeking that the trust property be made available by the trustees.

Since the beneficiaries demanded the winding-up of the LGA Gamble Succession Trust in September 2009 the trustees have failed to put them into all the funds that they are entitled to, and to date have only paid or caused to be paid, £410,000 out of £812,869.62. I am satisfied that the defendant's breach of its duties as a trustee, together with the breach by Valinger Trustees Ltd is the cause of this loss to the beneficiaries. Had the defendant not abdicated its responsibility and left it to only Valinger Trustees Ltd to manage the trust property instead of insisting on the usual protocols acceptable in the industry, this loss would not have been suffered by the beneficiaries.

Sections 32(1), 37(1) and 38(5) of the International Trust Act [herein after referred to as the Act] are relevant in these circumstances. Section 32(1) of the Act states – “All trustees of an international trust shall, subject to the terms of the trust, join in the execution of the trust”.

All trustees must be involved in the execution of the trust without exception.

Section 37(1) of the Act provides – “A trustee shall not delegate any functions of the office of trust unless permitted to do by this Act or by the terms of the international trust”.

Section 38(5) of the Act states – “A trustee may delegate the trust or function to any person qualified to act as trustee of an international trust other than to the only other co-trustee of the delegator”.

The agreement between the defendant and its only other co-trustee that the defendant would act only as statutory trustee and the other co-trustee would look after the trust property runs foul of the foregoing provisions if read together. That agreement amounted to the defendant delegating to the only other co-trustee the function of looking after the trust property which is in violation of section 38(5) of the Act.

The plaintiffs contend that the defendant flouted his duties under sections 26 and 27 of the Act. Section 26 provides –

- (1) A person shall in the exercise of the functions of a trustee observe the utmost good faith and act -
 - (a) with due diligence
 - (b) with care and prudence; and
 - (c) to the best of the ability and skill of the person.
- (2) Subject to this Act, a trustee shall execute the functions of the office of trustee –
 - (a) in accordance with the terms of the trust;
 - (b) only in the interest of the beneficiaries or in the fulfillment of the purpose of the trust.

Section 27 provides –

Subject to this Act and to the terms of the international trust, a trustee shall –

- (a) ensure that the trust property is held or vested in the trustee, or held by a nominee on the trustees' behalf, or is otherwise under the control of the trustee; and
- (b) preserve and enhance so far as is reasonable, the value of the trust property.

It is the case for the plaintiff that the defendant failed in the above duties. From the beginning of this trusteeship the defendant wrongfully delegated authority to look after the trustee property to the only co-trustee of the international trust. It did not exercise any care, prudence or diligence to the trust property. It failed to ensure that the trustee property was properly vested in the trustees including itself. The result of these failings is that approximately half of the trust property is not available to the beneficiaries and or the trust.

Liability of trustees is governed by Part 7 of the Act. Section 43 states in part,

- (1) Subject to this Act and to the terms of the International trust, a trustee who commits or concurs in a breach of a trust shall be liable for –
 - (a) any loss or depreciation in value of the trust property resulting from the breach; and
 - (b) any profit which would have accrued to the international trust had there been no breach.
- (2)
- (3) Where the trustees are liable for a breach of trust, they are liable jointly and severally.

Section 44 is relevant too. It states –

- 1. A trustee of an international trust is not liable for a breach of trust committed by-
 - (a) another person prior to the trustee's appointment;
 - (b) a co-trustee unless
 - (i) the trustee becomes or ought to have become aware of the breach, or of the intention of the co-trustee to commit the breach; and
 - (ii) the trustee actively conceals the breach or intention or fails within a reasonable time to take proper steps to protect or restore the trust property or to prevent a breach.

2. A trustee who becomes aware of a breach of trust to which subsection (1)(a) applies shall take all reasonable steps to have the breach remedied.

The defendant on being appointed trustee participated in the first breach when they entered an agreement whereby he was to cede control of the trust property to the co-trustee and retain only the role of statutory trustee. Because of this agreement the defendant cannot take advantage of section 44(1)(a) of the Act to claim that the breaches were committed prior to his appointment. So apart from the breaches committed by Valinger Trustees Ltd the defendant committed his own breaches too in terms of section 44(2) of the Act in that he failed to take any step, let alone reasonable steps as required by the Act, to protect trust property or to restore trust property to the trust or beneficiaries.

Lastly, given the nature of breaches that have been established in this case, the defendant cannot benefit from section 49 of the Act that provides some protection to trustees that resign or are removed from office.

I therefore find the defendant liable to make good British Sterling £402,869.62 or the equivalent in rupees at the going rate at the time of payment, to the plaintiffs together with interest at the court rate from the date of filing of this suit till payment in full. I award to the plaintiffs costs of this suit.

I am aware that the defendant claimed to have a deed of indemnity from Valinger Trustees Ltd. The defendant did not choose to add Valinger Trustees Ltd in third party proceedings in relation to this claim. That was their choice but I suppose it is not too late in the day for them to enforce their indemnity against Valinger Trustees Ltd by separate proceedings.

The second action was in the alternative. It is unnecessary to consider this in light of my findings above. Nevertheless I should point out that there is no iota of evidence to show that the defendant misappropriated the trust property.

In the result this suit is allowed to the extent set out here above with costs.