In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014 No: 256

IN THE MATTER OF THE ESTATE OF PQR, DECEASED

JUDGMENT

(in Camera)

Date of hearing: July 13-14, 2015
Date of Ruling: August 6, 2015

Mr. Ben Adamson, Conyers Dill and Pearman Limited, for the Plaintiff ("the Executor")
Mr. David Kessaram, Cox Hallett Wilkinson Limited, for the 1st Defendant ("W")
Ms. Fozeia Rana-Fahy, MJM Limited, for the 2nd Defendant ("D")

Introductory

1. The Executor issued an Originating Summons on June 23, 2014 seeking directions on certain questions of construction relating to the Testator's homemade Will dated April 19, 2011 ("the Will"). There are only two beneficiaries, the Testator's widow (W) and his daughter (D). They each took different views as to the terms and effect of certain clauses in the Will. The Testator died in 2013 while resident and domiciled in Bermuda.

2. The questions placed before the Court for determination fell into two categories. There were two questions affecting beneficiary entitlement and a single important question of trust administration. The two beneficiaries each contended for their respective positions on the entitlement issues in question while the Executor took a

substantially neutral stance in relation thereto. The Executor only fully addressed the administration issue.

3. The first of the two entitlement issues was whether or not the Testator's rights in relation to certain real property in Bermuda under, *inter alia*, sale and purchase agreements entered into by him in 1997 and 2010 and two mortgages in 1997 (the "Bermuda Property") passed to W under clause 8 of the Will (Issue 1). The second of the two entitlement issues was whether or not certain tax liabilities paid by the Executor ("the US Tax Payments") in relation to certain US assets devised equally to W and D should be treated as an estate expense or an expense solely payable by D (Issue 2).

4. The administration issue concerned the somewhat anomalous clause providing for Trustees to also administer the Estate. This issue was, in the event, the least contentious one (Issue 3).

Overview: the relevant testamentary provisions

5. Clause 3 of the Will provides that the "*Will be governed by and shall be construed in accordance with the laws of Bermuda and that the courts of Bermuda shall be the forum for the administration thereof.*" Clause 4 appoints the Plaintiff as executors of the Will. Clauses 5 to 10 contain the various gifts.

6. Clause 5 gives all of the Testator's interest in the "*New York Real Property*" to W "free of any taxes or duties". The "*Vermont Real Property*" is also given to W "*free of any taxes or duties*". In the event that the Vermont Real Property is owned by a company then its shares are to be owned by W. Clause 7 requests that W leave the Vermont Real Property to D by her own will. By Clause 8 ("Bermuda Real Property"), the Testator bequeaths "*free of any taxes or duties all my interest in any real property situate in the Islands of Bermuda*".

7. The Testator gives "*50 per cent of all my cash and investments*" to W and D respectively under clauses 9 and 10. The latter clause further explains: "*Thus an equal percentage goes to my wife and daughter*". Then clause 11, incongruously in light of clause 4, appoints K, a United States lawyer, any surviving partner, F or such other person as the executors may appoint:

> "*to be the trustees of my estate as to investments or property both real and personal, other than money in their absolute discretion to sell, call in or convert all or any of such investments or property into money with power to postpone such sale, calling in and conversion and to permit the same to remain as invested and upon trust as to money with a like discretion to invest the same in their names or under their control in any of the investments authorized by my Will or by law with power at the like*

discretion from time to time to vary or transpose any such investments for others so authorized; to pay such of my debts, funeral, testamentary and administrative expenses (including all duties and taxes wheresoever payable on or by reason of my death) and to give effect to legacies."

8. The latter clause appears to be largely duplicative of the functions traditionally assigned to executors under Bermuda law.

Findings on Issue 1: did the Testator's interest in the Bermuda Real Property pass to W under clause 8 of the Will?

The nature of the Testator's interest in the Bermuda Real Property

9. The main controversy is whether not the Testator possessed at his death any interest at all in the Bermuda Real Property capable of passing to W under clause 8 or whether such interests pass instead under clauses 9 and 10 as "investments" to W and D in equal shares.

