

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CIVIL SUITS NO. 83 OF 2001, 84 OF 2001 AND 87 OF 2001 consolidated
BETWEEN:

WORLDWIDE CORPORATE SERVICES INC. LTD.

Claimant

And

SARA ROLDAN DEL CASTILLO

First Defendant

RAMON MENDOZA AND OTHERS

Second Defendants

Appearances:

Mrs. J. George-Creque for the Claimant

Mr. M. Mann Q.C., Mr. R. Davis and Mr. M. Pringle for the
First Defendant

Mr. P. Dennis and Mr. K. Anderson for the Second Defendants

2002: April 23, 24 and 25;

May 24.

JUDGMENT

[1] **MATTHEW J. Ag.:** Suit 83 of 2001 filed on September 14, 2001 is an Originating Summons between Sara Roldan del Castillo as Applicant and Boarder Ltd. as Respondent for a declaration inter alia,

that the Applicant is the holder and beneficial owner of share certificates nos. 1 and 2 representing the entire issued share capital of Boarder Limited.

[2] Suit 84 of 2001 also filed on September 14, 2001 is another Originating Summons between Sara Roldan del Castillo as Applicant and Applegate Overseas Ltd. as Respondent for a declaration, inter alia, that the Applicant is the holder and beneficial owner of share certificates nos. 1 and 2 representing the entire issued share capital of Applegate Overseas Limited.

[3] By suit 87 of 2001 filed on September 21, 2001 Worldwide Corporate Services Inc. Ltd., corporate director of Boarder Ltd. and Applegate Overseas Ltd., claims interpleader relief against Sara Roldan del Castillo and the Heirs of Mendoza Fontella deceased.

[4] On October 16, 2001 this Court ordered, inter alia, that all three suits be consolidated and the First and Second Defendants proceed to the trial of the issue to determine whether the shares of Boarder Ltd. and Applegate Overseas Ltd., the subject matter of the consolidated proceedings, are the property of the First Defendant or the property of the Second Defendants.

[5] These proceedings come about because of the death of Ramon Mendoza Fontella intestate on April 4, 2001 at the age of 73 or 74 in the Bahamas. Fontella by all accounts was an exceedingly rich man. Learned Counsel for the First Defendant in his opening said the extent

of Fontella's wealth is unknown and learned Counsel for the Second Defendants also indicated that Fontella was very wealthy.

[6] Fontella lived well and in the year before his terrestrial demise he purchased a luxury yacht "AMOUR SECRET" for approximately \$6.3 million with monies supplied by one of his many companies. Himself and Sara, the First Defendant, traveled all over the world.

[7] It was while he was on another Caribbean Cruise that he died. He had an obsessive passion for women, many times more than one at a time. He separated from his only wife about 1975 and for the next 20 years he lived with Jeanine Girod. Jeanine left him because of his many infidelities.

[8] After Jeanine left him he met Sara in 1997 when she was employed by one of his companies, BIMARAN, in Spain. Sara who was less than half of his age – he was about 69 then, she was in her thirties – was a trained lawyer having graduated from University the year before. Within three months she became his mistress and shared house with him for the next four years.

[9] But he seems also to love his children and grandchildren. At the time of his death; his eldest of three daughters, Rosario, was also traveling with him together with her husband and children. Rosario and her five siblings are the Heirs of Ramon Mendoza Fontella and they are the Defendants in these proceedings.

[10] Jeanine Girod was handsomely rewarded with 300 million pesetas as her parting gift. Fontella was a self made man. According to his first of three sons and first child, Ramon Mendoza Solano, under cross-examination, his father was a brilliant man from humble origins. He had no family for his mother died at his birth. He had a lot of character, a man of ideas, family lover, adventurer, who made decisions quickly and was still active in business at the time of his death.

[11] Fontella mingled with the nobility in Spain including the King of Spain who visited him in the yacht and signed the visitor's book. The King personally attended the funeral parlour. He was a former President of Madrid for over a decade.

[12] In one of her affidavits Sara described him as a high profile personality and said their relationship attracted media attention. In another affidavit she deposed that:

"he had a wide circle of friends (family and relatives, the King and many in his circle) and he liked us all to have a good time."

[13] One of the publications in Spain, "HOLA" of May 19, 2001 printed GOODBYE TO RAMON MENDOZA and in the publication stated:

"The well known businessman Ramon Mendoza, who was Real Madrid's Preident for 11 years, and who died from a heart attack in the Bahamas on 4th April last at 73 years of age, was cremated at the La Almudera cemetery in Madrid. His Majesty the King of Spain wanted to attend personally at the funeral parlour to give his condolences to the Mendoza family, with whom he has a great

friendship. King Juan Carlos was received by Ramon Mendoza Solano, the eldest son of the Deceased, who the King embraced with feeling and sorrow.”

