EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0018

BETWEEN:

[1] ZORIN SACHAK KHAN
[2] AFAQUE AHMED KHAN
[3] SASHEEN ANWAR

Appellants

and

[1] GANY HOLDINGS (PTC) SA
[2] ASIF RANGOONWALA

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
Justice of Appeal
The Hon. Mde. Gertel Thom
Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer
Justice of Appeal [Ag.]

Appearances:

Mr. Richard Wilson, QC, with him, Mr. Robert Christie
and Ms. Clare-Louise Whiley for the Appellants
Mr. Christopher Tidmarsh, QC, with him, Ms. Arabella di Iorio and
Mr. Brian Lacy for the First Respondent
Ms. Sue Prevezer, QC, with her, Mr. Andrew Willins for the
Second Respondent

2015: January 13; (Corrected date)
2016: March 14.

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 was created by a wealthy businessman, Muhammed Aly Rangoonwala ("MAR"). His daughter Zorin Sachak Khan, her husband, Afaque Khan, daughter, Sasheen Anwar ("Zorin")[1] and Zorin's brother, Asif Rangoonwala ("Asif") are among the beneficiaries of the trust. The ZVM Trust was established by MAR on 24th September 1982 and US$100 vested in the trust. The trustee of the Trust at that time was a company called Schweizerisch Finance Limited (SFL). SFL was succeeded as trustee of the trust by Maly Investments SA ("MISA"), which was in turn succeeded by Gany Holdings (PTC) SA ("Gany"). Asif is also a director of Gany and appointor of the Trust.

After Gany was appointed as trustee, shares in a Hong Kong registered company called European Commodities Limited ("ECL HK") were transferred to Gany. ECL HK held the shares in the English registered company, Valson International Limited ("Valson") as nominee for MAR. Two days after the ECL HK shares were transferred to Gany, one share in European Commodities Limited BVI was allotted to Gany.

Following MAR's death, Zorin sought to have the trustee account for the assets that formed part of the ZVM Trust as she was convinced that the Trust had very substantial assets. The trustee refused to account for the Trust's assets. Subsequent to MAR's death, substantial monies were paid to the beneficiaries. Zorin contended that the moneys that were paid came from the ZVM Trust; however, Asif asserted that the monies came from a separate MAR foundation. Zorin had received substantial sums of money which had belonged to her father but was unconvinced that her father's assets had been properly distributed. Asif and Gany told Zorin that the ZVM Trust was an empty shell but Zorin was of the view that Asif and Gany were not being forthright. Asif had initially indicated that the ZVM Trust had no assets and that his father had given all of the remaining assets to him. Nevertheless, Zorin pressed Gany and it eventually admitted that the ZVM Trust had assets in the nature of shares in ECL HK but asserted that they were not of significant value.

Very belatedly, it was revealed to Zorin that the assets in the ZVM Trust which, were taken to mean the ECL HK shares, were appointed out to Asif on 22nd December 1998. Convinced that the Gany was not properly accounting to the beneficiaries, Zorin filed proceedings in order to have Gany account for the assets of the ZVM Trust. The learned commercial court judge gave directions to Gany to account to the beneficiaries, but despite

[1] Zorin Sachak Khan individually and the appellants collectively are referred to as "Zorin" where the context so provides.

those directions, which Gany purported to comply with, Zorin had remained unconvinced that Gany had provided full accounts. She therefore filed a claim against Gany and Asif in which she sought to have Gany removed as trustee of the Trust and Asif as appointor. Zorin also sought to have the court declare that the appointment was void or liable to be set aside and grant an order setting aside the appointment. In addition, she sought a number of reliefs against Gany and Asif, including a declaration that Asif is liable to account as constructive trustee.

The proceedings were heard by the learned commercial court judge who made a number of findings of fact and findings of law. He held that the burden of proof was on Zorin to show that the account was deficient and that she had failed to do so. The learned judge held that there was no breach of trust and refused to set aside the 1998 appointment. In addition he held that the trustee was not under a misconception when it appointed out the assets to Asif. He further held that Asif was not personally liable on the basis of knowing receipt as constructive trustee and dismissed the claim against Asif. The learned judge therefore dismissed Zorin's claim and awarded costs against her to Gany.

Zorin, being dissatisfied with the judge's decision, appealed against the judgment in relation to several findings of fact and findings of law, including, that the ZVM Trust had ceased to have any significant assets; that the burden of proof was on Zorin to establish that the assets held by Gany were held on trust for the ZVM Trust and that she had failed to do so; that the 1998 appointment was not a sham; that the trustee was not under a misconception when it appointed out the assets to Asif; and that the appointment was valid and there was no breach of trust.

Held: allowing the appeal; and making the orders as set out in paragraph 112 of the judgment; and ordering that Gany pay Zorin's costs in this Court and in the court below to be agreed within 21 days, failing which, costs to be assessed by a commercial court judge, that:

1. The law is well settled in relation to the approach an appellate court will take on an appeal against a trial judge's findings of fact. An appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, however, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that the judge has not taken proper advantage of having seen and heard the witnesses, and the matter will then become at large for the appellate court.

Thomas v Thomas [1947] AC 484 at pp. 487 – 488 applied; **Central Bank of Ecuador and others v Conticorp SA and others** [2015] UKPC 11 at para. 5 applied; **McGraddie v McGraddie and another** [2013] UKSC 58 at para. 1 applied; **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 applied; **re B (A Child) (Care Proceedings: Threshold Criteria)** [2013] 1 WLR 1911 at para. 53 applied.

2. In the case at bar there was overwhelming evidence before the judge to indicate that in addition to the ECL HK shares, Gany held shares in ECL BVI, Cedilla Investments SA and Schweizer Holdings. It was clear that the ZVM Trust contained assets that were significantly more than US$100. Accordingly, the learned judge made an incorrect finding of fact when he stated that there was no evidence that Gany held the shares in these companies.

3. A trustee as legal owner of property for the benefit of the beneficiaries has control over the trust assets. The trustee has a fiduciary duty to the beneficiaries in respect of the trust property. The trustee usually has all management and ownership functions in respect of the trust property. The beneficiary's only remedy is to ensure that the trust property is properly administered in accordance with its terms and the trustee's fiduciary duties. The trustee must maintain accurate accounts of trust property and it is the first duty of a trustee to be constantly ready with his accounts. The trustee's duty to account is the irreducible core minimum of the trusteeship.

   Armitage v Nurse and others [1998] Ch 241 at p. 253; **Davis v Administrator-General** (1969) 14 WIR 111 applied; **O'Rourke v Darbishire and others** [1920] AC 581 at p. 626 applied.

4. If a 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 applied.

5. On the evidence that was before the learned commercial court judge it was clear that there were assets vested in Gany which it held as trustee of the ZVM Trust. The learned trial judge was of the incorrect view that if Zorin wished to challenge that the only assets in the ZVM Trust (aside from the immaterial US$100) were the shares of ECL HK, the onus must be on them to show that the account is deficient.

This was an error of law. Instead of placing the burden on Gany to rebut the presumption that the assets form part of the ZVM Trust, he incorrectly placed the burden of proof on Zorin. Gany ought to be held liable to account to Zorin for all the assets that have been held or held by it as trustee of the ZVM Trust together with all assets which came into possession from MAR or from anyone on his behalf, since Gany failed to lead any evidence in rebuttal.

Re Curteis' Trusts (1872) LR 14 Eq 217 applied.

6. The failure of a trustee to consider a relevant consideration or factor can give rise to a breach of trust in administering the trust. Trustees are to take the interests of the beneficiaries into account during the administration of the trust. The court will invalidate the exercise of discretion by trustees where it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account. In this case, the uncontroverted evidence was that the directors of Gany in making the decision to appoint the assets of the ZVM Trust to Asif did so on the false or mistaken belief that the assets that formed the ZVM Trust was US$100.00. The ECL HK shares had a significant value unlike the view that the learned commercial court judge held. In addition, it was clear that the trustee acted under the misconception that the ZVM Trust was valued only at US$100 when it appointed out the assets to Asif. The learned commercial court judge therefore erred when he held that the trustee acted under no misconception.

7. In the case at bar there was no evidence that the trustee acquainted itself with the relevant matters, one of which was the nature of the assets that formed part of the ZVM Trust. The trustee did not take into account the interests of the beneficiaries when it exercised its discretion to appoint the assets of the ZVM Trust to Asif. Accordingly, Gany's decision is vitiated due to this failure to exercise its discretion properly.

Re Hastings Bass (deceased); Hastings and others v Inland Revenue Commissioners [1974] 2 All ER 33 applied; **Pitt v Holt and another**; **Futter and another v Futter and others** [2013] UKSC 26 applied.

8. In this case, in order to establish a constructive trust claim based on knowing receipt, Zorin would have had to satisfy the judge of three things: (1) that there were significant assets in Gany at the time of the deed of appointment; (2) that in breach of trust owed by Gany as trustee to the beneficiaries, it appointed out those assets to Asif; and (3) Asif received those assets with the knowledge of breach of trust. On the evidence, there was no basis upon which the judge could have

concluded that Asif was guilty of knowing receipt. Accordingly, the learned commercial court judge quite correctly rejected this contention and did not err.

9. Even though there was no basis upon which the learned commercial court judge could have held that Asif was personally liable, the justice of the case requires that Asif return the ZVM Trust assets that he has in his possession which were improperly transferred to him by Gany. It is not sufficient for him to simply assert that he has parted with the assets. If he asserts that the assets are now in the hands of a third party, the trustee should be able to trace them with a view to determining the veracity of this contention.