10. The Bermuda Real Property has two titles, because it consists of the main property and an adjoining small piece of land used at all material times primarily as parking space. However, the Testator (as "Purchaser") entered into a sale and purchase agreement on or about April 16, 1997 relating to both Bermuda properties (the "1997 SPA"). The following provisions of the 1997 SPA were referred to in argument:

    (a) General Condition 2: "*As the Purchaser is a restricted person as defined in clause 4 hereof, Completion shall take place on before thirty days after the attorneys for the Purchaser receive written notification of the grant of the of a License by the Ministry of Labour and Home Affairs*…";

    (b) General Condition 4: " *As the Purchaser is a restricted person within the meaning of the Bermuda Immigration and Protection Act 1956 (as amended) he shall at such time as Property has an Annual Rental value making it available for non-Bermudian ownership with all due diligence and despatch cause an application to be made on his behalf to the Minister of Labour and Home Affairs for a license to acquire the Property for private residential purposes and will use his best endeavours to procure the grant of such license. If such license is not granted to the Purchaser within a period of six (6) months from the date of application or within such further period as the Vendor and the Purchaser shall agree in writing then the provisions of Special Condition 9 shall apply*";

(c) General Condition 20(iv): "*Wherever in this agreement the context so admits the expression the "vendors' the 'Purchaser' or the 'Agent' shall mean and include their respective executors, administrators, assigns and successors in title (as the case may be)*…";

(d) General Condition 20(v): "*The Purchaser shall be entitled to assign or otherwise dispose of the rights benefits and obligations contained in this Agreement to any other person or body corporate*";

(e) Special Condition 1: "*Within thirty (30) days of the date hereof…The Vendors shall grant a lease of the Property to the Purchaser for a period of five (5) years at a nominal rental value…The Lease will contain express provisions permitting the Purchaser to carry out leasehold improvements to the property*…";

(f) Special Condition 2: "*Once the Lease is fully executed and in place, the Purchaser will pay to the Vendor the deposit and balance of the Purchase Price…('the Loan')…As security for the Loan and contemporaneously therewith the Vendors will execute a first legal mortgage upon the Property in favour of the Purchaser. Such Mortgage…will secure the Loan and any further sums expended by the Purchaser in carrying out leasehold improvements to the Property*";

(g) Special Condition 9: "*If for any reason the Purchaser's license to acquire the property is not granted, and if the Purchaser is unable or unwilling to assign or otherwise dispose of the rights, benefits and obligations contained in this Agreement, then the Vendor and Purchaser hereby agree that the property shall be offered for sale upon the open market at a mutually agreed price but being not less than the Purchase Price plus the cost of leasehold improvements made to the Property by the Purchaser*…";

(h) Special Condition 13: "*In the event of the death of the Purchaser prior to completion of the purchase of the property contemplated herein, then this Agreement shall be binding upon the Estate Representatives of the Purchaser and such person shall be entitled to all of the benefits and burdens of this Agreement*";

(i) Special Condition 16: "*The Purchaser shall be fully entitled to assign or otherwise dispose of the rights, benefits and obligations of this Agreement without the written consent of the Vendor.*"

11. Two mortgages in respect of each of the two portions of the Bermuda Real Property were entered into in favour of the Purchaser on May 19, 1997 as contemplated by the 1997 SPA. Leases were also entered into on or about May 19, 1997, May 19, 2002, May 19, 2007 and May 19, 2012 although only a copy of the latter document was referred to at trial.

12. A new shorter form Sale and Purchase Agreement was entered into as of April 10, 2010 (the "2010 SPA") by the Testator as purchaser in relation to the larger portion of the Bermuda Real Property. The Purchase Price apparently incorporated the costs of the leasehold improvements which had now been made to the property. The 2010 SPA also stated that the term "Purchaser' and 'Vendor' included "their respective successors in title and permitted assigns" (clause 2.10). Special condition 4.6 provided:

> "*The* [Purchaser] *is a Restricted Person within the meaning of the Bermuda Immigration and Protection Act (as amended) and shall with all due diligence and despatch cause an application to be made on his behalf to the Minister of Labour and Home Affairs for a license to acquire the Property for private residential purposes and will use his best endeavours to procure the grant of such license. If such license is not granted to the Purchaser within a period of one (1) year from the date of application (or within such further period as the Vendor and the Purchaser shall agree in writing) then either the Vendor or the Purchaser shall be at liberty by notice to the other to rescind this Agreement.*"

13. A Deed dated January 12, 2011 (the "Deed") was entered into which was by its terms supplemental to the 2010 SPA. Apart from acknowledging repayment of the deposit referred to in the latter agreement, paragraph (a) extended the period for obtaining a license to 5 years from the date of the Deed and provided that "*the Purchaser may assign the Agreement subject to all the provisions of the Immigration Act*". Clause (c) of the deed, apart from waiving interest on the Mortgages, provided as follows: "*The Agreement and provisions of the Lease (renewed) apply to the Purchaser and the Vendor and their successors in title and assigns.*"

14. W currently occupies the main portion of the Bermuda Real Property under the renewed Lease. The Testator prior to his death failed to acquire a license so as to be able to complete the purchase contemplated by the 1997 SPA and/or the 2010 SPA. However the Testator's rights under both of these agreements were expressly described as being assignable and/or transferable.

