In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 39

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

BETWEEN:

LILLIAN CASEY MARTIN

Applicant

-and-

THE MINISTER OF NATIONAL SECURITY

Respondent

REASONS FOR DECISION

(in Court)

Judicial review-refusal of application by restricted person of application for license to acquire land-whether Minister made a valid decision-whether applicant entitled to be granted license-whether arrangements pursuant to which applicant entered into occupation of land constituted an unlawful "scheme"-Bermuda Immigration and Protection Act 1956,

sections 76-82, 84 and 88-Bermuda Immigration and Protection (Amendment) Act 2007, Preamble, sections 13-17 and 21

Date of hearing: July 1-2, 2019
Date of decision: July 5, 2019
Date of Reasons: July 31, 2019

Mr Michael Fordham QC of counsel and Mr David Kessaram. Cox Hallett Wilkinson Limited, for the Applicant

Mr Myron Simmons, Senior Crown Counsel and Ms Lauren Sadler-Best, Crown Counsel, Attorney-General's Chambers, for the Respondent (the "Minister")

Introductory

1. By a Notice of Application dated January 30, 2019, the Applicant applied for leave to seek judicial review. Leave was granted by Subair Williams J on February 13, 2019. By her Notice of Originating Motion dated February 14, 2019 the Applicant sought (in paragraphs 2 and 3) the following alternative forms of relief which formed the focus of oral arguments in the hearing before me:

   An Order of Mandamus to require a decision granting the application;

   (1) Alternatively, a Declaration that the Applicant is entitled to a license and that the failure to grant a license is unlawful.

2. On July 5, 2019, indicating that reasons for the decision would be given later, I granted an Order in the following terms:

   "*1.That the Applicant is entitled to the grant of a licence to acquire Agar's Island, Pembroke Parish HM 05 under s. 84 of the Bermuda Immigration and Protection Act 1956 pursuant to her application dated 16th July 2014 and that the failure of the Respondent Minister to grant the said licence is unlawful.*

   2.Unless either party applies by letter to the Registrar of the Supreme Court to be heard as to costs within 21 days of the date when the reasons for this decision are delivered, the costs of this application shall be awarded to the Applicant."

3. These are the reasons for that decision.

Overview

4. The history of this matter, which might fairly be likened to a long and winding road, may be summarised as follows. In 1997 the late Dr James Martin, a leading international academic specialising in information technology, entered into contractual arrangements which contemplated his purchasing Agar's Island (the "Property") if he was able to obtain a license. The arrangements also expressly contemplated that he would from the outset be occupying the Property as a tenant under a 5 year lease and financing the development of the Property. The development was needed to raise the value of the Property to the requisite land valuation threshold which would enable a restricted person to obtain a license to purchase the land under the Bermuda Immigration and Protection Act 1956 (the "Act"). Dr Martin had resided in Bermuda since 1980 and the Applicant (his wife) since 2000. Perhaps because of undue haste to complete the renovations within the term of the initial lease, certain aspects of the development took place without planning approval, construction was completed by 2001 but planning approval was not granted until 2003. A second lease was entered into in 2002 but during the term of that lease (in 2005), a moratorium on any further licenses to acquire land was announced by the Government as part of a policy designed to clamp down on "fronting" arrangements. For reasons which are unclear, Dr Martin (who had obtained a Permanent Residence Certificate ("PRC") in 2003) did not apply for the license until the deadline for doing so under the Bermuda Immigration and Protection Amendment Act 2007 (the "2007 Act") had come and gone on June 22, 2007. The statutory moratorium introduced in 2007 expired in 2012 and in 2013 Dr Martin sadly died. His widow applied for a license on July 16, 2014 under the Act.

5. Shortly before the application for a license under the Act, the Executor for Dr Martin's estate issued an Originating Summons seeking to resolve an entitlement dispute turning on the legal character of the contractual rights in relation to the Property. An opposing beneficiary contended at the hearing that the arrangements were illegal on their face. In *Re the Estate of PQR,* Judgment dated August 6, 2015 (unreported version), I held that (1) the Testator could lawfully devise his contractual rights in relation to the Property under the Will, and (2) where illegality was not formally raised as an issue in civil proceedings a Court should only decline to enforce the impugned arrangements where "*the evidence before the Court clearly establishes the relevant illegality*" (paragraph 19). As a prelude to concluding that the illegality argument was not sufficiently clearly supported by the evidence before me to justify making a formal finding on the non-pleaded issue, I observed:

> "*22… 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….*"

6. In these circumstances I am bound to accept the submission of Mr Simmons that the Minister can hardly be viewed as being harsh or unfair on the Applicant in forming the view that the relevant arrangements were unlawful and insisting that the true legal position should be determined by this Court rather than resolved in an out of Court settlement. It is unclear when before the hearing of the present application (if at all) the Minister first had sight of the *Re PQR* [2015] SC (Bda) 53 Civ (6 August 2015), judgment and connected it to the present case. It was published in redacted form. This judgment made it obvious that I considered the merits of the illegality question to be too difficult to summarily assess. Against this background, the surprise I expressed in the course of the hearing about what appeared to me to be an excessively robust preliminary view by the Minister and his advisers that a *prima facie* case of illegality had been made out was, perhaps, to some extent misplaced. The relevant judgment may not have been brought to the Minister's attention as concerning the present case until the Applicant served the main Hearing Bundle shortly before the hearing. Nonetheless, the present case was strikingly unusual for the fact that no formal decision on the application was ever promulgated by the Minister.

7. Nonetheless, the present application, despite its somewhat colourful background, centrally turns on an essentially bland point of statutory construction. It requires considering whether the impugned arrangements contravene the provisions of, in particular, sections 76, 78 and 81 of the Act as amended in 2007. The arrangements were initially consummated in 1997 pursuant to which Dr Martin agreed to purchase the Property subject to obtaining a license under the Act, to develop the Property through loans secured by a mortgage and to occupy the Property under what turned out to be a series of five year non-renewable leases. They were in my judgment obviously lawful arrangements when initially made. The critical legal question is, therefore, whether the arrangements, taking into account the way in which Dr Martin (and the Applicant after him) occupied the Property, were caught by the more restrictive regime introduced by the 2007 Act and became unlawful as a result.

8. It is necessary to consider the legal arrangements in relation to the Property, the pre-2007 statutory regime regulating ownership of land by restricted persons, the public policy concerns about abuses under the pre-2007 statutory regime and the 2007 amendments before addressing the pivotal issue of whether the Applicant's post-2007 occupation of the Property became unlawful by virtue of the operation of the 2007 Act. Construing the relevant provisions of the 2007 Act in a case where the object and purpose of the legislative scheme is the primary consideration is an interpretative task which should be shaped by an objective assessment of the mischief Parliament was seeking to cure combined with an analysis of the intention of Parliament as expressed in the statutory language actually used.

9. In addition, however, the Respondent invited the Court to infer from the overall history of the dealings with the Property that, the express contractual arrangements notwithstanding, Dr Martin had entered into an arrangement or understanding with

BTCL that, come what may, the initial Lease would be renewed indefinitely as many times as Dr Martin wanted.

The legal arrangements in relation to the Property

1997

10. Dr Martin entered into the following agreements in relation to the Property with the owner of the Property, Bermuda Transportation Company Limited ("BTCL"):

    (a) a Sale and Purchase Agreement dated April 16, 1997 (the "SAPA");

    (b) a Lease dated May 16, 1997 (the "1997 Lease");

    (c) a Mortgage Deed dated May 19, 1997 (the "Mortgage).

11. Under the SAPA, BTCL agreed to sell the Property to Dr Martin for $3.5 million. The SAPA also dealt with a lot of land which is irrelevant for present purposes. The Completion date was defined as "*thirty days after the attorneys for the Purchaser receive written notification of the grant of a Licence by the Ministry of Labour and Home Affairs*". Clause 4 provided as follows:

    > "*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 the Property has an Annual Rental Value making it available to non-Bermudian ownership with all the 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 the application or within such further period as the Vendor and the Purchaser shall agree in writing then Special condition 9 shall apply.*"

12. Special Condition 1 obliged the Vendor to issue a Lease for a period of five years which would permit the Purchaser to make leasehold improvements. Special Condition 9 provided as follows:

    > "*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 his 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 not being less than the Purchase Price plus the cost of the leasehold improvements made to the Property by the Purchaser. The*

Purchaser agrees to furnish the Vendor with full written and documentary evidence certifying the cost of leasehold improvements to the Property. Upon any such sale of the Property the net proceeds of sale shall be applied firstly in repayment of the Loan secondly in repayment to the Purchaser of the cost of leasehold improvements to the Property and thirdly and [sic] any balance thereafter shall be paid to the Vendor. If the sale proceeds of the Property are insufficient to meet the cost of repayment of the Mortgage and/or the leasehold improvements then under no circumstances shall the Vendors be liable for any shortfall and any loss sustained shall be borne solely by the Purchaser."

13. Mr Fordham QC submitted that this clause was inconsistent with the idea that the contractual arrangements conferring autonomous control over the Property to the Tenant. However, Special Condition 10, which was not referred to in the course of argument, also provided in relation to any sale pursuant to Special Condition 9:

> "*10. Upon any sale of the Property pursuant to clause 9 above neither the Vendor nor the Purchaser shall accept a purchase price for the Property without the consent of the other.*"

14. The Lease was for a term of five years with no option of renewal. It provided for the Tenant to construct a principal dwelling house and ancillary buildings and structures for the Tenant to occupy. The Mortgage was granted over the Property in the amount of $3.5 million to secure repayment of a loan from Dr Martin as Mortgagee to BTCL as Mortgagor.

