

JUDGMENT

Substantive Issues

1. On 15th July, 2005 a company named Sunshine Holdings Ltd. was incorporated in Belize. There were two issued shares of the company and they were held by two persons, each holding one share. These persons by certificate of transfer dated 16th July, 2005 transferred their respective shares to Dean Boyce and Pyrallis Limited, a company registered in the British Virgin Islands. On the said 16th July, 2005 Dean Boyce and Pyrallis Limited made a declaration of trust to the effect that they held the shares in Sunshine Holdings Ltd. on trust and as nominee for Belize Bank Limited, a company incorporated in Belize, as beneficial owner of the shares.
2. On 16th September, 2005 Belize Bank Ltd. declared a trust concerning the two issued shares of Sunshine Holdings Ltd. The trustees under the trust were Dean Boyce and Keith Arnold described as “Original Trustees” in the trust. In addition, on the said 16th September, 2005 Belize Bank Ltd., instructed, as the Bank was authorized to do under the trust of 16th July, 2005, Dean Boyce and Pyrallis Ltd. to transfer their two shares held in Sunshine Holdings Ltd. to the “Trustees of the Belize Telecommunications Ltd. Employees Trust,” the claimant in this matter. By share transfer form Pyrallis Ltd. transferred its share to the claimant, and a certificate dated the said 16th September, 2005 was issued as proof of the transfer. On the said 16th September, 2005

Dean Boyce, by a declaration of trust, declared that he held his one share on trust and as nominee for the said “Trustees of the Belize Telecommunications Ltd. Employees Trust,” the said claimant.

3. On 19th September, 2005, Sunshine Holdings Ltd. bought 7,375,038 shares in Belize Telecommunications Ltd. which later became Belize Telemedia Limited (B.T.L.). According to paragraph 24 of Keith Arnold’s first affidavit, the government in 2005 sold 20% of the shares in Belize Telemedia Ltd. to Sunshine Holdings Ltd. for the cost of BZ \$40 million. This was funded by a loan to Sunshine Holdings Ltd. of BZ \$20 million from the government and the Social Security Board, and by another loan of US \$10 million from the British Caribbean Bank Ltd., which was formerly the Belize Bank (Turks Caicos) Ltd. The financial secretary Joseph Waithe swears in his second affidavit at paragraph 8 that the “Government of Belize has not received any payment for the shares notwithstanding that Sunshine Holdings was made to borrow US \$10 million from the Belize Bank (Turks Caicos Islands) Ltd. allegedly to purchase the shares.”

4. But Keith Arnold in paragraph 5 of his fourth affidavit stated that the government did receive payment. His evidence to prove payment is really two documents, exhibit K.A. 1 and K.A. 2 requesting the Social Security Board to pay BZ \$10 million to the government and a loan note from Sunshine Holdings Ltd. promising to pay the BZ \$10 million back to the Social Security Board. But did the Social Security

Board pay the BZ \$10 million to the government. Mr. Waithe says that the government has not received any payment.

5. Keith Arnold in paragraph 24 of his first affidavit states that after the purchase of the shares in 2005 by Sunshine Holdings Ltd., and a further pro rata distribution of the shares in B.T.L., Sunshine Holdings Ltd. held 11,092,844 ordinary shares in B.T.L.
6. On 25th August, 2009 the House of Representatives and the Senate of Belize enacted the Belize Telecommunications (Amendment) Act 2009 No. 9 of 2009. Section 63 (1) of the Act provides that:

“.... where the Minister considers that control over telecommunications should be acquired for a public purpose, the Minister may, with the approval of the Minister of Finance, by Order published in the Gazette, acquire for and on behalf of the Government, all such property as he may, from time to time, consider necessary to take possession of and to assume control over telecommunications, and every such order shall be prima facie evidence that the property to which it relates is required for a public purpose.”

7. As authorized under section 63(1) above, the Minister responsible for telecommunications issued a Statutory Instrument No. 104 of 2009 entitled “Belize Telecommunications (Assumption of Control Over

Belize Telemedia Ltd.) Order 2009. The Order states, among other things, as follows:

“AND WHEREAS, after a careful consideration of all the facts and circumstances, I consider that control over telecommunications should be acquired for a public purpose, namely, the stabilization and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in a harmonious and non-contentious environment;

NOW, THEREFORE, in pursuance of the above objectives, it is hereby ordered as follows:

1.
2. The property specified in the Schedule to this Order is hereby acquired for and on behalf of the Government of Belize for the public purpose aforesaid.”.

