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1 IN THE **GRAND COURT** OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

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5 CAUSE NO. 56 OF 2003

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7
8 BETWEEN: **SMITH BARNEY PRIVATE TRUST COMPANY**
9 (CAYMAN) LIMITED

PLAINTIFF

10
11
12 AND: FRANCISCO ALATORRE CEBREROS
13 JAVIER ALATORRE TAPIA
14 HAYDEE ALATORRE TAPIA
15 RAUL FRANCISCO ALATORRE ARMAGNAC

16
17 DEFENDANTS

18
19 **Appearances:** Mr. Neil Timms instructed by Mr. Colin McKie of
20 Maples & Calder for the Plaintiff
21 Mr. Ramon Alberga Q.C. instructed by Ms. Linda DaCosta of
22 Myers & Alberga for the 1st, 2nd and 3rd Defendants
23 Mr. Kenneth Farrow of Quin & Hampson for the
24 4th Defendant

25
26 **Before:** Hon. Justice Henderson

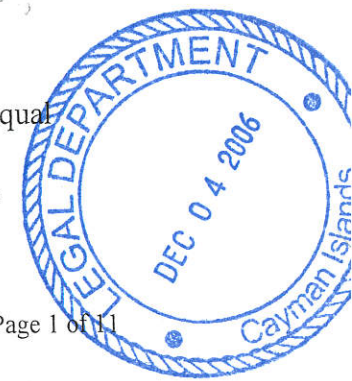
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29 **Heard:** November 15 & 16, 2006



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32 **JUDGMENT**

33
34 Mr. Francisco Alatorre Urtuzastegui ("the settlor") established two trusts to be
35 administered in the Cayman Islands for the benefit of his children. The plaintiff, Smith
36 Barney Private Trust Company (Cayman) Limited, has served as trustee of both trusts.
37 The four defendants are the children of the settlor.

38
39 The first trust established, the JAT Trust, provided for the four beneficiaries in equal
40 shares. The second trust, the RAA Trust, provided solely for the first defendant.



1

2 The settlor died unexpectedly on December 3, 2000. Earlier that year, he sought to
3 exercise the powers of amendment reserved in each deed of settlement to himself. His
4 intention was to alter the JAT Trust to exclude the fourth defendant, to reduce the first
5 defendant's share to 20%, and to provide an equal 40% share to each of the second and
6 third defendants. He also sought to amend the RAA Trust to exclude the first defendant
7 entirely, to provide a 50% share to the fourth defendant, and to provide 25% shares to
8 each of the second and third defendants.

9

10 The dispute is over the validity of each of these two attempts at amendment.

11

12 The parties have posed five questions for preliminary determination by the court. The
13 fifth question has been reworded, as set out below, by consent.

14

15 During argument, it became clear that the real dispute between the parties depends to a
16 substantial extent on questions of fact or mixed law and fact. In particular, the issues
17 involving agency and waiver require resolution of some difficult questions of fact which
18 will depend, at least in part, on the credibility of certain witnesses. In this ruling, I do not
19 propose to decide, or even comment upon, these disputed factual areas.

20

21 The JAT Trust Deed contains, in article 1.1.4 the following amendment provision:

22

“during the lifetime of the settlor...

23

24

1.1.4 the settlor may, if not incapacitated, at any
time or times by written instrument delivered to the

25

1 trustee revoke any trust created under this deed of
2 trust and may with the written consent of the trustee
3 alter, amend or modify this deed of trust.”
4

5 In contrast, the RAA Trust Deed contained the following in clause 1.1.4:

6 “during the lifetime of the settlor...

7
8 1.1.4 the settlor, if not incapacitated, may at any time or times by
9 written instrument delivered to the trustee;

10 (i) revoke any trust created under this deed of trust
11 whereupon the trustee shall transfer title to the
12 whole or part of the trust fund to the settlor; and

13
14 (ii) with the prior written consent of the trustee alter,
15 amend or modify this deed of trust.”
16

17 In fact, the settlor had no material direct contact with the trustee in the Cayman Islands.

18 That entity is a part of the Citigroup Inc. group and affiliated with Salomon Smith Barney

19 (“SSB”) in Tucson, Arizona. The trustee and SBB are sister corporations with a

20 common, ultimate parent. The settlor had an established relationship with a financial