15. There was no suggestion that there was anything remarkable about any of these documents on their face. Dr Martin was paying for leasehold benefits he hoped to benefit from as a tenant in the short-term and as owner in the long-term, but if he was unable to complete the purchase and did not assign his SAPA rights, his loan would be repaid and BTCL would retain the benefit from the improvements through the enhanced value of the Property and a likely profit made on any sale. Dr Martin assumed the commercial risk of any sale failing to generate sufficient funds to repay his investment in improvements to the Property. The SAPA indicates that the Purchaser's lawyers were Conyers Dill & Pearman and the Vendor's Cox Hallett & Wilkinson.

<u>2002</u>

16. On May 19, 2002, a further five year lease was granted in respect of the Property (the "2002 Lease") on the same terms as the 1997 Lease. The recitals referred to the fact $8 million had been spent by the Lessee towards leasehold improvements ("the Leasehold Improvement Sum"). The 2002 Lease also provided:

"*(2) The parties acknowledge that Leasehold Improvement Sum (LESS any costs to be borne solely by the Lessee in effecting any demolition and/or remedial works to the Premises as may be required by Planning) is due and owing to the Lessee by the Lessor and as previously agreed by the parties to be applied to the completion monies provided by the Lessee (as Purchaser) towards completion of the purchase of the Premises (or any portion thereof) in the event he (or his assigns) is able to purchase the Premises (or any portion thereof), and meanwhile shall continue to be secured by the Mortgages dated May 19,1997, upon terms previously agreed.*"

<u>2007</u>

17. The Applicant deposes that in May 2007 there was another five year lease ("the 2007 Lease) but that this document cannot now be located.

<u>2010</u>

18. On April 10, 2010, the same parties entered into another Sale and Purchase Agreement in relation to the Property (the "2010 SAPA") The purchase price was $11.5 million ($3.5 million plus the $8 million Leasehold Improvement Sum referred to in the 2002 Lease. The Completion Date rather than referring to the Special Conditions was defined as follows: "*28 days after approval of all licenses*". Clause 4.6 not only required the Purchaser to apply for a license to acquire the Property "*with all due diligence and despatch*". It also excised from the initial agreement the Purchaser's right to veto the price of any sale if completion did not take place, strengthening the commercial position of the Vendor as beneficial owner:

    "*If such License is not granted to the said James Thomas Martin within one (1) year from the date of this agreement (or within such further period as the Vendor may agree in writing) then either the Vendor or the Purchaser shall be at liberty by notice to the other to rescind this Agreement.*"

19. Mr Fordham QC rightly submitted that this clause reinforced the autonomy of the Vendor/ Landlord. It was common ground that the moratorium on land acquisition licenses which was introduced in 2005 for five years was in fact extended for another two years. By letter dated July 9, 2010, an application for a license was made; it was refused by letter dated December 14, 2010 on the grounds that the moratorium was still in force.

20. An application for a deferral license was made by letter dated December 31, 2010 from Lincoln Law to the Minister. The letter referred to the incorrect section of the Act, a minor matter. But it also stated: "*The Mortgagee has gone into possession subsequent to a summons in the Supreme Court dated 27th May 2010…*" No reference

was made to a Possession Order being obtained; the basis of the application was queried by the Department of Immigration on October 3, 2011 and Lincoln Law promised to elaborate. The matter remained in limbo until Dr Martin's death. Was an initial view taken that a deferral license had to be obtained to ensure the legality of the mortgage after the end of the transitional period on December 31, 2010? Was the possession Summons mentioned in the December 31, 2010 letter not pursued because of legal doubts about the consequences of such a step? There is no evidence which directly answers these questions which Dr Martin alone would be the logical person to provide answers to. As will be seen when the statutory provisions are addressed below, there is some ambiguity in the new 2007 provisions dealing with restricted persons and mortgages. It seems self-evident that whether or not the application was needed, it provides clear evidence of an attempt by Dr Martin to comply with the Act. It is also noteworthy that changes were made to the 2010 SAPA which does suggest a commercial compromise.

2011

21. The 2010 SAPA was further revised by deed on January 11, 2011 after a 2010 license application had been refused on the basis of the moratorium (the "2011 Deed"). This essentially provided (in terms which suggest a compromise of the mortgage default dispute):

    (a) the period time for the Purchaser to obtain a license was extended for a further 5 years (on top of the original 1 year);

    (b) the Vendor's deposit of $500,000 was acknowledged as having been refunded and it was agreed that the increased stamp duty flowing from the increased purchase price resulting from applying the $8 million leasehold expenses to the purchase price would be borne solely by the Purchaser;

    (c) the Purchaser waived interest on the Mortgage.

2012

22. Dr Martin and the Applicant jointly acquired another five year lease of the Property on May 19, 2012 (the "2012 Lease").

2014

23. By a letter dated July 16, 2014 the Applicant applied for a license to acquire the Property.

2017

24. The Applicant, having applied for a license in 2014 and still awaiting a decision, obtained a further 5 year lease in May 2017 (the "2017 Lease").

Preliminary view of the legal effect of the arrangements

25. In *Re PQR,* without deciding the issue which is presently expressly before the Court for formal determination, I observed as follows:

> "23…*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.*"

The policy underpinnings of the 2007 Act

26. Dr Danette Ming, Chief Immigration Officer, described the policy concerns which prompted the enactment of the 2007 Act as follows (First Affidavit, paragraph 14):

> "…*Those amendments were passed, after a methodical and involved process of research and consultation, to address longstanding problems of appropriation of land in Bermuda by non-Bermudians and to put an end to the practice of Bermudians 'fronting' for non-Bermudians. The purpose behind these efforts was to preserve the majority of housing opportunities and undeveloped land in Bermuda for Bermudian ownership and by doing this to ameliorate the unfair competition which had previously existed between Bermudians and non-Bermudians. The statistics showed that a large number of properties held by trusts for example, were 'fronts' concealing the appropriation of land by non-Bermudians. Such schemes were often used to acquire land that was not available to non-Bermudians*…" [Emphasis added]

27. Mr Simmons for the Minister referred to my own decision in *Re Herrerro* [2004] Bda L.R.9 where I observed:

> "*94. It should be noted that absent legislative changes to more explicitly prohibit the conduct complained of here, an allegation of conspiracy to defraud may prove to be a very blunt and ineffective weapon indeed…*"

28. That was a case where warrants were issued to conduct searches in relation to an offence of conspiracy to defraud based on the assertion that a trust was holding land for the benefit of a restricted person was quashed. Mr Simmons suggested that this decision prompted the 2007 Act to quell the perceived growth in fronting arrangements which avoided the existing provisions of Part V of the Act. Notably, the central complaint in *Herrero* was that the applicant was seeking to evade liability for the costs of a land acquisition license while enjoying the rights of ownership of the relevant property. The accuracy of this broad submission on behalf of the Minister is confirmed by the Ministry of Labour and Immigration's October 2007 '*Guidance Notes for Part VI of the Bermuda Immigration and Protection Act 1956 and related policy for the acquisition of land by restricted persons*'. The Introduction stated as follows:

> "*The Ministry of Labour and Immigration recognizes that this important legislation and policy relating to land-holding in Bermuda may well have profound effects on persons who hold or acquire land in Bermuda or wish to do so. It is also understood that the law and related policy is complex hence these guidance notes have been compiled purely as an aid to understanding the regulatory framework surrounding land-holding in Bermuda and some of the reasons behind it.*" [Emphasis added]

29. The acknowledgement that the law was complex and that the reasons behind the 2007 Act might elucidate its meaning suggest the need for caution in construing the provisions of the Act in relation to non-standard applications and highlights the need to have regard to the legislative purpose underpinning the statutory regime. In terms of a broad overview, the second paragraph of the Introduction is pertinent indeed:

> "*The underlying philosophy of Part VI of the Bermuda Immigration and Protection Act 1956 (the '1956 Act'), the Regulations made pursuant to that Act and the related policy is to preserve the majority of land in Bermuda for ownership by individuals who possess Bermudian status by:*
>
> - *requiring restricted persons (e.g. non-Bermudians) to have licenses to hold or acquire land in Bermuda and by preventing them from appropriating it*
>
> - *requiring trustees of trusts to have licenses to hold or acquire land in Bermuda for the benefit of restricted persons, and*

- *preventing corporations from acquiring or holding land except in accordance with Part VI of the 1956 Act.*"

30. Section 2 of the Guidance Notes is headed "*Important concepts*", and explains certain new concepts introduced by the 2007 Act. For present purposes, three concepts are important:

    (a) "*Appropriation*" is crucially explained in paragraph 2.02 as follows:

    "*A person appropriates land by assuming any of the rights of an owner of the land…This notion of 'appropriation' is fundamental in describing the relationship which a restricted person has to the land in cases of 'fronting' either by individuals or through trusts…*";

    (b) "*Financial assistance*" is a concept connected to "*appropriation*". Mr Fordham QC referred to Example 1, which indicated that permission from the Minister was required for a restricted person to provide assistance even to their Bermudian child to acquire property (paragraph 2.02). It was conceded that the funding of the leasehold improvements would not have been lawful (without a license) under the post-2007 legal regime under Part VI of the Act which expressly prohibits restricted persons from taking a mortgage over land without the Minister's permission;

    (c) "*Scheme*" is initially described in paragraph 2.04 as follows:

    > "*A 'scheme' is defined in section 72(1) of the 1956 Act (paragraph 2.04) in two parts: firstly as an agreement, arrangement etc. whether express or implied and whether or not it is enforceable in the law courts; secondly, as a plan, proposal etc. This notion is taken from the Australian legislation for which there is a considerable body of case law.*"

31. In considering the concept of "*appropriation*" in further detail (paragraph 3.03), the Guidance Notes attempt to illustrate where the boundaries should be drawn between permissible and criminally prohibited conduct. In explaining section 78(2A) which permits a trustee to appropriate land for the benefit of a Bermudian at the direction of a restricted person where (a) the restricted person receives no benefit, and (b) the restricted person is a parent or grandparent of the Bermudian and obtains the Minister's permission, it is warned that:

    "*this provision is not intended to allow restricted persons who are the parents of Bermudian children to devise a scheme to acquire a property to be used for their benefit <u>with the illusion that</u> the child will benefit at some unknown time in the future. Such schemes are known to be used to purchase properties that are not available to restricted persons or to evade the payment of the land-*

holding charge on properties that are eligible for purchase by restricted persons…" [Emphasis added]

32. This warning follows a repetition of the earlier statement that links "*appropriation" to "the relationship that a restricted person has to land in cases of 'fronting'*". It is also explained that "*in order for appropriation to reach the standard of a criminal offence, restricted persons must have the* ***intention*** *of occupying or of using or of developing the land for profit for themselves or someone else*".

33. The impression that the 2007 Act was intended to prohibit arrangements which were designed to conceal or distort the true relationship of a restricted person to land in Bermuda is confirmed by paragraph 3.05, "*Scheme to defeat purpose of Part V*". The Guidance Notes state:

    "*Subsection 81(1) of the 1956 Act prohibits any person from participating in a scheme which he 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 <u>contrary to the purpose of Part VI</u>; or

    (b) *to appropriate land in Bermuda contrary section 78 of the 1956 Act.*" [Emphasis added]

34. The Guidance Notes accordingly suggest that the sort of schemes which are prohibited are (a) (most broadly) arrangements designed to "*defeat the purpose of Part V*" and (b) (more specifically) illusory "fronting" type arrangements through which restricted persons acquire an interest in land in Bermuda without obtaining the requisite Ministerial permission. These policy concerns are reinforced by the evidence of the Chief Immigration Officer filed in the present case (and set out above) as to the specific concerns which prompted the enactment of the 2007 Act. In essence, 'fronting' arrangements allowed restricted persons to obtain an interest in Bermudian land without obtaining the legally required Ministerial permission.

Part V of the Act

<u>The pre-2007 regime</u>

35. Since the Minister conceded that the arrangements were not inconsistent with the pre-2007 statutory regime, that regime can be described in summary terms. Mr Fordham QC described section 80 of the Act as containing two core prohibitions, each of which resulted in offending transactions being void:

(a) a prohibition on restricted persons acquiring land in Bermuda without a license; and

(b) a prohibition on trusts holding land in Bermuda for the benefit of restricted persons without such persons obtaining a license.

36. It was also clear from section 80(3) that a license was not required for a lease to be taken for up to five years with no option of renewal and that restricted persons could take mortgages over land in Bermuda without a license.

The 2007 Act

37. Mrs Sadler-Best referred to the 2007 Act primarily to demonstrate that its transitional provisions were designed to be fair by affording persons whose previously lawful arrangements were rendered unlawful an opportunity to bring those arrangements to an end to avoid the risk of prosecution. However, she firstly referred to the Preamble which provided in material respects as follows:

> "*AND WHEREAS it is necessary…to prevent circumvention of the licensing system through the use of trusts and schemes…*"

38. The Preamble confirms the main thrust of the Guidance Notes, a proposition that might be said to be ultimately obvious: that the main purpose of the 2007 Act was to "*prevent circumvention of the licensing system*".

39. Section 13 defines the transitional period as beginning on June 22, 2007 (when the 2007 Act came into force-the "*transition day*") and ending on December 31, 2010. Section 21 provided that no prosecutions under the new Part V would be commenced in respect of land acquired or appropriated before the transition day if it was disposed of during the transition period. This was a very important and proportionate provision designed to ensure that the new criminal penalties did not have retrospective effect and prejudice vested rights. Section 21 did afford a reasonable opportunity for persons involved in schemes which the new Part V would render unlawful to extricate themselves from their legal predicament. If Dr Martin's arrangements did offend the post-2007 regime, there had been an ample opportunity for him after the transition day to bring them to an end.

40. Thirdly, the Respondent's counsel referred to section 17 which created a statutory moratorium of applications for five years from June 2, 2007.

The current substantive statutory provisions

41. The first of what Mr Fordham QC described as 'three core prohibitions' may be found in section 76 of the Act:

"*76. No restricted person shall hold or acquire 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, unless the restricted person has a licence or a deferral certificate.*"

42. The second "core prohibition" is found in the next section:

"*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, unless the trustee has a licence or a deferral certificate.*"

43. Section 77 was not directly relevant to the present case. However the third core prohibition was pivotal:

"*78.(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.*

(2) No trustee shall appropriate land in Bermuda for the benefit of a restricted person.

(2A)No trustee shall appropriate land in Bermuda for a beneficiary who possesses Bermudian status, at the direction of a restricted person, unless—

(a) the restricted person receives no benefit from the appropriation; or

(b) the beneficiary is the child or grandchild of the restricted person and the trustee obtains the Minister's approval in writing before appropriating the land.

(3)For the purposes of this section, a person appropriates land by assuming at any time any of the rights of an owner of the land, whether at law or in equity.

(4) A restricted person is deemed to have the intention referred to in subsection (1) in the following circumstances—

(a) the restricted person provides or procures or arranges for another person to receive financial assistance for the acquisition of the land, whether or not pursuant to any scheme; or

(b) the land is held by a person who, by virtue of a scheme made for the benefit of the restricted person, would be regarded by a reasonable person in possession of all the facts as a person acting for the benefit of the restricted person and not as an absolute owner beneficially entitled to the land.

(5)Subsection (1) does not apply in the case of a restricted person who provides financial assistance to his child or grandchild for the acquisition of the land, if the restricted person obtained the Minister's approval in writing before providing the assistance.

(6)This section does not apply to a restricted person or a trustee who holds a deferral certificate or a licence in respect of the land.

(7)In this section "child" includes step-child and adopted child." [Emphasis added]

44. The "first core prohibition" found in section 76 to my mind expresses the overarching principle of Part V of the Act: "*No restricted person shall hold or acquire land in Bermuda with the intention of occupying it, or of using or developing the land for profit…unless the restricted person has a licence...*" The subsequent sections are subsidiary to this dominant provision and primarily designed to supplement it and to increase the efficacy of section 76. This is in my judgment the <u>only</u> true "*core prohibition*". Thus 78(1) (Mr Fordham QC's "second core prohibition") prohibits restricted persons from appropriating land, but section 78(6) makes it clear that the prohibition does not apply to "*a restricted person or a trustee who holds a deferral certificate or a licence in respect of the land.*" Clearly occupying land without a license potentially qualifies as prohibited appropriation, but that prohibition must be read with section 82, which creates various exceptions to this general rule only two of which are relevant for present purposes. Before considering those exceptions, mention must be made of what might be described as another subsidiary prohibition which is also qualified by section 82. Section 80(1) provides:

> "*(1) No restricted person or trustee of a trust which is holding or acquiring land for the benefit of a restricted person, and no agent or nominee of a restricted person or of such a trustee shall, without the prior approval of the Minister, accept or take, directly or indirectly, any mortgage or charge on land in Bermuda, whether legal or equitable.*
>
> *(2)This section does not apply to a licensed bank or deposit company or to a non-resident insurance undertaking, as defined in section 1 of the Non-Resident Insurance Undertakings Act 1967.*"

45. Section 82 critically provides for present purposes as follows:

> "*(1) Subject to subsection (2), no person contravenes section 76, 77 or 78 by reason only that the person—*

> *(a) holds or acquires land as a mortgagee or holds or acquires a charge on land, if the person has obtained the approval of the Minister under section 80;*
>
> *(b) is a bona fide temporary occupant or a bona fide tenant who leases land for a term that does not exceed five years, where there is no scheme or option whereby he may extend the term beyond a total of five years…*
>
> *(2) Subsection (1) does not apply to—*
>
> *(a) person who holds or acquires land by a judgment of foreclosure or as a mortgagee in possession; or*
>
> (b) *a transaction that is part of a scheme referred to in section 81(1).*"

46. Section 82(1)(a) (as read with section 80(1)) introduced a new defence to a new prohibition on a restricted person accepting or taking a mortgage on land in Bermuda. Although section 80(1) does not expressly prohibit "holding" a mortgage without permission, the defence under section 82(1)(a) is expressed in terms which suggest that a person who holds a mortgage taken before the new prohibition came into effect only has a defence if they continue to hold such a mortgage with permission from the Minister. It was not contended, however, that this framing of the defence shaped the ambit of the substantive offence created by section 80(1) which does not prohibit holding a pre-2007 mortgage at all. It is also noteworthy that section 82(2)(a) makes this defence unavailable to a mortgagee in possession. This is not an absolute position, because section 85(1) provides that the requirement to obtain a license to hold land is deferred for three years:

> "*(b) where a restricted person acquires the land by a judgment of foreclosure or as a mortgagee in possession, the deferral commencing on the date the land was acquired;…*"

47. The fact that the transactions permitted by section 82(1) do not include "*a transaction that is part of a scheme referred to in section 81(1)*" (section 82(2)(b)) brings one to Mr Fordham QC's "third core prohibition". It is perhaps the third of the three most important provisions in the context of the present case; but again, in my judgment, section 81 is best characterised as subservient to the single core prohibition promulgated by section 76. Section 81 first provides as follows:

> "(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."