8. The schedule to the Order specified the property acquired by the government, which were, briefly, the shares in Belize Telemedia Ltd., including all the shares held by Sunshine Holdings Ltd. and all proprietary and other interest held by Belize Bank (Turks Caicos) Ltd. in Belize Telemedia Ltd. under mortgage agreements. The claim by the claimant is that by virtue of the above legislation, the government acquired the above mentioned shares and proprietary interests, in breach of sections 3,6,16, and 17 of the Constitution of Belize, and therefore the acquisition was unconstitutional, null and void.

Preliminary Applications

9. Before the substantive constitutional issues came up for hearing, the defendant filed applications, supported by affidavits and skeleton arguments dated 9th and 23rd November, 2009 raising preliminary issues as follows:

1. That the claimant purports to act as trustees of an incompletely constituted, invalid and unenforceable trust, and as such has no right or standing to bring this claim.
2. That the claim be stayed pending the outcome of the trial of the preliminary or issues and any appeal therefrom.

10. The claimant in reply filed affidavits and skeleton arguments in relation to the said preliminary issues above. The parties agreed that the issue whether the claimant has a right to bring this claim should be tried as a preliminary issue. The arguments of the defendants in support of their submissions are that the claimant has no standing or right to bring this claim. Basically the general arguments are:

1. That Belize Bank Ltd, when it declared the Trust in respect of the two shares owned by Boyce and Pyrallis Ltd. in the Trust Deed dated 16th September, 2005 did not own the property of the trust and therefore the trust was incompletely constituted, invalid and unenforceable.
(The Ownership Point)

2. That the Belize Bank Ltd. engaged, as a fiduciary under the Trust Deed dated 16th September, 2005, in transactions in which it had a financial interest and this was unlawful under section 25(5) of the Banks and Financial Institutions Act, Chapter 263. Therefore the said trust is invalid and unenforceable under section 7 2(a)(ii) of the Trust Act (**The Financial Interest Point**)
 3. The property in the said trust was not vested in the trustees mentioned in the trust and therefore incompletely constituted. (**The Vesting Point**)
 4. That the claimant is not a legal person and could not accept the transfer of shares from Dean Boyce and Pyrallis Ltd. and had no right or standing to bring this claim. (**The legal person point**).
11. The defendant submits that based on the above, the Trust Deed of 16th September, 2005 is invalid and the instructions by Belize Bank Ltd. which were given to Dean Boyce and Pyrallis Ltd. to transfer their shares to the claimant were also invalid and illegal. Therefore the claimant has no right or standing to bring this claim.

The Ownership Point

12. The defendant submitted that Belize Bank Ltd. declared a trust with respect to property it did not own; and, therefore, the trust was incompletely constituted, invalid and unenforceable, and no rights

arose under the trust. Section 8(4) of the Trust Act, Chapter 202 of the Laws of Belize (The Trust Act) states that: “where a settler declares a trust respecting property it does not own at the time of the declaration then the trust is incompletely constituted at the time of the declaration and no rights and duties arise thereunder.” The ownership point was made in the application by the defendant dated 9th November, 2009. After that date, trust documents were submitted by the claimant as part of its skeleton arguments which describe the Belize Bank Ltd. as beneficial owner. The defendants therefore did not further argue, in the light of the trust documents, the ownership point.

The Financial Interest Point

13. The submission of the defendants is that the Belize Bank Ltd. as the Protector under the Trust Deed of 16th September, 2005 had fiduciary duties under the trust. Fiduciary duties would mean that the fiduciary must act under the trust in a bona fide way to the best interest of the beneficiaries. The beneficiaries under the said Trust Deed are the employees of Belize Telecommunications Ltd.

