

**IN THE SUPERIOR COURT OF JUDICATURE  
IN THE SUPREME COURT  
ACCRA- GHANA**

**CORAM: AKUFFO, J.S.C (PRESIDING)  
DATE-BAH, J.S.C.  
ADINYIRA (MRS), J.S.C.  
OWUSU, J.S.C  
DOTSE, J.S.C.**

**CIVIL APPEAL  
NO. J4/12/2008  
21<sup>ST</sup> JANUARY, 2009**

**GATEWAY WORSHIP CENTRE                      ...                      RESPONDENT**

**VRS.**

**DAVID SOON BOON SEO                      ...                      APPELLANT**

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**JUDGMENT**

**AKUFFO, JSC:**

This is an appeal from the judgment of the Court of Appeal dated 9<sup>th</sup> December, 2005, which upheld a judgment of the Circuit Court dated 8<sup>th</sup> December, 2003 in favour of the Respondents herein.

**Brief Background**

The Appellant is a missionary of Korean nationality and was at all material times resident in the Tema Metropolitan area. The 1<sup>st</sup> Respondent is the Pastor of the 2<sup>nd</sup> Respondent, a church located in Tema. According to the Respondents, the Appellant promised to raise funds for the 2<sup>nd</sup> Respondent whilst on a projected trip to Korea. Prior to his departure, the Appellant, with the members of the church as participants, produced a video film, which depicted members of the church living in the Ashaiman Community in abject

poverty and degradation. The purpose of the video was to curry the sympathy of prospective Korean benefactors and foster their generosity. Upon his return from his Korean trip, the Appellant made an open declaration to the church that the said funds had been so raised from a benefactor. The Appellant, however, did not disclose the quantum of the monies he had collected; nor did he hand over any such fund to the respondent church, but retained the same in his own bank account. He then used part of it to acquire the land in dispute herein. Subsequently, the pastor of the church, Ben Adjei, together with the church, acting by its trustees, sued the Appellant in the Circuit Court for a declaration of title to the land in dispute, recovery of possession, perpetual injunction, an order for accounts and other orders. The Circuit Court granted to the Respondents the reliefs claimed, except the one for accounts. The Appellant, thereupon, appealed to the Court of Appeal upon the sole ground that the judgement was against the weight of the evidence. The Court of Appeal affirmed the decision of the Circuit Court, and dismissed the appeal. The Appellant then appealed to this court upon no less than 8 grounds which for the sake of brevity may be summed up as follows:-

- a. Taking into account the claim and evidence in the matter, the 1<sup>st</sup> Respondent herein had no locus standi in the suit and should have been struck out as a party thereto.
- b. Since the reliefs sought by the respondents in their suit against the Appellant 'involved the application of principles of trusts or equity', the Circuit Court had no jurisdiction to entertain the claim.
- c. The claim against the Appellant was a claim by a volunteer to enforce a promise to make a gift and, therefore, could not be maintained.
- d. To the extent that the promised gift related to funds not in the possession of the Appellant at the time of the promise, the promise was one to give non-existent future property and, therefore, unenforceable.

- e. Since the promise did not quantify how much money was to be raised for the 2<sup>nd</sup> Respondent, it was void for uncertainty and, therefore, unenforceable.
- f. Since the defence was that the money raised was for general missionary work in Ghana, the trial and appellate courts erred in 'failing to raise and consider' the issue of whether the funds were raised for such general purposes or specifically for the 2<sup>nd</sup> Respondent.
- g. The trial and appellate courts also erred in not specifying whether their conclusion that the land was purchased in trust for the 2<sup>nd</sup> Respondent was founded on the centre's ownership of the money or on the Appellant's abuse of his position in the 2<sup>nd</sup> Respondent church, to purchase the land for any person other than the 2<sup>nd</sup> Respondent.

Although there was an 8<sup>th</sup> ground set down in the notice of appeal, the same was not touched upon in the statement of case and consequently we will not take that ground into any consideration in this judgment.

