

IN THE GRAND COURT OF THE CAYMAN ISLANDS

**FSD CAUSE NO. 132 OF 2013 &
FSD CAUSE NO. 51 OF 2013**

BETWEEN

**JUAN PABLO NAVARRO WIELER
and others**

Plaintiffs

And

HSBC INTERNATIONAL TRUSTEE LIMITED

and

MYRNA WIELER VELARDE

Defendants

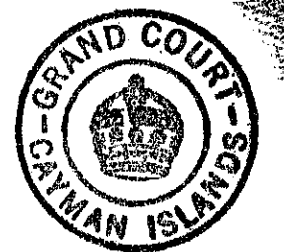
**Mr. A. Akiwumi & Mr. R. Annette for the Plaintiffs
Mr. C. de Serpa Pimental & Mr. R. Coe for the first Defendant
Mr. T. Lowe, QC, Mr. C. Flanagan & Mr. N. Dixey for the Second Defendant**

Henderson, J.

Hearing: April 29 & 30, 2014

Judgment: August 27, 2014

Circulated: 2nd September 2014



JUDGMENT

1. In this set of applications, the Second Defendant asks for an order staying Cause 132/13 on the ground that the most appropriate forum is the United States of America and for the lifting of a stay imposed earlier in Cause 51/13 while the plaintiffs seek an anti-suit

injunction restraining the Second Defendant from proceeding with a counterclaim in Florida and consolidation of causes 132/13 and 51/13. The Second Defendant also argues that Cause 132/13 is an abuse of the process of the Court and should be struck out.

2. It is convenient to address the choice of forum first.

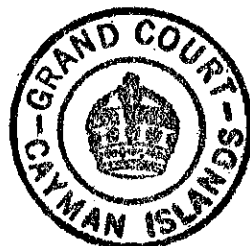
Facts

3. The Plaintiff, Juan Pablo Navarro Wieler asserts that he is the Administrator Ad Litem ("the Administrator") of the estate of his father, Gregorio Navarro Quiroga ("Mr. Navarro"). The other three plaintiffs ("the Corporate Plaintiffs") are corporate entities controlled by the estate and thus by the Administrator.
4. Mr. Navarro was a wealthy citizen of Bolivia who resided in Argentina and accumulated substantial wealth through a network of businesses engaged in mining, importation, wheat, grain, pasta and milling activities. In 1964, Mr. Navarro married the second Defendant, Myrna Wieler Velarde ("Ms. Wieler"). They have had seven children.
5. It became Mr. Navarro's practice to transfer assets into the names of Ms. Wieler and his various children. The Administrator says that at all material times there was a mutual



intent that Mr. Navarro would remain the beneficial owner of these assets; they were held by his wife and children for his benefit.

6. On June 29, 2009, Ms. Wieler as Settlor established a trust at the First Defendant, HSBC International Trustee Limited ("the Trustee"). This settlement is known as the "Famex Settlement". The assets of the Famex Settlement are the shares in Famex Investments Ltd. ("Famex") which was incorporated for the purpose of the Settlement. It is an exempt Cayman Islands company. The sole director of Famex is Lion International Management, an affiliate of the Trustee.
7. The governing law of the Famex Settlement is that of the Cayman Islands and this Court is established as the forum for the administration of the trust. The trust is administered in Bermuda at this time. Mr. Navarro was a member of the Investment Committee together with Ms. Wieler. The final beneficiaries (after an amendment in 2010) are two of the children of Mr. Navarro and Mr. Navarro himself. Ms. Wieler is the sole discretionary lifetime beneficiary of the trust. Ms. Wieler, as Settlor, retained a power of revocation.
8. Approximately US \$9.3 million has been injected into Famex by "Mr. Navarro and/or one or more of the Second to Fourth Plaintiffs" (Plaintiffs' Skeleton, paragraph 5); the details are unclear. These funds are held by Famex, and thus by the trust, in an account



at HSBC Private Bank International in Miami. Mr. Navarro had a number of other accounts there as well.