14. Under the Trust Deed dated 16th September, 2009 the Belize Bank Ltd. is described as “original settler and protector.” The said Trust Deed defines Protector as meaning the Belize Bank Ltd. So the Bank was Protector as stipulated in the above Trust Deed. As Protector the bank owed a fiduciary duty to beneficiaries of the trust or to the purpose for which the Trust was created. Section 16(5) of the Trust Act states:

“16(5) Subject to the terms of the trust, in the exercise of his office, a Protector shall owe a fiduciary duty to the beneficiaries of the trust or to the purpose for which the trust is created.”.

15. Since Belize Bank Ltd. was the Protector under the Trust Deed dated 16th September, 2005 it owed under section 16(5) above, a fiduciary duty to the beneficiaries of the trust or to the purpose of the trust. It was therefore submitted by the defendants that the Belize Bank Ltd. as a fiduciary, acted in breach of section 25(5) of the Banks and Financial Institutions Act Chapter 263 of the Laws of Belize (The Banks Act) when it engaged as a fiduciary in transactions in which it had a financial interest. The effect of such a breach, it is submitted, is that the Trust Deed dated 16th September, 2005 is invalid and unenforceable. In support of this submission the defendants rely on statutory provisions contained in section 25(5) of the Banks Act and section 7(2) (a) (ii) of the Trust Act. Section 7(2) (a) (ii) of the Trust Act states:

“7. (2) A trust shall be invalid and unenforceable –
(a) to the extent that –
(ii) it purports to confer any right or power or impose any obligation the exercise of which or the carrying out of which is contrary to the law of Belize;”

Section 25(5) of the Banks Act states:

“(5) Unless authorized under other applicable laws, an order of any court of competent jurisdiction, or the instrument creating the trust relationship, no licensee shall engage as fiduciary in any transaction in which it has a financial interest as might affect its best judgment in engaging in such transactions.”

16. Section 25(5) of the Banks Act prevents a fiduciary from engaging in any financial transaction in which it has a financial interest as might affect its best judgment in engaging in such transaction. The word “licensee” is defined in section 2 of the Banks Act as meaning a company licensed or required to be licensed as a bank or financial institution under the Act. The Belize Bank Ltd. is licensed as a bank.
17. The question now is whether the facts show that the Belize Bank Ltd., as fiduciary, engaged in any transaction in which it had a financial interest as might affect its best judgment in engaging in such transaction. If it did, the trust would be invalid and unenforceable under the provisions of sections 7(2) and 25(5) above. Let us examine the evidence to see if the Belize Bank Ltd., as fiduciary, had any such transaction.
18. The defendants rely on the following evidence to prove transactions in which the Belize Bank Ltd. has such a financial interest:

1. The Belize Bank (Turks Caicos) Limited, a wholly owned subsidiary of Belize Bank Ltd., lent under the provisions of an agreement named Syndicated Loan Agreement dated 19th September, 2005 US\$10,000,000 to Sunshine Holdings Ltd.
2. Belize Bank Ltd. according to the loan agreement was manager and entitled to a management fee to be paid by Sunshine Holdings Ltd.
3. Sunshine Holdings Ltd. had to pay Belize Bank Ltd. manager expenses for preparation and completion of the Loan agreement.
4. On 19th September, 2005 Belize Bank (Turk Caicos) Ltd. entered into a security agreement with Sunshine Holdings Ltd. whereby Sunshine Holdings Ltd. mortgaged its 7,035,038 shares in Belize Telemedia Ltd. to the said Bank to secure the loan of \$10,000,000 US under the Syndicated loan Agreement.
5. The loan agreement had provisions for interest to be paid to the lender by the borrower Sunshine Holdings Ltd.
6. At the time of the loan agreement, and the agreement to pay management fees, expenses and payment of interest, all the shares in Sunshine Holdings Ltd., were held by Dean Boyce and Pyrallis Ltd. at the date of the Trust Deed, under which,

as we have seen above, The Belize Bank Ltd. is the Protector and fiduciary.

