



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2010: No. 297

BETWEEN:

AMANDA HAMZA

Plaintiff

-v-

- (1) DR. HENRY SUBAIR
- (2) DR CLARENCE JAMES  
(As Trustees of the Estate of Mohamed  
Suleiman Hamza)
- and
- (3) ALIA HAMZA

Defendants

## JUDGMENT

(In Court)

Date of Hearing: March 30, 2011

Date of Judgment: April 8, 2011

Mr. Mark Diel, Marshall Diel & Myers, for the Plaintiff  
Mr. David Kessaram, Cox Hallett Wilkinson, for the Trustees  
Mr. Delroy Duncan and Mr. Kyle Masters, Trott & Duncan,  
for the 3rd Defendant

## Introductory

1. The Plaintiff (who is not Bermudian) is the widow of and the 3<sup>rd</sup> Defendant (who is Bermudian) is the daughter of the Testator, by a previous marriage. The Testator was a doctor who practised as a consultant in Bermuda prior to his death on May 22, 2001. The Trustees are former colleagues and friends.
2. By an Originating Summons issued on September 3, 2010, the Plaintiff seeks the following relief:

*“Pursuant to clause 2(c) of the Last Will and Testament of Mohamed Suleiman Hamza dated 30 April 2001 an order that:-*

- (a) the Defendants as Trustees of the Estate of Mohamed Suleiman Hamza, deceased, sell the property known as on ‘On the Rocks’, situated at 34 West Side Road, Sandys Parish; and*
- (b) that the proceeds of the sale of the property be used to purchase a reasonable property in Scotland for the Plaintiff’s use for her life.”*

3. It was recently ascertained that the Plaintiff requires a permit under Part VI of the Bermuda Immigration and Protection Act 1956 (as amended with effect from June 22, 2007) to continue to hold her interest in the property to which this action relates (“the Property”). As a result, in or about January, 2011 the Plaintiff apparently applied for a permit under the 1956 Act in relation to her interest in the Property. Because the result of this application potentially impacts on the relief sought, it was common ground that the application for the primary relief sought would have to be adjourned.
4. However, the Plaintiff’s counsel was eager to have what was in effect a preliminary point of construction resolved. At the beginning of the hearing I declined to adjourn the Plaintiff’s application altogether, as sought by a Summons issued by the 3<sup>rd</sup> Defendant. This Summons sought to have the Court determine as a preliminary issue whether or not the Trustees could lawfully hold the Plaintiff’s interest under the Will so long as she did not have a permit. On balance, it appeared to me to be more cost-effective to determine the construction of Will point first as it was clearly the shorter point and would definitely have to be resolved if the requisite permit was obtained. As Mr. Diel submitted, there was no basis for the Court at this juncture assuming that the permit application would be refused. On the other hand, I accepted that subsequent events might prove this judgment to be wrong, so I reserved the costs of the 3<sup>rd</sup> Defendant’s application after refusing it.
5. The construction of the Will point, which in the event was fully argued in less than a day, was raised in Dr. Subair’s October 21, 2010 Affidavit as follows:

*“24. I and Dr. James are conscious that we have to adhere to the terms of the Will which state that if Amanda so desires, we should sell the Property and purchase another house, condominium or apartment for her. However, the Will*

*remains silent as to whether the replacement property should be in Bermuda or can be purchased overseas.*

*25. At paragraph 4 of her affidavit Amanda refers to her affidavit sworn on 11<sup>th</sup> April 2007 in action 2007: No. 45 where she 'required the property be sold and a property bought for me in Scotland.' She continues, 'The Trustees have failed to even begin carrying out this request.'*

*26. As noted above, I and Dr. James have only recently managed to regain control of the Property by Consent Order dated 12<sup>th</sup> August 2010. Further, we are unsure as to whether the terms of the Will allow us to carry out Amanda's request in full. Therefore, we would be grateful for the Court's direction on this issue."*

6. It emerged at the hearing that two points of interpretation required to be decided: (1) did the Will permit the Trustees to purchase real estate overseas for the Plaintiff's lifetime use; and (2) did the Will require the Trustees to follow the Plaintiff's wishes in terms of both selling the Property and choosing an alternative property.