9. It is alleged that money deposited by Mr. Navarro into the Famex account was money in which he retained the beneficial interest. As for money deposited into the Famex account by the three Corporate Plaintiffs, it is alleged (in paragraph 19 of the Statement of Claim) that Mr. Navarro retained the beneficial ownership of those funds or “alternatively, they belonged beneficially to Rivoli, IDT and Molinera”; this lack of certainty is found throughout the pleading. It is said (in paragraph 33 of the Statement of Claim) that Mr. Navarro and Ms. Wieler “expressly agreed that the Second Defendant would hold the assets which were put into the Famex Settlement on trust for Mr. Navarro in the event that the Famex Settlement was revoked or came to an end for any reason.” The same paragraph goes on to allege that “alternatively, they agreed that the Second Defendant would hold them on trust for whoever of Rivoli, IDT and Molinera they had originated from.”

10. In June 2010 Mr. Navarro and Ms. Wieler were divorced in Argentina. A dispute arose over the distribution of Mr. Navarro’s assets. The plaintiffs say that in March 2012 Mr. Navarro had Ms. Wieler sign a document acknowledging that the money in the Famex bank account (and in other accounts) “is the exclusive property of” Mr. Navarro. The consideration for this acknowledgment is alleged to have been a promise by Mr. Navarro that he would not instigate certain criminal proceedings against his son Arturo.



Ms. Wieler denies that she executed the document. She says that she has signed pieces of paper in blank for her husband and one of these must have been used to create it without her knowledge.

11. On August 22, 2012 Mr. Navarro commenced an action against Ms. Wieler and against his children Arturo and Jimena in the Circuit Court of the Eleventh Judicial District, Miami-Dade County, Florida ("the State Action"). In his "Verified Complaint" Mr. Navarro asserts (at paragraph 21) that the defendants had agreed to hold "bare legal title" to the various assets while Mr. Navarro "retained the true ownership interest" in them. He alleged misappropriations of his assets by the defendants. The State Action was aimed in particular at the contents of the five Miami bank accounts, including the Famex account. He alleged (at paragraph 52 ff.) that he retained the beneficial interest in all of the bank accounts and that "accordingly a resulting trust arises by operation of Florida law". He also pleaded unjust enrichment, a constructive trust for his benefit, conversion, civil conspiracy, and breach of fiduciary duty by Ms. Wieler and the other defendants. He said they held his assets "as trustees of a resulting or constructive trust" for his benefit but had breached their fiduciary duties to him by misappropriation and in other ways.



12. On the subject of jurisdiction, Mr. Navarro pleaded that:

- 1) the three State Action Defendants, including Ms. Wieler, breached their fiduciary duty to him in the State of Florida;

- 2) those defendants, including Ms. Wieler, engaged in business activities in the State of Florida “which directly relate to the subject matter of this lawsuit”;
- 3) the defendants, including Ms. Wieler, committed tortious acts within the State of Florida;
- 4) the bank accounts and assets which are the subject of the dispute are located in Miami, Florida.

13. The three defendants in the State Action pleaded an Answer to the Verified Complaint and did not contest the choice of forum by Mr. Navarro.

14. On the day after he filed the Verified Complaint, Mr. Navarro obtained an *ex parte* temporary injunction freezing the contents of the bank accounts including the Famex account. *An inter partes* review of this order was conducted by Judge Kreeger over the course of several days, after which she discharged the injunction. Judge Kreeger heard extensive oral evidence from Mr. Navarro in support of the injunction and observed him under cross-examination. She concluded:

“Frankly, Mr. Navarro’s testimony so totally lacked credibility that it was a struggle to listen to. It was sad. It’s a real problem with the Plaintiffs’ case. I understand Mr. Navarro was on the witness stand today for, say, two and a half hours, given the breaks this morning and another hour, hour and half this afternoon. It is not there. I could not, in good conscience, find a substantial likelihood that he would prevail based on his testimony that he owns everything.”



15. On the issue before her, Judge Kreeger said:

"It has to rise and fall on his testimony as to what he intended."

16. Mr. Navarro appealed to the Third District Court of Appeals from the discharge of the injunction by Judge Kreeger. His appeal was rejected summarily. Judge Schwartz put the problem succinctly to Counsel: *"she didn't believe your guy."* For good measure, he added: *"and, in fact, boy, did she not believe your guy."*

17. In March 2013 Ms. Wieler exercised her power of revocation to revoke the trust. Accordingly, the Trustee now holds the Famex shares and (indirectly) the contents of the Famex account on a bare trust. The beneficiary of the bare trust would in ordinary circumstances be Ms. Wieler as the power of revocation in article 3 of the Famex Settlement reads:

"The Settlor may revoke this Settlement in whole, or with the consent of the Trustees in part, by written instrument delivered to the Trustees, whereupon the Trust Fund (or the relevant part of the Trust Fund, as the case may be) shall be beneficially owned by and revested in the Settlor."

