

BRITISH VIRGIN ISLANDS COURT OF APPEAL

Zorin Sachak Khan Et Al -v- Gany Holdings (Ptc) Sa Claim No. BVIHCMAP 2014/0018

COMMERCIAL APPEAL - WHETHER TRIAL JUDGE MADE INCORRECT FACTUAL FINDINGS - DISCRETIONARY TRUST - RESPONSIBILITIES OF TRUSTEES - DUTY OF DISCLOSURE TO BENEFICIARIES - ACCOUNT OF TRUST ASSETS BY TRUSTEE - BURDEN OF PROOF - BREACH OF TRUST - PERSONAL LIABILITY TO ACCOUNT - KNOWING RECEIPT

A discretionary trust called the ZVM Trust (the "Trust") was created by a wealthy businessman, in favour of, among others, his daughter, two individuals, and his son. The Trustee of the Trust at the material time was a company, whose director included one of the beneficiaries, (i.e. the son). Following the death of the businessman, several beneficiaries sought to have the Trustee of the Trust account for the assets, as they were convinced that the Trust had very substantial assets and were transferred to the son in breach of the terms of the Trust. The Trustee's refusal to account resulted in these beneficiaries seeking orders that: (1) the Trustee be held accountable for the assets of Trust; (2) the Trustee be removed and (3) its director (the son) be held liable to account as a Constructive Trustee on the basis of knowing receipt.

The proceedings were heard by the Commercial Judge who held against the Applicant Beneficiaries, in that: (1) the burden of proof was on the applicant to show that the account was deficient and that they had failed to do so; (2) on evidence, there was no breach of trust and (3) the Director of the Trustee was not personally liable on the basis of knowing receipt as Constructive Trustee.

On Appeal, the Court of Appeal reversed the decisions of the Commercial Judge on the first two issues, and confirmed the applicable law in relation to the Court of Appeal's approach to an appeal against a trial judge's findings of fact. The Court of

Appeal held, *inter alia*, that a trustee must maintain accurate accounts of trust property and it is the first duty of a trustee to be constantly ready with his accounts. A beneficiary has a right to access the documents which he desires to inspect upon what has been called a proprietary right. The Beneficiary is entitled to see all trust documents because they are in this sense, his own. (*O'Rourke -v- Darbishire and others*, [1920] AC 581 applied). Further, if the settlor of a trust subsequently transfers to or vests further monies or assets in the trustees, then a presumption arises that those further assets are to be held by the trustees on the same terms as the original trust. Similarly, if a person purchases property in the names of the trustees of a settlement previously made by him, there is a presumption that he meant to add the property to the trust fund. (*Re Curteis' Trusts* (1872) LR 14 Eq 217)

The Court of Appeal found that it was an error of law to conclude that the Appellants wished to challenge that the only assets in the Trust were the shares of a company in Hong Kong, the onus must be on them to show that the account was deficient. The Trust ought to be held liable to account to the Appellants for all the assets that have been held or held by it as Trustee of the Trust together with all assets which came into possession from the settlor or from anyone on his behalf, since the Trustee failed to lead any evidence in rebuttal. The Court of Appeal also held that Trustees are to take the interests of the beneficiaries into account during the administration of the trust. The failure of a

trustee to consider a relevant consideration or factor can give rise to a breach of trust in administering the trust.

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