[2015] JMSC Civ. 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2012HCV00292

BETWEEN	**CARLENE MILLER**	**CLAIMANT**
A N D	**HAROLD MILLER**	**DEFENDANT**

Mrs. Symone M. Mayhew for the Claimant.
Ms. Marjorie E Shaw instructed by Brown & Shaw for the Defendant.

HEARD ON: 4th December 2014 and 13th February, 2015.

IN CHAMBERS

Dissolution of Marriage in Foreign Court - Separation Agreement Incorporated in Dissolution judgment - Provision in Separation Agreement to Establish Trust over land in Jamaica - Consequential Orders made by Foreign court - Trust and Conveyancing Deeds executed by Foreign Court in name of absent Defendant - Whether foreign judgment and/or Orders in personam or rem - Whether foreign judgment enforceable in Jamaica - Whether Separation Agreement enforceable in Jamaica.

CORAM: Dunbar-Green, (Ag.)

Background

[1] The parties were married in Hartford, Connecticut, on February 16, 1993 and domiciled in the United States for a period. They owned properties in Jamaica and the United States. In 2007, the claimant petitioned for divorce in the Superior Court of Connecticut. The respondent filed an appearance in the proceedings and was

present at the hearing of the petition on December 1, 2008 before His Honour Judge Richard Dyer. At the time of the hearing the claimant was then residing in Atlanta, USA, and the defendant was living in Southfield, St. Elizabeth, Jamaica. Both parties entered into a Separation Agreement, which included the establishment of a trust over a property (Top Hill) in Jamaica, for the benefit of their three children. They consented to their agreement being incorporated in the judgment of the court. One term of the agreement was that it would survive and stand independent of any such judgment.

[2] An order for dissolution of marriage was made on 1st December 2008. The Court further ordered, as agreed by the parties, that the written agreement between them dated 1st December 2008 be incorporated, by reference.

[3] The provisions in the Separation Agreement, in so far as they are germane to the instant proceedings, read as follows:

> ...WHEREAS, the parties desire to enter into an agreement settling all of the claims and demands which may (sic) have against the other, including, but not limited to, support, maintenance and alimony; and any and all claims which either party may have or claim upon or against the estate of the other for support, maintenance, alimony and any other matter whatsoever arising out of the marital relationship; and
>
> WHEREAS, the Husband and Wife have been fully advised by their respective attorneys of their choice as to their respective rights and obligations, and have each carefully reviewed the contents of this Agreement with the said attorneys...
>
> ...5 <u>CHILD SUPPORT:</u>
> The Defendant Husband will pay child support for the benefit of the minor children in compliance with the State of Connecticut Child Support Guidelines...

...15 REAL PROPERTY:

...**Top Hill, St. Elizabeth, Jamaica**

The parties shall transfer Top Hill into a trust for the parties' three minor children. The transfer shall include both the lot and the house and the lot bounded as follows...

The parties shall agree upon a neutral trustee. Defendant Husband shall have the right to occupy the upstairs apartment for a period of one year until November 30, 2009. Upon vacating the property, the Defendant Husband shall not remove fixtures or appliances. The current physical structure shall remain the same except for reasonable wear and tear. Downstairs shall be rented and the rent shall be paid to the trust. The first rents collected shall be utilized to pay legal fees and costs associated with the transfers to effect the trust.

...18 DISSOLUTION:

The parties understand and agree that a copy of this Agreement may be marked into evidence at the time of a final marital dissolution hearing and may be incorporated by reference into any judgment entered in connection therewith. The parties further understand and agree that the incorporation of the within (sic) Agreement will not be deemed a merger of the Agreement into any such judgment, but rather the Agreement will survive and stand independent of any such judgment.

...20 MODIFICATION AND WAIVER:

A modification or waiver of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality of this Agreement...Nothing in this provision shall preclude a court of competent jurisdiction from the modification of weekly orders of support and alimony.

...22 JURISDICTION:

Each of the parties hereto hereby irrevocably contests (sic) and submits to the jurisdiction of the courts of the State of Connecticut and of any

federal court located therein in connection with any suit, action or other proceeding arising out of or relating to this Agreement or the transactions contemplated hereby, and also waives any objection to venue in the Hartford County Superior Court at Hartford.

[4] The Separation Agreement made provision for other matters, including custody, a parenting plan, education, debts, bank accounts, and other properties (real and personal) situated in the United States.

[5] At the divorce hearing in the United States, the parties were specifically examined on whether they had received legal guidance and confirmed their understanding of all the material terms of the agreement and its incorporation in the judgment of the court. Both parties separately confirmed, under examination by their respective counsel, and in response to questions from the judge, that they understood the terms of the agreement and had been satisfied with the legal guidance provided by their respective counsel.

[6] The claimant's then Jamaican attorney-at-law, Mr. Conrad Powell, was in attendance at the dissolution hearing and reference was made to him as participating in settling the Separation Agreement and how the trust would be effected. The claimant, agreed in examination by her USA Counsel, that "…rents [would] go to pay for the transfers and any costs associated in Attorney Powell's attorney's fees in doing that…" In examination, the defendant agreed that "rental [would] be used to pay the legal fees and costs associated with creating a trust, getting a TRN number for the trust and having any documents that [needed] to be effectuated that [put] the trust in existence and [determine] who manages the trust." Both parties also agreed, in their respective examination, that the trust was to be established for the "benefit" of their children. (pp 1, 22-23, 52-53 of **the Transcript of proceedings**).

[7] The parties failed to agree on the establishment of the trust for the Top Hill property. The claimant alleged that it was the defendant's fault as he refused to co-operate and execute the appropriate documents. On that basis, she filed a motion in the Superior Court of Connecticut for an order to have the Top Hill property in

Jamaica transferred into a trust for the benefit of the minor children. The motion was granted on 21st October 2009.

[8] The defendant did not put in an appearance at those proceedings. It appears, from court records, that by the time the motion was filed, the attorney-at-law who had represented him in the divorce proceedings, Mr Patrick Lyle, had withdrawn. The defendant, who by that time had returned to Jamaica, denied being served notice of the motion, although he had received late receipt of other court documents. There is a certification by the claimant's USA attorney that the defendant was served at his address in Jamaica, by pre-paid postage.

[9] The motion and order of 21st October 2009, referred to a prior order of July 28, 2009 by Judge Epstein. That order required the defendant to execute trust documents on the Top Hill property, under Jamaican law, and that all proceeds should go into a trust which was to be administered by the plaintiff. The July 28, 2009 order was not exhibited and the claimant gave evidence that she had not been aware of it.

[10] Apparently, on the basis of the 21st October 2009 order, a trust deed was executed on 18th December 2009 appointing Kadian Rodwell, teacher of Santa Cruz, St. Elizabeth, as trustee. Judge Jack W. Fischer, a Judge of the Superior Court of Connecticut, signed on behalf of the defendant. A deed of conveyance and instrument of transfer dated 18th December 2009 were also executed by Judge Fischer, on the defendant's behalf, purportedly transferring the Top Hill property to Kadian Rodwell (trustee) '...upon trust for sale subject to and for the trusts (sic) and purposes set out in the trust deed'.