JUDGMENT

[1] **BLENMAN JA**: The responsibilities of trustees are brought into sharp focus in this appeal coupled with their duty of disclosure to beneficiaries. This is an appeal by Zorin Sachak Khan, her husband Afaque Khan and daughter Sasheen Anwar ("Zorin") against the judgment of the learned judge in which he refused to grant the reliefs they sought against Gany Holdings (PTC) SA ("Gany") (the trustee) and Asif Rangoonwala ("Asif"). With no disrespect intended I will refer to the parties as Zorin,[2] Gany and Asif for ease of convenience. Both Gany and Asif are strenuously resisting the appeal.

Background

[2] Muhammed Aly Rangoonwala ("MAR") was a very wealthy businessman who had several assets. He created a discretionary trust, the ZVM Trust (or "the Trust"). His daughter Zorin, her husband, daughter and her brother, Asif are among the beneficiaries of the trust. The trustee of the Trust was Maly Investments SA ("MISA") and it was succeeded by Gany. Asif plays a very important role as director of Gany (the trustee) and appointor of the Trust. Upon the death of MAR,

[2] I shall refer both to Zorin Sachak Khan individually and the appellants collectively as "Zorin" where the context so provides.

Zorin sought to have the trustee account for the assets that formed the assets of ZVM Trust. The trustee was very reluctant to do so even though Zorin was convinced that the Trust had very substantial assets.

[3] Despite her (Zorin's) protestations and urgings for the trustee to account for the Trust's assets, it refused to do so and she caused several letters to be written to it seeking information in relation to her father's assets. Subsequent to the death of MAR, substantial moneys were paid to the beneficiaries which Zorin says she was told came from the ZVM Trust. Asif for his part says that the monies came from a separate MAR foundation and did not form part of the Trust assets. Zorin received substantial sums of money but remains of the view that her father's assets had not been properly distributed. Zorin, being of the view that Gany and Asif were not being forthright, did not believe them when they told her that the ZVM Trust was an empty shell. She kept pressing them through her attorneys to account for the assets held by the ZVM Trust. Initially, Asif indicated that the ZVM Trust had no assets and he further indicated that his father had given all of the remaining assets to him. Undaunted, Zorin continued to press Gany and it very belatedly admitted that the ZVM Trust had assets in the form of shares in a Hong Kong registered company called European Commodities Limited ("ECL HK") which were not of significant value.

[4] Quite late in the day, it was revealed to Zorin that the assets in the ZVM Trust were appointed out to Asif by appointment executed on 22nd December 1998. Gany and Asif also indicated that by deed of appointment executed on 22nd December 1998, Gany appointed the ECL HK shares to Asif absolutely.

[5] Zorin was by now more convinced that Gany as trustee was not being accountable to the beneficiaries but rather was withholding information. She therefore filed proceedings in order to get Gany to account for the assets of the ZVM Trust.

[6] The learned judge gave directions with a view to having Gany account to the beneficiaries. Despite the interim orders to account, Gany did not appear to provide the full accounts. Zorin, being satisfied that Gany was not acting properly as trustee, filed a claim. Zorin broadened her claim to have Gany removed as the trustee of the Trust and sought the removal of Asif as appointor.

[7] Zorin also sought to have the court declare that the appointment was void or liable to be set aside and grant an order setting aside the appointment. She also sought a number of reliefs against Gany and Asif and a declaration that Asif is liable to account as constructive trustee.

[8] The proceedings were heard by the learned trial judge who made a number of findings of fact. He held that the burden of proof was on Zorin to show that the account was deficient and that she had failed to do so.

[9] The judge was not persuaded that the trustee simply rubber stamped Asif's recommendation in effecting the appointment. Also, the learned judge refused to hold that the 1998 appointment was a sham or was made on the basis of the trustee's misconception. He therefore held that there was no breach of trust and declined to set aside the 1998 appointment.

[10] The learned judge further held that Asif was not personally liable, on the basis of knowing receipt, as a constructive trustee and therefore dismissed the claim

against Asif. Accordingly, the learned judge dismissed Zorin's claims and awarded costs against her to Gany with effect from 21st February 2013.

The Appeal

[11] Zorin is dissatisfied with the judgment and she has appealed against the judgment in relation to several findings of fact and findings of law. I propose to indicate the findings of fact and findings of law that have been appealed.

Findings of Facts

(i) the audited financial statements of ECL HK show no shares in the English registered company, Valson International Limited ("Valson") or any other company;

(ii) that the appointment of VM Finance and Holding AG as "Trust Manager" was pursuant to a "Swiss Agency Agreement";

(iii) the funds used to pay Asif's siblings must have been funded with money accessible by Asif;

(iv) Gany has sworn that assets in the ZVM Trust included ECL HK shares and Zorin has failed to show that the account that GANY has provided is deficient;

(v) the funds could not have come from ZVM Trust since there was no evidence that it ever held assets capable of generating payments of that magnitude;

(vi) that as at 22nd December 1998 the only assets of the ZVM Trust were shares in ECL HK;

(vii) that as at 22nd December 1998 the only assets of the ZVM Trust would not have amounted to anything substantial and that the ZVM Trust had ceased to have any significant assets or purpose;

(viii) there was no evidence that the directors of Gany other than Asif "rubber stamped" the appointment dated 22nd December 1998.

Findings of Law

(i) the burden of proof was on the claimant (Zorin) to establish that the assets held by Gany were held on the trusts of the ZVM Trust;

(ii) that in the circumstances of the case the appointment was a sham;

(iii) that the appointment was not void, alternatively, liable to be set aside, by reason of a misconception on the part of one or more directors of Gany as to the value of the assets of the ZVM Trust;

(iv) that the appointment was not void, alternatively, liable to be set aside, by reason of the failure of one or more directors of Gany to apply their minds properly to the appointment and merely "rubber stamping" the appointment;

(v) that there are no grounds for setting aside the appointment;

(vi) that Asif is not personally liable to account for assets received by him pursuant to the appointment;

(vii) that Zorin is liable to pay Gany's costs from 21st February 2013.

Appellant's Submissions

The Burden of Proof

[12] Learned Queen's Counsel, Mr. Richard Wilson's main complaint was in relation to the burden of proof. He said that, contrary to the judge's findings[3] the burden was on Gany to prove that assets held by it were not held on the ZVM Trust.

[13] He reminded the Court that the judge acknowledged the duty to keep proper accounts. The judge stated that "[a] trustee is obliged to keep accounts of what he holds as trustee…"[4] but then went on to state that "…his own property will not become property of the trust because he fails to keep records of what he owns personally. He holds on trust only what he has accepted as trustee." Mr. Wilson, QC said that if the latter proposition is intended to summarise the appellants' case, it is a mischaracterisation of it; they do not contend that assets belonging to Gany became trust assets as a result of its failure to keep full and accurate accounts. Such a proposition presupposes a clear answer to the initial question of which assets were and which were not held on trust from the outset. The point of the accounting process is to answer that very question. Zorin's position is that because a trustee is under a duty to keep clear and accurate records of the property it holds on trust, where it has not done so, the burden of showing that assets transferred to it during the currency of its trusteeship were held otherwise

[3] At paras. 64 and 65 of the judgment. The learned judge found that the burden was on the claimants to prove positively that assets vested in Gany were held as assets of the ZVM Trust rather than beneficially or as nominee for anyone.

[4] At para. 65.

than as trust assets falls upon the trustee, rather than the beneficiary. Mr. Wilson, QC said that this proposition is consistent with the English decision of **Re Curteis' Trusts**[5] in which it was held that where assets are transferred to the trustee of an existing settlement, those assets are presumed to be intended to be held as an addition to the settlement, rather than on resulting trust or beneficially by the trustee. Such a presumption is, of course, rebuttable on the basis of evidence.[6]

[14] Mr. Wilson, QC said that applying **Re Curteis**, it is to be presumed that any assets transferred by MAR to Gany or its predecessors during their respective trusteeships of the ZVM Trust were additions to the ZVM Trust unless it is proved otherwise. As Gany was the party seeking to prove that it held the assets otherwise than on the ZVM Trust, the burden of proof was on it. Queen's Counsel, Mr. Wilson, contended that if the position were otherwise than as contended for by Zorin, the outcome would be extraordinary. For example, a settlor might add assets to a trust simply by transferring them to the trustee with an oral direction to the trustee to hold them as an addition to the trust fund. If after the death of the settlor, the trustee denies that the assets were transferred to it on trust but were intended for it beneficially, a beneficiary has no means of proving positively that the assets were ever settled, particularly if the trustee has failed to keep proper trust accounts from the outset. By default, the trustee acquires beneficial ownership of valuable assets. For that to be the case would fatally undermine the trustee's fundamental duty to account. Yet the learned judge's findings give rise to precisely that result, argued Mr. Wilson, QC. The unfairness of imposing the

[5] (1872) LR 14 Eq 217.

[6] At this juncture it should be noted in fairness to the trial judge that the record does not reflect Re Curteis' Trusts being specifically referred to him or being cited, although there is in passing reference to its principles in submissions to him. On this appeal, however, it cited and specific and detailed written and oral submissions on its relevance and applicability were put before this Court by all counsel. That was both appropriate and proper in the circumstances and we therefore received those submissions.

burden of proving that assets belong to the trust is particularly acute in a case such as this in which Gany (and those associated with it) have sought to prevent Zorin from obtaining information concerning the trust and its assets. The learned judge's approach essentially rewards an obstructive trustee who in breach of its fiduciary duty withholds information from the beneficiaries.

