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

CAUSE NO. 56 of 2003

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

PLAINTIFF

AND: **FRANCISCO ALATORRE CEBREROS**
JAVIER ALATORRE TAPIA
HAYDEE ALATORRE TAPIA
RAUL FRANCISCO ALATORRE
ARAGNAC, A CHILD

DEFENDANTS

Appearances: **Mr. Neil Timms instructed by Ms. Jane Clarkson of Maples and Calder for the Plaintiff Trustee**
Mr. Ramon Alberga Q.C. and Ms. Linda DaCosta instructed by Myers and Alberga for the First to Third Defendants
Mr. Kenneth Farrow of Mourant du Feu & Jeune for the Fourth Defendant

Before: **Hon. Justice Henderson**

Heard: **March 12, 2008**

JUDGMENT

Shortly before his death on December 3rd, 2000 Mr. Francisco Alatorre Urtuzastegui ("the settlor") attempted to amend two deeds of settlement establishing trusts (the "JAT trust" and the "RAA trust") in the Cayman Islands for the benefit of his children. The Plaintiff has served as trustee of both trusts. In my judgment of November 21st, 2006 (reported at 2006 CILR 517) I made certain determinations on preliminary questions of

law. I then conducted a hearing in June, 2007 but did not render judgment immediately; at the request of the parties, the hearing was adjourned indefinitely prior to argument for purposes of compromise. That effort not having succeeded, the parties have presented their final argument on questions of fact and asked for this judgment resolving the factual issues in the hope that this will be determinative of the action.

Issues

The settlor attempted to amend each of the two trusts by delivering letters of amendment to the trustee. As I held in my earlier judgment, neither letter of amendment could be effective until the trustee gave its consent in writing to the amendment or until the need for such written consent (which was a term of the deed of settlement) was waived. I held also that the written consent of the trustee must be given prior to the death of the settlor and, for a waiver to be effective, the acts or conduct amounting to a waiver must have occurred prior to the settlor's death. It is clear and uncontested that the trustee did not give a written consent to either letter of amendment during the lifetime of the settlor.

There are two issues of fact:

1) Were the letters of amendment delivered to the trustee during the lifetime of the settlor?

2) If so, did the trustee, during the lifetime of the settlor, waive the requirement for its written consent?

Burden of Proof

The first, second and third defendants are contending that each of the two letters of amendment was delivered to the trustee which then waived the requirement for its written consent, all prior to the death of the settlor on December 3rd, 2000. They say that each letter of amendment has taken effect and the trusts have been amended in their favour.

The fourth defendant says that neither of these propositions can be established on the balance of probabilities. He argues that the *status quo ante* remains unchanged.

Since the first, second and third defendants are seeking to establish affirmatively that the terms of each of the two trusts have changed, the burden of proof and persuasion lies with them. This well established principle is described in *Phipson on Evidence*, 16th Edition, 2005 at paragraph 6-06 in these words:

> "So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.
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> This rule is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative.
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> …
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> In deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader can frequently vary at will."

Facts Not in Dispute

Some of the facts are not in dispute.

The settlor dealt exclusively with Mr. Cesar Castelo Valenzuela ("Mr. Castelo"), who was at all material times a financial consultant in the employ of Salomon Smith Barney ("SSB") in Tuscon, Arizona. Neither Mr. Castelo nor SSB are alleged to have been agents of the trustee.

On July 17, 2000 the settlor executed a letter of amendment in respect of the JAT Trust. The fourth defendant concedes that this letter was delivered to Mr. Castelo in the latter half of July, 2000. What happened to the letter from that time on is in contention.

On August 27, 2000 the settlor executed a letter of amendment in respect of the RAA Trust. The fourth defendant agrees that this letter was delivered to Mr. Castelo by August 31st, 2000. Again, there is a dispute about what was done with it from that point onwards.

Mr. Marcelino "Manny" Pendas, a business development officer at Citibank in Miami, provided advice to the settlor and to Mr. Castelo from time to time. Mr. Pendas had been asked for and had given advice on the two trusts. It is accepted that Mr. Pendas was not an agent of the trustee with respect to either trust.