In our view, this appeal raises the primary issue of whether or not the Circuit Court had jurisdiction to entertain the action before it, and the secondary issue of whether, if the court had jurisdiction, it and the Court of Appeal properly applied the applicable principles of law and equity in determining the dispute.

Since jurisdiction is always a fundamental issue in any court action, we shall first deal with the question of whether or not the Circuit Court had jurisdiction to apply principles of trusts and equity in the determination of matters before it and to grant the equitable reliefs it did. However, before proceeding further, it is important for us to note that it is in this court that, for the first time in the course of the litigation of this matter, the Appellant raised this question of the trial court's jurisdiction. Taking into account the nature of the claims endorsed on the writ before the Circuit Court, it is rather puzzling that neither in the Circuit Court nor in the Court of Appeal did the Appellant raise

this matter. We deplore such lack of diligence which could lead to wastage of the time and other resources of the court and parties, since jurisdiction is fundamental to the validity of a court's judicial activity. Fortunately, in this case, it is our view that the Circuit Court's jurisdiction in the matter before it was unquestionable.

### **Jurisdiction of the Circuit Court**

In support of his ground of appeal challenging the Circuit Court's jurisdiction, the main thrust of counsel's argument on behalf of the Appellant was that, even though the Courts Act, 1993 (Act 459)(as revised) gives the Circuit Court jurisdiction in all causes and matters involving the ownership, possession, occupation of, or title to land, this jurisdiction does not include jurisdiction to entertain a cause or matter the determination of which involves the application of rules of equity or principles of trusts, such as in the instant case.

Section 42(1) of the Courts Act, which governs the civil jurisdiction of the Circuit Court, states that:-

*"(1) The civil jurisdiction of a Circuit Court consists of*

*(a) an original jurisdiction in civil matters*

*(i) in personal actions arising under a contract or a tort, or for the recovery of a liquidated sum of money, where the amount claimed is not more than one hundred million cedis;*

*(ii) in actions between a landlord and a tenant for the possession of land claimed under a lease and refused to be delivered up;*

- (iii) in causes and matters involving the ownership, possession, occupation of or title to land;*
  - (iv) to appoint guardians of infants and to make orders for the custody of infants;*
  - (v) to grant in an action instituted in the Court, injunctions or orders to stay waste, or alienation or for the detention and preservation of property which is the subject matter of that action, or to restrain breaches of contract, or the commission of a tort;*
  - (vi) in claims for relief by way of interpleader in respect of land or any other property attached in execution of an order made by a Circuit Court;*
  - (vii) in applications for the grant of probate or letters of administration in respect of the estate of a deceased person, and in causes and matters relating to the succession to property of a deceased person, who had, at the time of death, a fixed place of abode within the area of jurisdiction of the Circuit Court, and the value of the estate or property in question does not exceed one hundred million cedis; and*
- (b) any other jurisdiction conferred by this Act or any other enactment.*

In his statement of case, counsel for the Appellant contended that, had the intent of section 42(1)(a)(iii) of the Courts Act been to confer on the Circuit Court equitable jurisdiction in all land matters, it would not have been necessary to specify in Section 42 (1)(a)(v) that in all causes of action to come before the Circuit Court, it would have jurisdiction to grant the equitable remedy of injunction. According to counsel, therefore, having specified only injunction as the remedy in equity which the Circuit Court could grant, it cannot be said that other equitable remedies, such as those arising in the law

of trusts, which were not specifically mentioned, could be granted by the Circuit Court even in land disputes brought before it. Counsel urged that the mere existence of jurisdiction in the Circuit Court to deal with causes or matters involving disputed ownership, possession, occupation of, and title to land would not, without more, include or imply jurisdiction in equity to deal with such causes or matters by applying equitable principles of trusts.

Furthermore, counsel maintained that, because there was no specific mention of a Circuit Court jurisdiction in equity in the Courts Act, such jurisdiction cannot be reasonably implied. This, counsel argues, flows from the fact that before the English Judicature Acts of 1873/1875, the English common law courts possessed jurisdiction to deal with causes or matters involving disputed ownership, possession, occupation of, or title to land, yet had no jurisdiction to grant equitable relief by way of injunction or trusts law in such disputes. It was only by virtue of specific statutory provisions that the common law courts in England became empowered to apply principles of equity, and grant equitable reliefs. That being so, according to counsel, the Circuit Court, without express statutory power, has no jurisdiction to apply equitable principles of injunction and trusts as it did in this case, neither could such jurisdiction be reasonably conferred upon it by implication.