[11] As this trust deed is being sought to be enforced in these proceedings, I will recite some of the clauses.

...Trust Fund

5. The subject property is to be held by the Trustees on trust for sale for the benefit of the children of the Grantors, with such provisions for maintenance, advancement and otherwise for the benefit of the said children.

6. The Trustees shall hold the subject property upon trust for the sale with power to postpone the sale and retain the property in the present state of investment or with the consent of the Grantors during their lifetime and thereafter at the discretion of the Trustees to realise same and invest the proceeds in any investment hereby authorised and may from time to time with the consent of the Grantors or at their discretion transpose such investments into others as hereby authorised...

...Trusts

14. The Grantors hereby declare that the trusts herein created and the income from the Trust Fund shall be applied by the Trustees at their sole discretion for the education support and maintenance of the beneficiaries up to the age of twenty-five (25) years...

Power to pay Capital

17. The Trustees may in the exercise of their absolute discretion at any time after any of the said beneficiaries shall have attained the age of twenty-five (25) years raise and pay to that beneficiary one-sixth (1/6) or any less part of the Trust Fund.

18. On the attainment of the youngest beneficiary of the age of twenty-five years (25) so much of the funds that remain shall vest in the beneficiaries absolutely and in equal shares and the trusts herein created shall upon that event so occurring cease.

Residuary Fund

19. In the event that any of the beneficiaries dies under the age of 25 years leaving issue surviving or does not attain a vested interest then the Trust Fund shall be held in trust for such surviving issue

who shall take the share which his or her parent would have taken had he survived to take an absolutely vested interest hereunder...

ii In the event that any of the beneficiaries under the age of 25 dies without issue then the Trust Fund shall be held in trust for such persons as that beneficiary shall by Will or codicil appoint...

The Fixed Date Claim Form

[12] On the basis of the orders by the Superior Court of Connecticut, or, alternatively the powers of the Supreme Court of Jamaica to enforce the Separation Agreement, the claimant, by way of Amended Fixed Date Claim Form, dated 27th November 2012, seeks orders as follows:

(1) An order that Kadian Rodwell, teacher at Santa Cruz in the parish of St Elizabeth be appointed trustee for the purposes of the trust provided for in Separation Agreement dated December 1, 2008.

(2) An order that the trustee Kadian Rodwell have the powers and obligations set out in Trust Deed dated November 30, 2009.

(3) An order that the Respondent execute and deliver to the Claimant's attorneys-at-law, an instrument of transfer under the Registration of Titles Act, transferring his interest in Certificate if Title registered at Volume 1290 Folio 958 of the Register Book of Titles to Kadian Rodwell in trust for Horace Miller, Monique Miller and Janealle Miller, within 14 days of receiving same, failing which the Registrar of the Supreme Court shall be empowered to execute the said instrument of transfer on the Respondent's behalf.

(4) An order that the respondent execute and deliver to the claimant's attorneys-at-law, duplicate Certificate of Title registered at Volume 1290 Folio 958 of the Register Book of Titles, within 14 days of demand being made for same, failing which the Registrar of Titles shall cancel the said

title, issue a replacement, and deliver the duplicate certificate to the Claimant's attorneys-at-law.

(5) An order that the respondent execute and deliver to the claimant's attorneys-at-law, a common law conveyance, transferring his interest in the unregistered lands containing by estimation 2015 square metres more or less bounded and butted on the north by reserved road leading to property of Enid Stephenson; on the south by district road leading from Yardley Chase feeder road; on the east by lands belonging to Estate of Cecil Stephenson and on the west by lands belonging to Clynice Nelson, to Kadian Rodwell in trust for Horace Miller, Monique Miller and Janealle Miller, within 14 days of receiving same, failing which the Registrar of the Supreme Court shall be empowered to execute the said common law conveyance on the Respondent's behalf.

(6) An order that the respondent account for any income received from the said properties between December 1, 2009 to date and that such income as found due to be paid over to Kadian Rodwell in trust for Horace Miller, Monique Miller and Janealle Miller, within thirty (30) days of the making of this Order.

(7) An order that the Respondent pays the costs of this claim.

(8) Such other relief as this Honourable Court seems just.

Affidavits

[13] The claim is supported by the claimant's affidavits filed 3rd December 2012 and 10th April 2013, affidavit of Symone Brook filed 13th May 2013 and affidavit of Blosson Bent filed 13th May 2013.

[14] The defence is supported by affidavits of Harold Miller filed 3rd April 2013 and 24th May 2014.

[15] Both parties were crossed examined on their affidavits. The claimant said that she was not clear on aspects of the trust and the trust deed which had been settled

by the Connecticut court. This included whether the property was to be transferred into the names of trustees. She also did not understand the basis on which a power of sale was given to the trustee and said it was not her wish that such a power be given. As she understood it, at the age of majority, the land would be transferred to the children. She understood that Top Hill would be in someone's name to act on behalf of the children and her name along with the defendant's would be removed from the title as legal owners. She also said that at the time of settling the Separation Agreement the finer details about the trust deed had not been resolved.

[16] The defendant, in cross-examination, said that the trust was to be established for the benefit of the children but he understood that after the age of majority both parties' names would still be "…on the trust". It was his belief that although divorced, the parties would continue to be the owners of the property, and the children would have the land "…based on a will".

[17] Counsel made copious submissions which I will now summarise.

Claimant's Submissions

[18] The gravamen of the claimant's submission is that the defendant had breached the terms of the Separation Agreement; the trust established by the Superior Court of Connecticut and the trust deed executed by Judge Fischer are enforceable; and the Separation Agreement could also be enforced, independent of the order.

[19] Counsel for the claimant submitted that service of the 17th September 2009 motion by registered mail was sufficient to provide the defendant with notice of the proceedings and therefore accorded with natural justice. In determining whether to enforce a judgment of a foreign court, the party seeking to enforce the judgment need not show proof of actual service, but rather that the procedure adopted by the foreign court accords with principles of natural justice. Further, and in the alternative, even had the defendant not received the motion, he had an obligation to set it aside and had failed to do so.

[20] Counsel contended that Clause 15 of the Separation Agreement is conclusive, clear and unambiguous. It sets out the subject matter of the trust (property at Top Hill), the objects of the trust (the parties' 3 minor children), definitively uses the word "trust" and speaks to the appointment of a neutral trustee. The creation of the trust and appointment of trustee are procedural and not substantive, and would therefore not cause the trust to fail for uncertainty.

[21] Counsel argued that all the essentials for creating a trust are present, citing as authority, **Halbury's Laws of England**, vol 48 (2000), 4th ed. paras 504 and 549, viz:

> *A trust may be created intentionally inter vivos or by will. Essentials of such creation are:*
>
> *(1) property or rights capable of being subjected to the trust;*
> *(2) a declaration of, or disposition on, trust by a person competent to create a trust, or an obligation for valuable consideration to create a trust;*
> *(3) certainty of property and objects so that the trust is administratively workable; and*
> *(4) compliance with the statutory requirements regarding evidence and the rule against remoteness preventing interests vesting outside the perpetuity period and the rule against perpetual trusts preventing income from being inalienable for longer than the perpetuity period…*
>
> *A trust can be created by any language which is clear enough to show an intention to create it. A trust will not be imposed where the language of the creator expressly negatives any intention to impose a trust.*

[22] The judgment of the Connecticut Court should be enforced on three grounds. Firstly, the court had jurisdiction over the defendant. Secondly, the order was based on a contract and reflected a self-imposed obligation by the defendant. Thirdly, the court had not adjudicated on the rights of the parties in the property *in rem* but gave an in *personam* judgment to enforce a contractual agreement between the parties.

