



In The Supreme Court of Bermuda
No. 101 of 2016

Between:

EDWARD GAUDREULT (a.k.a. Edouard Gaudreault)
TERRY GAUDREULT
(as Executors of the Estate of Helen Marie Gaudreault)
a.k.a **HELEN MARIE KELLY a.k.a. HELEN KELLY**

Plaintiff

And

CHARLES ARCHIBALD SOUSA
AND SANDRA MILENA HERERA SOUSA

Defendants

RULING

Date of Hearings: 23 March 2017 and 6 April 2017

Date of Decision: 9 May 2017

Plaintiffs: Chris Swan, Christopher E Swan & Co

Defendants: Unrepresented and not present at hearing

(Restricted Persons- Failure to obtain a Deferral Certificate)
(Part VI of the Bermuda Immigration and Protection Act 1956)

(Power of Estate Representative to sell Property)
(Section 39 of the Administration of Estates Act 1974)

(Power of Court to authorize Transactions relating to Trust Property)
(Section 47 of the Trustee Act 1975)

RULING of Registrar S. Subair Williams

Introduction:

1. This matter has come before the Court on an Originating Summons dated 8 March 2017 made returnable for 23 March 2017. The Plaintiffs, who are non-Bermudians, seek an Order under section 47 of the Trustee Act 1975 empowering them to sell property situate at “Hill Top” 30 Ferry Road St George’s Parish (“the Property”) to the Defendants. The Property was owned by the Plaintiffs’ deceased Bermudian mother, Helen Marie Gaudreault (“the Testator”) who sought, by her will, to devise and bequeath the Property to the Plaintiffs. Both Plaintiffs reside overseas and are each restricted persons under the Bermuda Immigration and Protection Act 1956 (“BIPA”).
2. Charles and Sandra Sousa, somewhat artificially named the Defendants in this case, are the prospective purchasers of the Property. While, as a matter of formality, they are unrepresented by Counsel in these proceedings, they are otherwise clients to Mr. Swan. At the 23 March 2017 hearing, Mr. Swan advised the Court that the Defendants do not oppose the present application as they too are keen to follow through with the sale of the property. Notably, the Defendants did not attend Court when the present application was made.
3. The real controversy in this case is between the Plaintiffs and the Minister of Home Affairs (“the Minister”). The Plaintiffs, having been named in the will as beneficiaries of the Property, failed to comply with provisions of the BIPA which require an application to be made to the Minister for the grant of a Licence or Deferral Certificate in order for a restricted person to lawfully acquire property in Bermuda. This requirement extends to trustees who hold property for the benefit of restricted persons.
4. On the face of the affidavit evidence before the Court, the Minister, via the Chief Immigration Officer, declined to consider a late application from the Plaintiffs for a Deferral Certificate on the basis that this application is now time-barred.
5. The only affidavit evidence filed in support of the Originating Summons is from Mr. Swan, on behalf of the Plaintiffs. Exhibited to that affidavit are the following documents:
 - (i) Death Certificate in respect of Veronica Elizabeth Packwood (the Plaintiffs’ grandmother who is said to have voluntarily conveyed the Property to the Testator subject to a life interest for herself);
 - (ii) A certification from the Assistant Registrar dated 18 August 2016 in respect of the resealed last Will and Testament and Probate of the Testator. Annexed thereto:
 - a. A notarized copy¹ of the Testator’s will made on 25 September 1997 and

¹ The copy was notarized on 13 January 2010

- b. The Registrar's conditional grant of probate² given under the seal of the Supreme Court on 6 August 2010
- (iii) A Sales & Purchase Agreement dated 2 September 2016 ("the SPA") between the Plaintiffs, on one part as the co-executor vendors, and the Defendants, on the other part as the Bermudian purchasers; and
- (iv) Email correspondence dated 9 December 2016 from the Chief Immigration Officer, Danette Ming, to John Hourston of Christopher Swan & Co.
6. In addressing the Plaintiffs' encounter with the application process for a Deferral Certificate, Mr. Swan in his affidavit evidence stated the following at paragraphs 15-25:

"That it was brought to the Plaintiff's attention that there is a requirement under the Immigration and Protection Act 1956 for non-Bermudians to apply for a Deferral Certificate in circumstances where real property had not been disposed of within three years of it being bequeathed to them.