It is, however, noteworthy that the Courts Act does not expressly give "equitable jurisdiction" to the High Court either, even though counsel conceded that the High Court has such jurisdiction. Counsel sought to explain the "equitable jurisdiction" of the High Court, in contrast to that of the Circuit Court, on the incorrect ground that the High Court has unlimited jurisdiction.

Additionally, counsel contended that although the fused jurisdiction of the English High Court was derived from the Judicature Acts, when this jurisdiction was transplanted into this country, it was not extended to courts below the High Court. Consequently, the Circuit Court, which is a court below

the High Court, did not have jurisdiction to entertain the case in question inasmuch as its determination involved the application of principles of equity.

Counsel also contended that the jurisdiction given to the Circuit Court by the Courts Act in respect of causes and matters involving the ownership, possession, occupation of, or title to land did not confer on the court jurisdiction to entertain causes and matters involving the ownership, possession, occupation of, or title to other properties such as money (e.g. the funds the Appellant raised in Korea). He argued that, since the jurisdiction of the Circuit Court is in causes and matters with respect to land and not other properties such as money, then that part of the claim before the Circuit Court relating to the ownership of the money the appellant raised in Korea was outside the jurisdiction of the Court, particularly since the determination of the ownership of the said money had to involve the application of equitable principles.

The position of the law in Ghana is well established that every court in Ghana is a court of both common law and equity. As far back as 1976, the Court of Appeal pronounced upon the position of the law on the fusion of jurisdiction in law and equity, in the case of **Bou-Chedid v. Yalley [1976] 2 GLR 258**. As the learned Archer J.A. (as he then was) pointedly expressed himself, at page 264 of the law report:-

"Notwithstanding the vicissitudes of the courts in Ghana since they were established about a century ago, no one will venture to suggest that throughout this period separate courts have administered the common law and equity in Ghana. It follows that the plaintiff as an equitable owner in possession can maintain an action in trespass at common law in any court of law in Ghana."

The Appellant's position on this issue is further flawed by the fact that, all courts of Ghana are expected to apply the laws of Ghana, which by virtue of Article 11(1) of the Constitution, comprise of :-

“(a) this Constitution;

(b) enactments made by or under the authority of the Parliament established by this Constitution;

(c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution.

(d) the existing law; and

(e) the common law.”

Clause (2) of this article continues by stipulating that:-

“(2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.”

Additionally under Section 17(1) of the Interpretation Act, 1960 (C.A. 4) it is provided that:

“17. (1) The common law, as comprised in the laws of Ghana, consists, in addition to the rules of law generally known as the common law, of the rules generally known as the doctrines of equity and of rules of customary law included in the common law under any enactment providing for general application.”

Hence, once the Circuit Court has jurisdiction, under the Courts Act, in causes and matters in respect of land it may, in the exercise of such jurisdiction, apply any law in force in Ghana, including the common law, principles of equity, Acts of Parliament, customary law, etc, in the determination thereof. Thus it was not necessary, under Section 42 (1) of the Courts Act to make specific mention of the Circuit Court’s equitable jurisdiction since such jurisdiction necessarily flows from the provisions of the Constitution. Indeed such



jurisdiction has always attached to all courts of Ghana, for the principles of equity have, since the inception of the Republic of Ghana, formed part of its laws. To paraphrase the learned Archer J.A. (as he then was) in the **Bou-Chedid case** (supra), every court in Ghana is a court of both common law and equity, with jurisdiction to administer both common law and equity. In other words, we do not have separate courts of common law and courts of equity in Ghana. Both jurisdictions are vested in every court in Ghana. Any other interpretation of Section 41(1)(a) of the Courts Act, which would result in the ouster of the Circuit Court's jurisdiction in equity, will clearly be inconsistent with the provisions of Article 11(1) of the Constitution.