[14] And so when Mendoza died he left behind this contest by his two loves concerning the bearer shares in two overseas companies registered in the BVI, companies which were wholly owned by the Deceased up to the time of his passing.

EVIDENCE

[15] The evidence in this case mainly took the form of affidavits but some of the deponents attended for cross-examination. On behalf of the First Defendant Sara Roldan del Castillo swore to three affidavits on September 14, 2001, December 13, 2001 and March 15, 2002. She gave oral evidence in chief before she was cross-examined and re-examined.

[16] For the Second Defendants Ramon Mendoza Solano, son of the Deceased, swore to three affidavits on November 13, 2001, January 21, 2002 and March 22, 2002. He was cross-examined by Mr. Mann Q.C.

[17] Rosario Mendoza Solano, sister to Ramon, swore to two affidavits on November 19, 2001 and January 21, 2002. She was cross-examined by Mr. Mann. Rosario's sister, Izabel, swore to an affidavit on November 19, 2001 as well. Her brother, Luis, swore to an affidavit on

January 22, 2000. Neither Isabel nor Luis were required to attend Court for cross-examination.

[18] The other affidavits given on behalf of the heirs were by the three main advisers of the Deceased. They are Luis Muniz Garcia, general legal adviser; Rafael Sanchez Serra, a lawyer specializing in tax law; and Gonzalo Rodriguez Fraile also a lawyer but who is more involved in finance and investments. It was his company which incorporated the two BVI overseas companies for the Deceased.

[19] Garcia swore to two affidavits on November 15, 2001 and January 21, 2002. Serra filed two affidavits on November 15, 2001 and January 21, 2002. Fraile filed two lengthy affidavits on November 16, 2001 and January 18, 2002. Serra was not required to attend for cross-examination but the other two did attend Court for that purpose.

[20] It will be necessary to give some indication of what the witnesses stated in their affidavits but this will inevitably have to be brief accounts.

SARA ROLDAN DEL CASTILLO

[21] In her first affidavit Sara stated that she finished her law degree at Madrid University in the summer of 1996 after which she obtained a job as personal secretary to the Deceased in the autumn of 1996 in the offices of BIMARAN S.A.

- [22] She stated at the time the Deceased was divorced from his wife, had no partner and lived alone in a flat in Nuflez de Balboa in Madrid and she lived with her parents. She said 2-3 months after taking the job a relationship with the Deceased started. In the autumn of 1997 they decided to live together and the Deceased, RMF, purchased a home at Juan de Mena, Madrid, for that purpose.
- [23] She said RMF was in his sixties and she was in her thirties. She said sometime in 1998 when she and RMF were alone at Juan de Mena, RMF gave her the documents of the company, BOARDER. She said she did not read them nor did she know what they represented except that RMF told her words to the effect –
- "Take these, I want you to have them. You will never have any monetary concerns."
- [24] She said she took the documents and kept them at her parents' home and RMF never asked her to return them nor did he ever mention them again. This is the crux of the case.
- [25] She further stated that RMF had by then retired from the day to day management of his business affairs and conducted his work on the telephone either from home or the boat or at which ever hotel he was staying.
- [26] In her second affidavit Sara Roldan gives testimony as to various places in public she attended with RMF. She was there giving evidence to demonstrate the nature of the relationship they shared.

The other portions of the affidavit is taken up in answering statements of the witnesses for the Second Defendants in affidavits following the filing of hers.

[27] In paragraph 3 of that same affidavit Sara states:

“The article reports my age as 25 when I was in fact 29 when I commenced my relationship with RMF.”

I cannot help turning back to what Sara said in paragraph 7 of her first affidavit, that when she met the Deceased he was in his sixties and she was in her thirties. I am aware of women attempting to decrease their ages, not to increase them.

[28] In paragraph 9 of this affidavit Sara states:

“When RMF’s divorce came through we were already living together in a stable relationship which endured until RMF’s death.”

So I go back again to paragraph 5 of Sara’s first affidavit which states:

“At this time RMF was divorced from his wife and had no partners. RMF lived alone in a flat at Nuflez de Balboa (Madrid). I lived at home with my parents”.