Power of the Testator to devise his interests under the 1997 SPA and the 2010 SPA

15. The capacity of the Testator in general terms to dispose of his interest in the Bermuda Real Property was not disputed. Section 5 of the Wills Act 1988 provides:

> "*Subject to this Act, every person may dispose, by will executed in accordance with this Act, of all real estate and all personal estate owned by him at the time of his death.*"

16. Section 2(1) of the Wills Act defines real estate as follows:

> "*'real estate' includes messuages, lands, rents, and hereditaments, whether freehold or of any other tenure, and whether corporeal or incorporeal or personal, and any undivided share thereof, and any estate, right or interest (other than a chattel interest) therein...*" [emphasis added]

17. Ms. Rana-Fahy accordingly advanced the following submission in D's Skeleton Argument:

> "*15.2 As* [the Testator] *failed to acquire the BIPA License or deferral certificate before his death and accordingly had no right to hold, acquire or appropriate* [the Bermuda real property] *or to participate in an agreement (such as the SPA's) to hold or acquire land in Bermuda at the time of his death, the SPA's were frustrated. Explained another way, the failure to obtain a BIPA license, or a deferral certificate at the time of [the testator's] death, rendered it legally and commercially impossible to fulfil the contractual terms of the SPA's. It has been held governments can under statutory authority forbid, whether temporarily or permanently, the performance of a contract and so frustrate it.*
>
> *15.3 Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or provide any other remedies arising out of the contract...*"

18. D's counsel submitted very forcefully that, even if the issue of illegality had not been formally pleaded so as to be properly before the Court, of its own motion the Court ought not to turn a blind eye and grant relief in circumstances where the Court would be, in effect, enforcing an illegal transaction. This riposte to Mr. Kessaram's valid protestations that the issue of illegality was not properly before the Court was supported most clearly by reference to *Snell-v-Unity Finance Co. Ltd.* [1963] 2 QB 203 at 212, where Diplock LJ (as he then was) stated:

"*The statement of Lord Justice Lindley in Scott v. Brown, Doering, McNab & Company (1892 volume 2 Queen's Bench Division, page 734, at page 728) also in my view accurately states the law in a form particularly relevant to this case. The passage has already been read by my Lord, and I need refer again only to the last sentence there: "If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him". That passage is precisely in point. The evidence adduced by the plaintiff and accepted as true by the learned county court judge itself proved the illegality. It thereupon became the duty of the judge to take the point though neither party did so, and to refuse to assist the plaintiff by enforcing the contract. Any other rule would make a mockery of the law and leave it open to two parties to an illegal contract to enforce it as if it were legal by the simple expedient of refraining from raising the question of its illegality.*"

19. I accept W's contention that this Court ought not ordinarily entertain an illegality argument which has not been formally pleaded by party competent to raise the argument. However I also accept D's submission that the Court ought not to assist in the enforcement of an illegal transaction even if the point is not taken by the appropriate parties. The correct rule of principle, as demonstrated by the authorities relied upon by D's counsel, is that the Court only exercises this jurisdiction where the evidence before the Court clearly establishes the relevant illegality, whether the impugned transaction is illegal on its face or not.

20. Ms. Rana-Fahy submitted that the various instruments executed by the Testator in relation to the Bermuda Real Property on their face constituted a "scheme" which was prohibited by amendments to the Bermuda Immigration and Protection Act 1956 introduced in 2007. Any broader argument that the documents executed in 1997 were unlawful *ab initio* was not substantiated. In particular (as regards the post-2007 Immigration law regime), reliance was placed upon the following provisions of the 1956 Act:

"***Scheme to defeat purpose of this Part***

81. (1) No person shall participate in a scheme that the person knows or has reasonable grounds to suspect will enable a restricted person or a trustee, directly or indirectly—

(a) to hold or acquire land in Bermuda contrary to the purpose of this Part; or

(b) to appropriate land in Bermuda contrary to section 78.