That this is something the Plaintiff was not advised to do by their legal representatives who acted for them when the application was made for Grant of Probate. Had they known, they would have applied for a Deferral Certificate when they applied for the Grant of Probate.

The Plaintiff[s] instructed Mr. John Hourston of Christopher E. Swan & Co. to apply for a Deferral Certificate in regards to the matter and were told that the application was submitted outside of the timeframe set out in the Immigration and Protection Act 1956.

That Mr. John Hourston on their behalf inquired as to whether the Minister had a discretion to extend the time period within which to apply and was told by the Department of Immigration that the Minister had no such discretion.

That correspondence from the Department of Immigration addressed to Mr. John Hourston describes the Plaintiff's situation as a "quagmire". Even though the email sets out in addition to an initial period of three years from the date of death to deal with all the Bermuda land in the estate, a further three year deferral was available on application made to the Minister, and that finally if those two periods (six years after date of death) was not sufficient a further period of three years could be applied for if there were exceptional circumstances. That there is now produced and shown to me and exhibited hereto as "CES 4" a true copy of an email from Dr. Danette Ming Chief Immigration Officer of the Department of Immigration to Mr. John Hourston setting out the position.

² The administration of the estate was granted by the learned Acting Registrar, Peter Miller, to the Plaintiffs as executors in accordance with the tenor of the will until the production of the original will in the Registry. There is no evidence or suggestion before the Court that an original will or any other will was subsequently filed in the Registry.

That the Plaintiff's present situation is unfortunate and regrettable. They are being told that they require a Deferral Certificate but that they are too late to apply for one and that there is no discretion by the Minister to grant one.

That whilst the Plaintiff appreciates that the Immigration and Protection Act 1956 sets out that a Deferral Certificate is required in their situation they are asking for the Court to view this matter with a wide lens.

That the property was owned by the Plaintiff's Bermudian Grandmother, followed by their Bermudian Mother and was left to them. The Plaintiff(s) are eligible for Bermuda Status. They desire to sell the property to a Bermudian and have executed the Sales and Purchase Agreement in this regard.

That they are empowered by the Administration of Estates Act 1974 as Executors of the Estate to sell the property.

That in the circumstances it is vexing that the requirement to apply for Deferral Certificate was not made known to them, but be that as it may, the Immigration and Protection Act 1956 contemplates affording up to nine years to dispose of property. They have been advised that the Limitation Act, Section 20 gives persons up to 20 years to claim an interest in property under an Estate yet it appears that they may be unable to sell the property.

That an Application has been made for a Deferral Certificate and although discussions have taken place between Mr. John Hourston of Christopher E Swan & Co. and the Department of Immigration, the Application has not been refused, it has been characterized as a "quagmire".

The Will:

7. The Deceased's last will and testament, executed on 25 September 1997, ("the will") named the Plaintiffs the Liquidators of the Estate. In its material parts it reads:

ARTIVLE IV

"I bequeath to my children Edouard Gaudreault, Peter Kelly Gaudreault, Terry Randall Yves Gaudreault and Toni Gaudreault all my property, movable and immovable, including the proceeds of insurance policies on my life for which no beneficiary has been designated, hereby constituting them my universal legatees, share and share alike.

Should any one of my children predecease me, fail to survive me by thirty days, or renounce my succession, his share shall devolve to his children by representation, and failing children, to his colegatees."

ARTIVLE V

"I designate my children Edouard Gaudreault and Terry Randall Yves Gaudreault as liquidators of my succession

There shall always be two liquidators... ”

ARTIVLE VIII

“In addition to the powers given to him by law, my liquidator may, alone and without the consent of my heirs or the authorization of the court, alienate by onerous title all my property, movable and immovable, encumber it with real rights or change its destination, transact, and perform all acts which are necessary or useful.

However, he may not alienate property bequeathed as a particular legacy to a legatee of full age and who is fully capable, but shall execute the delivery of such legacy as soon as conveniently possible, subject to the provisions pertaining to the reduction of particular legacies.

My liquidator may also, alone, invest as he deems appropriate, without being restricted by articles 1339 and following of the Civil Code of Quebec or any other legislation.”