[23] Counsel submitted that the order in relation to Top Hill was incidental to the central issue over which the Connecticut court had jurisdiction. The primary concern of the court was the status of the parties vide divorce proceedings and ancillary issues concerning the maintenance, custody and welfare of the children to the marriage. The order did not purport to determine the parties' interest in or entitlement to the property itself. It was an order whereby a mechanism was set up to ensure that one of the primary issues, maintenance of the children, could be addressed.

[24] The Connecticut court was not only able to make the type order but had jurisdiction by virtue of the residence of the parties at the start of the proceedings in 2007, submission to the jurisdiction by the defendant and the defendant's voluntarily signing of the Separation Agreement.

[25] Counsel argued that the exceptions to the *Mocambique rule,* (***British South Africa Co v Companhia de Mocambique*** [1893] AC 602), should be applied. That is:

(a) the court may indirectly adjudicate disputes concerning foreign property if it has jurisdiction in person over the defendant and the dispute concerns a contract, an equitable obligation of the defendant or the administration of a trust; and

(b) the court has jurisdiction to determine the issues concerning foreign land if those issues are merely incidental to the central issues over which the court possesses jurisdiction (***Deschamps v Miller*** [1908] Ch. D 856; ***Pattni v Ali*** PC Appeal No. 23, 2005 (delivered 20th Nov. 2006).

[26] The judgment of the Connecticut court, counsel submitted, was final and conclusive, and this was further ground for its enforcement.

[27] In the alternative, it was submitted that the Separation Agreement should be enforced on three grounds. The first is derived from Clause 18 (the dissolution clause) which states:

> *The parties understand and agree that a copy of this agreement may be marked into evidence at the time of a final marital dissolution hearing and may be incorporated by reference into any judgment entered in connection therewith.* ***The parties further understand and agree that the incorporation of the within Agreement (sic) will not be deemed a merger of the Agreement into any such judgment, but rather that Agreement will survive and stand independent of any such judgment."****(Emphasis provided)*

[28] The second ground is based on Clause 22 (the jurisdiction clause) which states:

> *Each of the parties hereto hereby irrevocably contests [sic] and submits to the jurisdiction of the courts of the State of Connecticut and of any federal court located therein in connection with any suit, action or other proceeding arising out of or relating to this Agreement or the transactions contemplated hereby, and also waives any objection to venue in the Hartford County Superior Court at Hartford.*

[29] Counsel argued that these clauses mean that the contract can stand independent of the judgment and that jurisdiction is non-exclusive.

[30] ***Sinochem International Oil (London) Ltd v Mobil Sales and Supply Corp. Ltd*** [2000] 1 All ER (Comm) 758, 767 (para. 32) was cited to support the argument that a determination whether a clause is exclusive depends on whether, on its proper construction, it obliges the parties to resort to the relevant jurisdiction.

[31] Counsel also relied on ***Austrian Lloyd Steamship Co v Gresham Life Assurance Society Ltd*** [1903] 1 KB 249 and ***Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan and Anor*** [2004] 1 CLC 149 and submitted that the words "each of the parties hereto **hereby irrevocably contests (sic) and submits** to the jurisdiction…" when contrasted with the words "for all disputes which may arise...the parties...expressly agree to submit to the jurisdiction..." do not confer exclusive jurisdiction on the courts of the state of Connecticut.

[32] The third ground is that the Jamaican court is the appropriate forum for giving effect to Clause 15 of the agreement, for reasons that the defendant resides in Jamaica, the land which is the subject of the trust is located in Jamaica, the claimant will not be able to get an effective remedy in the absence of an order from the Supreme Court of Jamaica, and the agreement does not designate the law of any specific country as the governing law. For this ground, she relied on the House of Lords decision in ***Spiliada Maritime Corp v Cansulex Ltd*** [1986] 3 All ER 843

Defendant's Submissions

[33] Counsel for the defendant argued that although the claimant's attorneys-at-law in Jamaica had been in correspondence with the defendant's local attorneys (by letters of April 1, 2009, April 2, 2009, January 5, 2010 and March 10, 2010), there was no evidence that the claimant had notified the defendant or his attorneys of the motion in the Connecticut Supreme Court to establish the trust. She submitted that this was a breach of natural justice and of the **Civil Procedures Rules of Jamaica**.

[34] It was argued that the words 'incorporated by reference' in the dissolution judgment and the words "...the incorporation by reference will not be deemed a merger of the Agreement into any such Judgment, but rather the agreement will survive and stand independent of any such judgment..." in clause 18 of the Separation Agreement, meant that the agreement, in its totality, or in part, was not an order or a judgment of the Superior Court of Connecticut. Therefore, the sole order relating to the terms of the Separation Agreement, for consideration in the current proceeding, was the order of the Superior Court of Connecticut, dated October 18, 2009 (sic) upon which the terms of the trust deed and the execution of the conveyance, in December, 2009, are based. That order and consequential actions are unenforceable in Jamaica because the Connecticut court lacked jurisdiction over the defendant and there had been breaches of natural justice in the proceedings.

[35] A distinction had to be made between the hearing of the petition for dissolution of marriage, at which the defendant appeared, thereby subjecting himself to the foreign court's jurisdiction, and the order of October, 2009, pursuant to which the trust deed and conveyance were executed, for which the defendant received no notification or entered an appearance.

[36] The court should not enforce a Judgment made in the United States of America, if it is shown that the regulations governing service of process in that jurisdiction are inferior to that which would be secured for the defendant in Jamaica. Counsel relied on the Canadian case of ***Cortés v. Yorkton Securities Inc.***, 2007 BCSC 282 and rules 7.3, 7.6, 7.8, 7.13, 7.14 and 7.15 of the **Civil Procedure Rules, 2002**.

[37] Counsel referenced evidence by both parties as disclosing uncertainty about the manner in which the trust was to be established and the powers of the trustee. It was further contended that the order of October, 2009 and the Separation Agreement were unenforceable because Clause 15 of the agreement was inconclusive, incomplete, uncertain, and not final. ***Pro Swing Inc. v. Elta Golf Inc.*** 2006 SCC 52 was cited in support of the submission.

[38] Issue was taken with Kadian Rodwell's appointment as trustee, on grounds that there was no evidence of her participation in any of the proceedings up to the execution of the trust deed or of her accepting to be trustee. Neither was there any evidence of the criteria by which she was appointed.