48. The prohibition bites on schemes which will enable a restricted person to either hold or acquire land "*contrary to the purpose of this Part*" or to appropriate land contrary to section 78. Section 76 prohibits restricted persons from holding or acquiring land without permission and section 78 supplements that core prohibition by creating a subsidiary prohibition on acts of appropriation, designed to close what were perceived as loopholes under the pre-2007 law. The reference to "*this Part*" is also instructive, because it reminds one that the purpose of Part VI of the Act is spelt out as follows:

> "*72. 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.*"

49. This explicit statutory statement of legislative purpose reinforces the view, which was of course central to Mr Fordham QC's analysis in aid of his client's case, that the most important prohibition is that contained in section 76. That prohibition, which existed under the pre-2007 version of the Act, was merely buttressed by the new prohibitions on appropriating land without a license and entering into schemes to, most broadly, acquire or hold land in a manner inconsistent with Part VI of the Act. As the Guidance Notes make clear, these changes were primarily introduced with a view to eliminating practices designed to circumvent the broadly drafted general prohibitions under the pre-existing law.

50. It is therefore entirely consistent with the legislative structure of Part VI for section 81 to define prohibited schemes in terms which chime with the purposes of the Part as stated in section 72. Section 81(1) appears to implement the objectives of section 72 (a). Section 81(2) is merely supplementary and provides:

> "*(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." [Emphasis added]

51. Put simply, section 81(1) prohibits schemes which will enable a restricted person to acquire, hold, or appropriate land in breach of the Act. Section 81(2) spells out four specific elements of a scheme which the Court should analyse in determining whether or not the scheme is prohibited or not. Those factors (1) must be looked at cumulatively and (2) appear to require an objective analysis of the impugned scheme, in a way which will 'smoke out' artificial arrangements where it is obvious that the restricted person is in reality enjoying the rights of ownership in relation to the relevant property. I draw the requirement of an objective view of the impugned scheme from the language of section 81(1), which in my judgment clearly looks primarily to the objective effect of the scheme rather than merely to subjective intent of the parties to it. The section speaks of :

> "…*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.*" [Emphasis added]

52. The reference back to section 78 is important because the Minister in the present case relied on a breach of section 81(1)(b) and a breach of section 78(4)(b) in particular. This sub-paragraph also suggests an objective analysis of the facts is required:

> "*(4) A restricted person is deemed to have the intention in subsection 1 in the following circumstances:*
>
> *(a)…;*
>
> *(b)the land is held by a person who, by virtue of a scheme made for the benefit of the restricted person, would be regarded by a reasonable person in possession of all the facts as a person acting for the benefit of the restricted person and not as an absolute owner beneficially entitled to the land.*"

53. The starting point in the section 81 analysis generally is to ask the question whether, objectively viewed, the alleged scheme will enable a restricted person to hold, acquire or appropriate land in contravention of any provision in Part VI of the Act. The second step, depending on the facts of the case, may be to consider whether there is a scheme to appropriate land in breach of section 78. In the present case the arrangements are said to constitute a scheme which contravenes section 78(1) as read

with section 78(4)(b). So the first crucial question is whether the arrangements are such that BTCL as Landlord/Vendor "*would be regarded by a reasonable person in possession of all the facts as a person acting for the benefit of the restricted person and not as an absolute owner beneficially entitled to the land*"? Unless that objective question is answered in the affirmative, no question of a contravention of the Act would seem to arise where reliance is placed solely on an objective analysis of the relevant arrangements.

54. If the scheme is, <u>not</u> objectively viewed, such as to engage the deeming provisions of section 78(4)(b), it may still be possible for the Minister to invite the Court to consider the subsidiary question of whether or not a relevant person "*knows or has reasonable grounds to suspect*" that the scheme will facilitate a breach of the Act in a <u>subjective</u> sense. This would ordinarily require oral evidence and cross-examination directed at inviting the Court to conclude that the legal documents entered into are not genuine but are a sham. Despite having been aware of the substance of the arrangements since 2010 and having had ample opportunity to investigate the genuineness of the transactions over the last 8-9 years, the Minister did not go so far as to assert that if the Court found that the arrangements were not objectively unlawful, they should in the alternative be found to be a sham based on the subjective intent of the parties involved.

55. In the present case the central legal question by common accord was whether or not the arrangements entered into by Dr Martin before his death and relied upon by his widow the Applicant thereafter became after the 2007 amendments to the Act an unlawful scheme. If it <u>was</u> unlawful, the Minister's informally articulated decision to refuse the Applicant's application for a license was clearly legally justified.

The Minister's Decision

56. The Applicant did not receive a formal decision letter by way of response to the application for a license dated July 16, 2014 made on her behalf by new lawyers Cox Hallett Wilkinson Limited. This letter explained in summary terms that the Applicant was applying as the late Dr Martin's heir to his rights under the 2010 SPA. After the Department of Immigration sought clarification of the Applicant's position, an expanded explanation of the Applicant's legal position was provided by her attorneys by letter dated February 9, 2015. Thereafter, because the Department had concerns about the legality of the underlying transactions, the matter was referred to the Attorney-General's Chambers for legal advice.

57. By a letter dated March 15, 2017, following a meeting at which the Applicant's attorneys were requested to set out their client's case, Cox Hallett Wilkinson Limited explained why they contended the arrangements did not contravene Part VI of the act as amended in 2007. Correspondence went back and forth in the ensuing months with the Attorney-General's Chambers opining that the arrangements were a prohibited scheme because the sale and purchase agreement entered into in 2010 constituted an appropriation. Mrs Sadler-Best invited the Court to have particular regard to Chambers' letter dated June 12, 2017 for a distillation of the Minister's legal position. Benedek Lewin on behalf of the Landlord/Vendor intervened in September 2017 to refute the Attorney-General Chambers' suggestion that a license was required to enter into a sale and purchase agreement. Reliance was placed on the requirement under the

2007 vintage License Application Regulations[1] to submit a copy of the relevant sale and purchase agreement.

58. On May 3, 2018, Cox Hallett Wilkinson Limited sent a letter before action to the Attorney-General's Chambers in relation to a proposed judicial review application on, *inter alia*, the following grounds:

> "*9. In public law once an application is made to a decision-maker charged with exercising a statutory discretion whether to grant such applications, that discretion must be exercised within a reasonable time. The position is reinforced by the Act…*
>
> *11. If and to the extent that the failure or refusal to make a decision or grant a license reflects the contention (and rests on advice) that granting a license to our client would infringe the Act, that is not correct as a matter of law. The failure or refusal is therefore vitiated by a legal misdirection and could not withstand scrutiny on judicial review.*"

59. By an email dated June 28, 2018, the Attorney-General's Chambers responded by email as follows:

> "*I have received instruction in this matter. The Minister's position is that the Government must be seen to be enforcing the laws that it enacts and that it is premature to be engaging in settlement discussions before the laws have been tested. In these circumstances I have been instructed to pursue this matter to the fullest and make a recommendation to the DPP's office, which has the statutory authority to decide whether or not to prosecute…*"

60. Against this background, there was some force to the assertion by the Chief Immigration Officer (First Affidavit of Dr Danette Ming, paragraph 15) that the "*nature of the decision is in fact clear from the correspondence from counsel acting for the Minister*". This in no way diminishes the fact that, as I observed in the course of the hearing, this appeared to be an unprecedentedly indirect and informal way for a decision to be made on a statutory application by a Minister of Government.

The respective arguments distilled

61. The Applicant's submissions as advanced by Mr Fordham QC in oral argument embodied one central theme. The arrangements evidenced by the legal documents reflected an intention to comply with rather than evade the applicable statutory provisions and could not be properly found to constitute an unlawful "scheme" for the purposes of Part VI of the Act. The arrangements were lawful prior to 2007 and thereafter nothing was done which altered the position. No mortgage was taken by Dr Martin or the Applicant thereafter; no leasehold improvements made to the Property. As a gloss on this central submission, the Court was urged not make any adverse inferences which were inconsistent with the express terms of the legal documents.

[1] The Bermuda Immigration and Protection (License Applications) Regulations 2007.

The argument that Dr Martin was entitled to a deferral license as a mortgagee in possession did not appear to me to be pursued in oral argument with any real conviction. The importance of an objective analysis of any alleged "scheme" was supported by reference to the judicial approach taken in a broadly analogous statutory context of a prohibited tax evasion scheme by the High Court of Australia in *Federal Commissioner of Australia-v-Spotless Services Ltd* [1996] HCA 34.