18. The plaintiffs' case, however, is that the trust fund is held by the Trustee "on a Quistclose or resulting trust" for the Administrator and for the Corporate Plaintiffs (Statement of Claim, paragraph 65). The plaintiffs ask for a declaration to that effect and a vesting order.



19. The Trustee became aware of the dispute between Mr. Navarro and Ms. Wieler over the beneficial entitlement to the trust assets. On April 23, 2013 in Cause 51/13 the Trustee sought directions from this Court under section 48 of the *Trusts Law (2011 Revision)*. This is a non-contentious form of proceeding. Ms. Wieler and Mr. Navarro were provided with notice. There was delay, the causes of which are not material here. Mr. Navarro passed away in July 2013 and the Administrator stepped into his shoes for the purpose of litigation. I granted an initial order directing the Trustee to distribute the trust fund. This order was stayed by my order on October 31, 2013. It was modified but continued in effect by my order of January 9, 2014.
20. Cause 132/13 in the Cayman Islands was commenced by Writ of Summons on October 11, 2013. I ordered that the plaintiffs could serve the writ upon Ms. Wieler (who does not reside in the Cayman Islands) by serving her Cayman Islands attorneys.
21. On March 25, 2014 Ms. Wieler started an action in the United States District Court for the Southern District of Florida (“the Federal Action”) against HSBC Private Bank International, the bank where the Famex account is located. She alleged the existence of the trust, her own role as Settlor, and the terms of the revocation. Her pleading says that by failing to pay over the trust fund to Ms. Wieler pursuant to the revocation the Bank is in breach of its contract with her. She asked for a declaration of her entitlement to the Famex account.



22. HSBC Private Bank International applied for a stay of proceedings in the Federal Action on the ground that the beneficial entitlement to the Famex account would soon be decided by this Court. In his ruling on this application, Judge Goodman said:

“The issue of the right to control the Famex account and, more specifically the effect of the revocation of the Famex Trust, is before the Cayman Court and is the issue underlying each Plaintiff’s claims in this action. Allowing this case to proceed while the CI proceedings are pending would endorse piecemeal litigation and put the parties at significant risk of inconsistent judgments.”

23. The stay was for a set period of time which has now expired. I am told that the Federal Action will be tried in December, 2014. At the time he gave his ruling, Judge Goodman was aware only of Cause 51/13, the non-contentious litigation.

24. On January 3, 2014, Mr. Navarro filed a “Notice of Voluntary Dismissal” of all his claims in the State Action. This notice has no effect upon the Counterclaim made by Ms. Wieler against Mr. Navarro in the State Action. Ms. Wieler’s Counterclaim includes a request (at paragraph 109) for a declaration that the trust has been revoked properly by herself and that she is the “true owner” of the trust assets and the content of the Famex account. This proceeding has not been set for trial. Ms. Wieler has applied to strike out the Notice of Voluntary Dismissal on procedural grounds.



Choice of Forum

25. The essential allegation in the State Action and in Cause 132/13 is the same: can the Administrator prove on the balance of probabilities that the mutual intent of Mr. Navarro and Ms. Wieler at the time the assets were injected into the trust and into the Famex account was that Mr. Navarro would retain the beneficial interest?

26. What is the most convenient or appropriate forum for the trial of the beneficial ownership issue? The alleged agreement between Mr. Navarro, the three Corporate Plaintiffs and Ms. Wieler is essentially a question of contract. It is alleged that the agreement, or mutual intent, endured over a long period of time preceding the Famex Settlement and is evidenced as much by the past conduct of the parties as by verbal communications. A Court deciding the issue will need to consider what was said between the parties, at what time, and in what context. It will be necessary to consider whether the evidence demonstrates a mutual intent that the beneficial interest in the assets would be retained by the persons and corporations transferring them to Ms. Wieler. The alternative hypothesis, that of an outright gift by Mr. Navarro to his wife of long-standing, must be weighed and considered.

