[2019] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 32/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN CARLENE MILLER APPELLANT

AND HAROLD MILLER RESPONDENT

Mrs Symone Mayhew and Ms Kimberley Morris instructed by Symone M Mayhew for the appellant

Dr Leighton Jackson, Ms Marjorie Shaw and Miss Terry-Joy Stephenson instructed by Brown & Shaw for the respondent

2, 3, 4, 5, 18 May 2017 and 23 September 2019

BROOKS JA

[1] Two main questions arise in this case. The first is whether an order made by a court in Connecticut in the United States of America (the United States) may properly alter the ownership of title to real property in Jamaica. The second is whether an agreement made by the parties, while under the jurisdiction of the Connecticut court, is enforceable in Jamaica. Before analysing those questions, it is necessary to introduce the parties to this appeal and set out the dispute that brought them to the court.

The factual background

[2] Mrs Carlene Miller and Mr Harold Miller are both Jamaicans, but lived in the United States for many years, where they married and had children together. During their marriage, they acquired four parcels of real estate in that country, and two in Jamaica.

[3] On 1 December 2008, they appeared in the Superior Court of Connecticut (the Connecticut court) in respect of the dissolution of their marriage. At that time, Mrs Miller was living in Georgia, in the United States, and Mr Miller was living in Jamaica. As part of the dissolution exercise, they signed a separation agreement (the separation agreement). The Connecticut court, in its dissolution order (the first order), given that day, recognised the separation agreement.

[4] The separation agreement dealt with, among other things, the maintenance of their children and the ownership of five of the six items of real property. Clause 15 of the separation agreement concerned the real property. That clause stipulated that three of the four properties in the United States be transferred to Mrs Miller and the fourth to Mr Miller. The only Jamaican property mentioned in the separation agreement is one situated at Top Hill in the parish of Saint Elizabeth (Top Hill). Clause 15 stipulated that Top Hill be transferred into the name of trustees on trust for the children of the marriage, who were then minors. The clause also spoke to other issues with regard to Top Hill.

[5] The sixth property is also in Jamaica. It has been the subject of other litigation between the parties (see **Miller and Another v Miller and Another** [2015] JMCA Civ 42).

[6] After the dissolution of the marriage, Mrs Miller became dissatisfied with the pace with which the Top Hill issue was proceeding. In July 2009, apparently at her instance, the Connecticut court ordered (the second order) that Mr Miller execute a trust deed, in conformity with the separation agreement. Mr Miller did not comply with the second order, and, in October 2009, Mrs Miller secured an order (the third order), from the Connecticut court, that Top Hill be transferred to a trust.

[7] Mrs Miller had a trust deed (the trust deed) drawn up, pursuant to the third order. She signed it, and, on 18 December 2009, Judge Fischer of the Connecticut court signed it, in place of Mr Miller. Judge Fischer also signed other documents (the transfer documents), again in place of Mr Miller, purporting to transfer Top Hill to the trustee, Ms Kadian Rodwell, who is one of Mrs Miller's friends.

[8] Mrs Miller, thereafter, sought to have the title ownership in Top Hill transferred in accordance with the trust deed. In the absence of Mr Miller's signature, the relevant authorities in Jamaica refused to recognise the transfer documents. It should be noted that only a portion of Top Hill is under the operation of the Registration of Titles Act. The refusals were therefore by the Registrar of Titles and the Island Record Office.

[9] On 27 November 2012, Mrs Miller filed a fixed date claim in the Supreme Court asking for orders that largely covered the ground which was the subject of the third order. She applied that:

(a) Ms Rodwell be appointed trustee for "the purposes of the trust provided for in the [s]eparation [a]greement";

(b) Ms Rodwell be granted "the powers and [be subjected to the] obligations set out in the [trust deed]";

(c) Mr Miller execute and deliver the documents (including the certificate of title) necessary to have Top Hill transferred to the trustee;

(d) Mr Miller account for and pay over income from Top Hill from 1 December 2009;

(e) Mr Miller pays the costs of the application.