62. The Minister's submissions which were ultimately rejected will be set out in greater detail. Firstly, the June 12, 2017 letter from the Attorney-General's Chambers made the following main points:

    (a) the 2007 Act did not take away property rights in contravention of section 13 of the Bermuda Constitution because it did not have retrospective effect and provided a transitional period from June 22, 2007 until December 31, 2010. The only question in issue was the legality of the arrangements after the end of that transitional period. This submission appeared to me to be fundamentally sound and was not disputed by the Applicant in any event;

    (b) the critical legal question was whether or not Dr Martin had contravened section 78(1) of the Act by appropriating land. The mental element relevant to the present case was the intention to occupy the Property;

    (c) under the heading "*Reasonable assumptions and inferences to be drawn from the Facts to establish intention under section 78(4)(b)*[2]", reliance was placed on the following factual elements of the arrangements:

        (1) no interest payments were made under the mortgage between 1997 and 2011 when interest payments were waived;

        (2) no rent was paid between 1997 and 2017;

        (3) after December 31, 2010, the Property was leased "*as part of a scheme or option to renew*";

        (4) Dr Martin failed to terminate the 1997 SPA;

        (5) Dr Martin failed to surrender the leases, particularly the third lease which was in effect during the transitional period;

        (6) Dr Martin failed to exercise his contractual right to compel BTCL to sell the Property during the transitional period;

[2] Section 78(4) provides: "*(b) the land is held by a person who, by virtue of a scheme made for the benefit of the restricted person, would be regarded by a reasonable person in possession of all the facts as a person acting for the benefit of the restricted person and not as an absolute owner beneficially entitled to the land.*"

(7) Dr Martin invested $8 million in leasehold improvements "*on the strength (or lack thereof) of a 5 year lease, which if not part of a scheme would have been financially irresponsible*";

(8) The multiple 5 year leases operated as if Dr Martin had an option to renew;

(9) the mortgage principal and interest were only intended to be repaid if the Property was sold;

(10) the tenant's right to occupy were protected by the mortgagee's rights under the mortgage;

(11) although the arrangements may have been validly established under the Act prior to 2007, the position from 2011 establishes the deemed intention to appropriate land by a restricted person;

(12) the entry into the 2010 SPA would, absent a scheme, have raised concerns on BTCL's part about the agreement constituting a clog on the equity of redemption;

(13) the usual SPA contemplates occupation occurring after a license has been obtained, not before;

(14) an arrangement for a restricted person to occupy and develop land before they obtain a license made it illegal;

(15) Dr Martin appropriated the owner's right to occupy and develop land through the scheme.

63. As regards BTCL, it was argued in the same letter that:

> "*(33) Unfortunately, due to the broad definition of Trustee, this leads to the awkward conclusion that a Vendor/Trustee must obtain a license as constructive trustee to hold the Purchaser's equitable proprietary interest on trust pending the completion of the sale, if not the Trustee would be offending Sections 77 and/or 78(2) of BIPA 56.*"

64. None of these arguments directly engaged with the underlying purpose of the 2007 Act in global terms (i.e. arrangements designed to avoid restricted persons acquiring interests in land without a license) and considered the potential impact on the meaning of the new prohibitions of the objectives of the legislation (as set out in the Minister's own Guidance Notes) and the objectives of the arrangements entered into by Dr Martin. In short, the statutory provisions were construed in a literal rather than a purposive manner.

65. The Respondent's Submissions appeared to start from an unsubstantiated assumption that the arrangements were obviously inconsistent with the post-2007 legislative regime. The "policy shift" was accurately described in the following way:

> "*5. The 2007 Amendments represented a substantial amendment by introducing a paradigm shift in public policy as it related to the issuing of licenses to non-Bermudians to acquire land in Bermuda. This policy shift represented an overriding public interest which was intended to prevent what was considered to be egregious behaviour designed to circumvent the requirement for restricted persons to obtain to obtain licenses to acquire land in Bermuda. This public policy overrides any public policy in favor of the freedom to contract.*"

66. However various conclusory submissions were then made (paragraphs 13-22) without any real analysis of the overarching question whether the legislative scheme intended that an application to obtain a license could only validly be made before an applicant occupied the relevant property. Mrs Sadler-Best appropriately invited the Court to consider the June 12, 2017 letter as also embodying the Minister's central submissions. The Skeleton Arguments on Behalf of the Respondent correctly identified section 81(2) of the Act as setting out the matters the Court must have regard to when determining whether or not there is a prohibited scheme. The following submission was then set out which summarised the essence of the Minister's case:

> "*24. Using the guidance in section 81(2) and on analysis of the leases and the circumstances in which they were issued, together with the Sale & Purchase Agreement and the Mortgage, the Respondent was of the view that they were initially designed to avoid the provision of the Act which prohibited options to renew beyond a 5 year period; that they were granted for a non-commercial rent for successive 5 year terms and that they appeared to be part of a scheme whereby it was understood that the landlord would continue renewing the leases until Dr Martin obtained a license or terminated the scheme. The Respondent considered whether there was any evidence that the landlord made bona fide attempts, through advertising or other means to secure any other tenants at market rents. In these circumstances the Respondent was of the view that the leases were not bona fide and that they formed part of a scheme …*"

67. This submission was problematic for a number of reasons. Most broadly, in light of the careful and detailed analysis of the legal documents which Mr Fordham QC undertook in oral argument, this analysis is striking for the way in which it appears to substitute a sweeping judgment of hindsight for a detailed scrutiny of the arrangements in the contextual circumstances in which they were actually made. Secondly, and more importantly, it appears that important factual judgments are being attributed to the Minister by way of legal assertion unsupported by any or any direct evidence. As I observed in the course of the hearing, one reason why good administrative practice requires a formal decision to be promulgated by the legally competent statutory authority is to ensure that the constitutional actor Parliament has empowered to make decisions under a statute, and not a usurper, has actually made the decision in question.

68. The suggestion that the 1997 SAPA and the ancillary arrangements were at the outset intended to enable Dr Martin to remain a tenant indefinitely rather than obtain a license at the earliest opportunity is on its face an incredible suggestion, not least because (a) it is inconsistent with the concession made in the June 12, 2017 letter (paragraph (5)) that the arrangements were lawful prior to the 2007 Act coming into effect, and (b) the Minister's own evidence (Affidavit of Victoria Pereira) confirms that all construction was completed at the Property by 2001, before the first Lease had expired. It is not disputed that the renovation work had the consequence of bringing the Property into the land valuation band that would make it possible to obtain a license. In short, there is no direct evidential support for the proposition that the current or any previous Minister since 2014 when the application was made, formed the view (and if so based on what evidence) that the original 1997 arrangements were intended to evade the legal prohibitions then in force on restricted persons taking out renewable leases of more than five years.

69. Dr Danette Ming in her Affidavit for the Minister mentions no factual inquiry or findings by the Minister at all. On the contrary, she deposes that "*we*" had legal concerns and sought legal advice from the Attorney-General's Chambers. Typically, civil servants take legal advice before advising the Minister on any decisions so one assumes that "we" refers to the Department that she heads rather than to herself and a non-identified Minister. Admittedly the Chief Immigration Officer avers further that the Minister's decision could be inferred from correspondence written by the Crown Law Officers on the Minister's behalf. But those letters do not record any factual findings by the Minister. The only correspondence) to which I was referred which did expressly reference a view being expressed (the email dated June 28, 2018) suggests that the Minister felt the "laws" needed to be "tested" in Court proceedings.

70. To the extent that the assertions as to the Minister's findings set out in paragraph 24 of the Respondent's Skeleton that the leases were not *bona fide* are expressly supported by reference to the Attorney-General's Chambers letters dated June 12, 2017 and October 30, 2017, it is necessary to consider whether those letters do in fact provide support for these purported factual findings by the Minister that (a) from 1997, Dr Martin and BTCL planned to enter into renewable leases and that (b) Dr Martin (and thereafter the Applicant) was never a *bona fide* tenant. The position may be summarised as follows:

    (a) the June 12, 2017 letter sets out an elaborate legal analysis of the legal arrangements in connection with the Property on their face and does not mention the Minister making any factual determinations at all. It concludes, with surprising certitude:

    > "*It is our view that Dr Martin, BTCL and their legal advisors have all breached the provisions of the BIPA 56 set out in paragraph 2 above and are therefore liable to the penalties and forfeiture as a consequence of such breaches.*";

    (b) the October 30, 2017 letter is, as one would expect, another lawyer's letter, responding to Benedect Lewin's October 12, 2017 letter on behalf of BTCL. It makes the legal point that BTCL was liable for contravening the Act as a constructive trustee by entering into the sale and purchase agreements and

does not record any factual findings by the Minister. It concludes with a surprisingly robust statement, bearing in mind that the conclusions are based on pure legal analysis unsupported by any factual findings of deliberate wrongdoing, that:

> "*The Government's only interest is in making a recommendation to the Director of Public Prosecutions.*"

71. Accordingly there is no evidential support for the bare submission that the Minister determined that Dr Martin was never a *bona fide* tenant of the Property because from 1997 there was a scheme to enter into leases renewable at his option. The case for refusal advanced by the Attorney-General's Chambers always was that, objectively viewed in light of a legal analysis of the governing statutory regime, the arrangements were invalid on their face.

72. The next submissions set out have more relevance to an objective analysis of the legality of the arrangements. It is rightly pointed out that the application for a deferral license was not processed because it was incomplete and that the date it was made (the last day of the transitional period) suggested that it was an attempt to avoid prosecution. Less straightforward are the assertions that the December 31, 2010 application appeared not to be *bona fide*, not least because Dr Martin was already in possession of the property and did not require a Possession Order. Whether the application was *bona fide* is beside the point. The legal conclusion which was advanced on behalf of the Minister seemed to me to be irresistible: reliance could not be placed (as the Applicant sought to do in her own Skeleton Argument) on the mortgagee in possession defence because it was not substantiated by the material before the Court.