After the settlor's death, Mr. Castelo telephoned Mr. Pendas to advise him of that and mentioned the two letters of amendment. Mr. Pendas then asked Mr. Castelo to send the letters to him, which was done. Mr. Pendas translated the letters from Spanish to English and sent the letters and the English translations to the trustee in the Cayman Islands. The trustee received the English translations from Mr. Pendas on January 12th, 2001 and received faxed copies of the Spanish original letters on January 16, 2001. The trustee says that it has no record of receiving either amendment, or being told about them, prior to January, 2001. Mr. Pendas said in his evidence that the first time he received these letters was after the death of the settlor.

The trustee sought legal advice on the validity of the amendments. After receiving that advice, the trustee's Review Committee met and decided to treat the amendments as valid. A series of payments were made to the beneficiaries on the basis that the trusts had been amended.

Facts in dispute

The first to third defendants cannot hope to establish either of the two propositions for which they contend except by relying upon the evidence of Mr. Castelo. There is no other evidence, oral or written, to support those defendants on either issue. I turn now to a consideration of his evidence.

Mr. Castelo characterized the settlor as one of his best clients. When asked if he understood, in 2000, that an amendment had to be delivered to the trustee to be effective, Mr. Castelo did not answer directly. He deflected the question by saying that, if he had a question about how a trust operated, he would ask Mr. Pendas for advice.

Mr. Castelo said that the settlor came to him towards the end of July in 2000 and presented him with the first letter of amendment. He first explained in his evidence that he gave the original to the operations manager in "the cage" at SSB and instructed "them" to send it to the trustee and fax a copy to Mr. Pendas. The cage is a department at the Tuscon office of SSB which takes responsibility for delivery and filing of important documentation. Neither the trustee nor Mr. Pendas have any record of receiving such a document around this time. Mr. Castelo also said that he "would" keep a copy for his own personal file. A search of his files has revealed no such copy. Mr. John Goordman testified that he examined Mr. Castelo's own files and found nothing there to indicate receipt of the amendment letter or delivery of it to the cage. The records of the cage itself were not tendered in evidence by any party.

The first letter of amendment does not bear a date stamp; the evidence establishes that, as would be expected, the cage was in the habit of date stamping documents received by it. When asked about this discrepancy, Mr. Castelo simply replied: "I don't know. I don't work for the cage."

In his earlier affidavit evidence, Mr. Castelo said that he sent a faxed "notice" of the amendment to the trustee. In his oral evidence, he explained that he meant to say in his affidavit that the cage sent the fax. The only fax cover sheet found for a fax from Mr. Castelo to Mr. Pendas around this time was sent from a nearby private business called Mailboxes Etc. Mr. Castelo said that he sent the fax to Mr. Pendas from this business; he did not explain why he did not ask the cage to send the fax for him. Later, in his oral evidence, he said that the settlor himself sent the fax to Mr. Pendas. Later still in his oral evidence, he changed his testimony and said that he also asked the cage to fax the document to Manny Pendas, with the result that Mr. Pendas should have two such faxes on file.

In his affidavit evidence, Mr. Castelo said that the same day he sent the documents the trustee and Mr. Pendas "informed me that they had received the fax of the July … amendment and that the amendment would be made effective immediately." Mr. Pendas denies having participated in such a telephone call or having given any such advice. The telephone logs for Mr. Castelo's telephone show a single phone call between Mr. Castelo and Mr. Pendas on July 31st, 2000 (the day upon which he says he delivered the original to the cage and sent the faxes) which lasted just thirty seconds. I find it unlikely that an important question, such as the time at which the amendment of a deed of settlement would become effective, would be discussed in such a short period of time.

Significantly, Mr. Castelo initially did not identify the person he spoke with at the trustee who confirmed the amendment would be "effective immediately". When pressed in

cross-examination, he finally identified her as Jennifer Hydes. Mrs. Hydes denies any such conversation; no request to cross-examine her was made. Moreover, Jennifer Hydes had no authority to accept such an amendment on behalf of the trustee. That required a decision of the Review Committee, a body with three members but one to which Mrs. Hydes did not belong. It is improbable that Mrs. Hydes would so exceed her authority as to give an oral confirmation by telephone that a letter of amendment would be effective immediately.

