

IN THE SUPREME COURT OF BELIZE, A.D. 2010

CLAIM NO. 261 OF 2007

TOMAS VALENCIA GONZALEZ
ADOLFO PEREZ VALENCIA

Claimants

BETWEEN AND

INES HERMILIO VALENCIA
GONZALEZ
(Executor of the Estate of
Isela Valencia Gonzalez)
HILDA VALENCIA CAMPO

Defendants

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Fred Lumor SC for the claimants.
Mr. Lionel Welch for the defendants

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JUDGMENT

Introduction

This case arises in a material sense, out of the munificence of the late **Isela Valencia Gonzalez**, lately of No. 28 Corner New Road and Queen Street, Belize City. Mrs. Gonzalez appears to have been something of a matriarch of her family. She died on 30th September, 1993 in Chetumal, Quintana Roo, Mexico but before that she had made her last will and testament dated **19th June 1993**. This will was admitted to Probate in the

Supreme Court of Belize on 22nd September 1994 in Probate Petition 166/1994.

2. Mrs. Gonzalez died possessed of one real property situate at **No. 28 Corner New Road and Queen Street, Belize City** which served as her residence. It is the legacies she bequeathed regarding this sole property and the administration of her estate in relation to this property that have agitated this case.

3. The parties to this case are all related and connected to the late **Mrs. Isela Valencia Gonzalez** (Isela, hereafter). The first claimant, **Tomas Valencia Gonzalez** is a brother of **Isela**; the second claimant, **Adolfo Perez Valencia**, is a nephew of the first claimant and of **Isela**; the first defendant, **Ines Hermilio Valencia Gonzalez** is or was (he died on 3rd December 2009, in Mexico, before the conclusion of this case), also a brother of **Isela** and the first claimant and the uncle of the second claimant. He was also the father of the second defendant.

4. It may be noted that all the parties have the name **“Valencia”** in common. This case is about the rental and proceeds of sale of **The Valencia Building** as bequeathed and directed by **Isela** in her will dated 19th June 1993. This building is a large-ferro concrete two-storey structure situate at No. 28 Corner new Road and Queen Street, Belize city. This building was declared to be valued at \$400,000.00 in August 1994, when the first defendant, Ines Hermilio Valencia, petitioner the court for probate for **Isela**'s estate. It was the sole property in estate.

6. **Directions and bequest in Isela's will**

In her will, Isela gave the following directions and made several bequests. These are central to this case.

- 1.** She appointed Ines Hermilio **Valencia Gonzalez** (the first defendant) as **one of three executors** of her will. The others **Dr. Braulio Juan Metamoros** and his wife **Maria del Soccoro Lima Barrios**, both of Chetumal, Quintana Roo, Mexico.
- 2.** After the payment of all her just debts, funeral and testamentary expenses, she devised and bequeathed that **all rental accruals and proceeds** of sale of her sole property, the Valencia Buildings to be divided equally in three equal parts among: a) **Ines Hermilio Valencia Gonzalez** (the first defendant); b) **Tomas Valencia Gonzalez** (the first claimant) and c) **Adolfo Perez Valencia** (then an infant aged 13 years; he is now *sui juris* and the second claimant).
- 3.** She further directed that **all proceeds of rent** of her said property were to be collected by her personal representatives and be divided into four equal parts and paid into four accounts at the Belize Bank, Corozal Branch and she directed at the same time that the three of these accounts shall be in the names of the three beneficiaries earlier named. (That is **Ines**, **Tomas** and **Adolfo**) and that the fourth account shall be an **administration account** to be kept for paying of all outgoing of all kind whatsoever in respect of the property, including property taxes and insurance premiums and repair expenses. She also directed that the said administration account shall be in the joint names of her personal representatives.
- 4.** She then appointed Dr. Braulio Juan Matamores, one of her named executors, as the trustee of the bank account of Adolfo Perez Valencia, the infant beneficiary under her will. He as I have mentioned is now an adult and is the second claimant in this case.

- 5.** She directed that her personal representatives may in their absolute discretion, if they deemed it necessary, sell her property and that the **proceeds of sale be divided into three equal parts** among her three named beneficiaries (**Ines**, **Tomas** and **Adolfo**) to be paid by her personal representatives either into the bank accounts she had directed to be opened in the names of and for the three beneficiaries or directly to them as the personal representatives may in their discretion deem fit.
- 6.** She also directed that if one of her three beneficiaries **Tomas Valencia Gonzalez** were to die before the sale of her property, then all payments due him from rent accruals of the property or proceeds of its sale should be paid to his three named grand children and she appointed **Ines** her brother (one of the three executors and a third beneficiary under her will and the first defendant) as the administrator of the account to be opened in the name of three infants in the event that this became necessary.