ARTIVLE IX

“My liquidator shall be charged with the full administration of the property of my succession...”

ARTIVLE XII

“All the property bequeathed herein, and the fruits and revenues arising therefrom, shall be the private property of my legatees ... ”

ARTIVLE XIII

“All the property bequeathed by me or that which may subsequently represent it, and the fruits and revenue arising therefrom, are bequeathed as alimentary support and shall be exempt from seizure for any debt of my legatees, unless such legatees waive such exemption in whole or in part. The property is exempt from seizure in order that it may remain in the family and it shall remain exempt for thirty (30) years.”

8. In paragraph 9 of Mr. Swan’s affidavit he curiously construes Article IV as follows:

“That by Article IV of her Will the said Helen Marie Gaudreault (aka Helen Marie Kelly aka Hellen Kelly) devised and bequeathed the above mentioned property to the Plaintiff[s] absolutely.”

9. No mention was made to Peter Kelly Gaudreault or Toni Gaudreault in the said affidavit or in the hearing of the application. Notwithstanding, the Court has not been engaged to provide any direction on the construction of the will nor has it been asked to determine the beneficiaries of the Property. As such, I make no findings of fact in respect of the beneficial ownership of the Property.

The Sales & Purchase Agreement (“SPA”):

10. After prolonged and unsuccessful attempts to sell the Property via the services of multiple real estate agents, the Plaintiffs eventually secured prospective purchasers and entered into a Sales and Purchase Agreement dated 2 September 2016 with the Defendants in these proceedings.
11. At para 4.10 of the SPA it reads as follows:

“The Vendors are Restricted Persons within the meaning of the Bermuda Immigration and Protection Act (as amended) (“the Act”). This Agreement is subject to the Vendors, prior to the Completion Date, obtaining a Deferral Certificate under the Act from the Department of Immigration allowing them to sell the property to the Purchaser. If such a Deferral Certificate is not obtained within 60 days of the date of this Agreement then either party shall have the right to rescind this Agreement at which time the Agreement shall be declared null and void and the deposit returned to the Purchaser.”

12. While the 60 day period has been exceeded beyond three-fold, Mr. Swan informed the Court that both parties to the SPA wish to proceed with the sale.

The Department of Immigration’s Position:

13. Mr. Swan exhibited email correspondence to his firm from the Chief Immigration Officer, Danette Ming, dated 9 December 2016. The email reads as follows:

Good Day Mr. Hourston,

Further to my email of December 6 2016, the following is the reply from the Attorney General’s Chambers:

“On the 22 June 2007 the Bermuda Immigration and Protection Amendment Act 2007 (“the 2007 Act”) became effective and by Sections 85(2)(a) and (3) imposed on an estate representative a maximum of two years (an original 1 year + 1 year extension) from the date of death of the person whose estate he represents, for the disposal of any Bermuda land or interest in Bermuda land without violating the Act.

The deceased in this matter died on the 26th January 2009 which meant that her estate representatives had until the 26 January 2011 to deal with all of the Bermuda land in the estate.

It appears from the Probate Certificate sent to me that a conditional Probate certificate was issued to the estate representatives on the 6th August, 2010, which would have been within the 2 years mentioned above. However, it should be noted in the cover letter from Christopher E. Swan & Co. that reference is made to a Certified Copy of Bermuda Reseal of

Probate of the deceased dated 18th August, 2016, which has not been sent to me, but is presumably in respect of property in Canada.

Be that as it may, no Deferral Certificate was applied for within the requisite period and the 2007 Act did not provide an avenue for this to be addressed. As it stands, the estate representatives are in a quagmire unless they can come within the provisions of Section 85(1)(aa) of the Bermuda Immigration and Protection Amendment Act 2015 (“the 2015 Act”).

Section 85(1)(aa) imposed on the estate representative an initial period of 3 years from the date of death of the deceased to deal with all of the Bermuda land in the estate and if that was not enough time then a further 3 year deferral period was available on application being made to the Minister; and finally if these two periods (i.e. 6 years after the date of death) was not sufficient then further periods of 3 years could be applied for if there are exceptional circumstances but these further applications could be only if a Deferral Certificate had already been issued and extended.