27. None of the discussions between the parties is alleged to have occurred in this jurisdiction. None of the parties (except the Trustee) reside or have resided here. Any payments made by Mr. Navarro or the three Corporate Plaintiffs to the Famex account would have come from bank accounts in Bolivia, Argentina or the United States but not



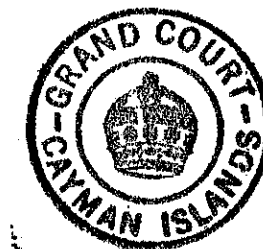
from the Cayman Islands. The relevant documents are, for the most part, to be found in Florida, Argentina or Bolivia; a few may be in the possession of the Trustee in Bermuda.

28. The governing law of the Settlement is that of the Cayman Islands and “all rights under [the Famex Settlement] and its construction and effect” are to be determined according to the laws of the Cayman Islands. However, the alleged agreement between Mr. Navarro and Ms. Wieler pre-dates the Settlement by many years so I do not accept that the governing law clause necessarily applies to this dispute.

29. The plaintiffs say that the trust fund is impressed with a *Quistclose* trust in favour of the Administrator and the Corporate Plaintiffs. A *Quistclose* trust arises when a lender stipulates that the loaned funds may be used only for a specific defined purpose; if the borrower uses the funds for some other unauthorized purpose a trust in favour of the lender is imposed. The Statement of Claim does not allege that the monies used to establish the Famex trust were loaned to Ms. Wieler. If, notwithstanding the pleading, they were, then the specific defined purpose (necessary for the creation of a *Quistclose* trust) must have amounted to a direction by Mr. Navarro to hold the funds until he demanded their return. This arrangement bears little resemblance to a *Quistclose* trust; see, generally, Hudson, *Equity and Trusts*, 5th edition, 2007, chapter 22; and Underhill and Hayton, *Law of Trusts and Trustees*, 18th edition, 2010, para. 23.39 ff. In reality, the plaintiffs’ case is that Ms. Wieler was a mere nominee for Mr. Navarro.



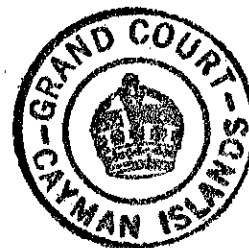
30. This Court is the forum “for the administration of” the trust but the alleged existence of a separate agreement between the Settlor and her husband which pre-dates the trust but which was not communicated to the Trustee until well after the trust was created is not a question of administration. The Trustee’s obligation is to carry out the terms of the Settlement unless ordered by the Court to do otherwise.
31. Most significantly, Mr. Navarro chose the State of Florida for the resolution of this dispute. Ms. Wieler accepted that. Mr. Navarro has alleged that Ms. Wieler breached her fiduciary duty to him in Florida; although she denies the breach, she accepts that the State of Florida is the proper place to resolve the matter. Mr. Navarro obtained an injunction in Florida and then sought to maintain it unsuccessfully throughout a multi-day hearing. He testified and was not believed. Then he sought to withdraw his claim in Florida. Seen in this context, the Administrator’s desire to litigate (or re-litigate) the question now in the Cayman Islands is suggestive of a mere tactical manoeuvre.
32. In these circumstances, the most appropriate forum is clearly the forum selected by Mr. Navarro himself – the State of Florida.



Order

33. For these reasons, this action is stayed on the ground that the proper and appropriate forum for the trial of this action is not the Cayman Islands. The request of the plaintiffs for an anti-suit injunction is, as a consequence, dismissed.
34. The request for consolidation of this action with the non-contentious litigation initiated by the Trustee in FSD Cause 51/13 is dismissed.
35. The stay of my earlier order in Cause 51/13 directing distribution will remain in place for 30 days beyond the date of this judgment to permit the plaintiffs to take such steps as are open to them in Florida to resuscitate their claims there. It is open to the plaintiffs to apply in the Cayman Islands for a freezing order, at which time the merits of their claim will fall to be considered.
36. I award the costs of all three summonses to the Trustee on the indemnity basis and to Ms. Wieler on the standard basis.

Henderson, J.
THE HON. JUSTICE HENDERSON
JUDGE OF THE GRAND COURT



(amended Sept. 24/14 to correct typographical errors)