(In the event, this was not necessary, as **Tomas** is manifestly still alive and the first claimant in this case as a beneficiary under **Isela**'s will).

- 7.** She finally directed that her personal representatives use their best endeavours to obtain the best rent possible for her property. This was not doubt for the benefit of her named beneficiaries under her will.

7. *The First Defendant became sole Executor/Personal Representative of the Estate of Isela Valencia Gonzalez*

When Isela died on 30th September 1993, one of her brothers who was named **one** of three executors in her will, and one of the three named beneficiaries thereunder, Ines Hermilio Valencia, the first defendant, petitioned the Court for the grant of probate for her will on 3rd August 1994 (Petition No. 166 of 1994). After he had executed a bond (Executor Bond) Probate was granted by the Court on 22nd September 1994. (A certified copy of the Grant of Probate with a certified copy of the will of the late Isela Valencia Gonzalez and a certified copy of the application (for the grant of probate together with a copy of the Executor Bond are in evidence as Exhibits APV 1A and B and APV 2 respectively and attached to the first affidavit of Adolfo Perez Valencia, the second claimant).

8. In both his executor bond and his oath as an executor, the first defendant undertook to faithfully administer Isela's estate, pay her just debts and the legacies contained in her will; and that he will exhibit a true and perfect inventory of her estate to the Supreme court within six months of the grant of probate to him; and that he **will also render a true and just account** of the estate **at or before the expiration of one year from the grant of probate to him and at or before the end of each succeeding year until the winding up of the estate.**

9. In granting the first defendant probate in 1994, the Court expressly reserved the power to grant probate to the other two executors named by Isela in her will, namely Dr. Braulio Juan Matamores and his wife Maria del Socorro Lima Barrios, whenever they would apply.

10. In the event however, probate was taken out by only the first defendant.

11. It is in respect of his administration of the estate, as per the will of the late Isela, that this claim is brought by the claimants as beneficiaries under the will and against the two defendants, the first of whom **Ines**, is both a beneficiary under the will of Isela and the executor of her estate to whom probate was granted in respect of the estate; and the second defendant, the daughter of **Ines**, to whom he sold the Valencia Building in 2007.
12. The pith of the claimant's case is that **Ines** the first defendant, breached his duties as executor when he failed to render and file any accounts in respect of Isela's estate and that he, in collusion with his daughter, the second defendant, devised and set up a fraudulent scheme to deprive the claimants as beneficiaries of Isela's estate, of the rent accruals and proceeds of sale of the Valencia Building.
13. The claimants in their Amended Statement of Claim have given extensive particulars of the fraud they allege against the defendants.
14. Relief sought by the claimants

The claimants now seek the following relief from this court:

- 1) *A Declaration that the Second Defendant, daughter of the First Defendant, obtained the transfer of ALL THAT property situate at No. 28 Queen Street, Belize City, Belize, from her father, the First Defendant, executor/Trustee of Isela Valencia Gonzalez by fraud.*
- 2) *A Declaration that the First Defendant acted fraudulently and improperly and in breach of his duties as Executor/Trustee when he purportedly sold the aforementioned property to his daughter, Hilda Valencia Campo, the Second Defendant.*

- 3) *A Declaration that the Second Defendant, Hilda Valencia Campo, holds title to the aforementioned property as a constructive trustee for the benefit of the Claimants.*
- 4) *An order that the Probate of the Estate of the late Isela Valencia Gonzales granted to the First Defendant 22nd September, 1994 be revoked and a new Executor be appointed by the Court to administer the Estate.*
- 5) *An order that Ms. Irma Yolanda Valencia, Secretary of No. 5726 Smith Street, Kings Park, Belize, Belize, or some other fit and proper person be appointed new Executor/Trustee of Isela Valencia Gonzalez in place of the first Defendant.*
- 6) *An order that the First defendant (sic) surrenders Transfer Certificate of Title dated 30th April, 2007 issued to her and registered in the Land Titles Register Volume 50 at Folio 108 to be cancelled by the Court.*
- 7) *An order for an account or inquiry to be taken of what is due to the Estate of the said Isela Valencia Gonzalez or the Claimants from the Defendants.*
- 8) *An order for the sale of the Valencia Building subject to directions of the Court.*
- 9) *Costs*