7. Sunshine Holdings Ltd. acquired 11,092,844 shares in Belize Telemedia Ltd., and these shares form part of the trust property under the Trust Deed.
8. The Belize Bank (Turks Caicos) Ltd. made on May 19th 2006 an over draft facility to Sunshine Holdings Ltd. in the amount of US \$1,000,000. Under this overdraft facility, the borrower, Sunshine Holdings Ltd. had to pay an arrangement fee of \$10,000 US to the bank as well as other fees, including legal and filing fees.
9. Clauses 4 and 5 of the Trust Deed dated 16th September, 2005, give the Belize Bank Ltd., who is fiduciary and Protector under the trust, general powers, the exercise of which, allowed the bank as fiduciary, to engage in the transactions above, including the loan agreements. Clauses 4 and 5 of the Trust Deed are as follows:

“4. IN the exercise of their powers and discretions under this settlement, the Trustees shall at all times have regard to the advice and recommendations of the Protector and shall be bound by the Protector’s wishes or the wishes of any other person who may be nominated in writing by

the Protector of the Trustees from time to time.

5. IN the administration of the trusts of the Trust and for the Trust Purposes (but not further or otherwise), the Trustees shall have and may in their discretion exercise the following powers:
 - (g) power subject to the consent of the Protector and such consents as may be required by law to borrow money on the security of the Trust Property and pay or apply the money so raised in any manner in which money forming part of the capital of the Trust Property may be paid or applied; and
 - (h) power to do all such other acts or things as are necessary for the proper administration of the Trust or the attainment of such objects that are approved by the Protector.”

19. The defendant therefore submitted that The Belize Bank Ltd., through its wholly owned subsidiary Belize Bank (Turks Caicos) Ltd., as fiduciary under the Trust Deed engaged in the above transactions, which show the bank had a financial interest as might affect its best judgment contrary to section 25(5) of the Banks Act. Consequently the Trust Deed dated 16th September, 2005 is invalid and unenforceable under section 7(2) of the Trust Act. Therefore any power exercised under the invalid Trust Deed would be invalid.

Therefore the instructions to the shareholders of Sunshine Holdings Ltd. – Dean Boyce and Pyrallis Ltd. by the Belize Bank Ltd. as Protector under the said Trust Deed to transfer their shares to the claimant were invalid. Therefore, according to the defendants, the claimant has no right or legal standing to bring the claim.

20. Learned counsel for the claimant, in an eloquent and impressive argument, submitted with respect to section 7(2) of the Trust Act that clauses 4 and 5 above were general clauses applicable to a myriad of circumstances. These clauses do not specifically confer any right or power which is contrary to law. Under section 7(2) the trust would be invalid if the trust itself contains any right or power which is contrary to law; but these clauses when examined do not specifically contain on the face of them anything which is contrary to the law. Since these clauses do not specifically state anything contrary to law, section 7(2) is not applicable to this case. Therefore the Trust Deed dated 16th September, 2005 is not invalid and unenforceable.
21. Moreover, states learned counsel for the claimant, section 25(5) of the Banks Act is not relevant, because banks do not fall within the provisions of the section. The word licensee that appears in section 25(5) of Banks Act does not include banks, when the structure of the Banks Act is considered. Therefore section 25(5) is not applicable to this case.
22. Learned counsel for the claimant submits, in the alternative, that even if the court finds that the power given to the Belize Bank Ltd. under clauses 4 and 5 of the trust deed is invalid, the court ought to consider

severing these clauses from the Trust Deed leaving the other parts of the Trust Deed intact and valid.

23. It seems to me that a trust under section 7(2) of the Trust Act would be invalid and unenforceable if it confers a right or power the exercise of which is contrary to law. It is the exercise or the carrying out of the right or power conferred which has to be contrary to law, before the trust becomes invalid. I have no doubt though that if the trust gives a power which by itself is contrary to law, it would be an invalid trust; but section 7(2), in my view, is also applicable in a situation where the Trust Deed gives a right or power, the exercise or the carrying of which, is contrary to law.
24. In this case, the Belize Bank Ltd., through its wholly owned subsidiary Belize Bank (Turks Caicos) Ltd. in the exercise of the powers given to it under the Trust Deed dated 16th September, 2005 entered into the financial transactions mentioned above from which it clearly, from the above evidence, had a financial interest as might affect its best judgment. The bank had a fiduciary duty to the beneficiaries under the trust, and as such is not permitted under section 25(5) of the Banks Act to engage in transactions in which it had a financial interest as might affect its best judgment in engaging in such transaction.
25. It was argued that from the structure of the Banks Act, the word “licensee” in section 25(5) did not mean a bank, but means financial institution; and therefore section 25(5) did not apply. But the word “licensee” as defined in the Banks Act clearly means any company

licensed as a bank or financial institution, which would include the Belize Bank Ltd.