Turning to the suggestion that Section 85(1)(d) applies, we must point out that this provision does not apply to individual persons and was introduced to deal with the meaning of “restricted persons” being extended to corporate person and partnerships which can become “restricted person” by virtue of a change in their membership. Furthermore, the Act deals with estate representatives separately under Section 85(1)(aa). Hence the estate representatives cannot avail themselves of this section either.

Again, as the law stands, there is no avenue to resolve the issue facing the estate representatives in this matter. Further amendments to the BIPA 56 are required.

I realize that the above reply is not the best. Subsequent to the above response from Chambers, I asked whether there a (sic) discretionary provision that would permit the Minister to issue a deferral certificate and the reply was ‘no’.

Regards,”

14. I should emphasize here that no Counsel from the Attorney General’s Chambers partook in these Court proceedings. It think it would, therefore, be unfair to presume Chambers’ stance on this application, notwithstanding the above cut and paste extract.

The Law:

The Immigration and Protection Act 1956 (“BIPA”):

15. Section 72 of the BIPA defines a “restricted person” to mean, *inter alia*, an individual ‘*who does not possess Bermudian status*’.

16. Part VI of the BIPA applies to the various statutory restrictions imposed on non-Bermudians in obtaining an interest in real property. The purpose of Part VI is stated in section 73 of the BIPA as follows:

“Purpose of Part VI

73 The purpose of this Part is to protect land in Bermuda for ownership by individuals who possess Bermudian status by-

(a) requiring restricted persons to have licences to hold or acquire land in Bermuda and preventing them from appropriating it;

(b) requiring trustees to have licences to hold or acquire land in Bermuda for the benefit of restricted persons and preventing them from appropriating it; and

(c) preventing corporations from acquiring or holding land in Bermuda, unless they do so in accordance with this Part”

17. Restricted persons are required to obtain a Licence or Deferral Certificate as a condition holding or acquiring land in Bermuda. Sections 76-77 of the BIPA reads:

“76 No restricted person shall hold or acquire land in Bermuda unless the restricted person has a licence or a deferral certificate.

77 No trustee shall hold or acquire land in Bermuda in trust for a person that the trustee knows or has reasonable grounds to suspect is a restricted person (other than the spouse of a person who possesses Bermudian status) unless the trustee has a licence or a deferral certificate.”

18. Where sections 76 or 77 apply, section 84(1) then applies:

“84(1) A restricted person or a trustee to whom section 76 or 77 applies who intends to hold or acquire land in Bermuda shall apply to the Minister for a licence.”

19. The licensing requirements may be deferred by obtaining a Deferral Certificate under section 86. The conditions for a 3 year entitlement to a deferral are outlined in general terms under section 85. Sections 85(1)(a) and 85(1)(aa) appear as follows:

“85(1) The requirement to obtain a licence under this Part is deferred for a period of three years in the following cases-

(a) where a restricted person acquires land by devise or inheritance, the deferral commencing on the date that the land was acquired; (or)

(aa) where an estate representative acquires land and either he is a restricted person or a beneficiary of the estate is a restricted person, the deferral commencing on the date of death of the person whose estate he represents”

20. Section 85(1)(aa) is to be read with section 85(4) which provides:

“85(4) Where an estate representative acquires land in the case mentioned in subsection (1)(aa) and the Minister has already extended the deferral period in accordance with subsection (3), the Minister may, in writing, extend the deferral period for further additional periods not longer than the original deferral period, but may only do so if he is satisfied that there are exceptional circumstances.”

