

1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

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4 CAUSE NO: 56 of 2003

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6 **In the Matter of Section 48 of the Trust Law (2001 Revision)**

7
8 **And in the Matter of Order 85 rule 7 of the Rules of the Grand Court**

9
10 **And in the Matter of two DEEDS OF TRUST made the 11th March and**
11 **31st October 1997 by FRANCISCO ALATORRE URTUZUÁSTEGUI**

12
13 BETWEEN:

14 SMITH BARNEY PRIVATE TRUST COMPANY
15 (CAYMAN) LIMITED

16 Plaintiff

17 AND:

18 (1) FRANCISCO ALATORRE CEBREROS
19 (2) JAVIER ALATORRE TAPIA
20 (3) HAYDEE ALATORRE TAPIA
21 (4) RAUL FRANCISCO ALATORRE ARMAGNAC, a
22 Child

23 Defendants

24
25 BEFORE: The Honourable Madam Justice Levers

26
27 APPEARANCES:

28 Counsel for the Plaintiff: Mr. Neil Timms instructed by Ms. Ziva Robinson
29 of Maples and Calder

30 Counsel for the First, Second and Third Defendants: Mr. Ramon Alberga,
31 QC instructed by Ms. Linda DaCosta of Myers & Alberga

32 Counsel for the Fourth Defendant: Mr. Kenneth Farrow of Quin & Hampson

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34 HEARD: 18th April 2006

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JUDGMENT



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3 Levers, J.
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5 On the 4th February, 2003 the Trustees through their attorneys took out an
6 Originating Summon asking for directions of this Honourable Court on the
7 following questions:

8 (1) Whether a letter signed by the above named Francisco Alatorre
9 Urtuzuástegui (hereinafter called "the Settlor") and dated the 17th July
10 2000 had the effect of altering the trusts of the above named Deed of
11 Trust made the 11th March 1997 (hereinafter called "the JAT Trust
12 Deed");

13 (2) If so, on what date the alterations took effect;

14 (3) If the said letter would be effective if the Plaintiff gave its written
15 consent, whether the Plaintiff should now do so;

16 (4) Whether the letter signed by the Settlor and dated 27th August 2000
17 had the effect of altering the trusts of the above-named Deed of Trust
18 made the 31st October 1997 (hereinafter called "the RAA Trust
19 Deed");

20 (5) If so, on what date the alterations took effect;

21 (6) If the said letter would be effective if the Plaintiff gave its written
22 consent, whether the Plaintiff should now do so;

23 (7) If either or both of the said letters was or were ineffective, whether the
24 Trustee should compensate the 1st and 4th above-named Defendants
25 for the income to which they were entitled but which was not paid or
26 credited to them because of the said letters out of the future income
27 attributable to the shares of the 2nd and 3rd above-named Defendants
28 under the JAT Trust Deed;

29 (8) Whether such compensation (if any) should include interest, and (if
30 so) at what rate;

1 (9) And that the costs of this Application may be provided for.

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3 Subsequent to the filing of the Originating Summons and affidavit evidence,
4 orders were made by this Court giving various directions.

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6 The Fourth Defendant in this matter now takes out a Summons to have the
7 following questions determined prior to trial:

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9 (1) That the following question or issue be determined in advance of the
10 hearing of the Originating Summons herein, namely, whether, on the
11 true construction of the Trust Deeds, the Plaintiff Trustee may consent
12 in writing to the Letters of Amendment after the death of the Settlor if
13 it did not do so in writing during his lifetime;

14 (2) That any necessary directions may be given for the determination of
15 the said question or issue;

16 (3) That the costs of this application may be provided for.

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18 The Trustees who originally filed the Originating Summons also urge the
19 Court to undertake the determination.

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21 The First, Second and Third Defendants object to the splitting of the issues
22 and submit that the Court should proceed to try all the issues together so that

1 the matter can be determined based on fact and law, after cross examination
2 etc if necessary.

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4 The Factual Background

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6 The questions raised by the Originating Summons related to purported
7 Letters of Amendments to two Trusts, the RAA Trust and the JAT Trust. In
8 particular, the questions raised relate to whether or not, under the terms of
9 the respective Trust Deeds, the Letters were effective to alter either or both
10 Trusts.