[39] A further ground on which counsel argued against enforcement of the foreign judgment, the trust deed and conveyance, is that they are matters in rem. They were intended to transfer the parties' beneficial or legal interest in the Top Hill property, and thereby violated private international law. Counsel cited ***Duke v Andler*** [1932] 4 D.L.R. 529, followed in ***Raeburn v Raeburn,*** High Court of Antigua and Barbuda, Suit No. 6 1988 (judgment 20th March 1997), which upheld the principle that a court of a foreign country has no jurisdiction to adjudicate in respect of title or the right to possession of any immovable situated outside of that country, except in cases where the claim is grounded in contract, trust or fraud, or the determination of rights and title is incidental.

[40] Counsel made a distinction between ***Mocambique***, which concerns the court's jurisdiction affecting title to foreign land and the instant case which is about whether the Jamaican Court will enforce a foreign court's judgment on local realty.

[41] Counsel argued against the trust deed being treated as taking effect *in personam*. On the contrary, the trust deed could have been excluded, as with their

“Yardley Chase” property in Jamaica. The land issue was therefore not incidental to the central issue of the dissolution of the parties' marriage. Rather, it was a substantive part of the order.

[42] It was argued further, that the intent behind the trust was to supplement maintenance provisions. This was evident from Clause 15 of the agreement and the repeated reference to maintenance and child support in the claimant’s affidavit of November 27, 2012 and correspondence exhibited pertaining to the agreement to establish the trust. The trust deed was also settled in similar terms. Clause 5 states:

> *The subject property is to be held by the Trustees on trust for sale for the benefit of the children of the Grantors, with provisions for maintenance, advancement and otherwise for the benefit of the said children.*

[43] The decision of the Court of Appeal in ***Malcolm-Riley v Riley*** SCCA No. 2/90 was cited as authority that the court has no inherent jurisdiction to make any orders in respect of the maintenance and/or education of children who are not within the jurisdiction or make primary or ancillary orders pertaining to them. A foreign judgment or consent order for maintenance and/or education of the parties’ minor children could only be enforced if it were for a definite sum (a debt), and the judgment was final and conclusive. The order and Separation Agreement drawn up by the parties did not satisfy those requirements.

[44] Accordingly, the claimant should not succeed in the enforcement of a foreign judgment which seeks, by the back door, to provide remedies that are available under the **Matrimonial Causes Act** and **Maintenance Act.**

[45] Counsel submitted that the provisions of the **Partition Act** and/or, with leave, the **Property (Rights of Spouses) Act** provides an appropriate remedy which is open to the claimant.

[46] As regards the proper forum for this matter, counsel argued that by Clause 22 of the agreement, the parties had "implicitly" agreed to the exclusive jurisdiction of the Connecticut courts. This was also evident from various applications and issues that had been dealt with in that court. Alternatively, reliance was placed on principles

enunciated in ***Austrian Lloyd Steamship, Sabah Shipyard*** and ***Spiliada Maritime Corp***.

[47] Counsel for the defendant also submitted that the instant proceeding was akin to contempt because having secured Epstein J's order that "the Top Hill property in Jamaica [be] transferred into a Trust for the benefit of the minor children", and the Connecticut court having established a trust and appointed Kadian Rodwell as trustee, the claimant was now seeking the same orders from the court in Jamaica.

Issues for Determination

[48] The questions which arise for determination are as follows:

(a) Were the judgment and orders of the Connecticut Superior Court made in rem or in personam?

(b) Was the Connecticut court competent?

(c) Are the judgment and orders by the Connecticut Judgment enforceable in Jamaica?

(d) Can the Separation Agreement be enforced independent of the order of the Connecticut Superior Court?

(e) Is the Separation Agreement enforceable in Jamaica?

Analysis

Dissolution of Marriage

[49] The dissolution order decreeing the divorce of the parties is an order in rem. In their comment on rule 40 the learned authors of **Dicey, Morris & Collins on Conflict of Laws (14th ed.)** state:

> *14-100…A judgment in rem is a judgment whereunder either (1) possession or property in a thing is adjudged to a person, or (2) the sale of a thing is decreed in satisfaction of a claim against the thing itself. The term is used also to describe (3) an adjudication as to status such as a decree of nullity or dissolution or marriage, and (4) a judgment ordering property to be sold by way of administration in bankruptcy or on death…*

[50] Dissolution orders are enforceable in Jamaica by virtue of section 24 of the **Matrimonial Causes Act** which recognizes foreign decrees.

[51] The issue is whether the aspect of the dissolution order for the transfer of land into a trust, is enforceable. The parties submit that this is dependent on whether that aspect of the order takes effect *in personam* or *rem*.

[52] The distinction between the two concepts can be challenging and the courts have been divided in their opinion (**Dicey** 11th edition 456). The distinction can also be one of a false dichotomy, for as the Privy Council observed:

> *...there is no reason why an order should be characterised as either wholly in rem or wholly in personam. It is in their Lordships' view inappropriate to speak in this context of —severance. The extent (if any) to which an order operates in part in rem and in part in personam is a matter of analysis, not severance.*(***Pattni*** para 37).

[53] In ***Pattni***, the Privy Council cited with approval, at paragraph 21, the definitions of *in personam* and *in rem* as are provided in **Stroud's Judicial Dictionary**, 7th ed (2006) at p 2029, and **Jowitt's Dictionary of English Law** (2nd Ed.), p.1025-6, respectively.

[54] The definition in **Stroud's Judicial Dictionary** is as follows:

> *A judgment in personam binds only the parties to the proceedings as distinguished from one in rem which fixes the status of the matter in litigation once for all, and concludes all persons.*

[55] **Jowitt's Dictionary of English Law** defines the concepts in this way:

> *A judgment in rem is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it precludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the adjudication. Thus the court having in certain cases a right to condemn goods, its judgment is conclusive against all the world that the goods so declared*

> *were liable to seizure. So a declaration of legitimacy is in effect a judgment in rem. A judgment of divorce pronounced by a foreign court is in certain cases recognised by English courts, and is then a judgment in rem..... Judgments in personam are those which bind only those who are parties or privies to them; as in an ordinary action of contract or tort, where a judgment given against A cannot be binding on B unless he or someone under whom he claims was party to it.*

[56] It appears their Lordships also approved of the suggestion in ***Spencer Bower, Turner and Handley on Res Judicata*** (3rd Ed.) para. 234 that "it would have been clearer if decisions *in rem* and *in personam* had been named decisions *inter omnes* and *inter partes*. (para. 21).

[57] The dissolution order, in so far as is material, states: "The written agreement between the parties dated 12/1/2008 is attached and its terms are incorporated by reference."

[58] Clearly, the dissolution order, by incorporating the Separation Agreement, made no declaration as to title in the Top Hill property. It only referenced the agreement by the parties, who are the titled owners of Top Hill, to create a trust for the benefit of their children. The aspect of the order referencing the Separation Agreement, was inter se the parties and takes effect *in personam*. I am not here suggesting divisibility or that the order is to be severed into different *in rem* and *in personam* parts, as exhorted against by the Privy Council in ***Pattni*** (para 37).

[59] Although I find that aspect of the order to take effect *in personam* it will not be enforceable in Jamaica unless determined to be final, conclusive and incidental to the dissolution of marriage. I will return to the requirements for enforceability later in this judgment.

[60] Unfortunately, the matter does not end here because the Superior Court of Connecticut made two subsequent orders which essentially have overtaken the aspect of the dissolution order dealing with the establishment of the trust. I now turn to the effect of those two additional orders.