(2)In determining whether there was a scheme referred to in subsection (1), the court shall have regard to—

(a) the manner in which the scheme was entered into or carried out;

(b) the form and substance of the scheme, including any powers or rights of a restricted person in regard to it;

(c) the result, in relation to the operation of this Part, that would be achieved by the scheme; and

(d) the benefit that has accrued, will accrue or may reasonably be expected to accrue to the restricted person or to the trustee of a trust that is holding or acquiring land for the benefit of a restricted person.

21. Section 78 of the 1956 Act provides as follows:

> "*(1) No restricted person shall appropriate land in Bermuda with the intention of occupying it, or of using or developing the land for profit at any time whether for his own benefit or for the benefit of another person.*"

22. Section 80 (1) of the Act further prohibits restricted persons from taking a mortgage on land without permission of the Minister. It is certainly arguable that the legal arrangements entered into by the Testator, principally prior to the 2007 amendments to the 1956 Act and looked at holistically, are inconsistent with the new 2007 provisions. On the other hand it is far from clear that the relevant transactions either on their face or by virtue of surrounding circumstances (which this Court has not fully explored in the present proceedings) are illegal. I reach this conclusion for three principal reasons.

23. Firstly, Mr. Kessaram's careful analysis of the way in which the two SPAs were structured makes it clear that the parties to the agreements were seeking to comply with applicable Immigration law. The scheme was structured in such a way as to be wholly dependent upon the Testator acquiring a permit to own the relevant parcels of land. It also expressly dealt with the parties' rights in the event that the Testator was unable to obtain a permit to acquire the relevant land. In these circumstances it is far from simple to reach a finding that the relevant transactions are illegal on their face, particularly since all that happened after 2007 was apparently designed to preserve rights acquired before the legislative changes at a time when there is no basis for contending the impugned contracts were not legal.

24. Secondly, as Mr. Kessaram also pointed out, this Court does not presently have before it the parties with whom the Testator contracted in relation to the Bermuda Real Property. Such parties have a right to be heard before this Court makes any finding

that they entered into unlawful transactions[1]. As a result, there is no sufficient evidential foundation for this Court to:

(a) conclude that the circumstances surrounding the relevant arrangements establish illegality with clarity; and

(b) to further conclude that the illegality is sufficiently obvious to justify a summary determination that the Testator could not lawfully have acquired any interests capable of being devised.

25. Thirdly, the effect of a finding that the 2007 amendments to the Bermuda Immigration and Protection Act 1956 was to render the rights the Testator had already acquired unlawful is an interpretation which is potentially inconsistent with the fundamental property rights protected by section 13 of the Constitution. I adverted to this point in the course of the hearing. As a matter of traditional common law canons of statutory interpretation, plain words are required to justify construing statutory provisions as interfering with vested property rights. Under Bermuda law, any legislation which effectively confiscated private property rights without complying with section 13 of the Constitution would be liable to be declared null and void. Section 13 provides in salient part as follows:

"*13. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—*

(a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and

(b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

*(c) provision is made by a law applicable to that taking of possession or acquisition— *

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to

[1] It is also impossible to ignore the concern that any such summary finding might unfairly undermine other similar pre-2007 arrangements.

which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and

(d) giving to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction."

26. There is nothing in the transitional or other terms of the Bermuda Immigration and Protection Amendment Act 2007 which suggests that Parliament intended the penal provisions of the Act, popularly described at the time as provisions designed to prohibit "fronting" arrangements, to have retrospective effect. If so, one would have expected express provision to be made in the new provisions for compensation and appeal rights as mandated by section 13(1)(c) of the Constitution. This analysis adds a further layer of complexity to the illegality argument which was not placed before the Court for determination. It is a further reason for declining to make what would in effect be a summary finding that the effect of the 2007 amendments to the 1956 Act was to make it legally impossible for the Testator validly devise his interests in (or in relation to) the Bermuda Real Property at his death.

27. For the purposes of the present application, I accordingly find that the Testator could lawfully devise his interests in the Bermuda Real Property under clause 8 of the Will.

Were the mortgages effectively devised under clause 8 despite the fact that mortgages generally constitute personal property rather than realty?

28. The practical question of whether or not the mortgages were validly devised to W under clause 8 or instead passed in equal shares to W and D under clauses 9 and 10 primarily turned on the proper construction of the Will. It was ultimately common ground that mortgage is ordinarily classified as personalty.