26. The claimant submits further that even if there is a conflict between the objects of the trust and the alleged financial transactions of the Belize Bank Ltd. – the protector and fiduciary under the Trust Deed – this does not invalidate the trust. If there is, according to the submission, such a conflict, an interested party may apply to the Supreme Court for a remedy. But the trust does not become invalid because of the conflict. Several authorities were cited in support of this submission, such as *Stace Investments Ltd. v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd.* 1968 W.L.R. 1072; *Sergeant v. National Westminster Bank plc* (1990) 61 p Cr 518; *Edge v. Pensions Ombudsman* 2000 Chd 602; *Bristol and West Building Society v. Mothew* 1998 Chd 1; and *Public Trustee v. Cooper* 2001 WRLT 901.
27. In **Stace** the bank, as trustee, was permitted by a trust deed to open and maintain savings accounts with any bank, including itself. The bank, as trustee, deposited trust moneys with itself as banker and credited the money to trust deposit accounts with itself. The bank became insolvent, and the question was whether the liquidator, on the winding up of the bank, had to pay to the beneficiaries under the trust, moneys in the trust deposits accounts, in priority over payment to other customers of the bank. The Privy Council held that when the bank became insolvent, the beneficiaries were entitled to obtain a new trustee in place of the bank, and the claim of the new trustee with

- respect to the moneys in the account, “will be as an unsecured creditor ranking pari – passu with the claims of other customers claiming moneys in the customers deposit accounts at the bank.”.
28. The facts of **Stace** are different from the case before me. Moreover, in **Stace** the court did not consider or mention or express any view concerning legislation similar to sections 7 2 (a)(ii) of the Trust Act or section 25(5) of the banks Act. Because of this, this case is distinguishable from the case before me.
29. *Sergeant and Another v. National Westminster Bank 1991 61--1 & 6R 518* was a case dealing with trustees under a will. The testator died and left a will which contained power for trustees under the will to purchase three farms, which were trust property. The trustees were also tenants of the farms, as a result of contracts of tenancies with the testator. The trustees wanted to purchase the largest farm, and to sell the two smaller farms for development purposes. A legal challenge was made to the sale, based on the rule that a trustee must not put himself in a position where his interest and duty conflict.
30. The court was asked to make a declaration that the trustees were not entitled to sell the farms so long as their tenancies subsist. The Court of Appeal held that clause 11(iv) of the will, which allowed the trustees to purchase trust property, had the effect to exclude a purchase by the trustees from the operation of the rule that disabled a trustee from purchasing trust property. The court in effect held that although there was a rule that disabled a trustee from purchasing trust

property, the testator by clause 11(iv) of the will allowed the trustee to do so and the executors could not complain. Nourse LJ said:

“I am therefore of the opinion that the effect of clause 11(iv) of the will is to exclude a purchase by the trustees jointly from the operation of the analogous rule which absolutely disables a trustee from purchasing trust property.”

31. This case, in my view, does not answer the submission of the defendants because the case deals with a trustee, which Belize Bank Ltd. was not under the Trust Deed; and the case makes no reference to legislation similar to sections 7 2(a)(ii) and 25(5) above. The other cases submitted on this point also do not consider such legislation.
32. The provisions of section 25(5) of the Banks Act may well have been inspired by the views of Lord Hershell in *Bray v. Ford 1896, A.C.*

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“It is an inflexible rule of a court of equity that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit. He is not entitled to put himself in a position where his interest and duty conflict. There is a danger of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.”

33. Section 7(2) of the Trust Act, as we saw above, provides that a trust is invalid if it confers a right or power which is contrary to the law of Belize. Section 25(5) of the Banks Act is a law of Belize; and it states that no bank shall engage as a fiduciary in any transaction in which it has a financial interest as might affect its best judgment in engaging in such transaction.