[15] Therefore, Mr. Wilson, QC submitted that the learned judge erred in law by finding that the burden of proving that assets were held on the ZVM Trust fell on Zorin where those assets were transferred to the trustee of the ZVM Trust by or on behalf of the settlor. The flaw in the judge's approach to the burden of proof clearly led to him reaching incorrect conclusions as to the extent of the trust assets. He approached the question of what were (and what were not) trust assets from the perspective of requiring Zorin to prove that assets were held on the ZVM Trust, rather than requiring Gany to prove the contrary.[7]

[16] Mr. Wilson, QC reminded this Court that Gany has been obstructive and inconsistent when providing any information concerning assets of the ZVM Trust. Gany itself has not provided details of its assets but Asif admitted during trial that as at 1994, when MAR was still alive, Gany held the legal title in Cedilla Investments BVI, Schweizer Holdings SA and European Commodities Limited BVI ("ECL BVI"). Gany's evidence as to the beneficial ownership of assets held by it has also been sadly lacking; Gany has provided no meaningful evidence to show how assets transferred to it were intended to be held beneficially. Its main witness was Asif's brother, Khalidmohammed Aly Rangoonwala ("Khalid") whose affidavit evidence was shown to have been untrue, and who would not come to the BVI for cross-examination. In short, if (as Zorin contends) the burden was on Gany to prove that assets transferred to Gany by or on behalf of MAR were something

[7] At paras. 64 and 66.

other than trust assets, there was simply no evidence before the Court to enable that presumption to be rebutted. As a consequence, the learned judge's finding[8] should be set aside and the Court should hold that all assets vested by or on behalf of MAR in the trustee of the ZVM Trust during their trusteeship are assets of the ZVM Trust, for which Gany is accountable to the beneficiaries.

[17] Zorin also appealed against the findings of fact by the learned trial judge.

Findings of Fact

Fact 1 (findings of fact relating to the assets)

[18] Learned Queen's Counsel, Mr. Wilson, said that regardless of the burden of proof, the learned judge erred in finding that the funds paid to MAR's children following the meeting in December 1998 came from a source other than the ZVM Trust.

[19] Mr. Wilson, QC acknowledged that ordinarily the Court of Appeal will not interfere with a judge's findings of fact. However, that rule is not absolute, and in certain circumstances, a first instance judge's errors in making findings of fact can amount to errors of law susceptible to appeal. He argued that the present appeal is one such case. In **Sheikh Abdullah Ali Alhamrani v Sheikh Mohamed Ali Alhamrani et al**,[9] the Court of Appeal stated that:

> "A decision which was not properly open to the judge below on the evidence amounts to an error of law in respect of which an appeal court should intervene unless it can be shown that the judge's decision was plainly and unarguably right notwithstanding his misdirection of himself.[12] [*Dobie v Burns International Security Services (UK) Ltd [1985] 1 WLR 43, per Sir John Donaldson MR at 48H-49C*] Where the correctness of a finding of primary fact or inference is in issue the role of the appellate court is to determine whether the finding or inference is wrong, giving full weight to the

[8] At para. 69.

[9] BVIHCMAP2013/0005 (delivered 18th September 2013, unreported) at para. 70.

> advantages of the trial judge.[13] [*Datec Electronics Holdings Ltd and others v United Parcels Service Ltd [2007] 1 WLR 1325*]."

That statement of principle is consistent with the decision of the English House of Lords in **Edwards (Inspector of Taxes) v Bairstow and Another**,[10] in which it was held that where a finding of fact was one which could not properly be reached on the basis of the evidence it amounted to an error of law.

[20] Mr. Wilson, QC submitted that this is precisely the situation in this case. The learned judge found that the sums paid to MAR's children '…must have been funded using money accessible by Asif by some other route – either because it belonged to him or because he had the means to direct its payment.'[11] In making such a finding, the learned judge expressly and emphatically rejected the respondents' case that the funds came from another Rangoonwala family structure, the MA Foundation ("MAF"), and Asif's evidence upon which such contention was based. At paragraph 36 he further stated:

> "I do not accept Asif's account that the money used to pay the siblings came from a MAF account with JP Morgan. No bank holding trust money would accept someone as the personal representative of a deceased sole trustee and pay money out to them or to their order without having seen a notarised grant."

[21] Mr. Wilson, QC said that the judge having rejected the MA Foundation as the source of the funds, was left with only one rival contention, namely that the funds came from the ZVM Trust, as asserted by Zorin. Such a contention was supported by the evidence of the letter dated 2nd December 1998 and signed by all of the relevant parties, including Asif and Khalid. He therefore ought to have found as a fact that the ZVM Trust was the source of the funds and therefore that

[10] [1956] AC 14.
[11] At para. 36.

it had sufficient funds as at December 1998 at the very least to make those payments. Instead, he reached his own conclusion, not contended for by either party, and crucially not supported by any evidence. Whilst the learned judge rejected Asif's evidence that the funds came from the MA Foundation, he had no proper evidential basis for concluding that they came from Asif's own personal funds. Mr. Wilson, QC contended that the judge stated as an alternative that the funds may have come from a source in respect of which Asif 'had the means to direct…payment'[12] but in view of his finding[13] that 'Gany is or appears to be under the control of the second defendant [Asif]' the ZVM Trust was a fund over which Asif had the means to direct payment.

[22] Accordingly, Mr. Wilson, QC, argued that the learned judge ought to have found that as at 22nd December 1998, the ZVM Trust held assets amounting to at least US$8m.

Swiss Agency Agreement

[23] Next, Mr. Wilson, QC submitted that the learned judge also erred in finding[14] that the minutes of a board meeting of the directors of Gany in December 1994 which described Gany appointing VM Finance & Holding AG as the "Trust Manager" was in the context of a "Swiss Agency Agreement" and therefore could not be given "any weight". There was no evidence before the judge to justify a conclusion that there was a "Swiss Agency Agreement", merely minutes referring to the appointment of a "trust manager". Therefore, the learned judge failed to give the evidence its proper weight when considering whether there was property in the trust to be managed as at December 1994. If Zorin succeeds in relation to either

[12] At para. 36.
[13] At para. 2.
[14] At para. 25.

of the challenges set out above, the learned judge's findings[15] concerning the extent of the assets of the ZVM Trust should be set aside and Gany's account of the assets of the ZVM Trust should be amended to include the funds of at least US$8m as at 1st December 1998, the shares in Cedilla Investments SA, Schweizer Holdings SA and ECL BVI as at December 1994 and the shares in Trading House International as at 1997. In any event, Gany has not sworn that the assets of the ZVM Trust included the shares in ECL HK. As the learned judge has found[16] that the shareholding in ECL HK was an asset of the ZVM Trust in 1998, Zorin has proved that Gany's sworn accounts are deficient and Gany should be removed as trustee of the ZVM Trust.

[24] Zorin's other main challenges to the judgment are in relation to the validity of the appointment, the non-liability of Asif and the costs order.

The Validity of the 1998 Appointment

[25] Zorin also challenges the learned judge's finding that the 1998 appointment was valid. In making such a finding, the learned judge rejected a number of arguments made by Zorin, namely:

(i) that the 1998 appointment was a sham;[17]

[15] At paras. 64, 66, 69 and 73.
[16] At para. 69.
[17] At para. 72.

(ii) that the appointment was not void or liable to be set aside by reason of a misconception on the part of the directors of Gany as to the assets of the ZVM Trust;[18]

(iii) that the appointment was not void or liable to be set aside by reason of the failure of the directors of Gany to apply their minds to the 1998 appointment, merely 'rubber stamping' the proposal by Asif that the assets should be appointed to him.[19]

Mr. Wilson, QC submitted that the judge was wrong to do so for the reasons set out below.

The 1998 Appointment was a Sham

[26] The learned judge rejected the argument that the 1998 appointment was a sham, namely that it was a document not intended to have the legal effect that it purported to have. He stated:

> "… in my judgment the point falls on the facts. If it was a sham, it was among the world's most ineffective. So far from fishing the document out to wave at Zorin when she began to make difficulties, it slumbered forgotten until it was unearthed by Mr Salim in late 2012."[20]

Mr. Wilson, QC submitted that the very fact that the 1998 appointment was forgotten about by the main protagonists (including Asif) serves to demonstrate that it was a sham. Given the momentous nature of the 1998 appointment (i.e the winding-up of the ZVM Trust), if it had genuinely been believed to have had that effect, it seems inconceivable that it would have been "forgotten". In reality, the 1998 appointment was a document that was put in a drawer "for a rainy day"

[18] At paras. 73 and 74.
[19] At para. 76.
[20] At para. 72.

ready to be produced when it was required. It was produced when it was required: as an answer to Zorin's' pleaded case. Before that, Gany had sought to deter Zorin by resisting the disclosure of information. Mr. Wilson, QC argued that the learned judge erred by not finding that it was a sham.

Misconception

[27] Next, Mr. Wilson, QC said that accepting that the ZVM Trust had assets of significant or substantial value as at 22nd December 1998 (as Zorin contends it should be), the directors of Gany clearly acted under a fundamental misconception as to a highly relevant factor in the exercise of their discretion. The decision as to whether they should appoint out assets of trivial value is very different to that of whether assets worth at least US$357,819.24 should be appointed, and the 1998 appointment was flawed accordingly as per the principles established by the Supreme Court in **Pitt and another v Holt and another; Futter and another v Futter and others**.[21] He said the learned judge's finding that there was no misconception is based on his conclusion that there were no significant assets in the ZVM Trust. This finding is flawed since the ZVM Trust had significant assets.