[29] In paragraph 14 Sara deposes to argument and seems to be alleging what the Defendants urge, that in this affidavit she is changing her story from an outright gift to a trust. She seems to be answering to the allegation that a gift could not have been made to her since the Deceased was using the funds in the Companies at his will.

[30] In paragraph 14 Sara states that the Deceased told her when he gave her the shares that she would never have to worry for the future. Then she states:

“It was obviously not RMF’s intention that I should administer the assets of “BOARDER” and “APPLEGATE” during his lifetime and this is acknowledged by all parties to this actions. I do not see why the fact that RMF controlled “BOARDER” and “APPLEGATE” precludes him having made a valid gift of the shares to me.”

[31] Sara disputed that RMF did not consider their relationship to be a lasting one or that he wanted Ms. Girod to return to him. She said their relationship was marital in nature. She said the relationship between RMF and herself was far more intense than that which he had with his children, but she says he did have a good relationship with them.

[32] She stated that she did mention to RMS that she had been given some papers by his father but RMS did not ask to see them. RMS vehemently denies that.

[33] She referred to the gift of 150,000,000 pesetas (approximately US\$1,000,000) which RMF wished to make to her and which she refused because she found it morbid. She said in her negotiations with the children about that sum it became clear that the payment was not motivated by kindness or moral duty but by a desire to obtain her renunciation of any rights to inheritance that she had acquired by living with RMF.

- [34] She said RMF tried to give her the 150,000,000 pesetas at the same time he made the same gift to each of his children but she made excuses to avoid accepting the gift. She said Rosario and herself did not get along together and they had strong words after RMF's death.
- [35] She said that none of RMF's children were involved in RMF's business affairs. The evidence would not support that statement. It is clear to me that RMS was considered the heir apparent and he did take part in the business affairs of the Deceased.
- [36] In her third affidavit Sara states that it is inconceivable RMF would have taken Jeanine Girod back for he wanted to have fun with a much younger woman for whom he showed great love and deep affection as she did him and still do in memory.
- [37] In paragraph 9 of this affidavit Sara Roldan says that when in her first affidavit she said RMF gave her the shares sometime in 1998, that was a mistake and on reflection she is now reasonably accurate that the date was between February and March, 1999.
- [38] The Defendants in answer to this say Sara changed her story because since the filing of her first affidavit they have sworn to affidavits which make it more difficult for her to maintain the 1998 date.
- [39] In this affidavit she again gives the circumstances as to how the shares were passed on to her. She states:

"One of the staff told me he was calling me. I went to him. He

was in his dressing room; there was something in his hand. 'These are for you', he said, gesturing to two brown documents in an open folder which he then handed to me. I didn't know what they were but I remember the way he looked at me, emphasizing the importance of the documents and what he was doing. 'Keep them', he said. 'You will never need for anything', or words to that effect such as mentioned in paragraph 7 of my first affidavit."

[40] When Sara gave evidence in chief she was shown a photograph with herself and RMF and friends on "ARMOUR SECRET". When asked the date she replied Summer of 1997. When she was cross-examined she agreed the yacht was acquired in May or June 2000 and so the photograph could not have been taken before that date.

[41] In cross-examination it was sought to show that in each of her three affidavits she gave a different version of how the gift was made. In her reply she said basically it's the same thing.

"I do not believe there are different versions in what I say in those affidavits."

I tend to agree with her.

[42] Under cross-examination she agreed that what she said in her affidavit to the effect that none of the Deceased's children were engaged in his business is not true and she also agreed that her statement that the Deceased had angina is not true.

RAMON MENDOZA SOLANO

- [43] As stated earlier Ramon is the eldest son and child of the Deceased, aged 53. In his first affidavit he said he had a close relationship with his father until the time of his death.
- [44] He said his father separated from his only wife, his mother, in 1974 and after that, beginning in 1975 or 1976, he lived with Jeanine Girod for 20 years. He said in October 1996 his father was diagnosed with renal cancer and one of his kidneys was removed.
- [45] He said he was fully empowered to act in different banks and companies where his father had assets at the time, and his father's only instructions were to distribute everything equally among his six children. He stated that once his father's cancer was cured Jeanine left him because he had failed to marry her after being together for 20 years and because of his father's constant infidelities.
- [46] Ramon's affidavit in some parts are to the effect that his father only loved Jeanine Girod and it was Sara who pursued RMF. He said his siblings and himself knew of his father's intentions to give Sara the gift of 150 million Spanish pesetas and in spite of the fact that there was no document requiring them to give Sara the gift, they followed their father's wish and made the gift to Sara which she accepted.