The Second and Third Orders

[61] The second order was made on 28th July 2009 in the Superior court of the State of Connecticut for the establishment of a trust in accordance with the laws of Jamaica, to be administered by the claimant. The claimant said she had no knowledge of it. That order was not exhibited but it was referenced in the motion for the third order.

[62] I see no necessity for dwelling on the second order because it was overtaken by the third order which was granted on the 21st October 2009, in terms of a motion "to have the Top Hill property in Jamaica transferred into a trust for the benefit of the minor children". The applicant had argued successfully, that, inter-alia, "…the defendant [had] failed, refused and or neglected to execute the appropriate documents, thereby making it impossible to effectuate...a transfer or to rent out the property [and that]...a trust document signed by [this] court [would] assist her in to (sic) effecting the trust under Jamaican law."

[63] On 18th December 2009, the trust deed, the deed of conveyance and instrument of transfer were signed by the claimant, the trustee, Kaydian Rodwell and judge Jack W Fisher on behalf of the defendant.

[64] The court must determine whether this third order, along with the trust deed and instruments of conveyance and transfer, is enforceable in Jamaica.

[65] According to **Dicey, Morris & Collins on Conflict of Law** (14th Ed.) it is a rule of private international law that a court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovable situate outside that country.(pp.613-614).

[66] This is essentially what is stated in the principle referred to as the ***Mocambique rule,*** that the proper forum for actions involving title to land is the *lex situs.* In other words, a court in the commonwealth should not entertain any action which involves title to land in a foreign country.

[67] The instant case, however, is about the converse. That is, whether the Jamaican Supreme Court should entertain an action to enforce a foreign judgment which affects land in Jamaica. In two commonwealth cases dealing with that situation, the ***Mocambique*** rule was followed and there was no enforcement.

[68] In ***Raeburn*****,** a decision of the High Court of Antigua, Benjamin J. decided that the court would not take judicial notice of orders that were obtained in dissolution of marriage proceedings in England, affecting title to land in Antigua. That decision followed the much earlier Canadian Supreme Court judgment in ***Duke v Andler*** and the rule in **Dicey** that 'all rights over, or in relation to, an immovable...are governed by the laws of the country where the immovable is situate (lex situs)'

[69] Justice Winston Anderson, the respected Caribbean academic (as he then was), who is currently a judge of the Caribbean Court of Justice, made some critical observations about the ***Raeburn*** judgment in his text **Private International Family Law** (2005). He accepted that the decision was a correct application of orthodox legal principles but felt, among other criticisms, that the opportunity was missed to depart from a seemingly 'anachronistic' rule'. He also faulted the court for ignoring the fact that the plaintiff had unsuccessfully pursued her claim in the English court and should be bound by that process unless public policy considerations dictated otherwise. He observed that “In allowing the plaintiff to go back on her implicit undertakings made to the English court, the Antiguan court may have, unwittingly, undermined the sanctity of the modern concept of autonomy and self-determination." (pp. 197-211).

[70] The learned authors of **Cheshire and North's Private International Law**, 10th ed. 630, have also doubted that there is any compelling justification for allowing a plaintiff to re-litigate, so to speak, a matter that has already been determined by a foreign court of competent jurisdiction. This accords with the minority view of Lord Wilberforce in ***Carl Zeiss Stiftung v Rayner and Keeler, Ltd***. (No. 2) [1967] 1 A.C. 853, 966. However, the majority accepted that the doctrine of non-merger remains good law.

[71] Much can be said about notions of 'autonomy' and 'self determination' but there is nothing 'anachronistic' about the primacy of land to the concept of sovereignty. Technology has ‘virtually’ integrated states and transformed human and social interaction, but the nature of land and the character of relations pertaining to land, remain virtually unchanged. The 1982 Falklands war between the UK and Argentina is illustrative. So, it remains necessary to heed Lord Wilberforce's caution that 'the nature of the rule itself, involving . . . possible conflict with foreign jurisdictions, and the possible entry into and involvement with political questions of

some delicacy, does not favour revision (assuming such to be logically desirable) by judicial decision but rather by legislation."(***Hesperides Hotels Ltd v Muftizade*** [I9791 AC 508, 536.

[72] Lord Wilberforce was also concerned that a retreat from ***Mocambique*** might result in 'forum shopping' (ibid, 537). That appears to have been what was attempted in ***Raeburn***.

[73] These are not unimportant considerations in determining whether to upend the principle which preserves decisions pertaining to land for the *lex situs.* This is so, regardless of the criticisms that the ***Mocambique*** rule should not continue to be justified on grounds of the so called *'brutum fulmen*' principle – wherein a foreign court, because it cannot enforce its decree to title or possession of foreign land, should not act, because to do so would be futile. (see for example Johnson, R.(2003) :*The Mozambique Rule and the (Non) Jurisdiction of the Supreme Court of Western Australia over Foreign Land*.31(2) *UWAL* Rev 266).

[74] In ***Andler***, the California Court ordered re-conveyance of land situated in Canada and empowered the clerk of court to make, execute and deliver the deed and to effect and perfect the conveyance if the defendant failed to do so. As it turned out, the defendant did not comply with the court order and the clerk effected the conveyance, which the claimants sought subsequently to enforce in Canada. The Canadian court refused to enforce the California judgment on the basis of ***the Mocambique*** rule.

[75] Smith J., at page 738 of the judgment, cited with approval, **Story's Conflict of Laws** (8th ed.),p.591, which states:

> *And here the general principle of the common law is, that the laws of the place where such property is situate, exclusively govern, in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title therefore to real property can be acquired, passed and lost only according to the lex rei sitae. This is generally, although (as we shall see) not universally admitted by courts and jurists, foreign as well as domestic.*

[76] At page 739, his lordship also referenced **Dicey's Conflict of Laws** (4th ed.), p.393 in which it is stated:

> *This rule is merely an application of a more general principle that no court ought to give a judgment the enforcement whereof lies beyond the court's power, and especially if it would bring the court into conflict with the admitted authority of a foreign sovereign, or what is the same thing, the jurisdiction of a foreign court.*

[77] Smith J., acknowledged a long line of cases in which it had been held that English courts would enforce rights affecting real estate in foreign countries if such rights are based on contract, fraud or trust and the defendant was resident in England. (p.739). However, his Lordship said that the title to real property should be determined by the standard of the laws of the country in which the land is situated because "the courts of one country are not presumed to know the laws of another country" (p.741). He therefore concluded that it was the law of British Columbia which should have been the basis of the adjudication (742).

[78] In ***Shami v Shami*** [2012] EWHC 664 (Ch), David Donaldson Q.C. sitting as a Deputy High Court judge, observed that as ineluctable as the decision in ***Andler*** appeared, the premise on which it was based and the refusal to accord recognition of the foreign judgment, was dubious (para 34).

[79] His Lordship said that the California court had not been concerned with declaration of ownership of land, which was what had been the central issue of focus and argument in the Canadian Supreme Court. Rather, the California court had ordered a re-conveyance and execution and registration of the deed of conveyance, consequent on the recession of a sale agreement for the land in Canada (para 34).