21 consultant at SBB, Mr. Cesar Martin Castelo Valenzuela (“Mr. Castelo”).
22

23 By letter dated July 17, 2000, delivered personally to Mr. Castelo, the settlor directed the

24 amendment described above to the JAT Trust Deed. It is alleged that Mr. Castelo

25 advised the settlor orally, upon receipt of the letter, that the trustee was consenting to the

26 requested amendment. Mr. Castelo’s authority to do so is disputed, as is his authority to

27 waive the requirement for written consent. No such written consent was executed or

28 delivered during the lifetime of the settlor.
29

1 By letter dated August 31, 2000, the settlor requested the amendment described above to
2 the RAA Trust Deed. On September 5, 2000, shortly after receipt of this letter, Mr.
3 Castelo informed the settlor orally that the trustee was consenting to the requested
4 amendment. Again, his authority to approve the amendment and his authority to waive
5 the need for written consent is in dispute. No such written consent was executed or
6 delivered within the lifetime of the settlor.

7
8 After the death of the settlor, the trustee considered the position and determined to make
9 distributions on the footing that each of the two trust deeds had been amended. Some 23
10 distributions were made and accepted by the beneficiaries.

11
12 The fourth defendant, who was disadvantaged by the amendments, was, until recently, a
13 minor. Having obtained his majority, the fourth defendant now attacks the validity of
14 each amendment.

15
16 The five questions are framed so as to refer to “the Trust Deed” in the singular, but are
17 meant to apply to each of the two deeds.

18
19 Question (a): whether, on the true construction of the Trust Deed, the validity of the
20 relevant letter of amendment is dependent upon the written consent of the Trustee
21 whether given before or after the death of the settlor.

22
23
24 Clearly, with respect to each of the two deeds, the answer must be “yes.” Each of the
25 relevant provisions contains a mandatory requirement for the written consent of the

1 trustee; no other interpretation is reasonable. In giving this answer, I say nothing about
2 the viability of any argument that the requirement for written consent was waived.

3
4 Question (b): if the answer to (a) is in the positive, whether, on the true construction of
5 the Trust Deed, the relevant letter of amendment is ineffective by reason of the fact that
6 the trustee's written consent thereto was not given prior to the delivery of the same to the
7 trustee.
8
9

10 The question whether either amendment letter is “ineffective” is a question of mixed law
11 and fact which I will not answer on this preliminary hearing.

12

13 The JAT Deed says nothing about when the written consent of the trustee is to be
14 provided; in contrast, the RAA Deed says there must be “prior written consent ...”.

15

16 It may be useful to imagine the typical sequence of events where a settlor, acting under
17 the RAA clause, seeks to amend the trust. One would expect the settlor to provide the
18 requested amendment to the trustee in draft form to initiate the process. After deciding to
19 provide its consent, the trustee would deliver to the settlor a letter signifying its consent
20 to an amendment in the form of the draft amendment. Upon receipt of the trustee's
21 written consent, the settlor would then execute a letter amending the deed of trust and
22 deliver that to the trustee. The amendment would take effect only after the last
23 mentioned letter is executed by the settlor.

24

25 The wording of the JAT provision would allow a more abbreviated procedure. Typically,
26 one would expect the settlor to execute a letter of amendment and deliver that to the

1 trustee. The trustee would then execute a written consent to the requested amendment and
2 deliver its consent to the settlor. The amendment would take effect at the time the
3 consent is executed.

4
5 I take question (b) to be directed at the RAA Trust. That deed contains the additional
6 requirement that the trustee's written consent be given prior to delivery of the letter of
7 amendment, which was not done. Whether there has been a waiver of the requirement for
8 prior consent must be decided at trial; whether this provision is capable of being waived
9 will be dealt with below.