It is noteworthy that whilst one may speak of the jurisdiction of a court in a cause or matter, or as to the original, appellate or supervisory jurisdiction of a court, we do not speak of the jurisdiction of a court as to which of the laws of Ghana it has the power to apply in a cause or matter competently before it. Hence, as an example, even in the lowest court, it is expected that the provisions of the Constitution be observed and adhered to, although there are applicable limitations as to proceedings to enforce or interpret the Constitution. Thus although in the enforcement of an individual's fundamental rights and freedoms enshrined in Chapter 5 of the Constitution, article 33 gives original jurisdiction to the High Court, it does not mean that in determining a matter before it a District Court may not apply a relevant provision of the Constitution to uphold human rights or freedoms.

Finally, on the issue on jurisdiction, counsel argued that since the jurisdiction of the Circuit Court under section 42(1)(a)(iii) of the Courts Act is over causes and matters with respect to land and not other properties such as money, then that part of the claim before the Circuit Court, relating to the ownership of the monies the Appellant raised in Korea, was outside the jurisdiction of the Court. The Respondents did not make any direct claim for the recovery of any monies (liquidated or otherwise) from the Appellant, although the Circuit court does have jurisdiction under section 42(1)(a)(i) in actions for recovery of a liquidated sum. Admittedly, in order for the court to determine the issue

of title the court made findings relating to the ownership of the funds with which the land was purchased. However, it is our view that, in the circumstances of this case, counsel's contentions in this connection are irrelevant since the issue arose collaterally and it was necessary for the court to determine it in the course of determining the issue of title to the land. Indeed, this does not raise any jurisdictional question whatsoever.

In conclusion, therefore, the Circuit Court had jurisdiction to entertain the Respondents' action.

### **Capacity of the first Respondent**

In Ground One of the Notice of Appeal, the Appellant challenged the locus standi of the pastor of the 2<sup>nd</sup> Respondent church to be party in the case. The Court of Appeal reached the conclusion that, on the evidence on record, the beneficial ownership or interest in the property and/or funds in question vested in the 2<sup>nd</sup> Respondent, and no one else. As is clear from the record, the 2<sup>nd</sup> Respondent is a company limited by guarantee and incorporated under the Companies Act, 1963 (Act 179)(as revised). As a result, pursuant to Section 24 of the Companies Act, it has all the powers of a natural person of full capacity. As such, it is a fully-fledged legal entity, with a personality separate from the natural persons forming it, and with capacity to sue and be sued in its own name. In law, the members of a company have no direct proprietary rights over its assets, the company being the sole owner of its assets (**see Majdoub & Co. Ltd. v. W. Bartholomew & Co. Ltd. [1962] 1 GLR 122**). Since it is patent from the record that the subject matter of the action was being claimed as the Church's asset rather than the joint property of the church and the 1<sup>st</sup> Respondent, there was no reason why the 1<sup>st</sup> Respondent should have been included as a co-claimant. From the record, Pastor Ben Adjei really has no business in the suit, since he does not make any claim of interest or right in the subject matter of the suit. The 2<sup>nd</sup> Respondent church is capable of handling its own litigation and the 1<sup>st</sup> Respondent is an unnecessary party.

Under **Order 4 Rule 5(2) of the High Court (Civil Procedure) Rules, 2004 (CI 47)** the trial court has the power, at any stage of the proceedings, either suo motu or on application, to '*order any person who has been improperly or unnecessarily made a party or who for any reason is no longer a party or a necessary party to cease to be a party*'. Since, by virtue of Section 2(4) of the Courts Act, this court has the power, in an appeal before us, to make orders that the lower court could have made, we hereby order the 1st Respondent struck out of the action and accordingly, he ceases to be a party herein.

The 1<sup>st</sup> Ground of Appeal thus succeeds, although, effectively, it does very little to advance the Appellant's case since the removal of the 1<sup>st</sup> Respondent as party to the matter does not in any way affect the proceedings in the case up to now viz-a-viz the rights and interests of the rightful parties therein.