Failure to Apply their Minds

[28] In the alternative, Mr. Wilson, QC posited that the evidence before the Court demonstrates clearly that when making the purported decision to approve the 1998 appointment, two directors, Mr. Muhammed Salim and Mrs. Banu Rangoonwala failed to apply their respective minds to the exercise of Gany's discretion, merely approving the documents put before them by Asif. Such

[21] [2013] UKSC 26.

conduct renders their purported decision void as held in **Turner and others v Turner and others**.[22] Whilst the learned judge rejected this submission[23] and stated that there was no basis on which he could find as a fact that this was what occurred, Mr. Wilson, QC submitted that, based on the evidence before him, the learned judge reached a conclusion that could not properly be reached. He ought to have found that no proper decision was made by them.

[29] Mr. Wilson, QC therefore submitted that the finding that the 1998 appointment was valid should be reversed on one or more of the grounds referred to above, and that the Court should substitute a finding that the 1998 appointment was void, alternatively that it is liable to be set aside.

Asif's Liability

[30] Mr. Wilson, QC said that the learned judge found[24] that Asif was not liable to account on the basis of knowing receipt for the assets received by him pursuant to the 1998 appointment. If the Court finds that the 1998 appointment was invalid, Gany committed a breach of trust. The learned judge rejected the argument that Asif would be liable for knowing receipt in such circumstances because no breach of duty had been committed by him. A breach of duty by the recipient (as opposed to the trustee) is unnecessary; only knowledge is required and therefore the learned judge's finding to the contrary is wrong in law.

[31] Consequently, if Zorin succeeds in the case in relation to the 1998 appointment, it should follow that Asif is liable to account for knowing receipt or in any event should be made to account for the assets.

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[22] [1984] Ch 100.
[23] At para. 76.
[24] At paras. 78-80 of the judgment.

Costs

[32] As regards costs, the judge ordered:

(i) that Zorin pay Gany's costs from 21st February 2013; and

(ii) that Zorin pay Asif's costs.

[33] Mr. Wilson, QC submitted that if Zorin is successful on appeal, Zorin will seek an order for costs, both in the appeal and in the court below. However, if they are unsuccessful, they appeal independently against the costs order made on 13th June 2014.

First Respondent's Submissions

[34] Learned Queens Counsel, Mr. Christopher Tidmarsh, submitted that the appeal should be dismissed. In short, the judge was correct. In order to succeed in their claim, the onus of proof lay on Zorin to establish both that (i) assets had been vested in Gany by MAR and (ii) those assets had been vested in Gany as trustee of the ZVM Trust. In any event, the learned judge did not decide the case on the basis of the onus of proof. The learned judge found that the business assets that Asif claimed were given to him by means of transfer to Gany (i.e. Cedilla Investments SA, Schweizer Holdings SA and ECL BVI ("the Companies") were held by Gany for MAR. He was entitled to reach that conclusion. It was also open to the judge to find (as he did) that the money used to pay MAR's children after the 1998 meeting was funded by Asif from MAR's business assets that Asif claimed had been transferred to him. The learned trial judge correctly rejected the claim that the 1998 appointment was void and should be set aside. Queen's Counsel, Mr. Tidmarsh, submitted further that there were and are no grounds to remove Gany.

[35] Mr. Tidmarsh, QC said that it is understandable that Gany was slow to render an account. The only asset which Gany said had been held on trust was ECL HK. That belief was found by the judge to be correct and so, other than the initial US$100.00, those shares were the only asset to be included in an account. Gany had initially believed that even ECL HK had not been held on the trusts of the ZVM Trust but documents were then found that demonstrated otherwise; those documents were found by Asif and disclosed by him when he found them. In those circumstances, the only assets for which Gany was liable to account (other than the initial US$100.00) were the shares in ECL HK (which had been distributed) and Gany admitted that its account should refer to such shares.

The Burden of Proof

[36] Mr. Tidmarsh, QC submitted that contrary to Zorin's submissions, the onus was on them to prove that assets transferred to Gany by MAR were held on the trusts of the ZVM Trust. He said that Zorin confuses an account (of the trust assets) and the prior question of identifying the assets subject to the trust. The point of the accounting process is not, as Zorin asserts, to identify which assets are trust assets. It is well established that before an account can be taken it is necessary to decide what the trust assets were so that the trustee will be liable to pay whatever is found due on the taking of the account. Queen's Counsel, Mr. Tidmarsh, referred to **Baboo Janokey Doss and another v Bindabun Doss and others**[25] for this proposition. The subsequent account determines the validity of what a trustee has done or omitted to do with trust assets. Mr. Tidmarsh, QC submitted the case of **Ultraframe (UK) Ltd v Fielding and others; Northstar Systems Ltd and another v Fielding and others**[26] in support. Accordingly, beneficiaries

[25] (1843) 3 Moo Ind App 175, 196-197 (PC).
[26] [2005] EWHC 1638 (Ch).

cannot claim that a trustee should account for all assets vested in the trustee by or on behalf of the settlor. It is necessary first to identify the trust assets. That is, to establish what was vested in the trustee as trust assets.

[37] Mr. Tidmarsh, QC posited that there is not, as Zorin asserts, a presumption that anything transferred gratuitously to the trustee is presumed to be trust assets unless the trustee proves otherwise. Rather, assets transferred gratuitously to a person are presumed to be held on resulting trust for the transferor unless the presumption is rebutted by evidence. Accordingly, it is wrong to assert, as Zorin does, that the burden was on Gany to prove that assets transferred to it by or on behalf of MAR were something other than trust assets and that in the absence of any such evidence the assets are presumed to be vested in Gany on the trusts of the ZVM Trust. On the contrary, in the absence of evidence, assets transferred to Gany would be held on resulting trust for MAR's estate. Mr. Tidmarsh, QC argued that in order for Zorin to succeed in asserting that assets were trust assets, they had to prove that MAR intended the relevant assets to be subject to the trusts of the ZVM Trust. Insofar as Gany claimed that assets were held by it beneficially, it had to prove that MAR intended that result. In the absence of any such proof, the relevant assets are held on resulting trust for MAR.

[38] Mr. Tidmarsh, QC submitted that the case on which Zorin relies, **Re Curteis**, has nothing to do with the position. It did not decide as Zorin asserts that assets transferred to a trustee are presumed to be held as an addition to the settlement. In **Re Curteis**, assets had been transferred by a testator to four individuals who were trustees of a settlement ("the Settlement") that the testator had established. The transfer took place without any communication with the four individuals. It was held first[27] that because the testator did not inform the individuals about the

[27] At p. 220.

transfer it must be presumed that he intended them to take the assets as trustees (i.e. not as a gift to the individuals personally). There were then two possibilities: a presumed resulting trust or an intention that the assets should be held on the trusts of the Settlement. It was then held[28] that if the testator had intended that the trustees were to hold the assets for him he would have told them and as he did not do so, it followed that he must have intended that the money be held on the trusts of the Settlement. The court said 'it must be presumed' that he intended that result but the court was not suggesting that this was a presumption of law. The conclusion arose from the facts and was simply another way of saying that the court was inferring what he must have intended.

[39] In any event, submitted Mr. Tidmarsh, QC, insofar as it is relevant, contrary to Zorin's submissions, in the taking of an account, the onus is on those seeking to surcharge an account (i.e. to say that something has been omitted from it) to prove that the item should be included. This is sufficient to dispose of any claim that is being made that the Court should hold that all assets vested in the trustees of the ZVM Trust (whilst they were trustees) by MAR are assets for which Gany is accountable.

[40] Mr. Tidmarsh, QC was adamant that the learned judge did not decide the case on the onus of proof. He rejected the proposition that if a trustee does not keep clear records of what property is trust property and what property is his own property, then what is his own property will be treated as trust property.[29]

[41] The learned judge then decided the issues on the evidence and not on the onus of proof. He first found as a fact that the money paid to Zorin and her siblings came

[28] At p. 221.
[29] At para. 65 of the judgment.

from MAR's former business assets which Asif claimed had been transferred to him. He accordingly rejected both the contention that the money came from the ZVM Trust and Asif's evidence. That finding was open to him. For present purposes, the relevance is that the finding was not made on the basis of the onus of proof.

[42] Accordingly, Zorin's complaint that the learned judge approached the question of what were and what were not trust assets from the perspective of requiring Zorin to prove that assets were trust assets is not well founded and the ground of appeal based on the onus of proof must fail.

Findings of Fact

Funds – $8M

[43] Mr. Tidmarsh, QC said that Zorin initially based their claim regarding this sum on the letter dated 2nd December 1998 which mentioned no amounts at all. The only other relevant evidence was Asif's evidence that he suggested a payment of $2m to each of the siblings; his plan was to make that payment from the assets of the MA Foundation, the plan being to pay half to charity and $2m each to Tariq, Khalid and Zorin ($1m was in fact paid to Salim) and the balance to Asif; the letter was signed and the money paid. Zorin asserted that the funds came from the ZVM Trust but Zorin's primary case was that the money paid to the siblings came from the MA Foundation and submitted that it was very difficult to identify in the ZVM Trust a source of funds to make the promised payments.[30] Having adopted that stance, Zorin cannot now contend that the money came from the ZVM Trust. In any event, the learned judge was well entitled to make the finding of fact that he did.

[30] At para. 40 of Zorin's skeleton arguments.

[44] Mr. Tidmarsh, QC argued that contrary to Zorin's submissions,[31] the learned judge found that Asif had paid Tariq, Khalid, Zorin and Salim from MAR's former business assets.[32] That was a finding that was open to him and which he was entitled to reach on the evidence for the following reasons:

(a) It is well established that a judge is not bound to adopt one or the other of the contentions of the parties but may reach a finding for which neither side contends. Counsel submits the case of **Woodhouse School v Webster**[33] in support.