11

12 The Settlor in this matter had written two letters amending the Trust Deeds.

13 The terms of the Trust Deeds read:

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15 Clause 1.1.4 of the RAA Trust Deed of Trust states:

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17 “The Settlor, if not incapacitated, may at any times
18 or times by written instrument delivered to the
19 Trustee:

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21 (1) Revoke any trust created under this
22 Deed of Trust whereupon the
23 trustee shall transfer title to the

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whole or part of the Trust Fund to the Settlor; and

(2) With the prior consent of the Trustee, alter, amend or modify this Deed of Trusts.”

Clause 7 of the same Deed provides:

“Subject to Clause 7.2, the powers granted to or retained by the Settlor,....shall be exercised by a signed instrument in writing and shall not be effective until actual receipt by the Trustee.”

Article 1.1.4 of the JAT Deed of Trust states:

“The Settlor may, if not incapacitated, at any time or times by written instrument delivered to the Trustee revoke any trust created under this Deed of Trust and may with the written consent of the Trustee alter, amend or modify this Deed of Trust.”

Article 7 of that same Trust Deed provides:

“Subject to Clause 7.2, the powers granted to or retained by the Settlor, shall be exercised by a signed instrument in writing delivered to the Trustees.”

1 As will be seen, there was a slight difference in the wording of the two
2 Trusts.

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4 It is common ground that there is in fact no written consent in respect of the
5 relevant purported letters of amendment during the lifetime of the Settlor.

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7 The First, Second and Third Defendants have documentation which is
8 claimed amounts to consent after the lifetime of the Settlor. The issues for
9 this Court, therefore is:

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11 (1) Must the Trustees have given their written
12 consent to the terms of amendment before the
13 formal instruments are delivered for them to be
14 effective to amend the trust; and

15

16 (2) Whether by their conduct and/or documentary
17 evidence, the Court can construe that written
18 consent was given after the death of the Settlor.

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20 It is argued on behalf of the Fourth Defendant and the Trustees that this is
21 purely a matter of construction and if the answer is in favour of the Fourth
22 Defendant there will be no need in these proceedings to examine the
23 evidence. If, in fact, there was no prior consent given by the Trustees before

1 the death of the Settlor then it will substantively answer the questions raised
2 in the Originating Summons.

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4 The matter is slightly compounded in the sense that there was a distribution
5 based on the amendment, although there was legal advice sought prior to the
6 distribution. The First, Second and Third Defendants therefore argue that
7 this amounts to consent by the Trustees albeit not in writing. The Fourth
8 Defendant and the Trustee argue that there will be no additional cost in
9 dealing with this as a preliminary issue, indeed, if anything, it will reduce
10 the cost as the preliminary issue should take no longer than one day and may
11 well terminate the proceedings prior to the greater expense of a trial lasting
12 five days.

13

14 The First, Second and Third Defendants argue that due to the conflicting
15 evidence in the affidavits (for instance as to when the letters of amendment
16 were received by the Trustee etc, that is to say before or after the Settlor's
17 death on 3rd December 2000), and what was said and done by the Trustees
18 and its officers in relation to these letters of amendment, the matter should
19 be tried on the facts. They rely heavily on the question of distribution to say
20 that the Trustees must have consented to the letters and that in order to have

1 a fair hearing, the Court must hear the evidence including cross-examination
2 of the witnesses relating to all issues. They also submit that the question of
3 estoppel will arise. That the Trustees should be precluded and estopped
4 from contending, that they gave no written consent and that consequently,
5 the letters of amendment were of no effect.

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7 The Court is mindful of the principles on which it must act. In *Allen v Golf*
8 *Oil Refining Ltd.* [1981] AC 101, HL. Lord Roskill said:

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10 “The preliminary point procedure can in certain
11 classes of case be invoked to achieve the desirable
12 aim of economy and simplicity. But cases in
13 which invocation is desirable are few.”