Severance

34. As we saw above, it was submitted, that if the court found clauses 4 and 5 of the Trust Deed invalid, the court had the authority to sever those clauses from the trust deed, and leave the remaining clauses intact. Section 7(3) of the Trust Act states: –

“(3) Where a trust is created for two or more purposes of which some are lawful and others are not, or where some of the terms of a trust are invalid and others are not –

- (a) if those purposes cannot be separated or the terms cannot be separated, the trust is invalid;
- (b) if those purposes can be separated or the terms can be separated, the Court may declare that the trust is valid as to the terms which are valid and the purposes which are lawful.

35. The powers in clauses 4 and 5 are given above. The Belize Bank Ltd. as fiduciary and protector is given other powers of control under the Trust Deed, in addition to the powers given under clauses 4 and 5 above. Clause 1 states by what name the trust shall be known, and

continues that it shall be known by “such other name as the original trustees with the written approval of the Protector (the bank) shall declare.” Clause 2 defines Protector as meaning the bank. Clause 2(e) defines “Trust Period” as including such date as the trustees and the bank shall specify in writing. Clause 2 (g) states that “settler” includes the Bank as original settler.

36. In clause 2(h), “Trust Purposes” is defined as including purposes as may be approved by the Protector, the bank, and the trustees in consultation with the employee representative. Under clause 3 the bank is given power in relation to trust property; and trust property is defined as including the two issued shares in Sunshine Holdings Ltd., assets of the trust, and accumulations of income added to the trust. Under the trust deed, the trustees are granted numerous powers, in addition to powers given under Clause 5 (g) and (h) above, which deal with the management and administration of the trust. Powers of investment, maintenance, development and improvement of trust property are conferred on the trustees. But the trustees in the exercise of all the powers mentioned above must, at all times have regard to the advice and recommendations of the Belize Bank Ltd. and shall be bound by the Bank’s wishes.

37. If all the powers mentioned above given to the Belize Bank Ltd., are severed from the trust deed, it seems to me that what would remain would be a different trust deed from what the settler – the bank – intended the trust deed to accomplish. The principle laid down by Lord Oliver in *R v. Inland Revenue Commissioners ex p Woolwich*

Equitable Building Society 1990 1 W.L.R. 1400, at p. 141 3 on the question of severance is important:

“One has to ask also the question whether the deletion of that which is in excess of the power so alters the substance of what is left that the provision in question is in reality a substantially different provision from that which it was before deletion. If it is, it cannot be assumed that the legislator would have enacted it in its altered form and the whole must be declared bad. Your Lordships have been referred to a number of authorities, but I do not think the principles, at any rate as they apply to this case, are seriously in doubt..... The matter is in essence one of reading and construing the provision in question and if, on a fair reading, the provision shorn of its offensive part is, in substance and effect, a different provision from that which the legislator, on his own showing, intended to enact, then, for my part, I do not see how any of it can stand.”

38. Though the above words were spoken in relation to legislation, I do not see any reason why they should not be applicable to other legal documents, including trust deeds.
39. I rule that the severance or deletion of the above mentioned clauses would substantially alter the Trust Deed resulting in a substantially different deed, and I rule that the whole deed cannot stand. I also rule that the Trust Deed dated 16th September, 2005 is invalid and unenforceable on the ground that the Belize Bank Ltd., as fiduciary

under the trust deed, engaged in transactions in which it had a financial interest as might affect its best judgment in engaging in such transaction.

The Vesting Point

40. The defendants submit that a trust exists where the property is vested in the trustee who must be a natural person or a corporate entity. Reliance was placed on sections 2 and 66(2) of the Trust Act.

Section 2 states:

“2. A trust exists where a person (known as “a trustee”) holds or has vested in him, or is deemed to hold or have vested in him, property which does not form, or which has ceased to form, part of his own estate

Section 66(2) states:

“66. (2) For the purposes of this Act a trust shall be regarded as created at the time at which property is first received by or vested in the trustee to be held by him in accordance with the terms of the trust.”

41. The defendants also rely on *Noble v. Meymont 1851 LJ Ch. 612*. This case, it seems to me, laid down the rule that a transfer of trust property to trustees ought to take place after they have been properly appointed. Romily MR went on to give the reason for the rule. “Were it not so” the judge said, “in some cases, probably in all, no valid appointment of new trustees could finally be made,” I agree

with the submission of learned counsel for the claimant that “Noble and Meymont is not a case on whether or not a trust is validly constituted.”