(b) At the end of the trial, the contest was not, as Zorin asserts, between a contention by Zorin that the sums came from the ZVM Trust on the one hand and Asif's account on the other. Rather, Zorin's primary submission was that Asif's account was correct.

(c) The learned judge had heard Asif's account and thought it unlikely that the money had come from the MA Foundation (a fact that he raised with counsel). He was entitled on the evidence to find that payment did not come from the ZVM Trust and, having found that various of MAR's business assets were vested in Asif, he was entitled on the evidence to find that the payment came from those assets.

Swiss Agency Agreement

[45] Mr. Tidmarsh, QC said that the point about VM Finance goes nowhere. The learned judge was correct to place no weight on a document that was not in evidence. The appointment of a "trust manager" did not assist in identifying assets

[31] At paras. 39 and 40 of their skeleton arguments.
[32] At para. 66.
[33] [2009] EWCA Civ 91 at paras. 35 and 36.

subject to the ZVM Trust (and, even if used in the common law sense) the term is consistent with what Asif was saying and what the judge accepted – namely that the shares of ECL HK were in the ZVM Trust and that ECL HK held Valson on trust for Asif.

The Validity of the 1998 Appointment

[46] Learned Queen's Counsel, Mr. Tidmarsh, said that this aspect of the appeal is also hopeless and that the learned judge was correct in holding that there was no basis upon which to set aside the appointment.

Sham

[47] Firstly, Mr. Tidmarsh, QC argued that the learned judge was entitled to find that the appointment was not intended as a sham. Learned Queen's Counsel, Mr. Tidmarsh, contended that there is simply no ground to disturb that finding on appeal. It was not suggested that the finding was inconsistent with incontrovertible facts or anything else. Secondly, the judge could not find that the appointment was a sham as that was not suggested to Asif or indeed argued at trial. Contrary to Zorin's assertion, the learned judge did not reject such a submission. He simply said, at paragraph 72 of the judgment, that: 'Complaint is made that this was not put to Asif, but in my judgment the point falls on the facts.' Zorin cannot now ask this Court to find a fact when the case was not put to any of the witnesses. It is a rule that one must put one's case to a witness if one is asking the Court to disbelieve his evidence and also any part of one's case that is relevant. This principle can be seen in the case of **Brudenell-Bruce v Moore and others**.[34] Asif gave evidence about the 1998 appointment, the tenor of which was that he plainly did not regard the 1998 appointment as a sham. That evidence was not

[34] [2014] EWHC 3679 (Ch), at para. 208.

challenged in cross-examination nor was the point put to any other of the witnesses and so cannot now be pursued.

Misconception

[48] Mr. Tidmarsh, QC submitted that in order to set aside a decision on this basis, the Court must be satisfied that the directors of Gany failed to take into account relevant factors and the Court must also take into account what the directors would or might have done had they taken into account the relevant factors.

[49] Although it was pleaded that the 1998 appointment should be set aside because of misconception, the judge addressed that issue briefly in stating that Asif said in his witness statement that ECL HK did not hold any significant assets. It was not suggested to Asif in cross examination that he was wrong about that; and the court was not referred to the ECL HK accounts in order to assert that ECL HK had significant value. The question of what the directors would or might have done was not explored in evidence. Moreover, a claim that the 1998 appointment could be set aside for misconception was not pursued in closing submissions. Zorin's closing submissions were that the 1998 appointment was bad because two of the three directors of Gany who took the decision acted as ciphers.

[50] Mr. Tidmarsh, QC asserted that a point not taken at trial may not be taken on appeal unless no evidence that might affect the point could have been adduced. Queen's Counsel, Mr. Tidmarsh, relied on **Pittalis and another v Grant and another**[35] for this submission. He asserted further that a party must have put his case to a witness if he is asking the court to disbelieve the witness's evidence and also put to the witness any part of one's case that is relevant as was held in

[35] [1989] Q.B. 605.

Brudenell-Bruce v Moore. Zorin's reliance on the accounts of ECL HK to say that it was a substantial asset when the 1998 appointment was made can then only be made if Asif was wrong when he said that ECL HK did not hold any significant assets. This ground of appeal cannot therefore now be raised. In any event, the directors were not under a misconception as the value of the ECL HK shares was not significant in terms of MAR's overall wealth.

Failure to Apply Minds

[51] Learned Queen's Counsel, Mr. Tidmarsh, submitted that the learned judge rightly rejected the claim that the trustee failed to apply its mind in making the appointment since it was not pleaded; in any event, there was no evidential basis upon which the judge could have arrived at that conclusion.

Costs

[52] Mr. Tidmarsh, QC urged this Court not to disturb the costs order that was made by the learned judge. He argued that the order was within the range of discretion that the learned judge could have properly made.

Submissions on behalf of Asif

[53] Learned Queen's Counsel, Ms. Prevezner essentially repeated and adopted Mr. Tidmarsh, QC's submissions and arguments in relation to the grounds of appeal concerning: findings of fact relating to the assets; Swiss Agency Agreement; the validity of the 1998 deed of appointment; that the deed of appointment was a sham; material misconception; and failure to apply their minds. Ms. Prevezner, QC's submissions in relation to the grounds of appeal on the burden of proof and knowing receipt are set out below.

The Burden of Proof

[54] Learned Queen's Counsel, Ms. Prevezner, said that Zorin's contention that the learned judge held that the burden was on Zorin to prove positively that assets vested in the Gany were held as assets of the Trust is correct. It is trite law that Gany, as trustee, is under a duty to account. Moreover, it is not disputed that a trustee is under a duty to keep clear and accurate records of the assets held on trust. In the present instance, Gany did account for the assets in the Trust. It accounted for all assets other than the ECL HK shares on affidavit. In relation to the ECL HK shares, it accounted for them in correspondence on 6th March 2014, and thereafter made its position clear before the court. Once it had done so, then the burden of proof lay on Zorin to show that the account was incorrect – that assets not shown in the account by Gany were received by it. This is the position in **GHLM Trading Limited v Anil Kumar Maroo and others**.[36] Ms. Prevezner, QC argued that this was so accords with common sense. A trustee cannot be under a duty to prove a negative, that is, that it did not receive assets other than those in the account. However, if a potential beneficiary can show, by evidence, that other assets were in the trust, then the evidential burden may shift to the trustee to show otherwise.

[55] Ms. Prevezner, QC submitted that, as the learned judge correctly stated, once Gany had accounted for the assets in the Trust, the onus was on Zorin to show that assets in addition to the ECL HK shares and the US$100.00 (referred to in the account) had been transferred into the Trust. She further submitted that the decision in **Re Curteis** does not assist Zorin. In that case, the court was being asked to determine what had been the intention of the testator when he directed

[36] [2012] EWHC 61 (Ch) at paras. 147 and 149.

the sum of £2,000.00 to be invested in the names of the four trustees, in the absence of any express communication with the trustees as to what he intended and just as the learned judge did in the present instance, the court in **Re Curteis** determined the issue on the facts. The presumption in that case, that the testator intended the trustees to receive the monies in the character as trustees only, was one arising from the facts; it was not one of law.

[56] As the learned judge concluded, Zorin failed to show that trust assets (which Gany had not accounted for, on the basis that they were not trust assets) were actually transferred to Gany. Zorin did not identify the companies which they alleged were transferred; they simply asserted, without more, that all the assets held by or that had passed through Gany's hands since 1993 were trust assets. This was misconceived. The court had to decide whether Gany's account contained omissions, and it had to do so on the evidence in front of it. It then rejected Zorin's' submissions on the evidence.

[57] The learned judge, having set out the evidence in some detail[37] correctly answered[38] the question as to what assets were in the Trust at the date of the deed of appointment, and rightly concluded[39] that the only assets of the Trust at that date were the ECL HK shares. The suggestion that the learned judge came to the wrong conclusion as to what assets were or were not in the Trust because he allegedly placed the burden of proof on Zorin rather than Gany is unfounded and wrong. It is clear from the learned judge's analysis of all the evidence, which he heard over three days and which was, in part, tested in cross-examination, that he considered, with equanimity, all of the evidence before the court as to what

[37] At paras. 11 – 63 of the judgment.
[38] At paras. 64 – 68.
[39] At para. 69.

assets were or were not in the Trust. Zorin pleaded their case with regard to the account, and the court's task was to decide whether Gany's account of the Trust contained omissions. It had to do so, and did so, on the evidence before it.

[58] Finally, there has been no "rewarding" of Gany, nor has it acted at any time in breach of its fiduciary duties. The suggestion that Gany hid information is unjustified in circumstances where there was no complaint made about Gany's disclosure and Zorin rejected Asif's offer to replace Gany with an independent trustee and to fund an inquiry by the latter. There was no finding by the learned judge of any dishonesty on the part of either Gany or Asif, and rightly so. In the premises, this Court is not in a position to conclude otherwise.

Asif's Liability

[59] Ms. Prevezner, QC submitted that the learned judge correctly dismissed all claims against Asif. Moreover, his rejection of the knowing receipt claim, wrongly criticised by Zorin, was addressing the pleaded claim against Asif. In order to succeed against Asif, Zorin needed to establish that at the date of the deed of appointment in 1998, Asif knew not only that there were assets in the Trust over and above the ECL HK shares, but also that the deed of appointment was a breach of trust by Gany, or should have reasonably appreciated that fact. Learned Queen's Counsel, Ms. Pervezer, relied on **Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership) and others**[40] for this point.