The findings by the learned judge

[10] In December 2014, the application came on for hearing before a judge of the Supreme Court. The learned judge heard evidence from both Mrs Miller and Mr Miller, and submissions from counsel representing each. On 13 February 2015, she dismissed Mrs Miller's claim.

[11] In her written judgment, the learned judge recognised that there was a general principle that normally, a court cannot properly exercise jurisdiction over the title to, or

the right to possession of, real property in a foreign country. The principle is known as the Moçambique rule (from **The British South Africa Co v Companhia de Moçambique and Others** [1893] AC 602). She also acknowledged that there are exceptions to the Moçambique rule. The learned judge, at paragraph [48] of her judgment, identified several issues for her determination. She, thereafter, made the following findings:

(a) the separation agreement is personal between Mr and Mrs Miller, and personal agreements constitute one of the exceptions (the *in personam* exception) to the Moçambique rule;

(b) the second order was overtaken by the third order;

(c) the third order is also personal between the parties, since it:

  (i) seeks to enforce Mr Miller's undertaking contained in the separation agreement, and

  (ii) did not seek to determine title between the Millers;

(d) the third order, although ostensibly an *in personam* order, could not have been properly made by the Connecticut Court, and therefore was not within that exception to the Moçambique rule in that:

(i) the separation agreement did not give exclusive jurisdiction over Top Hill to the Connecticut court to make such an order; and

(ii) Mr Miller did not submit himself to the exclusive jurisdiction of the Connecticut court to enable it to properly make such an order, binding him;

(e) the second exception to the Moçambique rule (concerning proceedings that involved the administration of an estate or an existing trust) does not apply to this case, as the Connecticut court was not engaged in such proceedings involving the Millers;

(f) the third order and the transfer documents signed by Judge Fischer, pursuant to it, are unenforceable in Jamaica, as Mr Miller:

(i) did not reside in Connecticut at the relevant time; and

(ii) did not submit to the jurisdiction of the Connecticut court for those purposes;

(g) clause 15 of the separation agreement requiring the establishing of the trust is otherwise unenforceable,

as important details had been omitted; it therefore fails for uncertainty.

The appeal

[12] The grounds of appeal filed by Mrs Miller are:

> "(a) The learned judge erred when she found that [Mr Miller] did not contract to submit himself to the jurisdiction of the Connecticut Superior Court in relation to the establishment of the Trust over [Top Hill];
>
> (b) The learned judge erred in finding that the two exceptions to the Moçambique principle were not applicable in the case.
>
> (c) The learned judge erred in finding that the [Connecticut court] did not have jurisdiction to make the order establishing the Trust over the property at Top Hill and settling the Trust instruments in relation to the said property.
>
> (d) The learned judge erred in finding that Clause 15 of the Separation Agreement as it relates to Top Hill cannot be enforced independently in Jamaica because the clause is incomplete and lacks certainty.

(e) The learned judge exercised her discretion wrongly in awarding costs to the Defendant."

[13] Grounds (a), (b) and (c) will be considered together, and, thereafter, ground (d). Ground (e) was abandoned.

Ground (a) - The learned judge erred when she found that [Mr Miller] did not contract to submit himself to the jurisdiction of the Connecticut Superior Court in relation to the establishment of the Trust over [Top Hill]

Ground (b) - The learned judge erred in finding that the two exceptions to the Moçambique principle were not applicable in the case

Ground (c) - The learned judge erred in finding that the [Connecticut court] did not have jurisdiction to make the order establishing the Trust over the property at Top Hill and settling the Trust instruments in relation to the said property

[14] These issues, in large measure, turn on the jurisdiction of the Connecticut court to make the orders that it did.

[15] Mrs Mayhew, on behalf of Mrs Miller, submitted that the learned judge was correct in finding that the separation agreement constituted a binding contract between the parties. Learned counsel submitted that, in submitting to the jurisdiction of the Connecticut court for the purposes of the first order, and the first order having specifically referred to the separation agreement, Mr Miller could not properly, thereafter, dispute the jurisdiction of the Connecticut court in respect of a related issue. There could be no doubt, Mrs Mayhew argued, that the second and third orders were in respect of an issue related to the first order.