29. Mr. Kessaram submitted by reference to *Canning-v-Hicks* (1686) 1 Vern 412; 23 ER 553, that the mortgages should clearly pass under clause 8 pursuant to the following longstanding rule. In that case, the Lord Chancellor opined as follows:

"*And it is now a rule in all cases, that the mortgage shall be decreed as part of the personal estate, and belong to the executor or administrator, unless an intention be declared by the mortgagee, or it appears evidently from his conduct that it should not be so considered*…"

30. He also relied upon *In re Lowman, Devenish-v-Pester* [1895] Ch D 348. I found two passages particularly significant. Mr. Kessaram cited the following observations of Lindley LJ (at 354):

> "*What, after all, is a devise of land? It is only a devise of such estate or interest as the devisor has in the land, and prima facie whatever estate or interest as the testator has in land will pass under a devise of it by that name, if it is specifically referred to so as to shew that the testator had that particular land in mind, and if there was nothing else to fit that description*…."

31. This was a case concerning a trust for sale, not a mortgage, but the same principle that such interests in relation to land ordinarily passed as personalty applied. Kay LJ expressed similar views to Lindley LJ, save in more robust terms, at page 361:

> "*The intention to deal by this specific devise with the property to which the testator was entitled under the settlement in the parishes of Crewkerne and Wayford is indisputable; and it seems to me that it would be a flagrant disregard of that intention to hold that the trust for sale prevented the property such as it was from passing. The testator either forgot the trust for sale, or was not aware that the effect of it was to convert the property in equity into personal estate; but there is no authority or principle that I know of to prevent the Court from carrying out the expressed intention so far as the nature of the subject will permit.*"

32. These *dicta* provide powerful support for the proposition that the mortgages in the present case passed under clause 8 of the Will. The mortgages were taken out by the Testator as part of a package of which the 1997 SPA and related agreements (all connected with his attempts to purchase and develop the same land) formed an integral part. The Testator in the present case did not forget about the mortgages. It is clear from the evidence that he knew or must have known when he made the Will that he had not acquired legal title to the relevant real properties. This is why he devised "*all my interest in any real property situate in the Islands of Bermuda*". It is common ground that there is no other Bermuda real property to which clause 8 can have been referring. It is difficult to imagine a clearer expression of testamentary intention to leave a specific gift of all rights relating to identifiable real estate irrespective of the fact that the relevant rights might otherwise generally be classifiable as personalty as opposed to realty. This view is only fortified by the fact that the Will is a home-made one.

33. The contrary analysis, advanced by Ms. Rana-Fahy with as much conviction as could possibly be mustered in support of what was, when rigorously analysed, a weak argument, must be rejected. The array of cases which she deployed on this point merely established the application of the general rule that a gift of "land" is ordinarily restricted to interests in real property to factual matrices which did not resemble the facts of the present case to any material extent. Even if the principal right of a mortgagee is monetary repayment, it is impossible to sensibly construe the Will as a whole as manifesting an intention that the mortgage rights linked to the Bermuda Real

Property were to pass as investments to be shared between W and D equally, and not under clause 8 to W alone.

34. D's counsel also sought to challenge the proposition that the mortgages passed to W under clause 8 under a modified illegality argument. This argument had two limbs to it. Firstly it was submitted that the mortgages were tainted by the illegality of each SPA and the monies advanced purportedly on that security were wholly unsecured. I reject this argument for the same reasons as I rejected it in full-blown form as against the 1997 SPA and the 2010 SPA.

35. Secondly it was argued that the $8 million improvements "tacked on" to the Mortgages was not effective in terms of security because there was no evidence that stamp duty had been paid. Reliance was placed on section 75 of the Stamp Duties Act 1976 which merely states that any condition of sale designed to evade liability for stamp duty shall be void. Mr. Kessaram submitted that if any duty was still outstanding the Act contemplated that it could be paid at any time (section 9). I make no findings on the adequacy of stamp duty as the issue was not addressed in evidence on the present Originating Summons. No sustainable ground for holding that the mortgages were invalid on Stamp Duties Act 1976 grounds were advanced by counsel. This limb of the ineffectiveness of the mortgages as security argument is also rejected.

36. Even if I had been required to find that the Mortgages did not take effect according to their terms, I would still have found as a matter of a straightforward interpretation of the Will that the right to recover any monies lent by the Testator on the purported security of the Mortgages was devised to W under clause 8. This is because such rights are so closely connected with the Bermuda Real Property that a contrary construction simply makes no sense reading clause 8 in the wider context of the Will as a whole.