15. *The position of the Defendants*

First, the first defendant, Ines Hermilio Valencia Gonzalez, the executor of the estate of Isela comprise in the Valencia Building by reason of the grant of probate to him by the court on 22nd September 1994 and in which capacity he is sued in these proceedings. There has however been no acknowledgment of the instant claim by him, nor indeed an appearance by or for him and in fact no defence by or for him. There is evidence however, that pursuant to an order of the Court, service of the claim and other related documents were personally served on him, albeit, in Chetumal, Mexico (see paras. 33 to 39 of the witness statement dated 4th November 2009, of Jose Valencia Gomez). It should be observed here that frustrated attempts to serve the claim on the first defendant, including through official channels pursuant to the Hague Convention on service of official documents, greatly contributed to the delay in the hearing of this case. But service was eventually effected on him. Indeed, during a case management conference of the case on 7th July 2009, the second defendant (his daughter), informed the court that the first defendant was aware that proceedings were on-going in Belize against him relating to the Valencia Building. The court was later informed that the first defendant had died in Mexico where he had been resident. The second defendant then applied to have her carry on the case on his behalf. But she later withdrew and on the application of the claimants, the Registrar was substituted as the nominal first defendant for the purposes of hearing the case.

16. Therefore, in form and substancy, the claim against the first defendant has gone uncontested. The first defendant evidently lived in Mexico. This fact is one of the grounds of the claim against him: that despite the fact that since 1992, he had been living in Mexico, he swore to the petition and administration bond that he lived in Belize consequent upon which he was

given probate of Isela's will in 1994. This is a serious averment against the first defendant and it has not been denied or disproved. On this basis alone judgment could be entered against the first defendant. That is to say, his petition and administration bond contained serious misrepresentation of fact which would not have entitled him to the grant of probate.

This case, in my view, highlight the perils with which the grant of probate to non-residents to administer immovable property situate in Belize is fraught, especially where as in the instant case, the executor (in effect a trustee of the estate) has no **local agent** with the necessary authority to act. As the situs of such property, the *lexi situs*, that is Belizean law, is of course, the proper or governing law of the administration of the estate subject to the grant of probate.

17. The first defendant received the Valencia Building on trust for sale upon the grant to him of probate with the will of Isela attached by an order of the Court on 22nd September 1994 pursuant to his petition. He thereby by the operation of **sections 2(a) and 66(2) of the Trusts Act** became a **trustee** of the Valencia Building and was subjected to the general duties of a trustee as provided in **section 27(1)** of that Act and in particular, **subsection (2)** to “carry out and administer the trust in accordance with this Act and subject thereto, **in accordance with the terms of the trust**” (Emphasis added).
18. I have at para. 6 of this judgment set out the terms of the trust Isela created in her will regarding the Valencia Building.
19. In so far as the second defendant's position is concerned, it is fair to say that the platform of her case is that: i) She was not an agent of her father, the first defendant, for the purposes of the trust created by Isela's will and

that she was only a rent collector and therefore was not a trustee with duties to the claimants; ii) that she was a bona fide purchaser for value albeit, from her father, of the Valencia Building for value and therefore there way no breach of trust by her; and that she therefore does not hold the property as a constructive trustee for the claimants but as the absolute freehold owner; and that iii) the purchase price for the building she paid, **\$600,000.00**, was not an under value, but a fair market price; and finally, iv) the second defendant denied the particulars of fraud pleaded by the claimants.

20. *The Evidence*

A large number of documents were put in evidence including affidavits of both sides and exhibits, both at the interlocutory stage of this claim, when the court ordered an interim injunction prohibiting any dealing with the Valencia Building, until the conclusion if this matter. The documentation put in evidence was massive, in addition to witness statements on behalf of the claimants and the second defendant. As I have already observed, there was nothing heard from the first defendant.

In addition to their witness statements, the following persons testified orally and were cross-examined by Mr. Welch for the second defendant: i) Jorge Valencia Gomez; ii) Irma Valencia and iii) Antonio Quan.

For the second defendant, in addition to the witness statements, the following persons were cross-examined by Mr. Fred Lumor SC for the claimants: i) the second defendant herself; ii) Marcel Gabourel and iii) Alvaro Alcoser y Azcorna, an attorney living in Cancun, Mexico who spoke Spanish and had to be translated through a Spanish interpreter.

21. I saw and heard all the witnesses who testified under cross-examination for one side or the other. For the issues joined in this case (which I shall shortly state), I noted in particular that the second defendant stated as follows when cross-examined by Mr. Lumor SC:

“Yes, in December 2006, I was introduced to the tenants of Valencia Building as my father’s agent.” (The first defendant).

“Yes, when I commenced negotiations to purchase the building, I was my father’s agent.”

“I was then a signatory to a savings account in Scotia Bank for the building.”

“I do not know if my father did any transaction with the savings account.”

Apart from these answers coaxed out of the second defendant under cross-examination, I was otherwise left with the distinct impression, and I mean no offence or disrespect, when I say that I found her to be a vacillator and in denial in the witness box.