[16] The only issue remaining thereafter, on Mrs Mayhew's submission, was whether the proper procedure had been followed in the Connecticut court in arriving at the third order. Mrs Mayhew pointed out that, although the learned judge expressed some disquiet about the issue of service, she did accept that there was no impropriety in respect of the process in the Connecticut court.

[17] Where the learned judge fell into error, learned counsel submitted, is when she found that Mr Miller had not submitted to the jurisdiction of the Connecticut court for the purposes of the third order.

[18] Mrs Mayhew argued that the learned judge also fell into error in finding that the failure of the separation agreement to bestow exclusive jurisdiction to the Connecticut court, allowed Mr Miller to dispute that court's jurisdiction.

[19] In written submissions, filed on behalf of Mr Miller, the stance was taken that the learned judge was correct in rejecting Mrs Miller's claim. The submissions in respect of these grounds, however, were not all in harmony with the learned judge's findings. Some sought to support the learned judge's decision on bases that were different from those on which she relied. In the absence of a counter-notice of appeal, those submissions could not have been entertained. An application was made, during the hearing of the appeal, to allow the filing of a counter-notice of appeal. The application was refused, as having been made too late in the proceedings.

[20] The submissions that were properly made, with regard to these grounds, were, firstly, to the effect that the Connecticut court made an order that did not fall within

any of the exceptions to the Moçambique rule. The reason for the exclusion of the *in personam* exception, was, according to the submission, that Mr Miller was not bound by the separation agreement, which was too uncertain.

[21] The second relevant submission was made by Dr Jackson, on behalf of Mr Miller. Learned counsel, very importantly, pointed out that Mrs Miller's fixed date claim did not seek to enforce the orders of the Connecticut court.

[22] The submissions advanced on behalf of Mr Miller, may be more appropriately addressed during the assessment of ground (d), in respect of which Dr Jackson advanced comprehensive oral arguments.

[23] The learned editors of Halsbury's Laws of England, Volume 19 (2011), at paragraphs 690 and 692, set out the basic Moçambique rule, and the exception that is relevant to this case. The learned editors state:

> "690. Exclusion of jurisdiction at common law.
>
> At common law, it remains the case that an English court cannot entertain any action for a declaration as to title to foreign immovables, or for possession of such immovables or for injunctions having a similar effect. The same rule applies to other proceedings the primary question in which is one of title to foreign immovables, such as an action for an account of the proceeds of foreign land, title to which is in dispute, for the enforcement of covenants for quiet enjoyment of foreign land, or for the partition of such land.
>
> **Where the proceedings are not principally concerned with questions of title to, or possession of, immovable property, the usual rules as to jurisdiction *in personam* apply**."

> "692. Equitable jurisdiction in personam.
>
> While the jurisdiction to deal with foreign immovables is generally denied to an English court where the issue is characterised as relating to a right in *rem*, **equity can assist where a personal obligation relating to a foreign immovable is held to affect a person's conscience**. Where the English court has general jurisdiction over a person and there exists between the parties a personal obligation or equity which does not depend for its existence on the law of the location ('*lex situs*') of the immovable property but arises out of contract, or trust, or from fraud or other unconscionable conduct, the court may exercise jurisdiction *in personam*." (Emphasis supplied)

That learning is accepted as being correct and applicable to Jamaican law.

[24] The emphasised portions of those extracts, set out the bases on which the learned judge specifically proceeded in order to find that the *in personam* exception applied to clause 15 of the separation agreement and to the first order. She also found that it would have applied to the third order, had Mr Miller been subject to the jurisdiction of the Connecticut court. She found, however, that he was not.

[25] The learned judge is correct in finding that the separation agreement and the various orders of the Connecticut court were, at least in form, capable of falling within the *in personam* exception to the Moçambique rule. The orders sought to enforce a personal undertaking by Mr Miller.