21. The effect of a failure to acquire a BIPA Licence or Deferral Certificate was considered by the learned Hon. Chief Justice, Ian Kawaley, in *Re PQR, Deceased [2015] Bda LR 74*. This decision was not cited by Mr. Swan. However, I find that the judgment in *Re PQR* offers some valuable guidance on how to approach this area of the law.
22. In *Re PQR* the Executor issued an Originating Summons for the Court’s direction on disputed portions of the will in need of construction. There were three main points for determination which arose. The issue which nearly parallels this case concerned an entitlement issue on whether or not a non-Bermudian testator’s rights and interest in real property in Bermuda passed to the beneficiary (his widow) of his will.
23. The testator in *Re PQR* entered into a sales and purchase agreement on or about 16 April 1997 (the “1997 SPA”) to purchase Bermuda property. His status as a restricted person under the BIPA was expressly stated in the 1997 SPA and conditions were imposed which required the testator to first obtain the grant of a Licence by the Ministry of Labour and Home Affairs before completion of the sale.
24. In 2010 the Testator entered into another sales and purchase agreement (the “2010 SPA”) to purchase Bermuda property. Similar to the 1997 SPA, a condition requiring a grant of a Licence to the Testator was included in the 2010 SPA with liberty by notice to the other to rescind the agreement if the Licence was not obtained.
25. Following the SPAs, a Deed was entered on 12 January 2011. The Deed contained a paragraph which extended the period for obtaining a Licence 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.”*
26. In Clause 8 of the Testator’s will he bequeathed *“free of any taxes or duties all my interest in any real property situate in the Islands of Bermuda.”* The beneficiary of Clause 8 was the Testator’s widow who occupied the main portion of the property. However, the Testator failed to acquire a Licence so as to be able to complete the purchase contemplated by the SPAs, both of which expressly stated that the Testator’s rights under the agreements were assignable and/or transferrable.

27. Paragraphs 15-27 of the learned Chief Justice’s ruling reads as follows:

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] 2 QB 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. 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

(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. As a result, there is no sufficient evidential foundation for this Court to:

i. conclude that the circumstances surrounding the relevant arrangements establish illegality with clarity; and

ii. 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...”

28. It is important to keep in mind that in *Re PQR*, unlike in this case, the SPAs were made prior to the 2007 amendments to the BIPA. The Court's refrain from summarily determining that the Testator in that case could not have lawfully acquired any interests capable of being devised was inextricably tied to that distinction. The learned Chief Justice found that the 2007 amendments did not operate retroactively so as to render the rights the Testator had already acquired unlawful. The Court held that such an interpretation was potentially inconsistent with the fundamental property rights protected by section 13 of the Constitution (effectively distancing the Testator from penal provisions such as section 102G of the BIPA which creates an indictable offence for persons who contravene, *inter alia*, sections 76 or 77 and which gives the Court the power to make orders for forfeiture).
29. The provisions of the BIPA are considered in this Ruling *in tandem* with provisions in other enactments. For that reason, I am mindful of section 8 of the BIPA which states that a conflict of laws should be resolved in the following way:

“(1) Except as otherwise expressly provided, wherever the provisions of this Act or any statutory instrument in force thereunder are in conflict with any provision of any other Act or statutory instrument, the provisions of this Act or, as the case may be, of statutory instrument in force thereunder, shall prevail.

(2) Subject to subsection (1) nothing in this Act shall absolve any person from any liability that he may incur by virtue of any other Act or at common law.”

The Administration of Estates Act 1974 (“the 1974 Act”)

30. Mr. Swan relied on sections 38-39(1)-(2) of 1974 Act in support of his submission that the Plaintiffs, as estate representatives, have a right to sell the Property:

“38 (1) The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power disposes by his will, are assets for payment of his debts (including stamp duties), his debts (whether by specialty or simple contract) and liabilities, and any disposition by will inconsistent with this enactment is void as against the creditors, and the Court shall, if necessary, administer the property for the purpose of the payment of the debts and liabilities.

This subsection takes effect without prejudice to the rights of incumbrancers.

(2) If any person to whom any such beneficial interest devolves, or is given, or in whom any such interest vests, disposes thereof in good faith before an action is brought or process is sued out against him, he shall be personally liable for the value of the interest so disposed of by him, but that interest shall not be liable to be taken in execution in the action or under the process.

39(1) The estate representative may, without the consent of any person, sell the assets referred to in section 38 for the purpose not only of paying debts, but also (whether there are or are not debts) of distributing the estate among the persons beneficially entitled thereto, and before selling for the purposes of distribution the estate representative shall, so far as practicable, give effect to the wishes of the persons of full age for the time being beneficially entitled to the property proposed to be sold, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that this section has been complied with.

(2) Unless required for purposes of administration owing to want of other assets, personal chattels as to which a person dies intestate shall not be sold except for special reason.”