Findings on Issue 2: should the US Tax Payments be attributable to D alone or shared equally between D and W?

37. The question of whether the US Tax Payments should be regarded as an estate expense and applied on a *pro rata* basis before each of the two beneficiaries received their gifts had two dimensions to it. One was the issue analysed with reference to the terms of the Will. The other dimension was analysing the issue with reference to which beneficiary was responsible for the tax liability under US law. It was clear that W had no liability at all and was exempt as a widow while D was liable as a child of the Testator for taxes assessed on the value of her gifts of US property. It was common ground that a certain US investment to which the two beneficiaries were jointly entitled was liable to US tax ("the US Investment Asset"). I have rejected above D's contention that the US Real Property Legacies passed under clauses 9 and 10 as investments.

38. Mr. Kessaram argued that because the US Real Property Legacies to W were expressed to be "*free of any taxes or duties*", this indicated that W should not be liable. Ms. Rana-Fahy pointed out that those words were not linked with the alternative gift of shares in relation to one property. Moreover, clause 11 required the trustees "*to pay such of my debts, funeral, testamentary and administrative expenses (including all duties and taxes wheresoever payable on or by reason of my death) and to give effect to legacies*" [emphasis added]. He relied upon an important rule of construction to support his submission that the specific bequests to W alone were indeed intended to be "*free of any taxes*". He relied on the citation in '*Williams on Wills*', 9th ed., of *Re Matthews Will Trusts*[1961] 3 All ER 869 as authority for the following proposition:

> "*A specific gift of foreign property will also be subject to any foreign estate or inheritance taxes payable in respect of that property, in the absence of express direction to the contrary…It is important to make express 'free of tax' provision in relation to any specific gift of foreign property…if that is the testator's intention…*"

39. I accept for present and more limited purposes Mr. Kessaram's wider submission that the quoted portions of clause 11 ought to be read as applying to the Executors, who are primarily charged with administering the estate. This construction nevertheless creates a potential inconsistency between the provisions that W is exempt from paying taxes on her legacies of US property under clauses 6 and 7 (and indeed Bermuda Real Property under clause 8) and clause 11 which appears to contemplate all taxes being a charge on the estate.

40. This potential inconsistency can be resolved depending on how one construes the relevant wording in clause 11. Two alternative meanings were primarily contended for:

    (a) clause 11 can be read as contemplating that the cash legacies (clauses 9 and 10), which are not expressed to be free of taxes and which are also expressed as devising an "equal percentage" to W and D of the Testator's cash and investments are net of administrative expenses (including all taxes) being paid first on a *pro rata* basis. On this construction, no taxes would be left to be paid on the Real Property Legacies ; or

    (b) clause 11 could only fairly be read as requiring the payment out of the estate of taxes chargeable on the US Investment Asset and/or the US Real Property in priority to W's legacy if either:

        (i) the Will made no contrary provision (which it did); or

(ii) the rules under the law governing the gift of foreign property made no contrary provision (which they did).

41. The first meaning contended for by D appears at first blush to be more straightforward. The common law starting assumption, which is of course subject to variation by the express terms of a will of contrary statutory provision, appears to be that foreign taxes are payable as an expense of the estate rather than by those legatees due to receive the benefit of the foreign property. Ms. Rana-Fahy's Skeleton Argument referred the Court in this regard to *Peter-v-Stirling* (1878) 10 Ch D 279. The dispute there was whether taxes payable on property which would only be distributed to residuary legatees should be paid only by them or, alternatively, should be treated as an estate expense payable by all legatees Vice-Chancellor Malins concluded in that case (at page 284) as follows:

> "*It is perfectly clear that, whatever are the expenses of getting the assets in Victoria, whether they are the expenses of calling them in, or selling property, or paying duty to the government, they are all deductions to be made as expenses of the estate to be paid out of the estate generally; and that which remains after paying all the debts of the testator, remains as assets of the testator and goes to pay the legacies in full, and there is no obligation on the legatees to pay part of those expenses.*"

42. So the construction contended for of the Will on behalf of D is not only consistent with a comparatively uncomplicated reading of the instrument itself. It is also consistent with what appears to me to be a general common law rule that taxes are generally regarded as estate expenses to be deducted from the gross estate assets before the net estate available for distribution is ascertained. The Victorian duty in the *Peter-v-Stirling* case was not only expressly stated to be "*deemed to be a debt of the testator or intestate…and shall be paid by any executor or administrator*" (at page 280). The Australian statute expressly provided that the duty payable should be deducted from any payments made to all beneficiaries unless contrary provision was made in the will. Nor, indeed, was that a case where the foreign tax law impacted on the allocation issue by exempting gifts to some beneficiaries while taxing gifts to others. The ad valorem duty was a flat rate based on the asset value with the rate for widows lower, but not exempted altogether.