22. Issues in the case

Before I turn to a determination of this claim, in my view, I find that the following issues are thrown up by the facts, pleadings and evidence in this case:

- i) Was the first defendant a trustee for the purposes of this case? I believe I had foreshadowed the answer to this issue at paragraph 17 of this judgment.*
- ii) Was the second defendant an agent of the first defendant to have the status of a trustee (constructive) ascribed to her and thereby bound by the fiduciary duties and responsibilities of a trustee?*
- iii) Was there in fact a valid sale of the Valencia Building and in particular, whether its sale outside of Belize is sustainable in law?*
- iv) Does the Transfer Certificate of title in favour of the second defendant registered in the Land Titles Register, Volume 50 Folio 108 confer an irrevocable or indefeasible title on her?*

23. Determination

Let me say straightway at this juncture that I do not in anyway mean to diminish the industry and learning both Mr. Lumor SC for the claimants, and Mr. Welch the learned attorney for the second defendant, deployed in presenting the respective cases of their clients, including their extensive written submissions if I do not delve into every one of the very large amount of documents they presented. I must however, record my gratitude for the assistance they each offered that has enabled me to come to a determination of the issues I have identified in this case.

24. *i. Was the first defendant a trustee for the purposes of Isela's will and hence this case?*

I had foreshadowed the outcome of this issue earlier in this judgment. By the express terms of Isela's will the first defendant was appointed one of three **executors** of her will. However, *only* first defendant applied for probate and was granted this on 22nd September 1994 with the Court expressly reserving the power to appoint the other two persons named in the will should they apply. In his petition and his administration bond the first defendant presented himself as residing at No. 28 Queen Street, Belize City, the same address as the Valencia Building. But from the evidence, the first defendant had since 1992 being living in Mexico. In fact, when he embarked upon the administration of the estate, the first defendant appointed his son, David Valencia, as his agent to help him administer Isela's estate in Belize City: as the second defendant stated in para. 3 of her witness statement dated 18th September 2009:

“3. My brother, David Valencia, my father's agent in Belize who was administering the estate of Isela Valencia Gonzalez had left a few years before. My father then had no one in Belize to assist him.”
(Emphasis mine).

25. Moreover, by **section 2(a) of the Trusts Act** – Chapter 202 of the Laws of Belize R.E. 2000 provides:

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

(a) for the benefit of any person (known as “a beneficiary”) whether or not yet ascertained or in existence.”
(Emphasis mine).

The first defendant was with two others expressly named as executors by Isela in her will. An executor is by definition a **trustee**. And the Court expressly on his petition granted probate to the first defendant of Isela’s estate (which comprised only the Valencia Building) as a named executor on 22nd September 1994.

26. I am therefore satisfied that as from **22nd September 1994**, the first defendant was in fact and in law **a trustee** of the Valencia Building comprising the estate of Isela albeit an absentee trustee: see as well **section 5(1 of the Trusts Act and section 66(2))**.
27. From the time he became a trustee of Isela’s estate, the first defendant I find, became subject to the **duties** of a trustee which are spelled out in section 27(1) **of the Trusts Act** which include among other things, in the execution of his functions **to act with due diligence and observe utmost good faith and act to the best of his skills and abilities and exercise the standard and care of a reasonable and prudent man of business. A trustee shall also carry out and administer the trust in accordance with the Act and subject thereto, in accordance with the terms of the trust.** Also, **a trustee owes a fiduciary duty to the beneficiaries of the trust.** A trustee also has a duty to ensure that the trust property is held or vested in him or is otherwise under his control **and to preserve and, so far as is reasonable, enhance the value of the trust property.** A trustee shall keep accurate accounts and records of his trusteeship.
28. I am not satisfied from the evidence that the first defendant as an executor and trustee of Isela’s estate lived up to his duties. He was himself a beneficiary under the trust created in the will, but I find that he failed to

keep true and accurate accounts and to pay the rental income from the property in accordance with the express directions of the trust. I find, in particular, that from 1994 to 2006, there is no record of receipts of rental of the building although there is evidence of occupation by tenants and no evidence that the accounts expressly directed to be opened at the Belize Bank, Corozal Branch for disbursing the rent accruals were every opened and for the specific purpose as directed by the terms of the trust.