- [47] It is only true to state that Sara had to sign a document indicating that she would have no further claim against the Estate of RMF for any cohabitation or other rights she may have acquired.
- [48] In his second affidavit Ramon stated that he knew all his father's professional advisers from 1970 onwards. He stated:
- "Since 1997 until his death, the only advisers with whom my father maintained a permanent and general professional relationship were Mr. Gonzalo Rodriguez Fraile, who managed and advised him on matters regarding international investment; Mr. Luis Muniz Garcia, who advised him on all kinds of legal matters; and Mr. Rafael Sanchez Serra, who advised him on taxation matters. My father did not take any significant decision concerning his net worth without prior notice to any of such advisors and usually, prior consultation with them."
- [49] He stated that the assets held by his father in the BVI companies represented a substantial portion of his father's total assets in accordance with the information which his father gave him.
- [50] He stated that until the commencement of these proceedings Sara never said to his siblings or himself that she had any claim over her father's Estate or over any property which belonged to him, including his shares in Boarder Ltd. and Applegate Overseas Ltd.
- [51] In his third affidavit he states that Ms. Roldan's story defies reason and logic in that she needed her uncle to point out the significance of the

documents when his father had supposedly done so when he allegedly gave them to her.

[52] Ramon observes that Sara once again changes her story about the gift of the shares and her continued lack of clarity and decisiveness only lends support to the fact that the gift never occurred.

[53] He said in her first affidavit she claimed an outright gift sometime in 1998, then when faced with the undeniable evidence that his father maintained control of the assets throughout his lifetime she suggests for the first time in her second affidavit that RMF gave her the shares while acting as trustee during his lifetime (despite the also undeniable fact that he used the assets of the companies for his own personal consumption as opposed to having acted as a trustee). Then she alleged that the gift took place a year later.

[54] It is also true that before this Court Sara was saying the gift was a *donatio mortis causa* which is a slant different to an outright gift or one involving a relationship of a trust between a trustee and a beneficiary.

[55] Ramon states that knowing his father, if he had given the shares to Sara, he would assuredly have told his friends and family that he had secured her future and that she would never have need for anything. He said his father was a very proud man and he would not have let anyone believe otherwise if he had truly provided for Ms. Roldan through the shares as she claims.

- [56] In cross-examination Ramon stated that his father's Swiss companies were controlled by himself and his father and although he did what his father told him to do, he had authority by power of attorney to operate the accounts and to do business by telephone. He says he participated in several businesses and gave the names of three of the companies and the business they each transacted.
- [57] In respect of one company, PRISA, Ramon stated that when it was a private enterprise his father owned two percent but they got no profit from PRISA. This is in sharp contrast to what Garcia said under cross-examination, that RMF got a huge amount of cash as a result of the floatation of PRISA. This is one of the bases upon which Mr. Mann Q.C. has asked not to rely on Ramon's evidence.
- [58] Ramon again reiterated that Sara never told him at any time that his father had given her the documents. He stated that he could not say his father loved Sara even when some of the pictures on the boat were shown to him and it was suggested that RMF adored her.

ROSARIO MENDOZA SOLANO

- [59] Rosario is 46 years old. She is the first daughter and probably the second child of RMF. Rosario's testimony seems to be geared to promoting her father's relationship with Jeanine and to down play his relationship with Sara. These two women do not appear to like each other. How could Rosario be expected to get on with a much younger stepmother?

[60] There is nothing material in the second affidavit of Rosario. In her cross-examination Rosario continues to try to diminish the relationship between her father and Sara and states that while her father was in the relationship with Sara he had at least two other relationships. But is that not typical of the man whose huge assets we are dealing with?

IZABEL MENDOZA SOLANO

[61] Izabel is another sibling. She is 44. Again she is playing down the relationship between her father and her younger stepmother. She will not put their relationship as high as that between her father and Jeanine Girod.

[62] She said her father did not want to marry Sara as he did want to marry Jeanine. She said she had an excellent relationship with her father including the last few years of his life, and the relationship grew closer after she separated from her husband a little over a year since she lodged her affidavit. Izabel did not give oral evidence.

LUIS MENDOZA SOLANO

[63] Luis is the youngest of the three sons of RMF. He is 39 years old and most probably older than Sara. As part of the activities related to the settlement of the various issues concerning the Estate of his late father, he was entrusted to arrange the sale of the yacht "AMOUR SECRET".