[26] The next issue for this discussion is that of the validity of the jurisdiction of the Connecticut court at the times that it made those orders.

[27] Mrs Mayhew commendably expounded the law relevant to the issue of jurisdiction. Learned counsel cited the cases of **Emanuel and Others v Symon** [1908] 1 KB 302, **Murthy and another v Sivajothi and others** [1999] 1 All ER 721 and **Whyte v Whyte** [2005] EWCA Civ 858, in support of her submissions.

[28] Buckley LJ, in **Emanuel v Symon**, set out the basic law concerning submission to the jurisdiction of a foreign court. He said, in part, at page 309:

> "...In actions *in personam* there are five cases in which the 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 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**." (Emphasis supplied)

[29] The relevant extension to that principle of law is that where a party agrees to submit to the jurisdiction of a foreign court, he, thereafter, cannot properly contest the orders of that court on the basis that it lacked jurisdiction. Evans LJ, in **Murthy v Sivajothi**, explained the principle at page 730:

> "...But when the defendant has submitted to the jurisdiction of the foreign court, then he cannot be heard to say that the court has no jurisdiction to decide the issues raised by the proceedings in which the submission was made...."

[30] The court, in **Murthy v Sivajothi**, also stated that the submission to jurisdiction affected, not only the cause in which the submission was expressly made, but also all

other related causes. The reach of that submission to other causes is a matter of fact and degree. Evans LJ further said at page 730:

> "...The remaining question is what the scope of those issues was....[I]n my judgment, it is impossible to say that claims which are directly concerned with same subject matter should not [be taken to be within the scope of the submission]....**By accepting the court's jurisdiction in relation to the original claim, in proceedings where the potential for a contribution or indemnity claim exists, the defendant clearly has accepted its jurisdiction in relation to those other consequential claims also.** It is not unfair to him to hold that he has done so.
>
> …Whether a particular claim should be regarded as related in this sense must always be a question of fact and degree.
>
> ...." (Emphasis supplied)

[31] In the present case, it is incorrect to say that Mr Miller did not submit to the jurisdiction of the Connecticut court for the purposes of the second and third orders. Paragraph 22 of the separation agreement states:

> "JURISDICTION:
>
> Each of the parties hereto hereby irrevocably [consents] 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." (Emphasis supplied)

It is plain that the second and third orders arise out of, and are related to, the agreement. Mr Miller's arguments to the contrary are wholly misconceived.

[32] The cases of **Murthy v Sivajothi** and **Whyte v Whyte** are both applicable to the present case. In **Whyte**, the parties submitted to a decree of dissolution of their marriage by a Texan court. The decree included provisions regarding the care and custody of their daughter and provided for penalties for breaches of the provisions. The mother, thereafter, while outside of the jurisdiction of the Texan court, breached the provisions regarding custody. The breach caused the father to incur expense in recovering the child. He obtained a judgment in the Texan court for damages arising from the breach, but the mother did not appear in those proceedings. He sought to enforce the Texan judgment in London, where the mother had property. The English Court of Appeal ruled that since the mother had submitted to the jurisdiction of the Texan court for the purposes of the divorce and the custody of the child, she was subject to the Texan court for the purposes of the judgment that it had entered against her. The English Court of Appeal held that English courts, therefore, did have jurisdiction to consider the application for enforcement.

[33] In this case, the learned judge reasoned, at paragraphs [106]-[110] of her judgment, that Mr Miller had not submitted to the jurisdiction of the Connecticut court because the separation agreement:

(a) did not state that the parties had submitted to that jurisdiction for all disputes;

(b) did not stipulate that the Connecticut court would have had exclusive jurisdiction over the issues raised in the separation agreement; and

(c) in stating that certain matters would be dealt with by Jamaican attorneys-at-law, exemplified the parties' intention that those matters would be dealt with in Jamaica.