73. Finally, the Minister's counsel submitted that the Applicant was not entitled to rely (as against the Crown) upon my decision in *In the Matter of the Estate of PQR, Deceased* [2015] SC (Bda) 53 Civ (6 August 2015). As I indicated in the course of the hearing, the Minister's counsel were right to argue that I made no direct findings on the illegality issue because the issue was not pleaded in that case. I held, in the civil context of determining rights under a will, that the arrangements were not "obviously" illegal. I accordingly found the suggestion that the illegality position was so clear as to warrant possibly prosecuting the individuals concerned and their lawyers was surprising against the overall background to the matter. The Department itself formed no view one way or another of the legality of arrangements of which they were (to some extent at least) aware since 2010 and considered that legal advice was necessary. The illegality case was first explicitly advanced in 2017 by the Attorney-General's Chambers with no Minister over that period being willing to render a formal decision on the matter.

Findings: the arrangements entered into by Dr Martin were not an unlawful scheme despite the fact that by 2014 they excited suspicion

<u>Introductory</u>

74. In my judgment despite the fact that by 2014 the arrangements which Dr Martin had initiated in 1997 at first blush excited suspicion, they were not unlawful when

objectively analysed in light of a proper interpretation of the applicable statutory regime.

<u>The pre-2007 Act position</u>

75. I found that the arrangements Dr Martin entered into in 1997 were clearly lawful prior to January 1, 2011 when for present purposes the 2007 Act came into full force with the end of the transitional period. As the Attorney-General's Chambers rightly argued in their June 12, 2017 letter:

> "*(5)…the question is whether Dr James Martin, a restricted person, committed an offence contrary to Section 78 (1) of BIPA 1956 after the expiry of the transitional period.*"

76. The position during this pre-2007 timeframe is clear because there was no prohibition on restricted persons financing development or taking out mortgages without permission. The initial Lease was for 5 years and was not renewable and the arrangements were on their face designed to facilitate Dr Martin acquiring a license to purchase the Property. Apart from what appears to have been a somewhat shambolic approach to the planning aspects of the Leasehold Improvements, it was not unrealistic to assume that an application for a license could have been made before the end of the first Lease. There is no evidence that the lease arrangements were a sham and not what they purported to be. The arrangements were not only commercially rational but also quite transparent. On their face they were designed to comply with the law.

<u>The factors relevant to determining whether there was a scheme for the purposes of section 81(1) of the Act</u>

77. As noted above, section 81(2) lists four factors which must be taken into account. My assessment of the individual factors in the present case may be summarised as follows:

    (a) **manner in which scheme entered into**: the arrangements were initially consummated based on legal advice in a lawful manner. Dr Martin was a distinguished long-term resident of Bermuda who had no reason to believe that he would not be granted a license to purchase the property after developing it. In 2003 he obtained PRC status entitling him to reside in Bermuda on a permanent basis. Planning problems delayed the application until at least 2003. Thereafter, there is no satisfactory explanation as to why the application was not diligently pursued and made. However, in 2002 a second Lease was understandably granted because Planning approval for the development that was already completed had not yet been obtained. In 2003 following an appeal, planning permission was granted but Dr Martin needed to apply for a (retrospective) building permit and a Certificate of Completion and Occupancy. However, by 2005 a moratorium on land acquisition licenses was apparently announced by Government. There is no evidence or suggestion that Dr Martin or his then lawyers ought to have anticipated this development. Mr Simmons fairly pointed out that Dr Martin's failure to apply before 2005 should be attributed to his own defaults rather than any

obstructions placed in his way by the Minister. Nonetheless, I find that the way in which the arrangements were initially consummated does not operate so as to support an inference that the post-2007 arrangements were a prohibited scheme;

(b) **the form and substance of the scheme**: The 1997 SAPA involved BTCL agreeing to sell the Property to Dr Martin if he got a license and if he failed to obtain one Dr Martin agreed the Property should be sold if he did not otherwise dispose of his contractual rights and a mutually agreed price. Ancillary to this it was agreed that Dr Martin would fund the Leasehold Improvements but that the monies advanced would be repayable in the event that the sale could not be completed. The moratorium on licenses having been announced in 2005 and implemented by law in 2007 for a five year period, a further Lease was granted and the idea of the purchase was kept alive. The 2010 SAPA was entered into and a seemingly hopeless application for a license was made on July 14 that same year and promptly refused a few months later. The deferral license application was also made on December 31, 2010 and not pursued. After the end of the transitional period, the 2010 SAPA was further revised in 2011. In 2012 a further five year Lease was entered into. Dr Martin unexpectedly died the following year; the Applicant applied for a license as his heir the year after. The critical question is whether or not the form and substance of the arrangements evidence an intention to hold or acquire land in breach of the Act. Objectively viewed I found that they did not, for the following principal reasons:

(i) the 2010 SAPA reduced Dr Martin's control over the sale process and strengthened the legal position of BTCL. BTCL could unilaterally rescind the agreement if a license was not obtained. It also added the $8 million spent on Leasehold Improvements to the purchase price, avoiding any suggestion that the property was being purchased at an undervalue in order to avoid paying a higher level of stamp duty. (The 2002 Lease had in any event expressly recorded that $8 million had been spent on Leasehold Improvements and that this sum would be both added to the purchase price and secured by the Mortgage.) Clause 4.6 also expressly required Dr Martin to use his best endeavours to obtain a license within a year failing which either party could rescind the agreement;

(ii) the July 14, 2010 application for a license did evidence an intention to seek a license in circumstances where Dr Martin's occupation of the Property was presumably not a secret in Government circles. His lawyers had been dealing with Planning on his behalf before the moratorium. That application did not perhaps disclose the Lease or the Mortgage but it must have been obvious to Planning that he anticipated becoming owner of the Property and was occupying it. The 2010 license application did report that the application for a license to acquire the Property had

been advertised for sale and that although some interest was expressed no offers had been made. This lends some support to the Applicant's case that it was commercially rational for the Vendor not to insist on a sale;

(iii) The Minister adduced no evidence to suggest that that BTCL could easily have found a Bermudian purchaser for an $11.5 million island property. The Property had on its face price and locational characteristics which would have had made it accessible and attractive to a limited local market segment. And as Mr Simmons pointed out in argument, the Global Financial Crisis had begun in 2007;

(iv) the December 31 2010 deferral license application may not have been pursued, but it served to give notice to the Minister that he held a mortgage over the Property since 1997 and was occupying the Property;

(v) by the time the 2007 Act came into operation on January 1, 2011, the Minister was aware that Dr Martin was occupying the Property in circumstances where he was both a prospective purchaser and a mortgagee. The Minister did not suggest to Dr Martin or his legal advisers that such an arrangement was unlawful and should be brought to an end;

(vi) as Mr Fordham QC submitted in oral argument, if Dr Martin had no intention of actually acquiring a license to complete the purchase, it would have made no sense to bring himself to the Minister's attention in the way which he did;

(vii) having regard to Dr Martin's status as a prominent international academic and Bermuda resident who had obtained his PRC in 2003, it is inherently improbable that he would <u>not</u> genuinely wish to lawfully obtain a license to purchase the Property he had been seeking to acquire for so long. He clearly did not progress his license application after 2003 in an efficient manner. To my mind it was <u>not</u> inherently improbable that Dr Martin would handle his comparatively parochial private property affairs with less diligence, elegance and focus than he undoubtedly habitually dedicated to his far grander intellectual endeavours;

(viii) the January 12, 2011 Deed amending the 2010 SAPA extended the time for Dr Martin to obtain a license to a period of 5 years, waived any interest due on the Mortgage and provided that Dr Martin would pay for any increased stamp duty accruing from the increased purchase price

reflected in SAPA 2010. Since stamp duty was to be shared equally, that was not only a significant financial benefit to BTCL but it was also consistent with a genuine desire to obtain a license so the sale could be completed after the moratorium came to an end;

(ix) extending the license period did admittedly dilute the power of the Vendor to terminate the 2010 SAPA as amended in 2011 but on the face of the documents the purpose of this was to facilitate Dr Martin obtaining a license and completing the purchase of the property in a lawful manner. This also admittedly implies an agreement in 2011 to obtain a new Lease in 2012, a factor which potentially supports the Minister's case of a prohibited scheme to renew the Lease to some extent. However, BTCL received corresponding financial benefits as well so this was not a one-sided transaction benefitting Dr Martin alone;

(x) the 2012 Lease, unlike its predecessors which were placed before the Court, provided for rent of $12,000 per month. This severed the financial support for Leasehold Improvements from the Lease altogether, again suggesting an attempt to comply with rather than circumvent the post-2007 statutory regime by making the rental arrangements more orthodox;

(xi) assuming there was no prohibition on a restricted person occupying land he has contracted to purchase as a tenant before obtaining a license, the form and substance of the arrangements overall appeared more designed to comply with Part V of the Act rather than to circumvent it. Dr Martin was primarily keeping the purchase dream alive during the moratorium period in circumstances where the Minister had (as of January 1, 2011) actual or constructive notice that he was doing this and did not suggest he was flouting the law. The effect of the arrangements is a separate question;

(c) **the result that would be achieved by the scheme**: the main result achieved by SAPA 2010 as modified in 2011 and as combined with the 2012 Lease was to enable Dr Martin and the Applicant to continue to occupy the Property during a moratorium on the granting of licenses until such time as an application for a license could actually be made. For reasons which I elaborate upon below, the result was not inconsistent with Part V of the Act because:

(i) as a matter of law there was no prohibition on a *bona fide* tenant occupying a property the tenant proposed to buy, and