29. In this, I find that there was a palpable breach of trust by the first defendant, meaning a breach of any duty imposed on a trustee by the Trust Act **or by the terms of the trust: section 67 of the Act.**

30. *ii. Was the Second Defendant an Agent of the First Defendant for the purposes of the trust so as to be a trustee (constructive) herself?*

Generally, as a person invested with fiduciary powers, a trustee is not entitled to delegate his responsibilities to another person. But this rule from the maxim *“delegatus non potest delegare”*, it has been observed, was never strictly followed as it has always been recognized that a trustee may delegate certain functions, especially specialized ones, where ordinary business practice requires: see **Speight v Gaunt (1884) 9 App. Cas. 1; Learoyd v Whiteley (1887) 12 App. Cas. 727** and generally **Commonwealth Caribbean Trusts Laws** at pp. 260 – 263 (2nd Ed. 2002) by Gilbert Kodilinye and Trevor Carmichael.

31. **Section 34(1)** of the Trusts Act encapsulates the *delegatus non potest delegare rule* but subsection (2)(b) permits, except where the terms of the trust provide to the contrary, a trustee to “appoint and employ any lawyer or accountant or **other person to act in relation to any of the affairs of the trust** or to hold any of the trust property” (emphasis added).

32. From the evidence, I am satisfied that the second defendant **became an agent** of her father, the first defendant, who was undoubtedly a trustee of the Valencia Building, in relation to the affairs of this trust property.
33. The second defendant states in her witness statement from which I have quote extensively as I find it vital to this issue:

“2. *Sometime in November 2006 in Cancun, Mexico, my father, Hermilio Valencia Gonzalez, the First Defendant, asked me to take him to Belize City to assist him with some business regarding his role as executor of the state of Isela Valencia Gonzalez. My father and I do not see nor talk to each other often.*

3. *My brother, David Valencia, my father’s agent in Belize who administering the estate of Isela Valencia Gonzalez had left Belize a few years before. My father then had no one in Belize to assist him.*

4. *I believe my father asked me to assist him because he is 78 years old and no longer able to drive from Chetumal to Belize City, and he knows that I travel to Belize often to visit my mom in Cayo.*

5. *Sometime in December 2006, when my brother David was on a short visit to Belize, I accompanied him to the Valencia Building at the corner of Queen St and New Road in Belize City where I was introduced to all the tenants as my father’s new agent.*

6. *Thereafter my father opened a new account at Scotiabank Belize where the tenants were to pay their rents. He made me a signatory on the account so I could transfer regularly sums due the Claimants as their portions of the rental proceeds, they being beneficiaries of the estate. A copy of the ScotiaBank application for Retail Deposit Service is attached and marked exhibit **“HC 1”**.*
7. *During the period January to April 2007, the proportionate rental amounts due the Claimants for this period, being BZ \$10,000.00 each, were deposited into Atlantic Bank savings accounts’ numbers 210611756 and 210598539, being savings accounts for the First and Second Claimants respectively. A copy of Atlantic Bank Savings Deposit slips for both deposits is attached and marked exhibits **“HC 2”** and **“HC 3”** respectively.*
8. *On or about 10th February 2007, we gave Simon Quan & Co. Ltd. verbal notice to vacate the portion of the Valencia property it had been allowed to use free of cost to access their property from New Road.*
9. *On or about 14th March 2007, Korea Electronics, the tenant whose rent accounted for almost 90% of rental proceeds, informed us that they would be vacating the property by the end of May 2007. This notice came a little over a week after they had apprised us of structural damage on one of the beams.*

10. *Around this same time my father indicated to me that as executor of the will of the late Isela Valencia Gonzalez, he was contemplating his “absolute discretion” as granted him in the will to sell the property. He explained that he had received an offer of BZ \$600,000.00 from Mr. Oscar Sabido. I there and then expressed my interest to purchase the property for BZ \$600,000.00. A copy of said will is now produced and marked exhibit “HC 26”.*
11. *With the Second Defendant (First Defendant I presume) and I negotiating possible sale of the Valencia property to me, I approached ScotiaBank Belize for a mortgage loan to purchase the property. My intention was to use the property as collateral. The loan was denied. The attached email from me to Candy Watson at the Bank confirms that I was in discussions with the Bank for a loan. Said email is now produced and shown to me marked exhibit “HC 27”.*
12. *By email dated 28th March 2007 from Antonio Quan to me in response to proposal to lease, our discussions reveal clearly that the negotiations centred on a possible lease, not a sale of the Valencia property. Said email is now produced and shown to me marked exhibit “HC 28”.*
13. *On or about 30th March 2007, after failing to obtain a loan in Belize and Mexico for BZ \$600,000.00, as a result of my negotiations with the First Defendant, I secured a personal loan in Mexico for the entire amount of NP \$3,210,000.00, or BZ \$600,000.00 from Torricey Ulloa Alcoser. The*

contractual document for this loan and promissory notes made out to the Lender are legally binding in Mexico under Mexican civil law. A copy of the loan agreement and an official translated copy are produced and shown to me marked exhibits “HC 8” and “HC 9” respectively.”