10 Question (c): if the answer to (b) is in the negative, and on the assumption that no written
11 consent to the relevant letter of amendment was given by the trustee during the lifetime
12 of the settlor, whether, on the true construction of the Trust Deed, the Trustee may
13 consent in writing to the letters of amendment after the death of the settlor.
14

15 This is another timing issue – must the trustee's consent, or a waiver of it (if that is
16 possible), be given prior to the death of the settlor? The fourth defendant asserts that it
17 must. The argument is based upon the following general rule, enunciated in *Farwell on*
18 *Powers, third edition, 1916*, at page 159:

19 “5. As to the period for perfecting the execution of a power, it may be laid
20 down as a general rule that –

21
22 The consent of any person required to consent, and also all
23 formalities annexed to the execution, must be respectively given
24 and perfected during the lifetime of the donee of the power
25 (*Hawkins v. Kemp*, 3 East, 410; Sug. Pow. 240, 255).
26

27 The consent, which is a material and important element in the execution,
28 is usually required to be precedent to, or at least simultaneous with, the
29 execution: if so, this requirement must be complied with (*Greenham v.*
30 *Gibbeson*, 10 Bing. 363). But if the terms of the power admit, there

1 seems no real reason, in considering the execution of a power of
2 appointment to be executed by A., subject to B.'s consent, for limiting
3 the time during which B. may consent, to the duration of A.'s life. A.'s
4 appointment may be said to be conditional on B.'s consent: the two are
5 independent powers; and, in the absence of all expression of intention, the
6 consent of B. may as well supplement and render valid the appointment
7 of A., as B.'s consent receive meaning and validity from the appointment
8 of A. (see *Offen v. Harman*, 1 D.F. & J. 253; 29 L.J. Ch. 307). In that case
9 a power of releasing certain estates from charges and substituting others
10 in their stead, was to be executed by A. with B.'s consent, "such consent
11 to be signified by some deed to be duly executed by him, and not
12 otherwise." A. executed the power, but B.'s formal consent by deed was
13 not given till nine months after. It was shown, however, that he had
14 consented by parol previous to A.'s execution: the power was held well
15 executed.

16
17 The question of the time for perfecting the accompanying formalities is of
18 less importance since 22 & 23 Viet. E. 35. But one of the points decided in
19 *Hawkins v. Kemp* (3 East, 410), was, that where the creator of the power
20 required the deed executing the power to be enrolled, the enrolment must
21 of necessity be made during the lifetime of the donee of the power, on the
22 ground that the enrolment could not be made without the donee's
23 authority, and that authority of course terminated with his life.

24
25 In *Wright v. Wakeford* (4 Taunt. 213), the Court of Common Pleas
26 decided, by three against one, that the attestation of the requisite witnesses
27 could not be supplied after the death of the donee of the power, although it
28 was admitted that they might have added it during his lifetime."

29
30 Halsbury also states the requirement as a general rule:

31
32 "266. Consent to Exercise of Powers. Any required consent must be
33 given, and all required formalities must be perfected, during the
34 lifetime of the donee of the power ..."

35
36 *Halsbury, fourth edition, volume 36 (2), paragraph 266*

37
38 The authorities cited in Halsbury for the proposition are *Hawkins v. Kemp* (1803) 3 East
39 410 and *Offen v. Harman* (1859) 1 De G.F.& J. 253. *Offen v. Harman* was not concerned
40 at all with a consent given after the death of the settlor. A settlement contained a power
41 which was to be executed by A with the consent of B, "such consent to be signified by

1 some deed to be duly executed by him, and not otherwise ...”. B gave an oral consent
2 prior to A’s execution of the deed, but only executed a deed of consent some nine months
3 afterwards and just a short time before the action was commenced. In a very brief
4 judgment, the court held that the power was valid. The case is of little assistance with
5 respect to the question before me now.

6

7 In *Hawkins v. Kemp*, a certain deed of revocation was required to be enrolled in one of
8 His Majesty’s courts of record at Westminster after various consents were obtained, etc.
9 Everything necessary to be done except the enrollment was done prior to the death of the
10 donee of the power. The enrollment was done subsequently.