[60] Critically, Asif was not cross-examined on his knowledge at the date of the deed of appointment of either (i) what assets were in the Trust or (ii) the alleged breach by Gany of the Trust. As a result, Zorin failed to establish Asif's knowledge in respect

[40] [2012] Ch 453.

of the constituent elements of the claim of knowing receipt, and the claim of breach of trust against Asif failed.

[61] The breach of trust referred to in the judgment[41] is clearly a breach of trust by Gany, which had to be known to Asif.[42] The learned judge concluded that there was no such breach of trust by Gany. The learned judge did not conclude that a breach of trust by the recipient was necessary for a knowing receipt claim to succeed and his judgment cannot be read in this way.

Costs

[62] Ms. Prevezner, QC submitted that the present appeal should be dismissed with costs. Further, there is no warrant for this Court to amend the costs orders made by the learned judge below as Zorin does not seek to challenge the order made by the learned judge that they pay Asif's costs.

Analysis and Conclusion

[63] I propose to first examine the complaints that are made by Zorin in relation to the findings of fact that were made by the learned judge with a view to ascertaining whether there is any merit in Zorin's dissatisfaction with those findings. In addition, in the notice of appeal Zorin sought to have this Court set aside the judgment below and make specific orders in their favour. This too will be dealt with upon the determination of the specific matters that have been raised.

The Findings of Fact Appealed

[41] At para. 79.
[42] This is clear from the first sentence at para. 78.

[64] Zorin has appealed against the following findings of fact including that:

(i) the audited financial statements of ECL HK for the period 1988 – 2002 show no shares in Valson or any other companies as investments of ECL HK;

(ii) the appointment of VM Finance as Trust Manager was pursuant to a "Swiss Agency Agreement" and should not be given any weight;

(iii) the funds used to pay Zorin and Asif's siblings must have been funded with money accessible by Asif from some other source (insofar as the source of such money was found to be other than funds belonging to the ZVM Trust);

(iv) the funds cannot have come from the ZVM Trust because there was no evidence that it ever held assets capable of generating payments of the magnitude of the payments in question and that the source of the payments was business assets belonging to MAR;

(v) as at 22nd December 1998, the only assets of the ZVM trust were shares in ECL HK;

(vi) as at 22nd December 1998, the assets held on the trusts of the ZVM Trust would not have amounted to anything substantial and that the ZVM Trust had ceased to have any significant assets or purpose;

(vii) there was no evidence that the directors of Gany rubber stamped an appointment dated 22nd December 1998.

The Approach of Appellate Court to Findings of Fact

[65] The law is well settled in relation to the approach an appellate court will take on an appeal against a trial judge's findings of fact.[43] In **Central Bank of Ecuador and others v Conticorp SA and others**,[44] Lord Mance stated:

> "…any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ: see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2003] 1 WLR 577, paras 15-17, per Clarke LJ, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325, para 46."

[66] In **McGraddie v McGraddie and another**,[45] Lord Reed cited the well-known passage in the speech of Lord Thankerton in **Thomas v Thomas**:[46]

> "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

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[43] See Landar and the Big Bus Company Limited and another [2014] EWCA Civ 1102; Assicurazoni General Spa v Arab Insurance Group (BSC) [2002] EWCA Civ 1642; Fage UL Ltd v Chobani UK Limited [2014] EWCA Civ 5; Central Bank of Ecuador and others v Conti Comp SA and others [2015] UKPC; Alhamrani v Alhamrami.
[44] [2015] UKPC 11 at para. 5.
[45] [2013] UKSC 58 at para. 1.
[46] [1947] AC484 at pp. 54 and 487-488.

(3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[67] Lord Hodge in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**[47] cited this passage with approval. In **re B (A Child) (Care Proceedings: Threshold Criteria**),[48] Lord Neuberger stated:

"Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there is no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on facts can be expensive), delay (appeals on facts can often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different opinion is no more likely to be right than the first).

Lord Kerr at paragraph 108 stated:

"A conclusion by a judge at first instance on which facts have been proved, and which have not been, involves the judge sifting the evidence that has been led, assessing it and then deciding whether it has brought him or her to the necessary point of conviction of its truth and accuracy. Although an appellate court is competent to hear appeals against the findings of fact that the judge has made, of necessity, its review of those findings is constrained by the circumstance that, usually, the initial fact-finder will have been exposed to a wider range of impressions that influence a decision on factual matters than will be available to a court of appeal. This is not simply a question of assessing the demeanour of the witnesses who gave evidence on factual matters, although that can be important. It also involves considering the initial impact of the testimony as it unfolds – did it appear frank, candid, spontaneous and persuasive or did it seem to be contrived, lacking in conviction or implausible. These reactions and experiences cannot be confidently replicated by an analysis of a transcript of the evidence. For this reason a measure of deference to

[47] [2014] UKPC 21.
[48] [2013] 1 WLR 1911 at para 53.

the conclusions reached by the initial fact finder is appropriate. **Unless the finding is insupportable on any objective analysis it will be immune from review**." (My emphasis).

Findings of Fact

[68] Zorin having appealed against the above findings of fact made by the learned judge, it becomes necessary to determine whether or not the judge clearly went wrong, applying the principles that have been enunciated above.

[69] I propose to address each finding of fact in turn.

Swiss Agency Agreement

[70] I agree with Mr. Wilson, QC that there was no evidential basis upon which the learned trial judge could have come to the conclusion that the appointment of VM Finance as trust manager that was referred to in a board minute dated 29th December 1994 was pursuant to a Swiss Agency Agreement. The evidence that was adduced was inconclusive as to what it referred and the learned judge was therefore not in any position to make the factual finding that he did. He clearly erred in holding that it referred to a Swiss Agency Agreement. It was not open to the judge to conclude that the evidence adduced was sufficient to draw the inference he drew.[49] However, the judge was correct in his determination that no weight should have been given to that bit of evidence even though he came to an incorrect finding of fact, namely, that there was a Swiss Agency Agreement in existence. Equally, I am not of the view that the mere reference to VM Finance as trust manager (allegedly pursuant to an agreement that was not put in evidence) was sufficient to establish that Gany was managing a trust asset. In this regard, I accept the submission of Mr. Tidmarsh, QC.

[49] See Alhamrani v Alhamrani.

[71] I am not persuaded that the resolution which said that Gany would appoint VM Finance as trust manager, without more, indicated that this was in relation to the management of the trust assets. In fact, there was a marked absence of underlying evidence to support this finding. Accordingly, this finding of fact is properly assailed.

The funds used to pay the siblings must have come from some other source - The funds could not have come from ZVM Trust because there was no evidence that it ever held funds of that magnitude

[72] In so far as the learned judge held that the funds used to pay MAR's children on or after 1998 must have been funded with money accessible by Asif from other sources other than the ZVM Trust, it is clear to me that this was open to the judge to so conclude. It is noteworthy that the learned trial judge did not come to this conclusion of his own volition. To the contrary, learned Queen's Counsel, Mr. Cooper, who had appeared in the court of first instance on behalf of Zorin, had conceded this point. Queen's Counsel, Mr. Cooper, had agreed and accepted that based upon the evidence that was adduced by Zorin that indeed it was unlikely that Gany ever had funds of the magnitude that was used to pay the siblings the $8M. The learned trial judge was of this view and agreed with Mr. Cooper. It seems to me that Zorin cannot be allowed to reprobate and approbate in relation to this point.

[73] In any event, it was open to the trial judge to draw that inference based on the relevant finding of facts that he made and his decision cannot properly be impugned on that ground.[50] Based on the quality of the evidence, it was possible for the judge to conclude that the monies that were paid to Zorin and her siblings

[50] See Beacon Insurance Company Limited v Maharaj Bookstore Limited; Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2002] EWCA Civ 1642.

did not come from Gany. I am of the view that this Court should be slow to interfere with this particular finding of fact since it was open to the trial judge to so conclude. The **Alhamrani v Alhamrani** decision is clearly distinguishable from this appeal, so too is **Edwards v Bairstow**.[51]

$8 Million

[74] In relation to the $8M that was paid to Zorin and her siblings, I completely accept Mr. Tidmarsh, QC's submissions that the learned trial judge did not err in concluding that the $8m that was paid out to the siblings did not belong to the Trust. It is clear to me that this particular sum of money cannot be treated the same as the other assets that were held by Gany. Even though the entire $8M was distributed to the siblings, there was no credible evidence that the money came from Gany. In the circumstances of this case, there is no evidence that Gany (as trustee) had in its possession $8M which it caused to be paid to the beneficiaries; it cannot be presumed that it held it as part of the ZVM Trust. The trial judge clearly found this as a fact and it was open to him to so find based on the evidence that was adduced. Accordingly, this finding of fact cannot be impugned. It is trite law that a trier of facts who has heard the evidence and seen the witnesses and also has reviewed the independent documentation is not obliged to accept any of the positions advocated by either party.

That as at 22nd December 1998, the only assets of the ZVM trust were shares in ECL HK - That as at 22nd December 1998, the assets held on the trusts of the ZVM Trust would not have amounted to anything substantial.

[75] These two issues will be addressed together.

[51] See also Armagas Ltd v Mundogas SA; The Ocean Frost [1986] 2 ALL ER 385.

[76] The learned trial judge erred in his finding of fact on this matter. He was of the erroneous view that at the date of the appointment, the ZVM Trust was a shell and contained no assets apart from $100. This is not borne out by the evidence that was provided in the audited financial statements of ECL HK. In fairness to the judge, this was not specifically drawn to his attention even though the audited financial statements were before the judge and attached to Khalid's affidavit. What is uncontroversial is that Zorin, from the commencement of her claim, was complaining that the ZVM Trust contained significant assets. It was not necessary for her to state the exact figure in order to be able to succeed in her claim particularly since they were misleading her about the trust assets.