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16 Situations identified by Lord Roskill as being suitable for trial as preliminary

17 issues included:

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“(a) where a single issue of law can be
isolated from the other issues in a case
and any decision may be finally
determinate of the case as a whole;
(b) where the facts are agreed and the
sole issue is one of law.”

25 In *Ashmore and others v Corporation of Lloyd's* [1992] 1 W.L.R. page 446,

26 HL, preliminary points of law were ordered to decide:

1 (a) whether Lloyd's owed a duty of care to the
2 plaintiffs who were 'names'; and

3 (b) whether Lloyd's had immunity from suit
4 under Lloyd's Act 1982, section 14.

5

6 One of the key factors in these sorts of cases is whether the procedure is
7 likely to achieve a saving in costs or whether it is likely to increase expense
8 and delay.

9 One thing the House of Lords has protested against on several occasions is
10 the making of orders to determine points of law on assumed facts. As Lord
11 Scarman said in *Telling v Whiteman* [1980] AC 1, they are 'too often
12 treacherous short cuts. Their price can be delay, anxiety and expense.' If
13 the court finds against the point of law, the case will be no further advanced
14 than when the order was made. If the facts are found or agreed first, the
15 hearing on the preliminary issue should finally determine the action.

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17 I must however be satisfied, although I have the power to determine the
18 question of law or point of construction of a document, at any stage of the
19 proceedings and without a full trial, that there is a question which is suitable
20 for determination without a full trial. This means it must be a point of law to

1 be determined on proof or admitted facts and whether such determination
2 will finally determine, subject to any possible appeal, the entire case or
3 matter or any claim or issue therein. This case is a case of pure construction
4 - whether on the true construction of the Trust Deeds, the validity of the
5 relevant letter of amendment is dependant upon the written consent of the
6 Trustee and whether given before or after the death of the Settlor; and (2) if
7 the answer to (a) is in the positive, whether on the true construction of the
8 Trust Deed, the relevant letters of amendment are ineffective by reason of
9 the fact that the Trustee's written consent thereto was not given prior to the
10 delivery of the same to the Trustee. Are those questions of pure
11 construction? It is my view that no evidence and cross-examination can
12 assist the Court in construing the true meaning of the Trust Deeds.

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14 Are these questions therefore suitable for determination without a full trial?

15 It is my view that these questions are suitable for determination without a

16 full trial and arising out of those two questions certain other questions will

17 inevitably need to be determined and I set them out herewith:

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19 (a) whether, on the true construction of the Trust Deeds, the validity of
20 the relevant Letter of Amendment is dependent upon the written

1 consent of the Trustee whether given before or after the death of the
2 Settlor;

3 (b) if the answer to (a) is in the positive, whether, on the true construction
4 of the Trust Deeds, the relevant Letter of Amendment is ineffective by
5 reason of the fact that the Trustee's written consent thereto was not
6 given prior to the delivery of the same to the Trustee;

7 (c) if the answer to (b) is in the negative and on the assumption that no
8 written consent to the relevant Letter of Amendment was given by the
9 Trustee during the lifetime of the Settlor, whether, on the true
10 construction of the Trust Deed, the Trustee may consent in writing to
11 the Letters of Amendment after the death of the Settlor;

12 (d) if the answer to (c) is in the positive, whether any one or more of the
13 documents (to be identified by the First, Second and Third
14 Defendants) constitutes written consent of the Trustee for the purpose
15 of the Trust Deeds;

16 (e) if the answer to (d) is in the negative, whether the Fourth Defendant is
17 estopped from denying the validity of the relevant Letter of
18 Amendment by virtue of the receipt of distributions made by the
19 Trustee between March 2001 and May 2002 and that, consequently,
20 the Letter of Amendment is valid and effective.
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22 I therefore allow this application for the preliminary issues to be tried. Costs
23 of this application to be costs in the Cause.

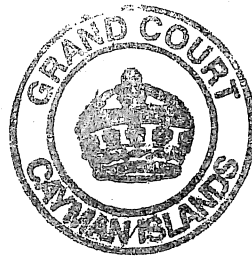
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25 Dated this 3rd day of May 2006

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28 Judge of the Grand Court