11

12 The report notes that the case was argued “very elaborately and at great length.” The
13 judgment of the court states that the requirement of enrollment “is in itself perfectly
14 arbitrary, and (except only as it is in fact required) unessential in point of effect to the
15 legal validity of any instrument by which the old uses should be revoked, or new uses
16 declared (at page 666).” It was “unessential and unimportant except as they are required
17 by the creators of the power.” That being so, “they can only be satisfied by a strictly
18 literal and precise performance.” It was pointed out that the donee “might stop where he
19 pleased” – if he changed his mind after completing some of the formalities but prior to
20 enrollment, he could simply stop and the revocation would not take effect. From that, the
21 court reasoned that one object of the requirement for enrollment “might be to afford a
22 period for consideration, after all other steps to revoke the old uses and appoint new ones
23 had been taken.” This line of reasoning lead to the conclusion that all steps must be taken

1 prior to the death of the donee. Had the donee simply stopped prior to completing the
2 process (including the step of enrollment), it would be wrong to permit some third party
3 to enroll the deed after his death because one would not know whether the donee had
4 intended enrollment to take place. As Farwell noted (at page 160), the decision in
5 *Hawkins v. Kemp* depended on the view that the enrollment of the deed could not be done
6 without the donee's authority, which, even if given, terminated upon death. The court
7 found utility in the ability of the donee to change his mind at any time before the final
8 step was complete.

9

10 These are elements not found in the present case. The consent of the trustee is not
11 dependent upon authority from the settlor. Moreover, the requirement for consent cannot
12 be described as either "unessential" or "unimportant"; it is not a mere formality, of the
13 sort which would be required if, but only if, the settlor imposed it as a requirement. On
14 the contrary, it seems obvious that any change of significance to the nature of the trust
15 administration would need the consent of those who are administering it.

16

17 Be that as it may, the rule that consent must precede the death of the donee of the power
18 has existed as a general rule at least since 1916 (the date of Farwell's text) and likely for
19 quite a bit longer. The first, second and third defendants have cited no authority which
20 doubts or distinguishes it. Their submission, which really focuses on the question of
21 waiver and agency, provides no clear rationale for disregarding this general rule. The
22 rule, as I have said, is asserted by Halsbury and Farwell without qualification. In these

1 circumstances, I am compelled to find that the consent of the trustee must precede the
2 death of the settlor; my answer to question (c) is “no”.

3 Question (d): if the answer to (c) is in the positive, whether any one or more of the
4 documents listed in the Schedule hereto constituted written consent of the Trustee for the
5 purposes of the Trust Deed.
6

7 No answer is required.

8
9 Question (e): whether the requirement that the Trustee consents in writing to the relevant
10 letter of amendment can be waived by the Trustee after the death of the settlor or at all.
11

12
13 This is not a power given to the trustee to grant or withhold consent; rather, this is a
14 power of amendment reserved by the settlor to himself which is conditional upon that
15 consent: *In Re Dilke [1921]* 1 Ch 34; *In Re Phillips [1931]* 1Ch.347; *In Re Triffitt’s*
16 *Settlement [1958]* 1 Ch 852; and *Commissioner of Estates and Succession Duties v.*
17 *Bowering [1962]* 171 (PC). Those same authorities establish that the trustee is under no
18 obligation with respect to its consent so long as it is not dishonest.

19
20 Question (e) asks whether the need for a written consent can be waived “by the Trustee”.

21 A contractual requirement can be waived only by the party or parties for whose benefit
22 the requirement was created: *Hawksley v. Outram (1892)* 3 Ch. D. 359; and *Heron*
23 *Garage Properties v. Moss et al [1974]* 1 WLR 148. The need for written consent is of
24 obvious benefit to the trustee. There are some amendments to a trust deed for which it
25 would withhold consent, such as removal of the trustee’s indemnity or an unwarranted
26 reduction in the trustee’s remuneration.

27

1 Can it be said that the requirement was also inserted by the settlor for his own benefit?

2 The trustee cannot, in any circumstances, accept instructions from the settlor if he is of
3 unsound mind. It is difficult to see what additional benefit might flow to a settlor by
4 requiring the trustee to consent to an amendment which the settlor wishes to make.

5 Nothing persuasive has been presented in argument. I find that the requirement for
6 written consent exists for the sole benefit of the trustee.

7

8 I have found above that the true construction of the deeds requires that the written
9 consent of the trustee be provided prior to the death of the settlor. It follows that, if the
10 trustee can waive the requirement, its waiver must be complete prior to the death of the
11 settlor. Where, as in the case at bar, it is said that the waiver can be implied from the
12 conduct of the parties, that implication must arise fairly from events occurring prior to the
13 settlor's death.

14

15 Dated this 21st day of November, 2006

16

17

Henderson, J.

18

Henderson, J.

19

Judge of the Grand Court

20

21