### **Relative Positions of Appellant and 2nd Respondent**

In arguing Ground 3 of the Notice of Appeal, counsel for the Appellant contended that the Appellant was merely a "gratuitous promissor" and, as such, he was not accountable to the 2<sup>nd</sup> Respondent, which is a "bare promisee/volunteer", having furnished no consideration for the promise made to it. However, this is not borne out by the record. The pre-departure promise to raise the said money in Korea was made expressly by the Appellant to the church. It is also on record that the said money was raised in the name of the church. Again, it is on record that the said money was given by a philanthropist, one Rev. Yei Jae Im, rather than the appellant raising the said money from his own efforts. More significantly, there is unchallenged evidence on the record that the Appellant, on his return from Korea, made an open declaration to the 2<sup>nd</sup> Respondent (i.e. before a whole congregation of the church, an assembly of God with all the liturgy that went with it) that the said money had been so raised for the benefit of the church. The foregoing will certainly not make the appellant a mere "gratuitous promissor" in law.

The 2<sup>nd</sup> Respondent cannot be said to be a "bare promisee" in law either. The 2nd Respondent was entitled in law to have legitimate expectation, based

on the pre-departure promise the Appellant made assuring it, that the monies to be raised were for its benefit. Thus, when the Appellant made the open declaration to the church, after his return from Korea, that the said money had been raised, the 2<sup>nd</sup> Respondent was entitled in law to have the settled assurance that the said money had been so raised for its benefit. Clearly then, counsel's description of a "promissor-promissee" relationship between the parties in the terms of an ordinary contract is unacceptable. The role or position of a very important player, the philanthropist in the person of Rev. Yei Jae Im, would be completely glossed over if we were to take the simplistic view, advocated by counsel, that the relationship between the parties is one of a bare and unenforceable "promissor-promissee" agreement. In reality, what we have here is a tripartite relationship involving a philanthropist, the Appellant and the 2<sup>nd</sup> Respondent. This situation simply does not fit a relationship between a promissor and a promisee in an ordinary contract. The relationship that fits the tripartite situation presented by the facts of this case is to be found, not in contract law but, in the equitable doctrine of trusts.

According to B. J. da Rocha and C. H. K. Lodoh, in their book '**Ghana Land Law and Conveyancing**' (2<sup>nd</sup> Edition) at pages 105-106, trust is a concept in equity whereby one person (called "the trustee") holds the nominal or legal title in property which has been made available to him by another person (called "the settlor") for the benefit of some other person (called "the beneficiary"). In this case, it is clear that the philanthropist, Rev. Yei Jae Im, who provided the money, is "the settlor" (the one who created the trust). The 2<sup>nd</sup> Respondent, for whose benefit the money was provided, is "the beneficiary" (the cestui que trust). The Appellant, who in equity stands between the settlor and the beneficiary, is "the trustee". The true position of the Appellant is, in equity, that of a trustee, not a "gratuitous promissor". The 2<sup>nd</sup> Respondent is the beneficiary under the trust and not a "bare promisee".

Regarding counsel's contention that the 2<sup>nd</sup> Respondent was, in equity, a volunteer, Philip H. Pettit in his book '**Equity and the Law of Trusts**' (5<sup>th</sup> Edition) at page 87 explains the term "volunteer as" follows:-

"A beneficiary under a trust is a volunteer unless either he has provided valuable consideration in a common law sense, or he is, as it is said, within the scope of the marriage consideration."

**Osborn's Concise Law Dictionary (8<sup>th</sup> Edition) at page 345** defines a volunteer as a person who is an object of bounty under a will or settlement as opposed to one who gives valuable consideration. Therefore, a volunteer under a trust is a beneficiary who has provided no valuable consideration in respect of the trust and who is not within the confines of marriage.

The significance of a volunteer in the law of trusts is seen in terms of whether the trust is completely or incompletely constituted. A trust is completely constituted when the trust property is vested in the trustees for the benefit of the beneficiaries. The classic statement of the law as to what is meant by complete constitution (or perfect creation) of a trust is to be found in the judgment of Turner LJ in the leading case of **Milroy v. Lord (1862) 4 De GF & J at pages 274-275** of the report as follows:

"...in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him."