1998 Appointment – Rubber Stamping

[77] I have no doubt that there was no evidence that the directors other than Asif rubber stamped the 1998 appointment. In fact, there is not a scintilla of evidence on which this complaint could have been made good before the learned trial judge since Zorin failed to lead any evidence upon which it could have been properly concluded that the other directors merely rubber stamped the decision. I have no doubt that the learned trial judge quite properly rejected this contention and cannot be faulted for so doing. I accept learned Queen's Counsel, Mr. Tidmarsh's submission on this point in its entirety. The judge specifically dealt with this issue and rejected it on the ground of the lack of evidential basis.[52] He was correct to do so. There was no basis upon which the judge could have found as a fact that the directors failed to apply their minds and merely rubber stamped the decision to the question of the exercise of the fiduciary power; accordingly, his finding of fact cannot properly be impugned on this basis.[53]

[52] At para. 72 of the judgment.
[53] Turner v Turner distinguished.

[78] I now propose to address Zorin's appeal against the findings of law.

Burden of Proof

[79] 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.[54] In **O'Rourke v Darbishire and others**,[55] Lord Wrenbury enunciated that, "[a beneficiary] has a right to access the documents which he desires to inspect upon what has been [is] called…a proprietary right. The beneficiary is entitled to see all trust documents because…they are in this sense, his own".

[80] Further, the principles of the decision in **Re Curteis' Trusts** are clear: 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, '[i]f 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.'[56]

[81] The ZVM Trust was established by MAR on 24th September 1982 and US$100.00 vested in the trustee (at that time, Schweizerish Finance Limited). Gany was appointed trustee on 15th November 1993 and the shares in ECL HK were transferred to Gany on 16th March 1994. Asif eventually conceded that they were held by Gany as trustee of the ZVM Trust.[57] The trial judge at paragraph 13 of his judgment accepted Asif's evidence that ECL HK held the Valson shares initially as nominee for MAR and they were never part of ECL HK's property. In these circumstances, the principles of **Re Curteis' Trusts** are clearly applicable in the

[54] See Davis v Administrator-General (1969) 14 WIR 111.
[55] [1920] AC 581 at p. 626.
[56] Lewin on Trusts (19th edn., Sweet & Maxwell 2015) at para, 9-034.
[57] At para 22 of the judgment.

present case. The ECL HK shares, whatever their value, are presumed to be held by Gany as trustee on the same terms as the original trust. Indeed, and if there were any doubt as to this, Asif eventually came to concede that this was so.

[82] On 18th March 1994, two days after the ECL HK shares were transferred to Gany, one share in ECL BVI was allotted to Gany. This share was subsequently transferred to Maly Investments SA ("MISA") on 30th September 2010. MISA had been incorporated on 7th February 1980 and had been trustee of the ZVM Trust from 19th March 1983 until the appointment of Gany on 15th November 1993. Khalid's evidence was that although MISA held investments on behalf of MAR, it had never declared itself as trustee,[58] but he was never cross-examined and on the evidence there must be a presumption that the share in ECL BVI was held as an asset of the trust and that presumption has not been rebutted.

[83] Cedilla Investments BVI according to Asif, was beneficially owned by Gany. Again on Asif's evidence, if none other, this was an asset held by Gany on the trust and there is no or no sufficient evidence to rebut the presumption.[59] It is therefore clear that there were assets vested in Gany which it held as trustee of the ZVM Trust. There then arises the issue of whether Gany's appointment to Asif on 22nd December 1998 was valid and effective.

[84] Accordingly, I do not accept the position adumbrated by the learned judge,[60] namely, that if Zorin wished to challenge the contention that the only assets in the ZVM Trust leaving aside the immaterial US$100.00, the onus must be on them to show that the account is deficient. As indicated earlier, this position runs contrary

[58] At para 14 of the judgment.
[59] There were other assets that Gany held, namely, shares in Schweizer Holdings and Cedilla Investments BVI
[60] At para. 64 of the judgment.

to the principle that was established in **Re Courteis** which is applicable to the appeal. In fairness to the judge, even though the principle to be extrapolated from **Re Courteis** was brought to the judge's attention, much emphasis was not placed on it; neither was the authority for the proposition cited to the judge. The case at bar is a very strong case in which the Trustee was clearly refusing to disclose the assets of the trust to the beneficiary; it would have been impossible for the beneficiary to get it to account in the absence of this knowledge. I accept learned Queen's Counsel, Mr. Tidmarsh's proposition that there is no principle in law that if a trustee fails to keep clear records, his property will be treated as trust property. In any event, this position was not contended for by Mr. Wilson, QC in the appeal at bar. The court is required to determine whether the accounts provided by Gany were correct. I agree with Mr. Wilson, QC that the process involves an enquiry into the nature of the assets that Gany received from the settlor with a view to determining firstly whether they are trust assets and if so the dealings with the assets that are held on trust can be scrutinised.

[85] In the appeal at bar, there is no doubt in my mind that the learned trial judge asked himself the wrong question and held that the beneficiaries had the burden of proving that the asset vested in the trustee of the ZVM Trust was not only the ECL HK shares. That was an error on an issue of law. Instead of placing the burden on Gany to rebut the presumption that the assets form part of the ZVM Trust, he incorrectly placed the burden of proof on Zorin. In applying the principle enunciated in **Re Curteis**, which reflects the applicable law, it is clear that Gany ought to be held liable to account to Zorin for all the assets that have been held or held by it as trustee of the ZVM Trust, together with all assets which they came into possession of, either from MAR or from anyone on his behalf, since they have failed to lead any evidence to rebut the presumption.

[86] The overwhelming evidence that was before the judge indicated that in addition to the ECL HK shares, Gany also held shares in ECL BVI, Cedilla Investments SA and Schweizer Holdings. Accordingly, the judge made an incorrect finding of fact when he stated that there was no evidence that any property other than the ECL HK shares was the subject of a gratuitous transfer. There was evidence that Gany held the shares in these companies and in so far as Gany has led no evidence to rebut the presumption, it must be regarded as holding the shares on trust from the ZVM Trust.

[87] Bearing in mind that Gany was appointed trustee of the ZVM Trust in 1993, it is the law that the trustee, as legal owner of property for the benefit of the beneficiaries, has control over trust assets. The trustee has a fiduciary duty to the beneficiaries in respect of the trust property. The trustee usually has all management and ownership functions in respect of the trust property. The beneficiary's only remedy is to ensure that the trust is properly administered in accordance with its terms and the trustee's fiduciary duties. It is for this reason that the trustee's duty to account has been held by the English Court of Appeal, to be the 'irreducible core minimum' of trusteeship.[61]

[88] While it is true that Gany has not provided details of its assets, there is no doubt that at the trial Asif admitted that as at 1994, Gany held the legal title in Cedilla Investments SA, Schweizer Holdings SA and a third company ECL BVI. In fact the assets in the ECL BVI company were placed in that company within a mere few days after ECL HK was placed in the ZVM Trust.

[89] In so far as there was evidence provided by Asif that Gany held the legal title in Cedilla Investments SA, Schweizer Holdings SA, and ECL BVI and in the absence

[61] See Armitage v Nurse and others [1998] Ch 241 at p. 253.

of any evidence to rebut the presumptions that these assets formed part of ZVM Trust, the learned judge ought properly to have concluded that they formed part of the assets for which Gany ought to account. This Court therefore has no hesitation in concluding that Gany held the shares in ECL BVI, Cedilla Investment SA, and Schweizer Holdings SA upon trust for the ZVM Trust since they have failed to provide any evidence to rebut the presumption and must therefore provide accounts to the beneficiaries. It is clear that the ZVM Trust contained assets that were significantly more than US$100.00.

[90] By asking the wrong question and incorrectly placing the burden of proof on Zorin, the learned trial judge fell into error in concluding that the ZVM Trust only contained assets in the form of the ECL HK shares.

[91] I propose now to deal with the complaints in relation to the 1998 appointment.

Misconception

[92] I propose now to address the issue of whether or not the judge erred by refusing to hold that the trustee acted based on the misconception in appointing out the assets to Asif.

[93] It is the law that the failure of trustees to consider a relevant consideration or factor can give rise to a breach of trust. The learned authors of **Lewin on Trusts** in their treatise have stated that:

> "The duty to take relevant factors into consideration is in our view best regarded as an element of the duty to act responsibly, so that trustees must have a rational basis for a decision but will be in breach of duty only if a given matter is so significant that a failure to take it into account would be irrational."[62]

[62] Lewin on Trusts (19th edn., Sweet & Maxwell 2015) at para, 29-159.

[94] Trustees are to take the interests of the beneficiaries into account during the administration of the trust. **Re Hastings Bass (deceased); Hastings and others v Inland Revenue Commissioners**[63] is authority for the proposition that the court will invalidate the exercise of discretion by trustees where it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account.

[95] The uncontroverted evidence was that the directors of Gany in making the decision to appoint the assets of the ZVM Trust to Asif, did so on the false or mistaken belief that the assets that formed the ZVM Trust was US$100.00. The ECL HK shares had significant value unlike the view that the learned trial judge had. In fact it was felt that they were merely bringing to a closure a trust which contained no assets. Muhammed Salim stated in his witness statement that at the meeting that was held to discuss the appointment of any assets in the ZVM Trust, there were no assets of any significance in the Trust as all businesses were already transferred to Asif in MAR's lifetime. I accept Mr. Wilson, QC's argument that this belief was wrong since the ZVM Trust still contained the ECL HK shares which were of significant value. The balance sheet for year ending March 1999 reflected that the assets of the ECL HK were HK$2.7 million or about US$357,819.24. Accordingly, when the trustee executed the appointment of 1998 they clearly acted upon the basis of a misconception of the assets that formed the assets of the ZVM Trust.