[64] In this regard he said he contacted Sara in the first days of May 2001 about the necessity of removing any of her personal belongings that may still be in the yacht. Sara responded and both of them took a flight to Palma de Mallorca on May 15, 2001. They went to the marina and Sara packed her suitcases and afterwards they both flew back to Madrid.

[65] Luis stated that Sara was perfectly aware that the yacht was going to be disposed of immediately, and to the best of his knowledge, she did not express any objections or reservations to the sale to any of the Defendants.

[66] I would have thought that by this time the shock and grief over the Deceased's death would be lessened and Sara as a lawyer might have thought it prudent to open the envelopes to see if the \$6.3 million yacht was not included in the gift to her. Luis was not required to attend the trial for cross-examination.

RAFAEL SANCHEZ SERRA

[67] Rafael Sanchez Serra is a 46 year old lawyer who practices as an expert in tax law since 1989. He had provided professional counsel regarding tax law to RMF on a regular basis from 1992 to April 2001.

[68] He stated that in several meetings held throughout May and June 2000 RMF informed him of his intention to donate 150,000,000

Spanish pesetas to Sara and asked him to think about a formula to minimize the tax implications of such donation.

[69] He said he suggested a form of loan agreement but Sara was not happy with this as she felt RMF's children could subsequently demand repayment of the amount.

[70] He stated that after RMF's death he had a meeting in May 2001 with RMS, Gonzalo Rodriguez Fraile and Sara to advise Sara on the best tax treatment for the gift she was going to receive.

[71] In his second affidavit he said he knew of no permanent professional advisers to RMF other than Fraile, Garcia and himself. He said RMF never consulted him about any gift or trust of shares to Sara and never informed him that she was consulting with anyone else about such matters.

[72] He said in his experience RMF would have consulted him about such a matter. Serra was also not required to attend Court for cross-examination.

LUIS MUNIZ GARCIA

[73] Garcia has been licensed to practice law in Spain since 1982. From 1987 he has been legal adviser to RMF either directly or through his company, BIMARAN SA.

- [74] He also got to know Jeanine Girod who lived with RMF from 1977 until 1996. He deposed to the excellent relationship between RMF and his children.
- [75] He spoke of the agreement reached between RMF and Girod where the former paid the latter 300 million pesetas as full and final compensation for her economic rights. Garcia it appears would seem to prefer Girod to Roldan.
- [76] He stated that he knows for a fact that in July 2000 RMF formalized the donations to his sons and daughters in the form of a loan without repayment date and RMF informed him that Sara had not accepted the donation, alleging that since it was formally a loan, she was afraid the children would claim its repayment upon his death.
- [77] Garcia stated that because RMF had a degree in law and was familiar with many legal matters, he was well aware that if he died without executing a Will, as was the case, all of his assets would be inherited by his sons and daughters which was his wish.
- [78] He deposed of events after RMF's death with regard to the gift to Sara. He drew up the necessary document which was signed by RMS and Sara on May 30, 2001.
- [79] In his second affidavit he replies to the affidavit of S.R. He stated that it was false that RMF did not wish to resume his relationship with Ms. Girod and it is also false that his declarations lack objectivity.

- [80] He said RMF never told him that he had created or thought of creating a trust in favour of SR and in his opinion he would never have done so without being advised by one of his three professional advisors and without informing his children.
- [81] He said to his knowledge the assets in the BVI companies represented a very significant part of the total funds and assets belonging to RMF.
- [82] When he was cross-examined he said he was not part of the social life of RMF. He admitted that, to the children, the father was the golden goose. He stated that RMF liked his children and would boast of his relationship with women. He said he had to put an end to some of RMF's relationships financially.
- [83] He was shown the visitors book for the yacht and pointed to a statement and signature on the first page. In response he said the signature appeared to be that of the King of Spain.

GONZALO RODRIGUEZ FRAILE

- [84] Gonzalo Rodriguez Fraile is a 44 year old trained Spanish lawyer who afterwards received an MBA from Harvard, after which he entered the investment banking business by starting PRS International Consulting Inc. with two of his Harvard classmates. He is chairman of the Board and President and CEO since its founding.