## **The Will**

7. Clause 2 of the Will dated April 30, 2001 devises all of the Testator's real and personal property to his Trustees upon trust:

*"(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.”*

8. The 3<sup>rd</sup> Defendant is a residuary beneficiary under clause (j) of the Will entitled to receive the Property or the capital generated by its sale.

### **Construction of the Will: applicable principles**

9. Mr. Diel referred the Court to Halsbury’s Laws, 4<sup>th</sup> edition Reissue, volume 50, paragraphs 423-425 and 431-432. The dominant principle is that the Court must give effect to the *“testator’s intention, as declared by him and apparent in the face of the will...so far and as nearly as may be consistent with law...The expressed intention is in all cases taken as the actual intention, whatever the testator in fact intended, and as a general rule the court may not give effect to any intention which is not expressed or implied in the language of the will itself”* (paragraphs 423-424).
10. Counsel also referred the Court to the following passage from *Halsbury’s Laws* which elaborated upon the dominant rule of construction:

*“In ascertaining the testator’s intention, the court of construction is concerned with three distinct matters:*

- (1) the words which the testator has used to express his intentions;*
- (2) the meaning of those words in relation to the persons and things described, that is to say, who and what are the specific persons and things to be identified as the donees and the subjects of disposition, or as the persons and things otherwise mentioned in the will, and*
- (3) the meaning of the words in relation to the disposition of property among the donees.”*

11. As regards the extent to which extrinsic evidence is admissible to construe a will, Mr. Diel relied upon the following passage in paragraph 431 in the same text: *“ In order that the will may be properly expounded, the court adopts the general rule that any evidence of the circumstances is admissible which in its nature and effect simply explains what the testator has written, but in general, no evidence may be admitted which in its nature or effect is applicable to the purpose of showing merely what he intended to have written. Extrinsic evidence may be resorted to for the purpose of proving a fact which makes intelligible something in the will which, without the aid of such evidence, would not be intelligible. ”*
12. Finally the Plaintiff’s counsel submitted that: *“The court construes the whole will in the light of the knowledge of the meaning of the words and expressions used and of the identity of the persons and things described by the will, and of the nature of the facts and circumstances there mentioned, which have been obtained by the admission of evidence of the material circumstances”* (Halsbury’s Laws, Vol. 50, paragraph 432). On the basis

of this latter principle, I was invited by Mr. Diel to take into fact as a material circumstance the fact that the Plaintiff was not Bermudian and likely to want to live outside Bermuda; Mr. Kessaram invited the Court to take into account the difficulties of non-professional Trustees (identified as the Testator's friends in the Will) administering overseas property.

13. The rules of construction identified by Mr. Diel were not challenged by Mr. Kessaram, nor by Mr. Duncan, who essentially adopted a neutral stance in relation to the application. There do not appear to be any local statutory provisions or case law which depart from the common law rules identified by *Halsbury's Laws*. In *Re Landy* [2003] Bda LR 26 where counsel referred to the same rules of construction as outlined in other leading English texts, I concluded (at page 4) as follows:

*"These guiding principles on the interpretation of wills have been affirmed by the Bermudian Court of Appeal in Re Murphy, deceased (Hind-v-Murphy) [1992] Bda LR 9, a decision which is binding on me. In that case, Harvey da Costa (Acting President) at page 2 of his judgment, delivered on behalf of the Court, cited with approval the following passage from Roddy-v-Fitzgerald (1857-58) VI H.L.C. 875:*

*" It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, what is the meaning of that which he has actually written..."*

*Under Bermuda law, the prohibition on utilizing evidence of events after the death of a testator to determine the meaning of words in his will arises from section 20 of the Wills Act 1988, which provides: "Every will shall be construed, with reference to the real and personal estate referred to in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention appears by the will."*

14. I also note that the Will describes the estate representatives not as executors but "Trustees"; this appears wholly consistent with the following provisions of the Administration of Estates Act 1974:

***"Trust for beneficiaries***

*23 Subject to this Act, the estate representatives of a deceased person shall hold the real estate which devolves upon and becomes vested in them under section 22(1) as trustees for the persons beneficially entitled thereto in accordance with the will of the deceased person or the law relating to intestacy, or the combination of his will and that law, and those persons shall have the same*

*power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.”*

**Does “purchase another house” in clause 2 (c) the Will mean “purchase another house in Bermuda (but not abroad)”?**

15. Mr. Diel submitted that having regard to the fact that the Plaintiff is not Bermudian, and was not Bermudian at the date of the Will, executed shortly before the Testator’s death, it made no sense to infer that the Testator intended to tie his widow to living in Bermuda property. He invited the Court to conclude that the unqualified reference to “*another house* [etc.]” should be construed as including property both within and without Bermuda.
16. Mr. Kessaram submitted that the limited scope of the Plaintiff’s interest in the Property was originally designed to steer clear of the need for her to acquire a permit as a non-Bermudian to hold an interest in Bermuda real estate. Her rights in the Property were limited to residence or income if she chose not to reside in the Property. The 2007 amendments to the 1956 Act extended the permit requirements to cover interests such as the Plaintiff’s. In construing the Will and determining whether or not the Plaintiff had the right to request the purchase of another house overseas, the Will had to be looked at as a whole. The only relevant residuary beneficiary was Bermudian. The Trustees were not professional trustees and it would be onerous for them to manage property abroad. While I have considerable sympathy for the difficulties faced by the present Trustees in relation to the instant estate, I am bound to accept Mr. Diel’s argument that this latter point lacked merit from legal interpretation point of view.
17. At first blush I would incline towards the view that, adopting a modern internationalist approach to an international jurisdiction like Bermuda and a non-local widow like the Plaintiff, the term “another house” should be construed liberally to include a house abroad. However, there are four cumulatively compelling factors, taking into the material circumstances surrounding the Will, which tip the scales in favour of the contrary interpretation. The main circumstances I consider to be material are: (a) the fact that the Will is a Bermuda instrument which appoints Bermudian Trustees and primarily deals with Bermuda property; (b) the different Bermuda immigration status enjoyed by the widow and the residuary beneficiary; (c) the relative youth of the widow at the Testator’s death shortly after the Will was executed (she appeared to me in Court, nearly 10 years later, to be a woman at most now in her forties), and (d) the notorious fact, of which I take judicial notice, that the average price of accommodation is far higher in Bermuda (the residuary beneficiary’s country of origin) than it is in most other countries, including the UK (the widow’s country of origin). These matters are material to

understanding both the identity of the key beneficiaries and the nature of the interests created by the Will.

18. Firstly, in my judgment, there must be an implicit assumption when reading the Will that its geographical scope is limited to the territorial limits of authority of the Trustees themselves, which is only (absent an application for recognition of their appointment abroad)<sup>1</sup> limited to the Probate jurisdiction of this Court. This is why, to oust that presumption, the Testator devises in clause 2 “*all of my real and personal property of whatsoever nature and wheresoever situate*”. It follows that where, exceptionally, action by the Trustees is contemplated abroad logically one would expect to see the foreign element expressly spelt out.
19. This approach appears to be adopted in the Will. The location of various items of personalty presumably located in Bermuda is not mentioned (clause 2(d), (e), (f), (g) and (h)); however the location of a gift of monies located in Switzerland is (clause 2(i)). It is in this light significant that, when defining the Plaintiff’s right to require the Trustees to “*purchase another house [etc.]*”, the Will omits the words “in Bermuda or abroad”.
20. Secondly, it is noteworthy that the Testator has limited the widow’s interest in the Property, or its replacement, in a way which is consistent with her never acquiring a full-blown legal interest in the existing house or its capital proceeds. This supports more than it undermines the inference that it was never contemplated that if the house was sold a replacement would be purchased abroad; because the widow’s interest was limited for all purposes in a manner designed to comply with Bermuda immigration law as it was at the date of the Will. The highly unusual interest devised to the Plaintiff only makes sense in the peculiar legal landscape of Bermuda and the immigration restrictions relating to land which existed at the date of the Will and the Testator’s death. The Will could easily have made express provision for the creation of a far more straightforward life interest in any overseas property bought with the proceeds of sale of the Property, if such overseas purchases were contemplated as potentially taking place. The Will did not make such express provision.
21. Thirdly, I find that the interest created in favour of the Plaintiff in the Property, read in conjunction with the residuary provisions for the 3<sup>rd</sup> Defendant, also make it difficult to construe the relevant terms of the Will as contemplating the Trustees purchasing a replacement house abroad. The crucial provisions read as follows:

