



The Court of Appeal for Bermuda

CIVIL APPEAL No. 6 of 2011

Between:

AMANDA HAMZA

Appellant

-v-

DR. HENRY SUBAIR

DR. CLARENCE JAMES

(as Trustees of the Estates of Mohamed Suleiman Hamza)

First Respondents

-and-

ALIA HAMZA

Second Respondent

Before: Zacca, President
Ward, J.A.
Baker, J.A.

Appearances:

Mr Mark A C Diel for the Appellant

Mr David Kessaram, for the First Respondents

Mr Kyle Masters, for the Second Respondent

Judgment

Date of Hearing:

1 November 2011

Date of Judgment:

17 November 2011

BAKER, JA:

Introduction

1. This case is about the meaning of a will. By his will dated 30 April 2001 the Testator, Mohamed Suleiman Hamza devised all his real and personal property to his Trustees upon trust:

“2(c) To hold my house ‘On the Rocks’ situate at 34 West Side Road Sandys (‘the House’) for the absolute benefit of my wife AMANDA until her death or remarriage whichever shall first occur (without impeachment for waste) and after her death or remarriage (as the case may be) the House shall form part of my residuary estate to be dealt with in accordance with sub clause (j) hereunder. During such time as the House is held for Amanda, she shall be responsible for the usual outgoings necessary to maintain the House including insurance, land tax, utilities, running repairs and general maintenance (such outgoings hereinafter collectively referred to as (‘the general maintenance expenses’). Amanda shall be allowed to live in the House or, if she so desires, it shall be rented with the income therefrom being paid to her after deduction of a suitable amount to enable my Trustees to meet the maintenance expenses of the House. If Amanda so desires, my Trustees shall sell the House and purchase another house, condominium or apartment for her as long as the sale proceeds from the House are sufficient for such purpose, (and if not, then any shortfall shall be made up by her). If there is a surplus of funds from the sale of the house, then such surplus of funds shall be deposited in an interest bearing account (or otherwise soundly invested) with income or interest accruing for the benefit of Amanda until her death or remarriage. In any event the House or its proceeds of sale, or any investments into which it may be transmuted shall (after the death or remarriage of my said wife) be held by my Trustees on the trusts contained in sub clause (j) below.”

2. Amanda is the appellant in these proceedings. The first respondents are the Trustees and the second respondent is the residuary beneficiary Alia who is the daughter of the deceased by his former wife.

3. Amanda was married to the Testator on 25 April 2001, five days before the will was made. It was common ground that the Testator was in very poor health at the time and indeed he died on 22 May 2001. Amanda, a Scot, had been in Bermuda for four or five years and for much of that time had been living with the Testator. He was a Bermudian citizen and Amanda’s marriage to him gave her a right to remain in Bermuda after his death—an option

to stay in Bermuda should she wish for the rest of her life. Absent the marriage, she would not have had this right.

4. Following the Testator's death, Amanda remained in Bermuda for some time but eventually returned to Scotland where she is looking after her parents. She is a nurse by profession and indeed worked as a nurse in Bermuda. The question at issue in the appeal is whether the words in clause 2(c) of the Will: "If Amanda so desires, my Trustees shall sell the House and purchase another house, condominium or apartment for her..." covers a house in Scotland, which is what Amanda wants, or whether the territorial ambit is limited to Bermuda.

5. The judge said that at first blush he inclined towards the view that adopting a modern internationalist approach to an international jurisdiction like Bermuda and a non-local widow like Amanda the term "another house" should be construed literally to include a house abroad. However, he found four cumulatively compelling factors that tipped the scales in favour of the contrary interpretation. These were:

- The fact that the will is a Bermudian Instrument appointing Bermudian Trustees and primarily dealing with Bermuda property.
- The different immigration status enjoyed by the widow and the residuary beneficiary.
- The relative youth of Amanda.
- The fact that the average price of accommodation is far higher in Bermuda (the residuary beneficiary's country of origin) than in most other countries including the United Kingdom (the widow's country of origin).

6. There was no dispute about the relevant principles of law for construing the will which are set out at paragraph 223 of Volume 103 of the Fifth Edition of Halsbury's Laws of England.

"Basic principles of construction"

In the 1990's there was a change in the approach to the construction of legal documents. The decisions which introduced this change concerned the construction of commercial agreements but they affect the approach to the construction of legal documents generally. The principles as they apply to wills may be briefly stated as follows:

(1) interpretation is the ascertainment of the meaning which a document would convey to a reasonable person having all the background knowledge which would reasonably have been available at the time the will was made;

(2) the admissible background knowledge includes 'absolutely anything which would have affected the way in which the language of the will would have been understood by a reasonable man', provided that it is relevant:

(3) the law excludes from the admissible background declarations of subjective intent;

(4) the meaning which a will would convey to a reasonable man is not the same thing as the meaning of its words: the meaning of words is a matter of dictionaries and grammars; the meaning of a will is what having regard to the relevant background the testator would reasonably have understood to mean; the background may not merely enable the reasonable man to choose between possible meanings of words which are ambiguous but even to conclude that the testator must, for whatever reason, have used the wrong words or syntax;

(5) the 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents; on the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the testator an intention which he plainly could not have had."