- [85] He states that PRS provides investment advising and other financial services to its clients. He said in early 1998 Mr. Fontella consulted him to inquire whether PRS could provide investment management services in respect of certain funds that he owned and as a result PRS incorporated the two BVI companies in 1998.
- [86] He stated that he acquainted RMF with the “know your customer” or KYC rules of the SEC, the NASD and the Swiss company financial regulating authorities to which PSR are subject and he did emphasize to RMF that for the purposes of these rules, if RMF were ever to change the beneficial ownership of these companies he would promptly notify PRS so that the applicable KYC forms and due diligence materials could be completed and executed with respect to any such new beneficial owner.
- [87] He stated that from the beginning of the relationship until the date of his death on April 4, 2001 RMF gave instructions to PRS relating to the investment, management or application of the assets and funds that PRS managed for him via Boarder Ltd. and Applegate Overseas Ltd.
- [88] He stated that he believes RMF would consult him if he ever wanted to transfer any of his bearer shares in the said companies. He spoke of instructions to him given by RMF that in the event of his death he should contact his eldest son who would distribute his assets to his six children.

- [89] He confirmed that RMF's eldest son had a long standing power of attorney for his father's international bank accounts.
- [90] He spoke of three meetings in which Sara was present. On the first occasion February 8, 2001 it concerned the gift of 150 million pesetas. RMF was present. He said SR began to cry and said she did not want money from RMF. The second meeting was after the death on May 16, 2001. The gift also featured. She cried again but accepted the gift. The third meeting on June 21, 2001 pertained to tax on the gift. She was trying to get RMS to pay the tax which he refused.
- [91] He stated that SR did not make any claim to him or to PRS at any of the three meetings although she knew that he was the primary investment adviser to RMF. He said at no time before or after RMF's death did SR contact him or anyone else at PRS with any claim to the assets of Boarder Ltd. or Applegate Overseas Ltd.
- [92] In his second affidavit he replies to an affidavit filed by SR on December 12, 2001. He stated that he was at all times legally obligated to have current, full and detailed knowledge of RMF's financial affairs as they pertained to Boarder and Applegate and the obligations arose from KYC rules of the United States Securities Exchange Commission; the United States National Association of Securities Dealers; the Cayman Financial Control Board; and the Swiss Central Bank.

- [93] He too thinks that the assets of Boarder and Applegate represented a very substantial portion of the overall funds and assets of RMF. He states that the lack of any professional consultation, formalities and memorialization of the purported gift or donation of the shares to SR strongly suggests to him that RMF never intended to give or pledge the shares or the assets they represented to SR.
- [94] Fraile states that perhaps most important is that SR failed to address paragraph 29 of his first affidavit where he stated that she was never present in any of his discussions with RMF regarding his financial affairs other than the one in February 2001 concerning the gift of 150 million pesetas.
- [95] When he was cross-examined he admitted that the owners of the shares keep them and can do what they want irrespective of KYC rules.
- [96] He stated that the legal advisers did not know the bearer shares were held by Sara until July 2001.

LEGAL ISSUES

- [97] The legal issues in this case pertain to whether or not the gift to Sara satisfied the requirement of a valid donatio mortis causa, the onus and standard of proof in these proceedings, and the relevance of the legal opinions given by the two Spanish Law Experts, one on either side.

[98] Donatio mortis causa: In *SEN V HEADLEY* 1990 1 All E.R. Mummery J held that there could not be a valid donatio mortis causa of realty and so the lady friend lost her claim to the house of the Deceased. The Court of Appeal at 1991 Ch. 425 allowed her appeal. Nourse L. J. delivered the judgment of the Court.

[99] The learned Lord Justice at *page 431* said:

“The three general requirements for such a gift may be stated very much as they are stated in *Snell's Equity 29th edition at pages 380-383*. First, the gift must be made in contemplation, although not necessarily in expectation, of impending death. Secondly, the gift must be made upon the condition that it is to be absolute and perfected only on the donor's death, being revocable until that event occurs and ineffective if it does not. Thirdly, there must be a delivery of the subject matter of the gift, or the essential indicia of title thereto, which amounts to a parting with dominion and not mere physical possession over the subject matter of the gift.”

[100] The nature of the gift mortis causa is dealt with also at *Halsbury's Laws of England, Fourth edition, Volume 20 paragraphs 67-68* and at *Snell's Equity 30th edition paragraphs 20-1 to 20-11*. See also the *Law of Donatio Mortis Causa by Andrew Borkowski LLB pages 1-4. Re Craven's Estate 1937 1 Ch. 423; and Caribbean Law of Trusts by Gilbert Kodilinye of U.W.I.*

[101] In their outline opening on behalf of Sara Roldan del Castillo learned Counsel stated that it was implicit that RMF made the gift in

contemplation of his death, but in paragraph 26 of their closing submissions learned Counsel for the Second Defendants submitted that there is no factual basis for asserting that when RMF made the alleged gift he did so in contemplation of death “within the near future” or “for some reason believed to be imminent.”