43. According to the US Federal tax memorandum relied upon by W, which was not contradicted by any evidence filed on behalf of D, the US tax applicable is a Federal estate tax: "*The taxable estate consists of the decedents property that is situated in the United States at the time of death…reduced by certain deductions, including an unlimited deduction on amounts passing from the decedent to his US citizen surviving spouse*". This tax is payable on the estate as a whole with questions of

apportionment left to be governed by state law. Applicable state law provides that "*when the Will is silent*":

(a) taxes are apportioned on a *pro rata* basis; and

(b) a surviving spouse is not liable for estate tax generated by distributions to other beneficiaries.

44. A central question was accordingly whether US apportionment law should decide the apportionment of tax in the present case. D's counsel submitted that the US position was irrelevant. She relied upon the observations made in a broadly comparable context of Pennycuick J in *Re Matthews Will Trusts*[1961] 3 All ER 869 at 876E-F:

> "*…the present question seems to me to depend…not on the way the courts in Australia would deal with the matter, but on the proper construction of the will of this testator, the question being: has the testator, or has he not, indicated an intention that these two duties should not fall on his moiety of the Roberts' Hotel itself, but should be discharged out of residue?*"[2]

45. D's counsel further submitted that US law as the *lex fori* for any prospective foreign grant will not apply to questions of apportionment of debts or the adjustment of beneficiaries' rights. Ms. Rana-Fahy relied on the following passage from *Dicey, Morris & Collins,*[3] at paragraph 26-034, commenting on rule 134:

> "*The courts have occasionally had to decide whether particular rules should be characterised as administration or succession. Thus the order of priority for the payment of creditors is a matter of administration, but the rules for deciding whether debts or legacies are payable out of realty or personalty, specific assets or residue, are concerned with the adjustment of beneficial interests and are therefore determined according to the lex successionis.*"

46. The present dispute about who should meet the expense of the US Tax Payments, I find, does not concern the adjustment of beneficial interests at all. It is a dispute about how the estate should be administered, namely how administrative expenses (defined in the Will as including foreign taxes) should be apportioned. It is essentially common ground that W and D is each entitled to 50% of the gross value of the cash and investments on the face of the Will. Controversy centres on whether their net shares should be equal too. The applicable conflict of law rule is that contended for by Mr. Kessaram as stated in *Dicey Morris & Collins*, 15th edition, at paragraph 26-032:

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[2] At 877E, Pennycuick J further noted: "*…it is well established that the expression 'testamentary expenses' in a will does not, in the absence of some supporting context, extend to duties in respect of foreign property specifically devised or bequeathed*" [emphasis added].

[3] '*The Conflict of Laws*' 14th edition, Vol. 2.

"*The general principle of English law appears to be that every question as to the admissibility of debts and as to the order in which debts of different kinds are to be paid is a matter of procedure and therefore to be determined in accordance with the lex fori. In administering the assets under an English grant the English personal representative must follow the order of priority prescribed by English law, irrespective of whether the creditor is English or foreign. (He may, however, adjust the order of priority to compensate for any preference which the foreign creditor has, as such, received in his own courts.) This applies of course only to assets administered under an English grant; if the English personal representative has also obtained a grant in a foreign country, he must administer the foreign assets according to the law of that country.*"

47. Even if I did not find that US law had to be directly applied to the apportionment issue, I would reach the same conclusion as a matter of pure construction of the Will in light of the applicable surrounding circumstances. I found the following submission set out in Mr. Kessaram's Skeleton Argument to be particularly compelling in ultimately resolving the apportionment of tax issue:

"47. *It cannot be inferred that the Testator intended that* [D]*'s share of the cash and investments be grossed up to ensure that after payment of the US Tax out of her share she obtained an amount equal in value to* [W]*'s share. The effect of this would be to increase the amount of US tax payable (by increasing the gross value of* [D]*'s share and thereby reducing the value of the share that was exempt). This cannot have been intended by the Testator and is not consistent with the Testator's direction that there be an equal division of the Testator's cash and investments 'at the time of [his] death'.* "