[34] The learned judge is, with respect, in error in this reasoning. The submission to the jurisdiction of a court, in earlier proceedings, "for all disputes", and the granting of "exclusive jurisdiction" to that court, are not essentials for deciding the question of whether the parties are subject to that court's jurisdiction in subsequent proceedings. The essential issue is whether the subject matter of that court's subsequent order, is so closely related to the subject of the earlier proceedings, that the parties must be held to be bound by the subsequent order.

[35] In Dicey Morris and Collins on The Conflict of Laws, 14th Edition, the learned editors address the issue of the granting of non-exclusive jurisdiction. They state at paragraph 12-093:

> "Where the court finds that the agreement confers non-exclusive jurisdiction on the designated court (whether England or a foreign court), it is more difficult to argue that the institution of proceedings is a breach of contract; and on that footing an application for a stay of proceedings in favour of that foreign court will be determined on the basis of *Spiliada Maritime Corp v Cansulex Ltd* [[1987] AC 460 in which it was said that injustice could not be said to be done if a party were in effect compelled to accept one of the well-recognised systems of procedural law in the appropriate foreign forum]. **But the fact that a court was contractually chosen by the parties will be taken as clear evidence that it is an available forum, and that, in principle at least, it is not open to either party to**

> **object to the exercise of its jurisdiction at least on the grounds which should have been foreseeable when the agreement was made**." (Emphasis supplied)

That reasoning is respectfully accepted as being correct.

[36] **First City Capital Ltd v Lupul** [1987] CanLII 983 (SK CA); [1987] 44 DLR (4th) 301, is also authority for these purposes, for the proposition that the jurisdiction bestowed by the parties, in their agreement, need not be exclusive. In that case, an agreement for the lease of equipment was deemed to have been made in Alberta, Canada, and subject to the court of that province. The agreement also stipulated that "nothing herein contained shall prevent the Lessor from proceeding at its election against the [guarantor of the lessee] in the Courts of any other province or country". The court in Alberta was held to have had jurisdiction despite the fact that the guarantor was not domiciled in that province and had not appeared in the lessor's claim that was based on the agreement.

[37] Based on that analysis, it must be stated that the learned judge was in error to have found that the absence of provisions:

(a) bestowing exclusive jurisdiction on the Connecticut court; and

(b) stipulating that that court had jurisdiction in respect of all disputes,

deprived the Connecticut court of jurisdiction to have made the third order.

[38] In this jurisdiction, however, the recognition of the order will in part, depend on the analysis of ground (d).

Ground (d) - The learned judge erred in finding that Clause 15 of the Separation Agreement as it relates to Top Hill cannot be enforced independently in Jamaica because the clause is incomplete and lacks certainty

[39] Although Mrs Miller's fixed date claim did not, in its terms, seek an enforcement of the orders of the Connecticut court, the matter of enforcement was extensively argued before and assessed by the learned judge. She treated the issue of the enforcement of clause 15 of the separation agreement as a discrete issue. Accordingly, she said at paragraph 12 of her judgment:

> "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, [Mrs Miller], by way of an Amended Fixed Date Claim Form, dated 27th November 2012, seeks orders as follows:
>
> ..." (Emphasis supplied)

[40] The learned judge, in finding that clause 15 of the separation agreement was too uncertain to be enforced, relied on the decision of their Lordships in **Western Broadcasting Services v Edward Seaga** [2007] UKPC 19; (2007) 70 WIR 213. Using guidance that she said she derived from that case, she focussed on the aspect of clause 15 that required the appointment of a "neutral trustee". She found that the failure to name a trustee in the clause rendered it too uncertain to be enforced. She said at paragraph [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."

[41] The issue of the enforcement of the separation agreement was also treated as a discrete issue by Mrs Mayhew in her submissions before this court. Learned counsel argued that the learned judge erred in her finding on the issue of certainty and was also in error in relying on the decision of the Privy Council in **Western Broadcasting v Seaga**.