[102] Paragraphs 21-26 of the closing address of learned Counsel for the First Defendant are to the effect that there was a valid donatio mortis causa even if RMF exercised control of the funds in the companies until he died. Learned Counsel for the Second Defendants at paragraphs 31-34 of their closing submissions say there must be the intention to part with dominion.

[103] Counsel for the First Defendant correctly identifies the issue in paragraph 3 of their closing submissions:

“If SR’s evidence is to be believed and the requirements of a valid donatio were otherwise satisfied, the shares are unquestionable hers and she is the owner of Applegate and Boarder. If, on the other hand, her evidence is disbelieved, that will be the end of the matter. The Court will not need to proceed any further.”

[104] It seems to me that I should first consider the evidence as to whether any gift was made, and then after to see if that gift complies with the law of donatio mortis causa, especially with regard to the questions of contemplation of death and delivery of the subject matter.

- [105] I should take the opportunity to refer to two cases which may be relevant in this context. *HAWKINS V BLEWITT* *English Reports, Volume LLXX page 489* states that to give effect to a donatio mortis causa the Deceased must, at the time of the supposed gift, part with all dominion over them.
- [106] And in *GREENIDGE V BANK OF NOVA SCOTIA* (1984) 38 WIR 63 Williams J, later to become Chief Justice Sir Denys Williams, held that the Deceased had intended to maintain his right to deal with the money in the bank account even after handing over the passbook to his niece and accordingly, could not have intended the money to be a gift to his niece for the purposes of a donatio mortis causa.
- [107] Onus and standard of Proof of Donation Mortis Causa: *Re Finch 1883 23 Ch. D 267* establishes that a claim of a donatio mortis causa cannot be supported without corroboration, and also that the circumstances did not furnish evidence of corroboration. I would therefore reject the submission of the First Defendant as regards corroboration.
- [108] The law in *Halsbury's Laws of England, Fourth Edition, Volume 20, paragraph 15*, seems to modify the strict rule on the necessity for corroboration in the same way that the Judge in Assizes gives the direction to a Jury on corroboration.
- [109] *Paragraph 15 of Volume 20 of Halsbury's* states:
"Proof of gifts by deceased persons. A gift alleged to have been made by a deceased person cannot, as a general rule, be

established without some corroboration. In some cases the judges have definitely stated that the Court cannot act on the unsupported testimony of a person in his own favour, but there is now no hard and fast rule that the evidence of the alleged donee must be disbelieved if uncorroborated. It must be examined with scrupulous care, even with suspicion, but if it brings conviction to the tribunal which has to try the case that conviction will be acted on."

[110] Borkowski puts it this way at page 41:

"The current position, as established by the case law, can be summarized thus: the onus is on the donee to prove the alleged donation by clear and unequivocal evidence; the court must scrutinize such evidence very carefully – given the opportunity for abuse and fraud – but the uncorroborated testimony of the donee can suffice if he is considered to be a truthful and reliable witness."

[111] In *PUBLIC TRUSTEE V BUSSELL* (1993) 30 NSWLR 111 Cohen J. stated:

"In claims such as this, where a party to the proceedings is alleging acts or conversations by a Deceased which cannot be answered, the Court must look with great care at the evidence before accepting it."

[112] Relevance of legal opinions on Spanish law: Professor Ms. Silvia Diaz Alabart of the University of Madrid gave an opinion on behalf of the Second Defendants to the effect that under Spanish Law the alleged gift mortis causa could not constitute a valid donatio. Dr. Antonio F. Delgado Gonzalez, Attorney-at-Law, on behalf of the First Defendant

says the gift is valid although the donee is limited to one third of the Estate.

[113] Learned Counsel for the First Defendant in their outline opening referred to *section 116 of the International Business Companies Act, Cap. 291* and submitted that it is BVI law which determines both the nature and the legal efficiency of the transactions and in his oral opening Mr. Mann Q.C. submitted that Spanish law is irrelevant. I agree with that submission.

CONCLUSIONS

[114] In their closing submissions Counsel for the First Defendant attacked the affidavits of RMS and Fraile with regard to the alleged instructions given by RMF to them. Counsel said the accuracy of the affidavit of RMS is doubtful and it is impossible to believe what Fraile says in this regard. Let me put Counsel's apprehensions at ease. My decision will not be based on any supposed instructions given by RMF to distribute all his assets to his six children.

