

**COMMONWEALTH OF THE BAHAMAS  
IN THE COURT OF APPEAL  
SCCivApp. No. 101 of 2020**

**IN THE MATTER OF the Estate of the late WILLIE GRAHAM SCAVELLA, Deceased  
B E T W E E N**

**AUDREY SHEILA FLOWERS (formerly AUDREY SHEILA SCAVELLA)  
(Personal Representative of the Estate of the late WILLIAM GRAHAM SCAVELLA)  
First Appellant/First Respondent**

**AND**

**AUDREY SHEILA FLOWERS (formerly AUDREY SHEILA SCAVELLA)  
Second Appellant/Second Respondent**

**AND**

**BRIA SCAVELLA  
First Respondent/First Applicant**

**AND**

**ERIN SCAVELLA  
Second Respondent/Second Applicant**

**AND**

**GINA SCAVELLA  
Third Respondent/Third Applicant**

**BEFORE: The Honourable Sir Michael Barnett, P  
The Honourable Mr. Justice Evans, JA  
The Honourable Madam Justice Bethell, JA**

**APPEARANCES: Mrs. Krystal Rolle, QC, Counsel for the Applicants  
Mr. Clinton Clarke, Counsel for the Respondents**

**DATES: 13, 27 July 2022; 5 September 2022**

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*Civil appeal – Application for leave to appeal to the Privy Council – Appeal as of right – General public importance - Section 65 of the Probate and Administration of Estates Act – Section 23 of the Court of Appeal Act*

The first and second applicants are the children of the late Willie Scavella (the deceased). The first respondent is the widow of the deceased and the second respondent is the personal representative of the deceased's estate. At first instance, the first and second applicants successfully claimed that they were entitled to \$85,390.01 representing half of the proceeds of an insurance policy on the life of the deceased, their father. Their claim was based on section 65 of the Probate and Administration of Estates Act which, they say, prohibited the respondents from applying the proceeds of the insurance policy in the manner which it was applied. The respondents appealed that decision to this Court which set aside the judgment of the trial judge. This Court held, *inter alia*, that section 65 relates only to property which formed a part of the estate of the deceased and only relates to property passed by will. The applicants now seek leave to appeal this Court's judgment to the Privy Council.

*Held:* Leave to appeal to the Privy Council granted on the usual conditions.

*per Barnett, P (Evans, JA concurring):* As the claim in the present case is in excess of the \$4,000.00 threshold stipulated by section 23 of the Court of Appeal Act, the applicants' appeal is as of right, unless the respondents can demonstrate that the claim is so unmeritorious that it amounts to an abuse of process.

The Court is satisfied that the applicants' claim is without merit. However, the Court is not satisfied that it would be a proper exercise of its residual discretion to refuse leave on the basis that the proposed appeal amounts to an abuse of process. This appears to be the first time section 65 of the Act has been considered by this Court and the appeal raises matters of general public importance.

*Evans, JA:* Even in the absence of an automatic right of appeal the Court has a discretion to grant leave on the basis that the proposed appeal is not frivolous and raises points of general public importance.

*Zuliani and others v. Veira* [1994] 3 LRC 705 considered

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## J U D G M E N T

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### **Judgment delivered by the Honourable Sir Michael Barnett, P:**

1. This is an application for leave to appeal, to the Privy Council, a decision of this Court allowing an appeal against the judgment of a judge of the Supreme Court.

2. The background is as follows.
3. On 14 November 2017 the children of the late William Scavella (the first and second applicants) brought an action claiming (inter alia) the sum of \$85,390.01. The action was brought against Audrey Flowers, the widow and personal representative (the first and second respondents) of their father's estate. The deceased died intestate.
4. The basis of their claim was that they were entitled to half of the proceeds of an insurance policy on the life of their father. The wife received the proceeds of the insurance policy and used it to partially pay a mortgage debt owed by her and her late husband on property owned by them jointly at the time of his death.
5. The wife defended the claim and stated that the mortgage debt was still owed by the husband's estate and that she was entitled to use the proceeds of the insurance policy to pay off that mortgage debt as well as others owed by the estate.
6. The children's position was that section 65 of the Probate and Administration of Estates Act (the Act) prohibited the wife from applying the proceeds of the insurance policy to the debt owed jointly by her and the deceased. The debt, they assert, could only be paid out of the mortgaged property itself. Section 65 provides:

**“65. Charges on property of deceased to be out of property charged.**

**(1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will, deed or other document signified a contrary or other intention, the interest so charged shall, as between different persons claiming through the deceased, be primarily liable for the payment of the charge and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.**

**(2) Such contrary or other intention shall not be deemed to be signified –**

**(a) by a general direction for the payment of debts or all of the debts of the testator out of his personal estate, or his residuary, real and personal estate, or his residuary estate; or**

**(b) by a charge of debts upon any such estate, unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.**

**(3) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction therefor either out of the other assets of the deceased or otherwise.”**