*“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*

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<sup>1</sup> Of course, the need for recognition might not arise if title to the property was formally vested in the Trustees, as may have already occurred.

*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.”*

22. It is a notorious fact that Bermuda real estate is some of the most expensive real estate in the world. The 3<sup>rd</sup> Defendant, who is entitled in remainder to own the House or its capital proceeds outright after the death or remarriage of the Plaintiff, is Bermudian. In my judgment plain words are required to justify the conclusion, in the peculiar context of the Will read as a whole, that “*purchase another house [etc.]*” should be construed as contemplating purchasing another house abroad. Assuming Mr. Diel is right that the Plaintiff can unilaterally choose what property she wishes the Trustees to buy, she could potentially sell a \$1 million property, purchase a \$100,000 property abroad, live off the interest on \$900,000 for the rest of her life, depriving the residual beneficiary of any capital appreciation on 90% of the capital value of the Property<sup>2</sup> over many years. Such a result would be wholly inconsistent with the relative nature and extent of the devises to the widow and daughter respectively. On the other hand, any other property bought for the Plaintiff to reside in Bermuda is likely to have a higher average capital value (or would have been so likely at the Testator’s death) than the average in most other jurisdictions (such as the UK, the Plaintiff’s apparent country of origin).
23. Fourthly, the Plaintiff’s interest is defined in such a way as to take into account the fact that she might choose to live abroad, as Mr. Kessaram pointed out:

*“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.”*

24. This is in my judgment a dominant clause which applies to any replacement property which may be purchased as well. In other words, the income generated by the Property or its proceeds enures for the benefit of the Plaintiff to cover her reasonable accommodation expenses if she elects not to occupy the Property (or its replacement). So the construction contended for by the Trustees in no way ties the Plaintiff to residing in Bermuda; it simply restricts the way in which she can utilize the gift should she choose to reside overseas. This result is not inconsistent with the residual gift of full beneficial ownership of a Bermuda house or its proceeds to a Bermudian child of the Testator.
25. For the above reasons, I find that clause 2(c) of the Will, properly construed, does not entitle the Plaintiff to require the Trustees to sell the Property and buy alternative accommodation for her outside of Bermuda.

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<sup>2</sup> This scenario and these figures are used for illustrative purposes only.



**Does the Will confer a duty or a power upon the Trustees in terms of complying with the Plaintiff's request to purchase "another house"?**

26. In my judgment the Will unambiguously imposes a duty on the Trustees to purchase such other property as she chooses upon the sale of the Property. I accept Mr. Diel's submission that this is the only sensible view flowing from the fact that the widow is required to make up any deficiency between the sale proceeds of the Property and its replacement. The position may well be<sup>3</sup> different as regards the investment of any surplus funds where the Trustees appear to have an implied power to ensure that any such funds are "*soundly invested*" so that the capital can be protected for the residuary beneficiary:

*"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."*[emphasis added]

**Conclusion**

27. For the above reasons, I conclude (a) (not without difficulty) that the Will does not entitle the Plaintiff to require the Trustees to sell the Property and purchase other accommodation outside of Bermuda; and (b) (with little difficulty) that the Will does impose a duty upon the Trustees to follow the Plaintiff's wishes in terms of selling the Property and purchasing alternative accommodation for her within Bermuda. My provisional view is that the costs of all parties ought to be payable out of the estate.

Dated this 8<sup>th</sup> day of April, 2011 \_\_\_\_\_  
KAWALEY J

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<sup>3</sup> This point was not addressed in argument; a provisional view only is expressed.