According to da Rocha and Lodoh's '**Ghana Land Law and Conveyancing**' (supra), a trust may be completely constituted in two ways:

- (a) by the settlor conveying the property to the trustees; or
- (b) by the settlor declaring himself to be a trustee for the intended cestui que trust.

Until the property is conveyed to the trustee or the settlor declares himself as a trustee for the intended cestui que trust, the trust is incompletely

constituted. The effect of an incompletely constituted trust is that, only beneficiaries who have given value (not volunteers) can enforce it and the court will only perfect the trust in favour of the one who has given value, following the maxim: "Equity considers as done that which ought to be done". The position, as stated in **Re Adlard [1964] Ch 29 and Ellison v. Ellison (1802) 6 Ves. 656 at 662**, is that equity will not perfect an imperfect trust in favour of a volunteer.

The effect of a completely constituted trust, however, is that, the beneficiary may enforce it whether or not he has given value. In his book **Equity and the Law of Trusts** (supra), Philip Pettit states at page 89 as follows:

"If the trust is completely constituted, the fact that a cestui que trust is a volunteer is irrelevant: he is just as much entitled to enforce the trust as a cestui que trust who has provided consideration."

The contrast between a completely and an incompletely constituted trust as regards volunteers is clearly depicted in the case of **Jefferys v. Jefferys (1841) Cr & Ph 138**. In that case, a father, by a voluntary settlement, conveyed certain freehold estates to trustees in trust for the benefit of his daughters. The conveyance was complete. He further covenanted to surrender certain copyhold estates to the trustees in trust for the benefit of the same daughters. The mode of conveyance of copyholds was by surrender and admittance. The conveyance in respect of the copyhold estates was, however, incomplete. Subsequently, he devised part of the same estates to his widow who, after his death, was admitted to some of the copyholds. It was held that, as to the freeholds, the trust in favour of the daughters was enforceable by them, since the trust was completely constituted by the complete conveyance thereof to the trustees. But, as to the copyholds, the trust was not complete and, therefore, it was unenforceable by the intended beneficiaries, namely the daughters.

From the facts of the instant case, it appears that the church has not given any valuable consideration in respect of the trust. Counsel may, therefore, be right in referring to it as a volunteer under the trust. The position is that equity does not assist a volunteer (see **Ellison v. Ellison**) (supra). However, this position is true only when the trust is incompletely constituted. Where the trust is completely constituted, it does not matter whether or not the beneficiary is a volunteer (see **Re Adlard**) (supra).

From the evidence on record, it is very clear that the philanthropist, Rev. Yei Jae Im, completely vested the funds raised in Korea (the subject matter of the trust) in the appellant as trustee, which funds the appellant even kept in his own bank account as the legal owner. The trust in question is, therefore, completely constituted. Thus, whether or not the 2<sup>nd</sup> Respondent is a volunteer in equity is irrelevant, the trust having been completely constituted or perfected. The trust is, therefore, enforceable by the 2<sup>nd</sup> Respondent. Accordingly, Ground Three of the appeal fails.

### **Nature and Type of Trust Created**

In connection with the 4<sup>th</sup> and 5<sup>th</sup> Grounds of appeal, Counsel's arguments were entirely based on the assumption that the trust created is an express trust. An express trust requires the "three certainties" of intention, subject matter and objects to be valid. A trust can be express or implied (resulting or constructive) and, where it has a public character, it can be a charitable trust in which case the cy-pres doctrine can be applied to save the trust from failing. The facts of this case do not support the creation of an express trust. The facts clearly support the creation of a constructive trust (an implied trust). In the case of **Saaka v. Dahali [1984-86] 2 GLR 774, at page 784**, the learned Taylor JSC explained constructive trust as follows:

"A constructive trust arises when, although there is no express trust affecting specific property, equity considers that the legal owner should be treated as a trustee for another. This happens, for instance, when one who is already a trustee takes

advantage of his position to obtain a new legal interest in the property, as where a trustee of leaseholds takes a new lease in his own name. The rule applies where a person, although not an express trustee, is in a fiduciary position...A person receiving property subject to a trust ....becomes a constructive trustee if ... although he received it without notice of the trust, he was not a bona fide purchaser for value without notice of the trust, and yet, after he had subsequently acquired notice of the trust, he dealt with the property in a manner inconsistent with the trust."