31. I will observe here that the Plaintiffs entered the SPA in their capacity as Co-Executors of the Estate. In any event, I see no difficulty in accepting as a general proposition, the powers of an administrator of an estate to dispose of estate property through a sale.

The Plaintiffs’ Application under the Trustee Act 1975:

32. The general application of the Trustee Act 1975 is provided by section 2 as follows:

- (1) This Act, except where otherwise expressly provided, applies to trusts including, so far as this Act applies thereto, executorships and administratorships constituted or created either before, on or after 1 March 1975.*
- (2) The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.*
- (3) This Act does not affect the legality or validity of anything done before 1 March 1975, except as otherwise expressly provided.*

33. The terms “trust” and “estate representative” are addressed in the Interpretation of the 1975 Act in the following way:

““trust” does not include the duties incident to an estate or interest conveyed by way of mortgage, but with this exception the expressions “trust” and “trustee” extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of an estate representative, and “trustee” includes an estate representative, and “new trustee” includes an additional trustee.”

““estate representative” means the executor, original or by representation, or administrator for the time being of a deceased person.”

34. The Plaintiffs’ application is made under section 47 of the Trustee Act 1975 (power of Court to authorize transactions relating to trust property) (“the 1975 Act”) which reads as follows:

“47(1) Where any transaction affecting or concerning any property vested in trustees, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by any provision of law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the court may think fit and direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2) The court may, from time to time, rescind or vary any order made under this section or may make any new or further order.

(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

(4) In this section, “transaction” includes any sale, exchange, assurance, grant, lease, partition, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any investment or application of capital, and any compromise or other dealing, or arrangement.”

35. I accept that the Court has broad powers under section 47 to make orders in relation to trust transactions which include orders for the sale of trust property. Of course, section 47 should only be exercised when it is just and expedient to do so. It does not serve to open the flood gates or create a procedural exemption from the provisions of the Immigration Act which require the Minister’s issue of a Licence or Deferral Certificate in respect of restricted persons.

Decision:

36. In my view, the present case turns on its own facts which are somewhat out of the ordinary. The Plaintiffs in this case were assigned a beneficial interest in the Property. Up until an unknown date in 2016, they were unaware of the BIPA provisions on Licences and Deferral Certificates. They now, with the benefit of legal advice from Counsel of record, wish to comply with the said provisions but are statutorily time-barred from so doing.

37. The requirement to obtain a Deferral Certificate would remain even if the Plaintiffs were replaced by Bermudian Executors. Section 77 of the BIPA aims to prevent a trustee from holding or acquiring land in Bermuda in trust for a restricted person (other than the spouse of a person who possesses Bermudian status) unless the trustee has a Licence or a Deferral certificate.

38. However, the Court must also look to the purpose of these statutory provisions which are ultimately put in place to protect land in Bermuda for Bermudians. In this case, the objective of the transaction is to place the Property into the hands of Bermudians. For that reason, I do

not think that the transaction under examination is designed or has the effect of defeating the purpose of the legislation.

39. The Plaintiffs' attempt to sell the Property to the Defendants was made in their capacity as Co-Executors of the Estate. The Plaintiffs' failure to obtain a Deferral Certificate, under these particular and unique circumstances, does not in the end contravene the purpose of the legislation because the transaction under consideration is effectively a conveyance of Bermuda property from a Bermuda Estate into the hands of Bermudian purchasers. This in my view does not go behind Parliament's intention when the 2007 Amendments to the BIPA were brought into force.
40. For these reasons I am inclined to grant the Plaintiffs' application made under section 47 of the Trustee Act 1975 so that the Plaintiffs, as Co-Executors of the Estate, may sell the Property to the Defendants (or any other prospective Bermudian purchasers) subject to completion of the following conditions:
- (i) A copy of this ruling shall be properly served on the Solicitor General and
 - (ii) An Affidavit of Service in respect of service on the Defendants of the Originating Summons, the supporting affidavit evidence and a copy of this Ruling shall be filed with the Court within 14 days of the date of this ruling.
41. This matter shall be mentioned on Thursday 1 June 2017 at 11:00am to allow any parties standing in opposition of the application to be heard on an application to vary or set aside this decision.

Tuesday 9 May 2017

SHADE SUBAIR WILLIAMS
REGISTRAR OF THE SUPREME COURT