42. Section 2 of the Trust Act contemplates two situations for the existence of a trust:-
 1. where a person holds property or
 2. where a person has vested in him the property – which does not form or which has ceased to form part of his estate.

43. It is possible under section 2 for a trust to exist, although the property in the trust is not vested in any person. If the trustee holds the property, not vested, a trust still exists under section 2 above. Section 66(2) is not inconsistent with this position. According to this subsection a trust is created when the property is first received by or vested in the trustee; so vesting is not necessary to create a trust, if the property is received by the trustee.

44. The common law seems to be consistent with these statutory provisions. In *Mascall v. Mascall 1985 50 P & CR 119* a father and son had an agreement to give as a gift a home to the son. The father, the plaintiff, did everything procedurally to transfer the house to the son, the defendant. Before the defendant received title to the house, the plaintiff and defendant had a serious row. The plaintiff brought an action for a declaration that he was not bound to transfer the house to the defendant. The court held that the plaintiff intended to make a gift

of the house to the defendant, and that the gift had been completed, although title had not passed to the defendant. The court refused to grant the declaration. But the court considered the case of *Milroy v. Ford 1862 4 De GF 264* where Turner LJ said:

“I take the law of the court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.”

45. In my view, I do not agree that if the trust property is not vested in the trustee the trust is invalid.

Legal Person Point

46. The claimant is described in the claim as “The Trustees of the B.T.L. Employees Trust.” Is this a body established by statute or incorporated under the Companies Act or established by any law or legislation? Is the claimant a legal person established under any law? I find no evidence before me in this case establishing that the claimant is a legal person established or created under any law. Moreover, who are “The Trustees” mentioned as part of the name of the claimants. Are they Keith Arnold and Dean Boyce referred to in the Trust Deed dated 16th September, 2005, where they are described, not as trustees, but as “Original Trustees.” Are the “original trustees” the same trustees, referred to as “The Trustees” mentioned as part of the name

of the claimant? The evidence does not establish a nexus showing that Dean Boyce and Keith Arnold are the same as “The Trustees” mentioned in the name of the claimant.

47. Moreover, it is clearly established from the evidence that Sunshine Holdings Ltd. comprised of two shares – one held by Dean Boyce and the other by Pyrallis Ltd. Pyrallis Ltd. transferred its share to the entity described as “The Trustees of the B.T.L. Employees Trust.” Did that entity have the legal status to receive the share? Dean Boyce did not transfer his share in Sunshine Holdings Ltd. to the claimant. He held his share on trust or as nominee of the claimant. Could he be a nominee or hold a share on behalf of a body that is not a legal person or established under any law? I think not. There is no evidence before me showing that the claimant is a legal person or body established under any law.

48. The evidence clearly establishes that Sunshine Holdings Ltd. held 11,092,844 shares in Belize Telemedia Ltd. whose property, as we saw above, was compulsorily acquired. Sunshine Holdings Ltd. was not made a claimant in these proceedings, nor were Dean Boyce and Keith Arnold the “Original Trustees, nor was Belize Telemedia Ltd. There is just one party as claimant; and, in my view, there is no evidence before me that that party is a legal person.

CONCLUSION

49. The trust deed dated 16th September, 2005 is invalid and unenforceable because the fiduciary under the Deed, the Belize Bank

Ltd. engaged in transactions in which it had a financial interest as might affect its best judgment in engaging in the transaction contrary to section 25(5) of the Banks Act. Moreover, several clauses of the Trust Deed, including clauses 4 and 5, if severed from the Trust Deed would leave a document substantially different from what was intended, and therefore the deed cannot stand. The fact that property is not vested in trustees does not make the trust invalid. There is no evidence before me that the claimant, described in the claim as “The trustees of the B.T.L. Employment Trust” is a legal person or body established by or under any law.

50. I therefore make the following orders:

1. The claimant has no locus standi or right to bring this claim.
2. Costs to the defendant to be agreed or taxed.

Oswell Legall
JUDGE OF THE SUPREME COURT
10th December, 2009