(ii) there is no evidence that, contrary to the express terms of the Leases, there was an undisclosed tacit understanding that Dr Martin and/or the Applicant had in reality an option to renew the Lease;

(d) **the benefit which would accrue to the restricted person and the alleged trustee**: The Minister did not suggest that the benefits conferred on Dr Martin were disproportionate to those conferred on BTCL and that they were on careful scrutiny more consistent with viewing BTCL as merely a nominal than as the beneficial owner. Mr Fordham QC rightly submitted that the legal arrangements were what they purported to be and were consistent with commercial logic as well. I found that the formal legal arrangements were in commercial terms entirely consistent with the status of BTCL as legal and beneficial owner as it purported to be, for the following principal reasons:

(i) from the outset there was nothing uncommercial about the 1997 SAPA and the wider agreement that Dr Martin could in return for financing the Leasehold Improvements stay rent free. If the Property had been sold to a third party, at any point after 2002 by which time the $8 million had been spent, BTCL would have been able to sell the Property with the benefit of Leasehold Improvements worth far in excess of even a generous market rent over the relevant period;

(ii) the position from January 2011 was that Dr Martin had the right to purchase the Property at a price comprised of the 1997 consideration of $3.5 million plus (as had been agreed as early as 2002) the $8 million advanced by Dr Martin to fund the Leasehold Improvements;

(iii) Dr Martin's $500,000 deposit had been reimbursed, but he assumed the obligation to pay 100% (as opposed to 50%, as previously) of the stamp duty attributable to the $8 million increase of the sale price. He was given more time to acquire a license before BTCL could force a sale (1 year was extended to 5 years) and was permitted to continue to occupy the Property rent free until the 2007 Lease expired in 2012;

(iv) BTCL, the legal owner, had the unilateral right to rescind the SAPA if a license was not obtained by 2016, and to sell the Property on the open market retaining the difference between the sale price and the $8 million repayable to Dr Martin without interest at the Mortgage rate of 9% (from 2002-2016) and without interest on the original $3.5 million (from 1997 to 2002);

(v) the 2011 amendments to the 2010 SAPA were on their face commercially beneficial to BTCL as legal owner of the Property. Moreover, in 2012 BTCL received $12,000 per

month in rent as well. Dr Martin's 'upside' was very much dependent on his obtaining a license to complete the purchase and being able to acquire ownership of the Property. There was mostly commercial 'downside" for him if he did not obtain a license and BTCL exercised its right to terminate SAPA 2010 (as amended);

(vi) if Dr Martin did obtain a license to buy, BTCL would in the interim have received a commercial rent and would then receive the balance of the purchase price of $3.5 million eliminating the risk of taking a potential loss on an open market sale. No evidence was adduced by the Minister to contradict the Applicant's evidence that in 2010 there was no serious interest in the Property when it was advertised for sale;

(vii) the Minister relied in broad sweeping terms on the fact that the Applicant obtained her own May 18, 2017 Lease as evidence of an agreement that she (and her husband before her) could renew the Leases at their option until a license was obtained. No analysis was undertaken of the commercial logic (or lack of it) behind BTCL deciding to grant a fresh Lease. I felt able to take judicial notice of the fact that in 2017 the Bermuda property market was in a depressed state. Mortgages were being foreclosed in proceedings before the Court during that time period at an unusually high rate. The commerciality of the sale price essentially remaining fixed would have been more easy to undermine if the post-2010 period had notoriously been a real estate boom period;

(viii) perhaps unsurprisingly, the Minister did not advance a positive evidence-based case that it was commercially irrational for BTCL to grant a fresh Lease rather than exercising its right to terminate the 2010 SAPA (as amended in 2011) and seek to sell the Property for more than $11.5 million. Unless BTCL was able to sell for more than $11.5 million, it made obvious financial sense to grant a fresh Lease, receive a fixed rent and the possibility of a guaranteed net $3.5 million.

78. In summary, the four statutory factors relevant to determining whether or not a prohibited "scheme" has been entered into contrary to Part VI of the Act, viewed individually and collectively, do not justify a finding that the arrangements entered into constitute a prohibited scheme. In my judgment the requisite analysis requires a presumption (in the absence of contrary evidence) that legal transactions take effect according the terms of the documents evidencing them. Due weight must be given to the circumstances in which the parties found themselves when the agreements were entered into. The mere fact that a series of Leases were entered into does not justify

the inference that BTCL gave Dr Martin at the outset, or at any undefined later point, an option to renew. The moratorium that was announced in 2005 and implemented by statute in 2007 could hardly have been foreseen in 1997 or even in 2002. Thereafter, the further Leases in 2007, 2010, 2012 and 2017 which kept the SAPA deal alive were not shown to be obviously inconsistent with commercial rationality at the relevant time. For instance, it seems likely that in January 2011 when the period for Dr Martin to obtain a license under 2010 SAPA was extended from 1 to 5 years, the parties had (with one year of the 2007 Lease remaining) agreed in principle on the 2012 Lease. This suggests quite convincingly that any such agreement was linked to genuine bargaining in relation to the 2010 SAPA and the circumstances which then prevailed rather than the posited pre-2007 agreement that the Lease could be renewed at Dr Martin's sole option in 2012.

79. I say "sole" option, because it is important to interpret section 82(1) in a purposive way. It provides that there will be no contravention of section 76, 77 or 78 where:

> "*(b) is a bona fide temporary occupant or a bona fide tenant who leases land for a term that does not exceed five years, where there is no scheme or option whereby he may extend the term beyond a total of five years…*" [Emphasis added]

80. The Minister appeared to accept that it was entirely lawful for a Bermudian to enter in to a five year lease with a restricted person which was not renewable at the option of the restricted person but which was then renewed by mutual consent. In other words, granting a fresh lease would be lawful so long as the Bermudian property owner had not in reality given away his right to freely decide whether or not to enter into a fresh lease. In the Minister's Skeleton Argument, it was asserted that the Leases:

> "*appeared to be part of a scheme whereby it was understood that the landlord would continue renewing the leases until Dr Martin acquired a license or terminated a scheme.*"

81. The complaint, made clearer in Mr Simmons' concise but forceful oral submissions, was that Dr Martin had at the outset entered into an understanding that BTCL, contrary to its strict legal right not to grant a fresh lease, would grant renewals as many times as Dr Martin wished. This argument is simply not supported by the evidence. I accepted Mr Fordham QC's submission that it would be wrong in principle for the Court to infer that (a) the Leases which are on their face legally binding are, in effect, a sham, and (b) that parties have entered into an illegal arrangement in the absence of positive evidence supporting such a serious finding.

82. Such a finding on the facts of the present case would also potentially expose any restricted person who has entered into a series of leases to criminal prosecution. It would also potentially constrain the economic freedom of Bermudian landlords to freely grant a series of leases to model tenants who happen to be restricted persons. For this additional reason, I rejected the submission advanced on behalf of the Minister that arrangements entered into in relation to the purchase and leasing of the Property constituted a scheme to defeat the purposes of Part VI of the Act.

The intention to appropriate land: was it unlawful for a restricted person to contract to purchase land in Bermuda without a license?

83. Having explained why I rejected the scheme to confer an option complaint, in remains to explain why I also rejected the alternative submission that section 78 of the Act prohibits a restricted person from entering into a contract to purchase land without a license.

84. Section 78(1) prohibits a restricted person from appropriating land "*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.*" The *actus reus* of the offence is the assumption of the rights of owner over the land "*whether at law or in equity*" (section 78(3)). The intention is deemed to exist where either (a) financial assistance is provided for the acquisition land, or (b) there is a scheme to defeat Part VI (section 78(4)).

85. The Minister submitted that the intention of occupying the Property sufficed to meet both the factual and the mental elements of the offence, but accepted that regard had to be had to whether or not any defences exist under section 82. This was a sound analysis. The crucial question which arose for determination was whether the occupation of the Property without a license could be justified by virtue of the asserted status of Dr Martin as a *bona fide* tenant. However, it was a bridge too far to say that "*the burden of proof would be on the Applicant to establish those defences*" (paragraph 22). On this basis, it was proposed (paragraph 31) to refer the matter to the Director of Public Prosecutions to determine whether reasonable defences exist. This submission was unsustainable for the following reasons:

    (a) it is trite law that even though section 6(11)(a) of the Constitution permits Parliament to require an accused person to prove particular facts, the dominant presumption of innocence principle in section 6(2)(a) means that the ultimate burden of proof is on the Crown to disprove the availability of any defence is potentially available; and

    (b) section 82(1) does not by its terms require an accused person to prove the elements of any of the listed defences. This is in stark contrast with other provisions in the same Act (e.g. sections 36(2)(proviso), 50A(3), 65(proviso), 112(1)(proviso));

    (c) it would lead to absurd results if every restricted person occupying land in Bermuda as a tenant or as a hotel guest could be regarded without more as *prima facie* guilty of contravening section 78 unless they proved that they were entitled to the defences under section 82(1)(b) or 81(ba) of the Act.