34. I am satisfied that as an agent of the first defendant trustee, in relation to the affairs of the trust property, the second defendant became bound by the same fiduciary duties applicable to the former. In particular, the second defendant like the first defendant trustee, as an agent of the latter was bound; in relation to the Valencia Building, by **the rule against self-dealing**. This rule precludes a trustee from purchasing trust property from himself. It matters not in my view that the trust property was “sold” by the first defendant to the second defendant, they both were trustees of the Valencia Building, the latter when she became the agent of the former to manage the affairs of the trust property. From the evidence the second defendant was introduced to the tenants of Valencia Building as the agent of her father the first defendant. In answer in cross-examination she admitted that she was still her father’s agent when she commenced negotiations with him to purchase the building in April 2007. But before her purchase, the second defendant was present when in February 2007 the late Simon Quan, the proprietor of Simon Quan Ltd., one of the tenants who rented a parking lot in the building, made an offer of **\$2 million** dollars to purchase the building. (See testimony of Antonio Quan in answer in cross-examination by Mr. Welch). This offer of **\$2 million** dollars to buy the building was later increased to **\$2.4 million dollars** in negotiations with the second defendant and Simon Quan Ltd. when she was still the agent for the first defendant.
35. But somehow inexplicably, in Cancun, Mexico, the first defendant entered into a “sale” agreement to have the second defendant, his daughter and

agent, buy the property for **\$600,000.00**. I say inexplicably because the offer of **\$2 million dollars or \$2.4 million dollars** to buy the building was a vast improvement, substantially more, than what the building was apparently “sold” by the first defendant to his daughter, the second defendant and agent for dealing with the property in Belize, from about late 2006. The “sale”, if there was one, is all the more inexplicable from the beneficiaries’ standpoint (that is, the claimants who together with the first defendant were expressly directed in Isela’s will setting up the trust, to be beneficiaries of the proceeds of sale of the building) since there has to the present been no accounting of the proceeds of “sale”.

36. The second defendant as the agent of the first defendant for the purposes of dealing with the Valencia Building in Belize, was, I find, a trustee for that purpose.
37. I find as well that in selling the building to the second defendant in the circumstances transgressed the rule against self-dealing by a trustee of a property in his trust.
38. As Georges CJ stated in **Roywest Trust Corporation (Bahamas) Ltd. v Savannah NV (1995)** (unreported) in the Bahamas Supreme Court and cited in **Commonwealth Caribbean Trusts Law** op. cit. at p. 242:

“It is clear from the authorities that there is an absolute prohibition against self-dealing. In ex p. Lacey, ((1802) Ves. 625 at 626) Lord Eldon stated:

“The rule I take to be this; not that a trustee cannot buy from his cestui que trust, but that he shall not buy from himself.”

A trustee buying from himself must inevitably be in a position of conflict. As a purchaser, he would be interested in buying at the lowest price and on the easiest terms of payment. As a trustee selling

on behalf of a beneficiary, he should bargain for the best available terms and promptest payment. To obviate this conflict between duty and interest, the inflexible prohibition against a trustee buying from himself has been laid down and enforced. The beneficiary at his or her option may have the self-dealing transaction set aside.”

39. I am therefore satisfied that as the agent/trustee for the Valencia Building, the second defendant offended this rule against self-dealing when she “bought” **it from her father**, the first defendant and named trustee cum beneficiary with the claimants under Isela’s will: a sale to a child of the trustee is likely to be set aside for offending this rule – **Gregory v Gregory (1821) 37 ER 989**. In the instant case, the second defendant, the daughter of the first defendant is, of course, *sui juris* and a business woman, a realtor in her own right in Mexico, but the daughter all the same of the first defendant whose agent she was at the time of the purported sale. There was, I find, in the circumstances of this case, an inevitable and unavoidable conflict of interest surrounding the “purchase” of the Valencia Building by the second defendant that clearly coloured it as one of self-dealing. As a result, there was, I find, an egregious failure on the part of both defendants to observe some primary duties incumbent on them as trustees, in particular, to act with due diligence, observe utmost good faith and exercise the standard of care of a reasonable and prudent man of business. Otherwise, I cannot see how they would fail to accept an offer to buy the building for **\$2.4 million dollars** and within a short time thereafter arrange to sell the same building for a considerable lesser sum **\$600,000.00** this time in Cancun in Mexico, to the second defendant. In this, there was a total disregard for the interests of the beneficiaries of the trust (inclusive of the claimant’s and the first defendant). This was, I find, clearly a **breach of Isela’s trust** against the interests of the beneficiaries.