[80] At paragraph 32 of the judgment, His Lordship observed that the exceptions in ***Mocambique*** were more accurately to be described as "falling out of it" since the court, in enforcing a contract or equity, was "merely acting on the conscience of a defendant subject to its jurisdiction…" as implied in the decision in ***Penn v Lord Baltimore*** (1750) 1 Ves. Sen. 444.

[81] He continued at para 33, "However the proposition is characterised, I can see no reason not to accord a similar width of jurisdiction to a foreign court…". On that

reasoning, he enforced a decision of the Israeli court, in divorce proceedings, which dealt with ownership of a flat in London.

[82] I adopt the reasoning of Donaldson Q.C. in ***Shami***. However, on the facts of the instant case, ***Andler*** is to be distinguished. It is a material consideration that in ***Andler***, all the parties were present within the California jurisdiction and were litigating a contract which was made in that jurisdiction. This did not appear to have resonated with the Canadian Supreme Court. In the instant case, such a consideration does not arise and this will therefore go to the question of whether the Connecticut court satisfied any exception to the ***Mocambique rule*** and was of competent jurisdiction.

[83] The first exception to the ***Mocambique rule***, also known as the *in persom* exception, applies to an action founded on a personal obligation to the plaintiff. A court will not refuse jurisdiction, *in personam*, to order a defendant to convey or otherwise deal with foreign land where the defendant has a personal obligation in contract or equity, and that obligation touches and concerns the foreign land (**Chesire and North's**, 11th ed. 257).

[84] **Cheshire and North's** puts it in these terms:

> *If the conscience of the defendant is affected in the sense that he has become bound by a personal obligation to the plaintiff, the court, in the exercise of its jurisdiction in personam, will not shrink from ordering him to convey or otherwise deal with foreign land.* (ibid).

[85] The court's jurisdiction is directly in relation to the enforcement of the defendant's contractual or equitable obligation. The fact that the breach of obligation concerns foreign land is therefore a secondary or indirect consideration because the court is not primarily concerned with an action founded upon a disputed claim of title to or proprietary rights in relation to foreign land.

[86] In ***Rose Hall Resort, L.P. v The Ritz-Carlton Hotel Co. of Jamaica Limited*** SCCA No. 2009 HCV 05413 Jones J., considered whether the Supreme Court of Jamaica would recognize or enforce an award by foreign arbitrators with respect to the possession of Jamaican land. It was accepted that **the Arbitration (Recognition**

and Enforcement of Foreign Awards) Act 2001 gives legal recognition to foreign arbitration awards that are made in reciprocal countries.

[87] The learned judge decided the question on the fact that the subject matter of the dispute was "not possession of Jamaican land (*in rem*)" but "…the rights as between the parties (*in personam*) in the arbitration to the possession of Jamaican land." He made a distinction between the "determination of possession of the [real property] as between the parties" on the one hand, and "an order in rem by a foreign arbitrator" on the other. The former could not affect the rights of third parties or any rights which are enforceable against the world. The latter, he said, was incapable of recognition in Jamaica (paras.28 & 32).

[88] At paragraph 29 Jones J., cited ***Catania v Giannattasio*** [1999] I.L.Pr. 630 in which the Ontario Court of Appeal was dealing with orders in relation to property overseas and had this to say:

> *It is a general rule of Canadian law that courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country. By way of exception, Canadian courts have jurisdiction to enforce rights affecting land in foreign countries if those rights are based on contract, trust or equity and the defendant resides in Canada. They will, however, only exercise this exceptional jurisdiction if four criteria are met : (1) the court must have in personam jurisdiction over the defendant; (2) there must be some personal obligation between the parties; (3) the jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment; and (4) the court will not exercise jurisdiction if the order would be of no effect in the situs.*

[89]. Jones J., also referred to ***Pattni*** at paragraphs 25 and 26 in which the Privy Council said:

> *An order purporting actually to transfer or dispose of property is, however, to be distinguished from a judgment determining the contractual rights of parties to property. Courts frequently adjudicate on the rights to property and otherwise of parties before them arising from contractual transactions relating to movables or intangibles situate in other states; in doing so, common law courts apply the governing law of the relevant contract and*

the lex situs of the relevant movable or intangible to the contractual and proprietary aspects of the transaction as appropriate in accordance with principles discussed in the test to rules 120 and 124 in Dicy, Morris & Collins. Immovables fall into a different and special category in private international law…Even so, it has long been accepted in England that an English court may, as between parties before it, give an in personam judgment to enforce contractual or equitable rights in respect of immoveable property situate in a foreign country: see Dicey, Morris & Collins rule 122(3).

[90] I now turn to whether, on the basis of these authorities, the third order is enforceable.

Is the Third Order Enforceable in Jamaica?

[91] It has to be determined whether the Connecticut court, by granting the order and executing the deed and conveyance, had made a determination as to rights in the property or declaring such rights.

[92] If the answer is in the affirmative, the judgment is *in rem* and unenforceable. It would not matter that the parties were in agreement.

[93] I would be hard-pressed to find that the third order was *in rem* because it was not determining title as between the claimant and defendant. The order in fact, recognized their title. The purpose of the order was to give effect to the parties' agreement to establish a trust.

[94] I therefore find that the third order was *in personam*. Just as the California court had done in ***Andler***, the Connecticut Court was giving effect to an agreement between the parties and in the course of doing so empowering a judicial authority (in the case of California, the clerk of court and in the instant case, a judge) to execute the deed and conveyance in circumstances where the court felt it was necessary to do so.

[95] Having regard to the long accepted and well known judicial treatment of immovables, as "falling into a different and special category in private international

law" (**Pattni** para 26) and to the decision in ***Catania*** and several other cases throughout the commonwealth, I must now test whether this *in personam* judgment has satisfied the requirements for enforceability in Jamaica.

[96] In ***Emanuel v Symon*** (1908) 1 K.B. 302, 309, Buckley LJ enunciated the principle by which such a judgment would be enforceable. At page 309 His lordship stated:

> *In actions in personam there are five cases in which courts of this country will enforce a foreign judgment: (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of the plaintiff has selected the forum in which he is afterwards sued;(4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.*

[97] Grounds 1,2 and 3 do not arise based on the facts of this case.

[98] In relation to ground iv, there is no question that the defendant had voluntarily appeared at the hearing of the motion for dissolution of marriage. It is clear from the transcript of those proceedings that it was understood by all that the aspect of the agreement dealing with the trust would have been dealt with under Jamaican law. There is no evidence that the parties had in any way varied that understanding. There is also no evidence that, in relation to the third motion, the defendant had submitted himself to the jurisdiction of the Connecticut court. Quite the opposite is the case, whether by him deliberately eschewing the court's jurisdiction or because, as he states, he had no knowledge of the motion.

[99] This leaves ground 5, the question of whether the defendant had contracted to submit himself to the forum in which the judgment was obtained.

[100] It is convenient here to deal with the exclusion clause in the Separation Agreement, since this is the only basis on which such an agreement could be established.

[101] In ***Austrian Lloyd Steamship***, the clause for consideration was:

> *For all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters*. (p.249).