48. Having regard to the applicable canons of construction, illustrated by the various persuasive authorities placed before the Court, I find that the Will should be interpreted as follows:

    (a) the specific legacies to W in relation to foreign property which are expressed to be "free of all taxes" under clauses 6 and 7 of the Will take effect according to their terms;

    (b) the intent expressed in clause 10 that the two beneficiaries should receive "*an equal percentage*" of the Testator's cash and investments and the gifts under clauses 9 and 10 of "*50% of <u>all</u> my cash and investments*" [emphasis added] contemplates an equal apportionment of the gross cash and investments;

(c) clause 11 contemplates payment of administrative expenses including foreign taxes out of, *inter alia*, the gross cash and investments before distributions are made to the beneficiaries. By necessary implication, those expenses are also required to be apportioned equally unless there are factual and/or legal grounds for concluding that any relevant expense is not a general administrative expense but, rather, should be viewed as an expense linked to the legacy of one of the two beneficiaries;

(d) in the case of a foreign estate tax, the fact that the relevant foreign tax law assesses liability by reference to the identity of the beneficiaries rather than levying a flat *ad valorem* charge is a highly relevant practical consideration when determining how the expense should be apportioned. The apportionment must as a practical matter comply with the *lex situs* of the relevant asset, irrespective of whether such law directly applies by virtue of the relevant conflict of law rules. Construing the Will in conjunction with the US tax law evidence:

(i) the tax exemption granted to W means that her 50% gross share is not liable to tax under applicable law; and

(ii) the tax assessed against D's 50% share is based on the assumption that D's maximum interest in the relevant investment is 50% of the gross value of the investment, and that her net interest is 50% less tax.

49. I reject the proposition that W is liable to contribute to any extent to US Tax Payments in respect of which under applicable US legal rules she is wholly exempt from tax liability.

Findings on Issue 3: what role should the Trustees named in the Will play in the administration?

50. It is common ground that the Will is duplicative in terms of purportedly appointing the Executor and the Trustee to perform overlapping functions and inconsistent to the extent that it contemplates a trust for sale. D, apparently motivated by concerns about the impartiality of the Executor, queried whether the Trustee should act as co-executor or replace the Executor. D's Skeleton Argument submitted that full force should be given to clause 11 and the Trustee to be required to fulfil the trust for sale provided for by the Will.

51. By the time of the hearing of the Originating Summons, this initial stance had softened. The Trustee advanced the compromise proposal of retaining the Trustee as

counsel to advise the Executor on the collection of assets and payment of expenses, subject to the consent of both beneficiaries. Ms. Rana-Fahy welcomed this proposal and confirmed that her client did not object to the Trustee being retained as counsel. Mr. Kessaram responded to the compromise proposal somewhat less enthusiastically, but did not oppose it either.

52. Mr. Adamson submitted that the Testator seemed to have envisaged that after the executorship was finished the Trustee would deal with distribution, as impractical as that might be. The Trustee was in any event willing to defer to the Executor and had confirmed this position in writing. Mr Adamson sought a direction that during the course of the executorship, the Executor was not required to consult with the Trustee. In my judgment the only sensible way in which the Will can be construed is that most of the powers purportedly conferred on the Trustee under clause 11 were intended to be conferred on the Executor. These functions can be discharged by the Executor without recourse to the Trustee, without prejudice to the Executor's present proposal to retain the Trustee as special counsel.

Conclusion

53. For the above reasons, I find that whatever interest the Testator possessed at the date of his death in the Bermuda Real Property passed to W under clause 8 of the Will (Issue 1). I further find that the US Tax Payments should be payable out of D's 50% share of the gross cash and investments devised to her under clause 10 of the Will (Issue 2).

54. I find that notwithstanding the fact that clause 11 of the Will purports to confer basic executorship functions on the Trustee the Executor has full authority to discharge the full range of executorship functions recognised by Bermudian law, without being required to obtain the consent of or to consult the Trustee (Issue 3). This finding is without prejudice to the right of the Executor, acting in its discretion, to retain the Trustee as special counsel or otherwise consult with the Trustee.

55. I will hear counsel if necessary on the terms of the final Order and costs.

Dated this 6th day of August, 2015 _____

IAN R.C. KAWALEY CJ