Also, da Rocha and Lodoh, in **Ghana Land Law and Conveyancing** (supra) explains constructive trust at page pages 117-118 as follows:

"A constructive trust is a trust which arises independently of the intention of the parties but it is imposed by equity because the circumstances demand that the person holding the title to the property should be considered as a trustee. This trust usually arises by operation of equity where a fiduciary relation exists. A trustee or a person in a fiduciary relationship is not permitted to profit from his position...."

From the foregoing, the essential ingredients of a constructive trust may be stated as follows:

- a. There must be no express intentions of the parties to create a trust (this is because the intentions of the parties are totally irrelevant; there being no requirement for an express trustee as in express trusts, neither is there a requirement for the parties to be ad idem as in the law of contract).
- b. There must be in existence a fiduciary relationship.
- c. The fiduciary relationship must specifically be in the context of trust such as to make the fiduciary a trustee in equity.



The above ingredients are all borne out by the facts of this case. The Appellant is not an express trustee, for there is nothing on record as to his intentions to be a trustee. It is on record, however, that the Appellant kept the funds, donated in Korea for the benefit of the 2<sup>nd</sup> Respondent, in his own bank account as the legal title owner. He, therefore, stands in a fiduciary position because he became a nominal owner or controller of something that does not belong to him, and which he had collected in the name of the church. According to **Osborn's Concise Law Dictionary** (supra) a fiduciary is a person who holds a position of trust in relation to another and who must, therefore, act for that person's benefit such as a solicitor in respect of his client. Inasmuch as, in this case, a trust (completely constituted) was created, the Appellant became a fiduciary who is a trustee in equity over the funds, which he used the name of the church to raise in Korea, for the benefit of the 2<sup>nd</sup> Respondent Church.

The Appellant, therefore, held the funds in question on a constructive trust for the 2<sup>nd</sup> Respondent. A valid trust had been created and, therefore, it is enforceable.

## **Conclusion**

Having arrived at the foregoing conclusions, the remaining grounds of appeal become quite superfluous. A person in a fiduciary position is not permitted to profit from his position (see **Re Biss [1903] 2 Ch 40**). The general principle, as stated in the locus classicus case of **Re Diplock's Estate [1947] Ch 716 at pages 744-745**, is that whenever there is or has been a fiduciary relationship, the beneficial owner of an equitable interest in property may trace it into the hands of anyone holding the property, except a bona fide purchaser for value without notice whose title is, as usual, inviolable. Once it is not a bona fide purchaser for value without notice who has acquired the land in dispute, the money raised in Korea for the benefit of the 2<sup>nd</sup> Respondent is traceable in equity to any hand whatsoever and in any form it, or part thereof, has been used to acquire. Therefore, whatever has been acquired by any monies that are proven to be part of the funds from Korea is

deemed to be for the benefit of the church. This is a matter of law and there was no need for either the Circuit Court or the Court of Appeal to make any particular finding in that regard.

Consequently, except in respect of ground one of the appeal, we uphold the judgment of the Court of Appeal and hereby dismiss the appeal.

**S. A. B. AKUFFO(MS)**  
**( JUSTICE OF THE SUPREME COURT)**

I agree

**DR. S. K. DATE-BAH**  
**( JUSTICE OF THE SUPREME COURT)**

I agree

**S. O. A. ADINYIRA (MRS)**  
**( JUSTICE OF THE SUPREME COURT)**

I agree

**ROSE OWUSU (MS)**  
**( JUSTICE OF THE SUPREME COURT)**

I agree

**J.V.M. DOTSE**  
**(JUSTICE OF THE SUPREME COURT)**

COUNSEL:

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CHARLES MBEAH FOR THE RESPONDENTS.