[102] Romer LJ concluded that the clause conferred exclusive jurisdiction to the Courts of Budapest as the proper construction of the contract was that the parties mutually agreed to submit to that jurisdiction in respect of all disputes which may arise under the contract. (pp. 251 -252).

[103] I agree with counsel for the claimant that the words used in the Separation Agreement: "each of the parties hereto hereby irrevocably contests (sic) and submits to the jurisdiction of the courts of the state of Connecticut" as distinct from the words "for all disputes which may arise...the parties...expressly agree to submit to the jurisdiction..." do not confer exclusive jurisdiction on the courts of the state of Connecticut.

[104] In ***Sabah Shipyard***, Waller LJ, at para 33 cited with approval the decision of Hobhouse J (as he then was) in ***Cannon Screen Entertainment Ltd v Handmade Films (Distributors) Ltd*** (unreported, 11 July 1989, QBD) . Hobhouse J had to construe the following clause:

> *This agreement shall be construed and interpreted pursuant to laws of England and the parties hereby consent and submit to the jurisdiction of the Courts of England in connection with any dispute arising hereunder. The parties further agree that process in any such action may be served upon either of them by registered or certified mail at the address of first above given or such other address as the party being served may from time to time have specified to the other party by previous written notice.*

[105] Hobhouse J found the clause non-exclusive, for the following reasons:

> *…The clause… uses words which are words of submission not reference: "The parties hereby submit to the jurisdiction." In the output agreement the equivalent phrase is "the parties hereby consent and submit to the jurisdiction". The addition of the word "consent" reinforces the same*

conclusion. The phrase in the Austrian Lloyd case was "agree to submit" but in that case it was construed in a transitive sense as an agreement to submit disputes to a particular court in the same way as one can agree to submit disputes to the decision of the arbitrator. The clauses which I have to construe do not lend themselves to a transitive construction; the sense is that the parties submit themselves to the jurisdiction of the court not that the parties submit disputes. In the Austrian Lloyd case it was open to the court to construe the words as if they read "agree to submit all such disputes". I do not consider that it would be appropriate to make such an inferential insertion in these clauses. Words are an accurate tool and relatively small differences in wording will produce different contractual effects. (para 34).

[106] I accept counsel's submission that similar reasoning may be applied in this case. The wording of the clause under consideration that the parties "hereby irrevocably consents and submits" as distinct from a formulation that the parties "agree to submit all disputes.." does not lead to a reasonable conclusion that the parties were agreeing that all disputes in the matter should be within the jurisdiction of the Connecticut Court.

[107] This is not just based on technical legal construction but also common sense. In the Separation Agreement, the parties did not only intend that the establishment of the trust be dealt with in Jamaica, they also expressly agreed that another Jamaican property, Yardley Chase, would be left to be decided according to Jamaican procedures. If exclusive jurisdiction were intended for the Connecticut court, it would have been pointless for the parties to have agreed that any matter in the agreement should fall to be decided or effected under Jamaican law.

[108] I will also refer to the second order in which the Connecticut Superior Court stated that the trust should be established under Jamaican law. That second order was consistent with the dissolution order and the Separation Agreement, save for the declaration that the claimant should be the trustee, which was a variation of the agreement that a neutral trustee would have been appointed. The import of this order, to the point under consideration, is that the Connecticut Superior Court clearly did not deem itself as having exclusive jurisdiction over the Separation Agreement.

[109] Clause 15 of the Separation Agreement is not an exclusive jurisdiction clause and the words used do not convey a meaning that the defendant had agreed to the Connecticut Superior court having exclusive jurisdiction in relation to the Separation Agreement, and specifically that aspect which pertains to the agreement by the parties to establish a trust over Top Hill.

[110] I therefore find that the defendant did not contract to submit himself to the jurisdiction of the Connecticut Superior Court in relation to the third motion and order.

The Second Exception to the Mocambique Rule

[111] The second exception, as stated by **Chesire and North's,** is that "if an estate or a trust, which includes English property and foreign immovable, is being administered in English proceedings, the court is prepared to determine a disputed title to the foreign immovable (11th ed. 265).

[112] This exception clearly does not apply to the instant case. The Connecticut court was neither dealing with an administration of an estate or trust nor having a need to be carrying out any incidental investigation to determine title.

[113] I therefore do not accept counsel for the claimant's s submission that the two exceptions to the ***Mocambique*** rule are applicable to this case.

Competence of the Connecticut Superior Court

[114] **Dicey, Morris & Collins***, 14th ed. 590, quotes* ***Adams v Cape Industries Plc*** [1990] Ch.433, 517-518 (CA) in these terms:

> *In determining the jurisdiction of the foreign court...,our court is directing its mind to the competence or otherwise of the foreign court to summon the defendant before it and to decide such matters as it has decided...we would...regard the source of the territorial jurisdiction of the court of a foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory.*

[115] The court went on to say that a foreign court will recognise a judgment unless it can be impeached for want of jurisdiction, fraud or natural justice.

[116] **Cheshire and North's** states that the authorities are against enforcement of a foreign judgment in which the court assumed jurisdiction over absentees. The authorities cited concerned forms of service which went against accepted international practice but the principle of general applicability is that enforcement against a party depends on an obligation by that party to perform whatever the judgment imposes, and such an obligation or duty cannot be derived from the inactivity of a defendant who is alien to the foreign court (p644 referencing **Schibsby *v Westenholz*** (1870) L.R. 6 Q.B 1558).

[117] In the Canadian Supreme Court case of ***Macdonald v. Georgian Bay Lumber Co****., (1878) 2 S.C.R 364* a deed was executed in New York purporting to pass property situated in Canada. The deed was not a "voluntary conveyance", but a "statutable assignment" arising from bankruptcy proceedings.

[118] At page 376 of the judgment, Ritchie J said:

> *This was...an involuntary legal conveyance, intended to convey only the property over which the legislature had assumed the disposition, in invitum, and consequently with which alone the court had power to deal and was intended to have, and had no, or greater effect than if the legislature had declared that the property of the bankrupt should pass to the assignee or trustee without conveyance by operation of law. In either of which cases the only property which would be affected by the deed or declaration would be the property...within the control of the legislature, or upon, or over which, it could operate, and which clearly would not include lands in a foreign country, for the principle is too well established to be questioned, that real estate is exclusively subject to the laws of the government within whose territory it is situate (p. 376).*

[119] On the basis of these authorities, it is my view, that if a foreign court executes a trust deed and instrument of transfer over land in Jamaica, in circumstances where the defendant resides in Jamaica and did not submit to the foreign court's jurisdiction, the judgment of that court is unenforceable in Jamaica, for lack of jurisdiction. That power could only reside with the *situs*. I have found no authority in the commonwealth which suggests otherwise.

[120] In the absence of the defendant, over whom the Connecticut court had no *in personam* or other jurisdiction, it was incapable of making a judgment that could be enforced against him in Jamaica.