[42] Dr Jackson, in oral submissions, mainly used a different tack from that used in the written submissions that were filed on behalf of Mr Miller. Learned counsel did not dwell on the issue of the enforceability of the orders of the Connecticut court on a conflict of laws basis. He rather approached the case by submitting that:

(a) Mrs Miller, in her fixed date claim, is not seeking to enforce the third order of the Connecticut court; she has, instead, sought to duplicate the third order;

(b) she is, therefore, as it relates to Top Hill, seeking to enforce clause 15 of the separation agreement, as a contract;

(c) the learned judge was correct in finding that clause 15, as it relates to Top Hill, cannot be enforced independently in Jamaica because the clause is incomplete and lacks certainty on critical issues;

(d) the uncertainty meant that Mr Miller could not have been bound by the relevant portion of clause 15;

(e) the Connecticut court was therefore wrong in making the second and third orders on the basis that Mr Miller was so bound; and

(f) the third order, being improperly made, cannot be enforced in this country.

[43] Dr Jackson submitted that, in respect of Top Hill, clause 15 was an agreement to agree. He contended that the case was on all fours with the decision in **Western Broadcasting v Seaga**. Learned counsel pointed out that no principles of the law of trust applies to this case because no trust had been created. Learned counsel argued that when the agreed date arrived for handing over the property to the trustee, the absence of a trustee, at that time, meant that the contract was thereafter unenforceable. Equity, he argued, will not complete an incomplete gift. He relied on a number of cases, including **Barbudev v Eurocom Cable Management Bulgaria** EOOD and others [2012] 2 All ER (Comm) 963, **Total Gas Marketing Ltd v Arco British Ltd and others** [1998] All ER (D) 227 and **Re Lysaght** [1966] 1 Ch 191.

[44] Dr Jackson also submitted that it was indicative of the uncertain nature of the clause relating to Top Hill, that the parties had different impressions as to the effect of the trust. He based his submission on the evidence that was adduced from each of them before the learned judge.

[45] Mrs Mayhew, in reply, accepted that the enforcement of the order of the Connecticut court had not been specifically sought. She asked this court to allow an amendment of the fixed date claim form to allow for that result. The application was also refused as being too late in the proceedings.

[46] Learned counsel submitted that the unspecified aspects of the agreement, namely, the naming of the trustee and the particularising of the powers of the trustee, were not matters that would cause the agreement to fail for uncertainty. Mrs Mayhew pointed out that clause 15 was just one of a number of matters dealt with in the separation agreement. Learned counsel submitted that the unspecified details were such that they could be ascertained by further agreement between the parties or, failing agreement, by litigation, as was done in the Connecticut court.

[47] In analysing these competing arguments, it is necessary to set out the relevant framework of the separation agreement. The parties crafted the separation agreement in order to avoid a trial in the Connecticut court (see page 139 of the record of appeal). The premises on which the separation agreement was based, are set out at page 26 of the record of appeal and stated, in part, as follows:

> "...
>
> **Whereas**, the parties have concluded that...their marriage [should] be dissolved; and
>
> **Whereas**, an action for dissolution of their marriage is pending...; and
>
> **Whereas**, the parties desire to enter into an agreement settling all of the claims and demands which [each one] may 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, [Mr Miller] and [Mrs Miller] 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...

NOW THEREFORE, in consideration of the mutual promises, covenants and agreements contained, it is hereby mutually agreed by and between the parties as follows:

..."

[48] There are 22 clauses in that agreement. They deal with a wide variety of matters including the custody, health, education and maintenance of the children, alimony, pension, debts, bank accounts, counsel's fees, personal property and real property. In clause 15, as mentioned before, the real property is assigned between the parties; either to one or to the other. Top Hill was dealt with differently. The relevant part of clause 15 states:

"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 [unregistered land with] the house and the [registered land].