[115] Counsel also referred to a conflict between the affidavit evidence of Fraile and his oral evidence where in his affidavit Fraile said he was concerned for RMF's health as opposed to his answer in cross-examination that he was not concerned with RMF's health. This depends entirely on the context of the statements. I find this a petty point on which to ignore a man's testimony. I again repeat I shall not

be deciding this case on any instructions given by RMF to GRF and/or RMS.

[116] In their closing submissions learned Counsel for the Second Defendants asked me to look at the history of RMF's dealing with the companies as this renders incredible any suggestion that he had made a gift – of any nature – of the shares of these companies.

[117] It passes strange that when Sara found out the true significance of what was contained in the envelopes she did not contact Fraile or PRS whom she undoubtedly knew was managing the funds of the Deceased but proceeded swiftly to commence litigation on September 14, 2001.

[118] I find it incredible that Sara would have received the two envelopes from the Deceased in the circumstances which she stated in February or March 1999, take them to her parents' home and never opened them till after RMF's death on April 4, 2001, perhaps in June 2001.

[119] For most persons, male or female, below or above 30, there would be a strange feeling, butterflies in the head, belly and feet.

“ Take these...you will never have any monetary concerns.”

[120] Many persons would share the good news with their parents or other loved ones, and some would go into their bedrooms behind closed doors and look to see what is it that the donor was talking about. But not Sara Roldan del Castillo.

[121] It would be very different for Sara to maintain that while she was helping RMS to clear the Deceased's papers she never mentioned that he had given her papers. So she says she told RMS about the papers and RMS asked for them but did not press the issue after Sara had signed the document of release.

[122] It seems to me that it would be the natural thing for Ramon to see the envelopes even before executing the document. He had no testamentary documents. He was looking for papers. And would Sara tell him his father had given her papers and he would ignore that? That also is incredible.

[123] Ramon denied on several occasions by affidavit and under cross-examination that Sara told him about papers. In answer to Mr. Mann to this question he said:

"Sara never told me before the agreement was signed that my father gave her the papers. If she had told me so I would have asked her to show them to me. We would not be here today."

I believe Ramon Mendoza Solano. Sara Roldan del Castillo is not speaking the truth.

[124] I am advised to scrutinize her evidence. Sara needs to do some explaining about her own evidence as to her age. In her first affidavit she said when she met RMF she was in her thirties but later as regards her comment on what a Newspaper had published she said she was 29. A little lie. Was it another little lie when she said when

she met RMF he was divorced from his wife, and later she said they were well established when his divorce came through?

[125] At the end of her examination in chief she pointed to a photo with friends aboard "AMOUR SECRET" and said the picture was taken in Summer 1997. And almost immediately afterwards upon cross-examination she had to admit that the date could not be correct for the "AMOUR SECRET" was only purchased by RMF in 2000.

[126] And she had to concede another misstatement in one of her affidavits when she said the Deceased had angina. And under cross-examination she had to retract from the statement in one of her affidavits that none of the Deceased's children were engaged in his business. I asked the question: Has Sara given clear and unequivocal evidence? She said the gift was first made to her in 1998 then she changes that to say that it is really February or March 1999. I doubt the reason she gives is correct.

[127] But she began in her first affidavit by alleging it was an outright gift and when met with the reply that the Deceased exercised control of the funds until he died, she suggests in her second affidavit that he was like a trustee – even a trustee who solely enjoyed the beneficial interest. Then before me she says the gift was a donatio mortis causa.

[128] I find Sara Roldan del Castillo is neither a truthful nor a reliable witness and her evidence lacks conviction. She has not satisfied the onus and standard of proof required in this case.

[129] I agree with the evidence given by RMS and the Deceased's advisers that the pattern of the Deceased's behavior in business would suggest he did not make the gift. This was a man who loved his children and there is no doubt that RMS was considered his heir apparent. Even Sara accepted this and under cross-examination stated:

"I told Ramon because the Deceased asked me to tell Ramon to do me no harm."

[130] If RMF had really made the gift of the share to SR would he additionally seek to make the gift of 150 million pesetas? I doubt it. It is more credible that Sara found the envelopes when she was searching the house after the demise of the Deceased.

[131] In my judgment the shares in Boarder Ltd. and Applegate Overseas Ltd. are the property of the heirs and children of Ramon Mendoza Fontella deceased.

[132] The Original Summonses initiated by Sara Roldan are dismissed and she is ordered to pay the costs of the Second Defendants assessed in the amount of \$20,000.

A.N.J. MATTHEW
High Court Judge Ag.