86. Mrs Sadler-Best did not press this argument in her oral submissions. Instead, she advanced a more nuanced submission that could not be rejected out of hand and which had to some extent been foreshadowed in correspondence. The broadest version of this argument was not seriously pursued, it being conceded (tacitly at least) that the pre-2007 arrangements were not unlawful. The broader proposition was that merely entering into a sale and purchase agreement contravened section 56 of the Act

because the purchaser acquired an equitable interest in land without a license. The point was made in the Attorney-General's Chambers' letter of June 12, 2017 (at paragraphs (29) to (34). However the point was most seriously advanced using the framework of the post-2007 Act. In paragraph 19 of the Respondent's Skeleton Argument, it was submitted:

> "*(o) As can be seen…the rights to occupy and to develop are rights of the owner of the land which have been assumed/appropriated by the Purchaser/restricted person through the SPA's and/or the scheme of arrangement described…below.*"

87. The only post-2007 acts of ownership that could be relied upon were the occupation under various Leases. The argument appeared to be as follows. The *actus reus* of the offence was established in the present case by Dr Martin exercising an owner's rights of occupation, in circumstances where he was not a *bona fide* tenant because he intended to acquire the Property. The contentious limb of this alleged offence was the assertion that occupation having entered to the SAPA 2010 was incompatible with being a *bona fide* tenant because the Tenant/Purchaser was more than a tenant but also owned an equitable interest in the Property.

88. The Minister's counsel also attacked the issue from the perspective of BTCL, the Landlord/Vendor. In a letter dated October 30, 2017 to BTCL's attorneys, it was argued by the Attorney-General's Chambers:

> "*Under the Post 2007 Law ''trustee' includes any person who owns land in Bermuda, against whom another (in this Act a beneficiary) or a person directly or indirectly deriving rights from a beneficiary may enforce rights in law or equity however they arise such that the person in ownership is not able to dispose of the land and the proceeds of disposition as a beneficial owner absolutely entitled to unencumbered property.'*
>
> *It therefore follows that the Vendor (or trustee) under a SPA owns land in Bermuda against whom the Purchaser (restricted person as a beneficiary) may enforce his rights in law (contractual rights) or in equity (constructive trust, specific performance, equitable mortgage, equitable charge or lien etc) such that the Vendor is not able to dispose of the land and use the proceeds of disposition as a beneficial owner absolutely entitled to property unencumbered by a mortgage or charge. The Vendor cannot elect to sell the property to another potential purchaser as the Vendor is prevented from doing so by the SPA or any scheme (informal agreement) proved to exist, both of which create constructive trusts.*"

89. This was an elegant property law analysis of the legal effect of a sale and purchase agreement on the ownership interest of the vendor, the mirror image being the equitable interest of the purchaser. The Applicant's counsel did not have the temerity to challenge this cogent analysis, but rather focussed on the pivotal question of whether Part VI of the Act should be construed as, most widely, prohibiting a land acquisition license applicant from entering into a sale and purchase agreement at all. To the extent that the narrower question of whether the combination of a restricted person being a purchaser and a tenant (and possibly also a mortgagee in possession)

amounted to appropriation in contravention of the Act was addressed at all, it was rebutted in a broad-brush way. This was in part because the Applicant's Trial Skeleton placed greater weight on my decision on the Will than I considered was justified for the purposes of the present application.

90. The threshold question is whether after December 31, 2010, the 2010 SPA became unlawful because the predecessor of section 76 as read with the new statutory code prohibited the acquisition of a prospective ownership interest without a license. The most compelling answer to this question, in practical terms, came when Mr Fordham QC pointed to the Bermuda Immigration and Protection (License Application) Regulations 2007, which prescribes the procedure for applying for licenses to acquire land under section 84 of the Act. The Regulations were made on the same date (June 22, 2007) as the primary operative date of the 2007 Act. Paragraph 16 of the First Schedule requires applicants to submit "*a notarised, signed copy of the sale/purchase agreement*", further to the requirement of paragraph 14(1) (dealing with acquisition by deed) that the purchase price must be provided.

91. In my judgment it was not open to the Minister in light of these express provisions of his own Regulations, purportedly made to support the implementation of the Act, to contend that the Act prohibits section 84 applicants from entering into sale and purchase agreements before they obtain their license. Whatever the true construction of the primary legislation may be, the Minister is surely estopped (or bound by a substantive legitimate expectation grounded in the Regulations he has adopted) from relying on a contrary legal position, as long as the Regulations in this form continue in force.

92. In the result the narrower question fell away. If it is permissible to enter into a sale and purchase agreement without a license, it is impossible to identify any freestanding prohibition on occupying land as a tenant prior to making the license application or while an application is pending. A tenant does not cease to be tenant merely because they are also a prospective purchaser of the property being leased. It is important to remember that the Department of Immigration had notice of the fact that Dr Martin was occupying the Property he had contracted to buy and was a mortgagee of as long ago as 2010, and was unable to identify any straightforward basis for criticising these arrangements. The main flaw of the interpretative approach adopted by the Minister's counsel in the present case is that it advocates giving penal provisions which should be strictly construed against the Crown sweeping effects untethered from the sturdy moorings of the mischief the new Part VI was designed to prevent. That mischief was restricted persons covertly exercising ownership rights over land in Bermuda through schemes designed to evade the requirements of obtaining a license. As was submitted in the Applicant's Trial Skeleton:

> "*62. The arrangements between Dr Martin and BTCL were nothing like the kind of concealment by way of 'fronting arrangements' that the 2007 Amendment were designed to prohibit and punish…Here there was no concealment. None has been alleged. There is none of the mischief at which the 2007 amendments were aimed.*"

Was Dr Martin entitled to a deferral license as a mortgagee in possession?

93. The Applicant's counsel rightly submitted that if Dr Martin was a mortgagee in possession he was entitled as a matter of law to a deferral certificate. Section 85 provides:

> "*(1) The requirement to obtain a license under this Part is deferred for a period of three years when-*
>
> > *(a)…;*
> >
> > *(b) where a restricted person acquires the land by a judgment of foreclosure or as a mortgagee in possession, the deferral commencing on the date the land was acquired;*"

94. Section 86(1) states that a person who believes they are entitled to a deferral "*may apply to the Minister for a deferral certificate*", but does not purport to exclude the right to rely on section 85 if a deferral certificate is not obtained. The certificate appears to be a protective device for restricted persons rather than a condition for obtaining a deferral. But in all the circumstances of the present case, the Applicant's evidence (reviewed in paragraph 20 above) in my judgment falls short of demonstrating that Dr Martin was a mortgagee in possession. There was an application for a deferral certificate which was made but not pursued; and in the months that followed there was relinquishment by Dr Martin of his right to interest under the Mortgage, which suggests a compromise may have been reached in respect of any prior Mortgage default. And as Mr Simmons rightly submitted on behalf of the Minister, there was ambiguity about the deferral certificate application stemming from the fact that (a) reference was made to an application for possession being made in Court, but no reference was made to a Possession Order, and (b) greater clarity was required because Dr Martin was already in factual possession of the Property.

95. I also agreed with the Minister's submission that the deferral certificate application on the day before the new Part VI came into force did suggest anxiety (Mr Simmons suggested desperation) on the part of Dr Martin's advisers about the legality of the Mortgage under the new statutory regime. Such anxiety would only have been allayed when the Department of Immigration responded by seeking amplification of the application rather than immediately sounding a regulatory alarm. But overall Dr Martin's contact with the Minister in 2010 was wholly inconsistent with the proposition that he was deliberately seeking to circumvent the law.

Summary of findings

96. The long and winding road which eventually led to the Applicant to make an application for a license under section 84 of the Act in 2014 had so many twists and turns that it was almost inevitable that the Chief Immigration Officer would seek legal advice on its validity. The arrangements initiated in 1997 would not now be lawful. But, objectively viewed in light of the object and purpose of the governing provisions of Part VI of the Act, they were designed in a transparent way to enable Dr Martin, and his widow after her death, to apply for a license to buy the Property which they quite openly treated as their home before the purchase was completed. In finding that

the arrangements were not unlawful and should be accepted as taking effect in accordance with their terms, I have simply adopted a well settled legal approach which corresponds to the following colloquial saying: 'if it looks like a duck, walks like a duck and quacks like a duck, then it probably is a duck'.

97. As Mr Fordham QC rightly submitted, positive evidence is required to justify impugning the authenticity of legally binding documents which otherwise law abiding citizens have entered into. In the present case Minister assumed the heavy burden of persuading the Court that on their face the agreements were not what they seemed and the reality was informed by a sly "nudge-nudge, wink-wink" understanding. Looked at superficially through the lens of hindsight, the series of five year Leases commencing in 1997 did excite suspicion that there was a scheme to renew the Leases until Dr Martin obtained a license or abandoned the scheme when the application was first effectively made in 2014. But this cynical first impression does not withstand careful and objective scrutiny because the arrangements entered into were not artificial or commercially inconsistent with BTCL retaining legal and beneficial ownership of the Property after the 2007 amendments came into force.

Findings: did the Minister make a valid decision?

98. In my judgment it is obvious that the Minister did not make a procedurally valid decision. There is no document evidencing a decision by the Minister and the constitutional function of the Attorney-General as principal legal adviser to the Government is incompatible with the notion of the Minister delegating to Crown Counsel the authority to make or communicate the reasons for a decision Parliament has entrusted to the Minister to make. It is clear that the Minister did in substance refuse the application by deciding that the legality of the application should be determined by this Court. As the Applicant invited the Court to deal with the case on this substantive basis, the failure to make a valid decision point effectively fell away.

Conclusion

99. For the above reasons on July 5, 2019 I granted the Applicant's application for judicial review and granted a declaration that she was entitled to be granted a license under section 84 of the act to acquire the Property that she considers to be home.

Dated this 31st day of July 2019

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IAN RC KAWALEY
ASSISTANT JUSTICE