Natural Justice and Procedural Points

[121] Counsel for the defendant submitted that the third order was a breach of natural justice because the defendant was never served notice of the motion, he had no legal representation in the USA at the time, the claimant's Jamaican lawyers knew that he had local counsel but purported to have served him by post from the USA and the defendant was outside the jurisdiction of the court. Further, there was a violation of the provisions for service outside the jurisdiction as provided in the **Civil Procedures Rules** and to give effect to the purported service would be a denial of better protection under Jamaican law.

[122] Counsel cited in support of her submission on natural justice, the Canadian Case of ***Cortés v. Yorkton Securities Inc.,*** 2007 BCSC 282, in which Myers L.J. stated; *inter-alia*:

> *A foreign judgment will not be enforced in Canada if it was not obtained in accordance with Canadian principles of natural justice. The requirement that timely notice of a claim should be given to a Defendant is fundamental to our concept of natural justice…I therefore conclude that the failure to take effective steps to provide Yorkton with notice of the action was a breach of natural justice.(paras 61-62 & 82).*

[123] Having already decided that there was a want of jurisdiction, I do not propose to delve deeply into these matters. However, I make the observation that it is an established principle that in determining whether a foreign judgment is enforceable the local court can only determine whether the judgment was made by a court of competent jurisdiction and cannot act as a review court. This principle applies to service and the procedure of the foreign court stands unless it is against accepted international practice. (See **Cheshire and North's** 10 ed. 644). This is the context in which I understand the ***Cortes*** decision.

[124] Even so, it would not follow, without more, that the apparent satisfaction of the Connecticut court with a certification by counsel that he had served notice by pre-

paid mail, would call into question the Connecticut court's judgment. Having said that, this court is troubled by the seeming lack of evidence in relation to the postage of the motion.

[125] My second observation, which might very well be a matter of mere coincidence, is that the claimant gave evidence that she was unaware of the second motion of the Superior Court of Connecticut which had been issued in her name and resulted in an order for her to establish the trust in accordance with Jamaican law, and the defendant in these proceedings has also claimed 'unawareness', albeit of the third motion which he says was never served on him or his local attorneys.

[126] Counsel for the claimant also contended that the third order should stand because the defendant had the opportunity to set it aside and chose not to do so. I cannot agree with that proposition because if he had put in an appearance and sought to contest the matter on the merits that could have amounted to his submission to the Connecticut Superior court, in circumstances where he is asserting that the court had no jurisdiction to adjudicate in the matter. This was established in ***S.A. Consortium General Textiles v. Son and Sand Agencies, Ltd.,*** [1978] QB 279, 308-309).

[127] At its core, this case is one of conflicts at law. I have considered the principles of law that are applicable and refuse to give effect to the third order of the Connecticut Superior court or to the instruments of deed and conveyance executed pursuant to it. I have reached this decision on the grounds that the Connecticut order was *in personam* but the court was not competent to make such an order.

[128] I would have reached the same conclusion even were the third order *in rem* because the Connecticut court would have made an order affecting land in Jamaica, without having satisfied either exception to the ***Mocambique rule.***

Whether the Separation Agreement can be enforced independently by the Supreme Court?

[129] Counsel for the defendant submitted that the claimant was attempting to enforce a maintenance agreement 'through the back door'. I disagree. The clause which is being sought to be enforced is for the setting up of a trust over land in Jamaica for the benefit of children. In the evidence adduced before me, the word

“maintenance” has been used alongside “benefit” in relation to that clause. However, those words need not and should not be viewed in reference to the **Maintenance Act.** More aptly, they are used consistent with the sense of powers and obligations of a trustee to minors under section 43 (4) of the **Conveyancing Act**.

[130] Counsel for the defendant also submitted that the proper forum for this matter are the courts in Connecticut because by Clause 22 of the Separation Agreement the parties had agreed, "implicitly", to the exclusive jurisdiction of the Connecticut courts.

[131] For the reasons outlined when I dealt with the exclusion clause, this submission is ill-conceived. Also, **Cheshire and North’s**, referencing a number of cases, states that “…the weight of authority is in favour of the view that an agreement to submit cannot be implied…” (10th ed. 636).

[132] In ***Spiliada Maritime Corp v Cansulex Ltd*** [1986] 3 All ER 843, 844, Lord Goff stated that the appropriate forum is “that with which the action had the most real and substantial connection” (p.844). This would include factors such as “convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business.”(ibid).

[133] The Jamaican Supreme Court is the appropriate forum because the defendant is a resident of Jamaica, the claimant, who is a US citizen, has submitted herself to the jurisdiction of this court having initiated these proceedings, the land (which is the subject matter of the agreement) is in Jamaica, and the agreement does not exclude this court’s jurisdiction.

[134] Moreover, this court, in exercising its equitable jurisdiction, will not refuse to consider an application to enforce an agreement pertaining to land in the *situs*. To do so would leave the claimant without a remedy since the foreign court has no jurisdiction to enforce the aspect of the agreement pertaining to Top Hill. It would facilitate the defendant in reneging on obligations entered into voluntarily abroad.

[135] Having assumed jurisdiction, I turn now to whether Clause 15, as it relates to “Top Hill”, is inconclusive, incomplete, uncertain and lacks finality. This is the defendant’s *force de resistance*, and in my view, it is unassailable.

[136] The claimant's observation, in cross examination, that finer details of the agreement were left undecided, was quite perceptive. There cannot be a trust without a trustee, and importantly there is no agreement on who the neutral trustee should be or how the trustee would be appointed. The parties agreed that that issue would be left for future agreement. Moreover, the word 'neutral', as a qualifier, adds another layer of agreement which is required.

[137] In the Privy Council judgment of ***Western Broadcasting Services v Edward Seaga*** (2007) 70 WIR 2013, their lordships considered whether a settlement agreement was enforceable in circumstances where the parties were to agree on the wording of an apology, its mode of publication and the number of times it was to be published. The court referred to **Chitty on Contracts** 29th ed. (2004) para. 2-110 and considered that although the parties may reach agreement on essential matters of principle, if important points are left unsettled, their agreement would be incomplete (p.221)

[138] The Privy Council also said that in some cases, it may be that the parties reached an enforceable agreement on part of the matters in issue leaving the rest to be determined by further agreement or the process of litigation. In other cases, the remaining details can be supplied by the operation of law or by invoking the standard of reasonableness.

[139] Future agreement on a "neutral trustee" cannot be cured by inference or even litigation. 'Neutral', as between the parties, is so subjective to them that it would be impracticable for it to be left to a draftsman or reasonable inference as to who would be neutral and how to determine neutrality. Such a *lucana*, as the Privy Council observed in ***Western Broadcasting Services,*** would be impossible to fill without a future agreement of the parties.

[140] I do not consider the naming of a neutral trustee a peripheral matter but instead an essential part of the agreement. This aspect is so crucial that a failure to settle its "terms" causes the agreement to fail for uncertainty.

[141] In all the circumstances, I find that the third order of the Connecticut court and the instruments that were settled pursuant to it, are unenforceable in Jamaica because the court had no jurisdiction over the defendant or the land in Jamaica. I

also find that clause 15 of the Separation Agreement, as it relates to “Top Hill”, cannot be enforced in Jamaica, independent of the Connecticut order, because that clause is incomplete and lacks certainty.

[142] Orders refused. Costs to the defendant to be taxed if not agreed.