7. The main thrust of Mr Diel's argument on behalf of Amanda was on the following lines. The will was widely drafted. Amanda obviously might want to return to Scotland. Why would a husband restrict a non-Bermudian wife to Bermuda property only? The wording of the will is quite clear; it would have been easy to insert the words 'in Bermuda' after 'another house, condominium, or apartment for her' if that had been the intention.

8. Mr Diel also pointed out that there was nothing in the will to indicate a desire for capital appreciation. Any surplus funds from the sale of the house were to be deposited in an interest bearing account or be otherwise soundly invested with income or interest accruing for the benefit for Amanda.

9. Mr Kessaram, for the Trustees, supported by Mr Masters, for Alia, argued that the judge's conclusions were correct. The issue for the judge was whether the Testator intended a geographical limitation to be read into the power given to Amanda to require the Trustees to purchase another property for her. Albeit her interest was in the purchase of a house in Scotland, the true construction options are either the purchase of a house anywhere else in the world i.e. without geographical limitation, or only in Bermuda.

10. Mr Kessaram identified, as had the judge, the following background knowledge reasonably available to the Testator as:

- Amanda's non-Bermudian status and Alia's Bermudian status.
- Bermuda's laws regarding the ownership of Bermuda land by non-Bermudians.
- The relatively high cost of Bermuda residential property compared to residential property in other parts of the world and especially the United Kingdom.
- The significant and steady growth in value of Bermuda residential property over the years.
- The Trustees were colleagues of the Testator carrying on their own medical practices.

11. It is of course necessary, as the judge recognised, to look at the will as a whole and identify any assistance to be found from its other provisions. In this regard it is to be noted that Amanda's interest in 'On the Rocks' was almost equivalent to, but fell short of, a life interest. Accordingly she was not given any proprietary right in the property. This was something she could not have without a licence from the Bermuda Government; she had no such licence. What the will gave her was a personal right to occupy or enjoy the income from the property. Furthermore such right was permanent (until her death or remarriage) and related not only to 'On the Rocks' where she had lived with the testator, but also to any other 'house, condominium or apartment' she required the Trustees to buy for her pursuant to clause 2(c).

12. The judge, importantly, pointed out that the will could easily have made provision for the creation of a more straightforward life interest in any overseas property bought with the proceeds of sale of the House if such overseas purchase was contemplated as potentially taking place. The will did not make such express provision.

13. Mr Kessaram submitted that the Testator's failure to make specific provision for Amanda to own a straightforward life interest in overseas property (where there would be no need to navigate carefully around land ownership laws) was indicative of an intention that any house, condominium or apartment bought for Amanda must be located in Bermuda. Also, the Trustees were personal friends and colleagues of the Testator and one would not expect the Testator to put these to the trouble, and possible expense, of administering property abroad.

14. The fundamental feature of the provision for Amanda was that she was to be entitled, at her option, either to the use of 'On the Rocks' or the income from letting it, in either case subject to her payment of the maintenance expenses and this was to continue for her lifetime or until her remarriage. Provision is made for the Trustees, at her instigation, to sell and purchase a substitute property.

15. Amanda was living in Bermuda with the deceased in 'On the Rocks' at the time the will was made. That had been the position for some years and there was no evidence that she intended to live anywhere other than in Bermuda.

16. The main strength of Amanda's case seems to me to be two-fold: first that the natural meaning of the words used by the Testator were unrestricted as to where any replacement house might be purchased and second that the Testator knew Amanda originated from Scotland and still had connections there.

17. On the other hand, this was a Bermuda will with Bermudian Trustees and all the Testator's property (including 'On the Rocks') was in Bermuda with the exception of some monies in a Swiss account which he specifically devised as an immediate legacy, so it was never going to form part of the residuary estate and be administered by the Bermudian Trustees. Further, the residuary beneficiary was Bermudian.

18. The argument that the Testator would have appreciated that at some point Amanda might wish to return to and be accommodated in her homeland is, I think, met by the fact that the will provided for Amanda's entitlement to the income from the proceeds of sale of 'On the Rocks'. Thus Amanda could be housed in Scotland in a property rented with those proceeds or, possibly, with a mortgage funded from those proceeds.

19. Of the four factors regarded by the judge as background that were cumulatively favourable to Alia's case, I was not impressed that the youth of Amanda or the high property prices in Bermuda added anything to the other two. In my judgment what tips the scales in the present case is that this was a Bermuda will made by a Bermudian Testator with Bermudian Trustees essentially dealing with Bermuda property and a Bermudian residuary beneficiary. I would therefore dismiss the appeal.

20. There is one matter to which I refer as a post script. With effect from 22 June 2007 Part VI of the Bermuda Immigration and Protection Act 1956 was amended so that

thenceforth Amanda requires a licence to continue to hold her interest in the Bermuda property. She applied for such a licence in January 2011 but her application is still outstanding. Although the outcome of the licence application could have serious consequences for Amanda, it does not affect the outcome of the present appeal.

Signed

Baker, JA

Signed

I agree

Zacca, P

Signed

I agree

Ward, JA