40. It was through this breach of trust that the second defendant came to have title to the property in her name. I find therefore that she is at the very least, pursuant to **section 51** of the Trusts Act, **a constructive trustee** of this property. This section provides in terms:

*“51(1) **A person who** derives a profit from a breach of trust or who **obtains property in breach of trust, shall be deemed to be a trustee of the profit or property,** unless he derives or obtains it in good faith and without actual, constructive or implied notice of the trustee.”*

From the evidence, it is unarguable of course, that the second defendant did have **actual** notice of the trust in this case. She collected rents for the building and opened an account at Scotia Bank in Belama where she deposited monies for the claimants and her father, all beneficiaries of the trust. It must be said to her credit that that evidently was the only time it would seem that the claimants received any money, \$10,000.00 each, from the trust in their favour. As she stated at para. 6 of her witness statement, she was made a signatory to what was evidently a trust account so that she could regularly transfer funds to the claimant beneficiaries.

41. As an agent/trustee, the second defendant should not have entered into a transaction in relation to the trust property by which she acquired or secured a personal advantage for herself. It cannot be denied that the “sale” to her of the building for **\$600,000.00** was more disadvantageous to the beneficiaries than the sum of **\$2 million dollars** or **\$2.4 million dollars** that had been offered for the property. Again I find that it is no answer that in her will creating the trust, Isela had directed that her executors/trustees could in their absolute discretion sell the property if they deemed it necessary. I do not think that this discretion would or

should permit the trustees to sell the property for about a quarter of the price a possible buyer had indicated he was prepared to pay.

A cardinal rule of equity is that a trustee shall not make a profit from his trust, nor even use his position as a trustee to secure a personal advantage at the expense of his beneficiary – Keeton's Law of Trusts 7th ed. p. 223.

This position is expressed as the rule in Keech v Sandford (1726) 25 ER 223.

42. Given her involvement with the property, I am satisfied that as a trustee by virtue of her agency, in relation to the property the second defendant should have distanced herself from purchasing the property from her father. But as she said in paras. 10 and 11 of her witness statement:

10. *Around this same time my father indicated to me that as executor of the will of the late Isela Valencia Gonzalez, he was contemplating his “absolute discretion” as granted him in the will to sell the property. He explained that he had received an offer of BZ \$600,000.00 from Mr. Oscar Sabido. I there and then expressed my interest to purchase the property for BZ \$600,000.00. A copy of said will is now produced and marked exhibit “HC 26”.*

11. *With the Second Defendant (First Defendant I presume) and I negotiating possible sale of the Valencia property to me, I approached ScotiaBank Belize for a mortgage loan to purchase the property. My intention was to use the property as collateral. The loan was denied. The attached email from me to Candy Watson at the Bank confirms that I was in*

discussions with the Bank for a loan. Said email is now produced and shown to me marked exhibit “HC 27”.

By purchasing the property for herself, I find the second defendant clearly breached her duties as a trustee.

43. I agree with Mr. Welch’s submission that the law is reluctant to make a *mere* agent a constructive trustee. But I am, on the evidence in this case, unable to find the second defendant was just a *mere* trustee. I am satisfied that her dealings with the property such as giving notice to Simon Quan Ltd. to quit the part of the Valencia property it had been allowed to use free of cost to access their property from New Road (para. 8 of her witness statement), coupled with the fact that she succeeded her brother, David Valencia, who had helped their father (the first defendant) to manage Isela’s estate (the Valencia Building) when he left Belize, to help manage the estate; and the fact that her father asked her to assist him in the management of the estate because he was getting old, clearly (paras. 3 and 4 of her witness statement), demonstrate that she was more than a *mere* agent as a rent collector. She was more than this, I think, she had some management responsibilities for the Valencia Building such as being apprised by Korea Electronics, the estate’s major tenant, of structural defects in the building and informing her of its intention to vacate (para. 9 of her witness statement): All these facts combined, in my view, to make her a trustee, though a constructive trustee, with all the attendant fiduciary duties that someone in that position would owe to the trust property and **ergo** to the beneficiaries of the trust.

44. It cannot be doubted from the evidence, that the second defendant had actual notice and knowledge of the trust: she admitted this in her witness statement and exhibited the will of Isela which of course created the trust

for her estate, the Valencia Building. As the learned authors of **Halsbury's Laws of England, Vol. 48, 4th ed** (2000 Re-issue) state at para. 599 at p. 413 under the rubric: **Receipt with notice of trust:**

“Where a person, whether gratuitously or for valuable consideration, acquired property or an interest in property which is subject to a subsisting trust, he becomes a trustee of it for the purposes of the trust if he has either actual or constructive notice of the trust”, and the cases cited thereunder.