7. At the trial at first instance, the judge acceded to the children’s claim and gave judgment for the sum of \$122,760.45.
8. The wife appealed to this Court, and this Court allowed the appeal and set aside the judgment of the trial judge.
9. In its judgment, this Court held that section 65 of the Act relates only to property which formed part of the estate of the deceased and can only relate to property passed by will. It said that pursuant to the laws of joint tenancy the property belonged to the wife solely and did not form a part of the deceased’s estate. This Court held that the deceased did not die possessed of the property as his interest in the property was extinguished upon his death. The Court held further that the death of the deceased did not extinguish the debt to the bank for which the deceased was jointly and severally liable. The Court also held that the wife, as personal representative, was entitled to use the proceeds of the insurance policy to pay off the debt of the estate before distributing any money to the beneficiaries of the estate.
10. The children have now applied for leave to appeal that judgment to the Privy Council.
11. The wife resists this application.
12. Counsel for the applicants assert that they have an appeal as of right under section 23 of the Court of Appeal Act. That section provides:

**“23. (1) An appeal shall lie to Her Majesty in Council from any judgment or order of the court upon appeal from the Supreme Court in a civil action in which the amount sought to be recovered by any party or the value of the property in dispute is of the amount of four thousand dollars or upwards, and with the leave of the court but subject nevertheless to such restrictions, limitations and conditions as may be prescribed in relation thereto by Her Majesty in Council, in any other proceedings on the Common Law, Equity, Admiralty or**

**Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.”**

13. Although the Statement of Claim includes a claim for unliquidated damages as well, it is a claim for the specific sum of \$85,390.01. This is above the \$4,000.00 threshold stipulated by section 23 of the Court of Appeal Act. The children, therefore, have a right to appeal to the Privy Council, unless the wife can show that the claim is so lacking in merit that it amounts to an abuse of process, such that we should refuse leave.
14. Although we are satisfied that the children’s claim lacks merit, we are not satisfied that it would be a proper exercise of the Court’s residual discretion to refuse leave on the basis that the proposed appeal amounts to an abuse of process.
15. The children’s claim found favour with the trial judge, and this appears to be the first time section 65 of the Act has been considered by this Court, although the provision, found in other jurisdictions, has been considered by other courts.
16. The appeal raises three issues. Firstly, does section 65 of the Act apply in the case of an intestacy? Secondly, does section 65 of the Act apply where the mortgaged property was owned jointly with another and therefore does not form part of a deceased’s estate? Thirdly, is the estate relieved of an obligation to pay a mortgage debt owed jointly and severally with the other owner of the mortgaged property?
17. The three questions are matters of general public importance which do not simply affect the parties in this present dispute.
18. In the circumstances, we accede to the request and grant leave to appeal to the Privy Council on the usual conditions.

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**The Honourable Sir Michael Barnett, P**

**Judgment delivered by the Honourable Mr. Justice Evans, JA:**

19. This is an application for leave to appeal to the Privy Council a decision of this Court allowing an appeal against the judgment of a judge of the Supreme Court.
20. I have had the opportunity to read the draft judgment of the learned President and I agree with him that the leave sought should be granted. However, I want to add a few comments of my own.

21. The background to this application is fully set out by the President in his judgment and I adopt the same for the purposes of my brief comments.
22. As this Court has adopted the ratio of the decision in the Privy Council's decision in **Zuliani and others v. Veira** [1994] 3 LRC 705 one of the questions we are required to answer is whether the sum sought to be recovered in the Supreme Court action was a liquidated sum.
23. The learned President has found that the applicants have an appeal as of right, notwithstanding that the Writ reveals that the claim was a mixed claim. He does so on the basis that the claim in the Supreme Court was for a liquidated amount and the fact that the claim also sought to recover other unliquidated amounts does not take it out of section 23 of the Court of Appeal Act as they are still claiming or seeking to recover a specific amount in excess of \$4,000.00.
24. I have some reservations as to whether this view is consistent with the development of the law on this issue as derived from **Zuliani**, and the line of cases which followed that decision. However, notwithstanding my reservations on this issue, I agree with the President that this is a case where leave should be granted.
25. As pointed out by the President, the proposed appeal raises three issues emanating from a dispute as to the proper interpretation of the Probate and Administration of Estates Act. He notes that:

**“16. The appeal raises three issues. Firstly, does section 65 of the Act apply in the case of an intestacy? Secondly, does section 65 of the Act apply where the mortgaged property was owned jointly with another and therefore does not form part of a deceased's estate? Is the estate relieved of an obligation to pay a mortgage debt owed jointly and severally with the other owner of the mortgaged property?”**

26. I agree that the three questions are matters of general public importance which do not simply affect the parties in this present dispute. In these circumstances even in the absence of an “automatic right of appeal” as designated by **Zuliani** we have a discretion to grant leave on the basis that the proposed appeal is (1) not frivolous and (2) raises points of law of general public importance.
27. I, therefore, concur with the learned President's decision to grant the leave to appeal sought.

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**The Honourable Mr. Justice Evans, JA**

28. I have had the opportunity to read in draft the judgment of my brother Barnett, P and the concurring judgment of my brother Evans, JA. I agree with the disposition they propose for the reasons stated therein.

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**The Honourable Madam Justice Bethell, JA**