Mr. Castelo's evidence was that the second letter of amendment was delivered to the cage on August 31st, 2000. A date stamp on the document confirms that. He says that he gave it back to the cage and instructed them to send the original to the trustee by Federal Express and to fax a copy to the trustee also. He was reminded that he had not said that he sent a fax of the document to Mr. Pendas on this occasion. He was then asked again if he instructed the cage to fax the document "to Mr. Pendas or to the trustee in Grand Cayman?" His answer was: "I would say both. I don't remember." Neither Mr. Pendas nor the trustee have any record of receiving such a fax.

In his earlier affidavit evidence, deposed at a time when Mr. Castelo may not have understood that he would be subject to cross-examination, he swore that the second letter of amendment "was acknowledged as received by the trust company on 31st August 2000" (underlining added). When asked about this in cross-examination, he said "I rely on the date stamp. That is why I mention here about the 31st." His reference is to the date stamp affixed by SSB, not the trustee. Given the central importance of this question,

it seems unlikely that Mr. Castelo was a simple victim of confusion when he swore the affidavit.

When asked if the cage gave him a "document for your file" confirming the instructions given to them, Mr. Castelo said (contradicting his earlier evidence) that they do not do so.

Again, Mr. Castelo's affidavit evidence asserts that the "same day" that the documents were sent, "the trustee and Mr. Manny Pendas" informed him they had received the second amendment and that the amendment would be "approved and made immediately." Mr. Pendas does not recall any such conversation. There is no record of Mr. Castelo calling Mr. Pendas on August 31st, the date he now says the conversation took place. Mrs. Hydes swore in an affidavit that she first learned of the letters of amendment after the death of the settlor. She then looked but could not find them on file. Mrs. Hydes was not asked to attend for cross-examination.

After the settlor died, Mr. Castelo sent copies of the two amendment letters to Mr. Pendas at the latter's request. With them, he sent a note in Spanish which, in its English version, read: "please confirm <u>when</u> the indicated amendments are done" (underlining added). When asked for an explanation for his use of the word "when", Mr. Castelo avoided answering directly.

Overall, I consider Mr. Castelo to have been an unreliable witness. His answers to important questions were studiously vague. There were a number of important

contradictions between his affidavit and oral evidence and within the oral evidence itself. I have not forgotten that Mr. Castelo's maternal tongue is Spanish; however, his fluency in English is good enough that the deficiencies in his evidence cannot be attributed to language problems. In the result, I am driven to the conclusion that Mr. Castelo's evidence cannot be accepted except to the limited extent that it is confirmed by other, independent evidence.

The trustee witnesses, whose evidence I accept as credible and reliable, made no attempt to conceal the fact that there was some degree of disarray in their office at the time of these events. The former managing director of the trustee said there were "significant difficulties in terms of paperwork and file management and a backlog of filing was created."

Such difficulties cannot explain why the trust company would have no record of receiving the two original letters and the faxes, because the receipt of a courier package or a fax was entered into a log. There was no evidence that the logging system had broken down or was backlogged. Moreover, for Mr. Castelo's evidence to be correct (and assuming that the cage carried out its instructions appropriately), the trustee's logging system would have to have failed on four independent occasions. I find that improbable.

The decision by the trustee to proceed with distributions as if the amendments were in effect after taking legal advice is curious but, in the face of the other evidence (and lack

of evidence), cannot support an inference that it received both amendments prior to the settlor's death. The trustee may, for a time, have believed that the amendments had been received at the relevant time and then lost or, more probably, have believed that it should proceed as if they had been so received. Neither of these circumstances really assists the 1st to 3rd defendants: their burden is to show by credible evidence that the amendments were received before December 3, 2000 and that the requirement for written consent was then waived prior to that date.

Having regard to the burden of proof and in light of my findings on credibility, I now make the following findings of fact:

1. Neither the first nor the second letter of amendment was sent to the trustee or to Mr. Pendas at any time prior to the death of the settlor;

2. No one employed by the trustee had any knowledge of either the first or the second letter of amendment prior to the death of the settlor;

3. No one employed by the trustee advised Mr. Castelo, prior to the death of the settlor, that either the first or the second letter of amendment had taken effect.

The parties are at liberty to speak to costs if they are unable to agree.

Dated this 7th day of May, 2008

Henderson, J.
Judge of the Grand Court