45. The receipt by the second defendant of the Valencia Building from the purported sale to her by the first defendant (her father and trustee) was, I find, a direct consequence of the breach of trust and fiduciary duty of which the second defendant had knowledge. She claimed to have paid her father, the first defendant/trustee in Mexican Pesos in Cancun by way of a personal loan she secured for the entire amount of NP \$3,210,000.00, equivalent to BZ \$600,000.00, as the purchase price of the building (para. 13 of her witness statement). There is however no evidence of payment of this, other than the say-so on the so-called “Sale Agreement”, executed in Mexico; there is as well no evidence of the receipt by the first defendant of this purchase price (I need not refer to the witness statement of Jorge Valencia Gomez who said the first defendant denied in the presence of the second defendant and her Mexican attorney that he was overpaid by the second defendant, for the Valencia Building). There is as well lacking any evidence that the beneficiaries (including the first defendant), ever received their share of the proceeds of what can only in the circumstances be a phantom sale: there is simply, no evidence of or sign of the proceeds of the purported sale.
46. I therefore find that the second defendant knowingly received trust property (the Valencia Building) in breach of trust. In the circumstances, it

is immaterial whether the breach of trust was fraudulent or not: **Agip (Africa) Ltd. v Jackson (1990) Ch. 265** at p. 292 **Vol. 48 Halsbury's** op. cit. at para. 600, p. 413.

47. In the light of the evidence in this case and the conclusions I have arrived at therefrom, I do not think it is necessary or worthwhile to consider the other two issues in this case relating to the validity of the sale of the Valencia Building in Cancun, Mexico and whether the Transfer Certificate in favour of the second defendant is valid or not. I do not also think it necessary to examine the issue of fraud pleaded for the claimants.

48. Conclusion

From the evidence, it was manifest that the trust Isela created in her will for the benefit of her family would be beset with difficulties that would result in serious breaches of that trust. In the first place, the first defendant alone procured his appointment as the sole executor/trustee and on the representation that he lived in Belize or Belize City at least, when the evidence is that he had since 1992 been resident and living in Mexico. Secondly, as a result, he could not himself administer the trust (the sole asset of which was the Valencia Building) and thirdly, had to have his son, David Valencia Gonzalez, act for him in relation to the property in Belize City. Fourthly, there is no evidence of any administration account ever being opened as directed by the terms of the trust; nor of any account being opened in favour of the beneficiaries, at least from 1994 until January 2007, when a savings account was opened in Scotia Bank, Belama Branch. And fifthly, on the departure of his son, David, for the United States of America, the first defendant brought in the second defendant, his daughter, to help him manage the trust property. This resulted in the alleged sale of the sole asset of the trust, the Valencia

Building, to her in Cancun, Mexico, where she resides as well with the first defendant her father, until his death in 2008.

49. I am satisfied on the evidence there was a clear breach of the trust created by Isela for the benefit of the claimants and the first defendant. I find on the evidence that the breach of trust resulted in a clear disregard of the directions of Isela in her will and that the first defendant and daughter, the second defendant, were guilty of this breach of trust. The first defendant is now dead. In the circumstances, I grant the following relief:

- i) **A Declaration that the first defendant, Ines Hermilio Valencia Gonzalez (deceased), acted improperly and in breach of his duties as Executor/Trustee when he purportedly sold the property situate at No. 28 Corner Queen Street and New Road, Belize City, to his daughter, Hilda Valencia Campo, the second defendant.**
- ii) **I Declare that the said second defendant, Hilda Valencia Campo, holds title to the aforementioned property as a constructive trustee for the benefit of the claimants and the estate of the first defendant, Ines Hermilio Valencia Gonzalez (deceased).**
- iii) **I order that the second defendant surrenders Transfer Certificate of title dated 30th April 2007 issued to her and registered in the Land Titles Register Volume 50 at Folio 108 to be cancelled by the Court.**
- iv) **I order that the probate of the estate of the late Isela Valencia Gonzalez granted to the first defendant on 22nd September 1994, be revoked and is hereby revoked and that a new**

executor or executors be appointed by the Court to administer the said Estate.

- v) I order that an account or inquiry be taken of what is due to the Estate of the said Isela Valencia Gonzalez or the claimants from the defendants.**
- vi) I order the sale of the property at Corner 28 Queen Street and New Road, Belize City (the property known as Valencia Building), subject to the directions of the Court.**
- vii) I award the prescribed costs of these proceedings to the claimants to be paid 50% from the Estate of the first defendant and the other 50% by the second defendant.**

**A. O. CONTEH
Chief Justice**

DATED: 28th September, 2010.