[96] Leaving aside the other significant companies which are presumed by law to form assets within the ZVM Trust, the judge felt that there was no evidence of any significant assets; this was the basis upon which he felt that there was no

[63] [1974] 2 All ER 93.

misconception. The evidence points to the fact that the trustee was presented with information which indicated that it was winding up the Trust and giving the very negligible asset to Asif.

[97] There was simply no evidence to indicate that the trustee acquainted itself with the relevant matters, chief of which was the nature of the assets that formed part of the ZVM Trust. I therefore accept Mr. Wilson, QC's submission that it did not take into account the interests of the beneficiaries when it exercised its discretion to appoint the assets of the ZVM Trust to Asif. It is therefore axiomatic that Gany's decision is vitiated due to this failure to exercise its discretion properly.[64]

[98] For the sake of completeness, it is clear to me that Zorin pursued the "misconception" argument during the hearing of the case at first instance. I am not of the opinion that it was fatal that Queen's Counsel, Mr. Cooper, who appeared on behalf of Zorin, did not put to Asif that the directors were under a misconception as to the extent of the ZVM Trust since there was no suggestion that he was under a misconception. Based on the evidence that was provided by Banu Rangoonwala and Muhammad Salim, it is incontrovertible that at the date of the appointment they thought that the assets which were contained in the ZVM Trust were negligible. However, it is apparent that this was not so, in fact, the ECL HK shares were valued at US$357,819.24.

[99] There is no evidence of Gany's thought processes at the meeting; however, the likelihood is that it was of the same view as Muhammed. Salim. The learned trial judge opined that there was nothing in the Trust apart from the ECL HK shares and indirectly, whatever assets ECL HK may have held beneficially. No evidence was adduced to show that that would have amounted to anything substantial.

[64] See Pitt and another v Holt and another; Futter and another v Futter and others [2013] UKSC 26.

Muhammed Salim said that he knew that there were no significant assets in the Trust because MAR had transferred his business to Asif. It seems to me that the factual matrix against which this decision was taken was that the Trust had ceased to have any significant assets or any significant purpose. The learned judge determined that the appointment cannot be impugned on the basis that the directors of Gany were labouring under misconception.[65]

[100] Therefore, in so far as the learned trial judge made the finding of fact that the ZVM Trust did not contain any significant assets, his finding is vulnerable and can be impugned. In so far as the directors/trustee erroneously thought that the ZVM Trust did not contain any substantial asset when indeed it did, they acted upon a misconception. Further, Gany would have acted in breach of its duties as trustee since it clearly has failed to take the beneficiaries interest into account when it purported to appoint out the assets.

[101] In view of the above reasons and circumstances, the appointment is void and liable to be set aside. Accordingly, the 1998 appointment is set aside as being made in breach of trustees' duties as such.

[102] During the hearing before this Court it became clear that ECL HK shares at the date of the appointment had significant value; this was based on audited financial statements for 1998 and 1999 that were before the judge and to which his attention was not directly adverted. In fact, it is clear that the shares were valued in excess of US$100. While the specific value of the ECL HK shares was not brought to the judge's attention, the thrust of Zorin's case was that the ZVM Trust had significant value at the date of the appointment. I agree with learned Queen's

[65] At para. 74.

Counsel, Mr. Wilson, that the trial judge erred when he concluded that there were no significant or substantial assets in the ZVM Trust as at 22nd December 1998.

[103] For the reasons which I have already provided, the ZVM Trust clearly held other assets in addition to the ECL HK's shares, namely the shares in the three companies, ECL BVI, Cedilla Investment SA and Schweizer Holdings SA. In any event, based on the evidence, it is clear that the ZVM Trust as at 22nd December 1998 at the minimum had assets worth at least US$357,819.24.

[104] The uncontroverted evidence indicates that when the appointment was effected on 22nd December 1998 the trustee was advised that the ZVM Trust was empty and proceeded on this basis. It was clearly wrong in its assessment of the assets that were in the Trust to be US$100.00. In effecting the 1998 appointment they clearly did so on a mistaken or fake belief as to the assets that were subject to the appointment and therefore failed to ask themselves the correct question (namely whether it was appropriate, in the circumstances, to appoint assets of the ZVM Trust to Asif absolutely), and/or to take into account all relevant considerations. In fact, it was Mohammed Salim's evidence that at the date of the appointment, all of the businesses had been transferred to Asif. The clear evidence and uncontroverted finding of fact is that this was not so since the ZVM Trust still consisted at the very least of ECL HK shares.

[105] The trustee therefore failed to take into account relevant considerations in appointing out the assets to Asif. This was clearly a misconception. The trustee's duty to take relevant matters into consideration is in our view best regarded as an element in the duty of trustees to act responsibly.[66] The failure on the part of the

[66] See Lewin on Trusts (19th edn., Sweet & Maxwell 2015) at para 29-158; see also Pitt v Holt; Futter v Futter [2013] UKSC 26.

directors of Gany, which therefore vitiates Gany's decision as trustee, is a misconception on the basis of breach of their duty to act responsibly. As a result, Gany's decision is vitiated and accordingly set aside as being void. Therefore, there remain assets that are subject to the ZVM Trust.

1998 Appointment – Sham

[106] I do not propose to address this issue at any great length in so far as the conclusion on the misconception point is determinative of the breach of trust argument. Also and of great importance, this point was not pleaded and I agree with Mr. Tidmarsh, QC and Ms. Prevezner, QC that it was not open to Mr. Cooper, QC to argue that the appointment was a sham since this was not pleaded. Even though the learned judge briefly referred to the "sham" argument in his judgment, I am not of the view that his treatment of this issue can be properly faulted. His analysis of the facts and application of the principle are correct. In any event, I completely agree with the learned judge that there was no evidential basis upon which it could be advanced that the appointment was a sham. The factual matrix in **Midland Bank plc v Wyatt**[67] is in contradistinction to those in this appeal.[68]

Personal Liability of Asif

[107] On this appeal, learned Queen's Counsel, Mr. Wilson, contends that in so far as the judge ought to have found that the 1998 appointment was made in breach of trust, he should have gone on further to hold that Asif was personally liable to account on the basis of knowing receipt, such finding not being dependent on finding any breach of duty by Asif.

Knowing Receipt

[67] [1997] 1 BCLC 242.
[68] See also A v A [2007] EWHC 99.

[108] It is the law that in order to establish a constructive trust claim based on knowing receipt, Zorin would have had to satisfy the judge of three things: (1) that there were significant assets in ZVM Trust at the time of the deed of appointment; (2) that in breach of trust owed by Gany as trustee to the beneficiaries, it appointed out those assets to Asif; and (3) Asif received those assets with the knowledge of breach of trust.

[109] I have no doubt that there was no basis upon which the judge could have concluded that Asif was guilty of knowing receipt. The learned judge quite correctly rejected this contention. Learned Queen's Counsel, Ms. Prevezner, was correct when she argued that the judge was correct to dismiss the claim against Asif on this basis. I am in total agreement with Ms. Prevezner, QC who argued that there was no basis upon which the trial judge could have held that Asif was liable as a constructive trustee. While I do not accept Mr. Wilson, QC's contention that the learned judge had sufficient information/evidence upon which he could have found Asif liable, I also do not accept Ms Prevezner, QC's contention that Asif is absolutely altogether barred from returning the funds that were improperly given to him by Gany.

[110] Even though there was no basis upon which the judge could have held that Asif was personally liable, this does not bring the matter to an end. Asif must be required to return the ZVM Trust assets that he has in his possession which were improperly transferred to him by Gany. It cannot be sufficient for him to simply assert that he has parted with the assets. If however he asserts that the assets are now in the hands of a third party, the trustee should be able to trace them with a view to determining the veracity of this contention.

Costs

[111] In so far as Zorin has prevailed in this appeal against both Gany and Asif, I have no doubt that Zorin is entitled to receive costs in this Court and below. It seems to me that the appropriate order should be that Gany pay costs to Zorin to be agreed within 21 days, failing which, costs to be assessed by a commercial court judge. Mr. Wilson, QC has indicated that if Zorin were to be successful, he would not seek 2/3 of the costs below.

Conclusion

[112] In view of the premises, I would allow Zorin's appeal against the judgment. In the notice of appeal Zorin requested that the Court grant a number of orders. In consequence of this, I make the following orders:

(1) That Gany's account of the assets of ZVM Trust be amended so as to include the following assets and all dealings with them:

(a) shares in Cedilla Investments SA, Schweizer Holdings SA and ECL BVI which form part of the assets of the ZVM Trust should also be accounted for by Gany.

(2) the 1998 appointment is set aside.

(3) Gany be removed as Trustee of the ZVM Trust and a new Trustee be appointed in its place.

(4) Asif is to account for all of the assets received by him as a result of the 1998 appointment.

(5) Gany pay Zorin's costs both in this Court and in the court below to be agreed within 21 days, failing which, costs to be assessed by a commercial court judge.

[113] I gratefully acknowledge the assistance of all learned counsel.

Louise Esther Blenman
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal

I concur.

Humphrey Stollmeyer
Justice of Appeal [Ag.]