The parties shall agree upon a neutral trustee. [Mr Miller] shall have the right to occupy the upstairs apartment for a period of one year until November 30, 2009. Upon vacating the property, [Mr Miller] shall not remove fixtures or appliances. The current 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 the legal fees and costs associated with the transfers to effect the trust." (Emphasis supplied)

[49] Clause 18 is also a relevant clause for these purposes. It states:

"**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 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." (Bold type and underlining as in original)

[50] Dr Jackson's submissions, in respect of the divergent impression that the parties held concerning the separation agreement, are based on an incorrect procedure that the learned judge allowed to be adopted before her. It was wrong for the learned judge to have allowed that evidence to have been adduced. The document spoke for itself, as to the establishment of a trust, and oral evidence should not have been allowed in that regard (see **Lowe v National Insurance Bank of Jamaica** [2008] UKPC 26). In **Lowe v National Insurance Bank of Jamaica**, their Lordships in the Privy Council, at paragraph 8 of their opinion, cited the word "hypothecation" as "a word well known in the legal lexicon". They rejected an attempt to give a different construction to the word. In similar manner, Mr Miller's attempt, before the learned judge, to re-define the term "trust" should be rejected.

[51] This is especially so as each party explained in testimony, at the dissolution hearing in the Connecticut court, that they fully understood the document and that it had been explained to them by their respective attorneys-at-law. They testified as to that understanding. Mrs Miller, is recorded, at pages 119-120 of the record of appeal, as having testified in the Connecticut Court, in part, as follows:

> "…
>
> Q Now, the two of you own a house that sits on a lot in an adjacent lot there where there are fruit trees in Top Hill…Correct?
>
> A Correct
>
> Q. Okay. And the – that property, at least the building on that property, consists of a two-apartment building. Correct.
>
> A. Correct
>
> Q Now, the two of you have agreed to transfer that property to a trust for the benefit of your children?
>
> A That's correct.
>
> Q And you're going to agree upon a neutral trustee. Correct?
>
> A Correct.
>
> …
>
> Q And we spent a great deal of time last evening talking to Mr. Powell [Mrs Miller's attorney-at-law in Jamaica] about how we're going to effect that trust and how we're going to set that up. Correct?
>
> A That's correct
>
> …"

[52] Mr Miller, is recorded as having testified on the issue, in response to questions from his attorney-at-law, Mr Lyle, in the Connecticut Court. He testified, in part, at pages 137-138 of the record of appeal, as follows:

> "…
>
> Mr. Lyle: And again we met with Mr. Miller's -- Mrs Miller's counsel, Mrs. Miller, and her attorney, Mr. Powell, from Jamaica, on Sunday for a considerable period of time, in order to review the separation agreement and offer comments and objections that we had to the original proposed agreement. Is that correct?
>
> [Mr Miller]: That's correct
>
> Mr. Lyle: And, after those discussions on Saturday, as well as Sunday, at some point in the late evening on Sunday, we arrived at an agreement, which is being offered for the Court today to be made final orders in connection with this case. Is that your understanding?
>
> [Mr Miller]: That's correct.
>
> …"

Mr Miller is recorded, in part, at page 140 of the record of appeal as further testifying:

> "…
>
> Mr. Lyle: And you then understand that this agreement then concerns those properties here in the United States of America, which you either have a title claim to or an equitable claim to, and one property in Jamaica, which is a house and a continuous [sic] lot located in Top Hill, which you and your wife have title issues to. Is that correct?
>
> [Mr Miller]: That's correct.
>
> …"

Mr Miller is further recorded, in part, at pages 148-150 of the record of appeal as also testifying:

> "…
>
> Mr. Lyle: …As to Top Hill, St. Elizabeth, you understand that the property consists of a quarter-acre, more or less, lot with a house on it. You currently reside in the second floor of that house. Is that correct?
>
> [Mr Miller]: That's correct. …
>
> Mr. Lyle: And that property, as well as an adjacent property, which is currently encumbered by some fruit trees but no building, will be conveyed into trusts for your three minor children of this marriage. Is that correct?
>
> [Mr Miller]: That's correct.
>
> Mr. Lyle: And that you understand that…the second floor…
>
> [Mr Miller]: The first floor,
>
> Mr. Lyle: I'm sorry, the first floor. – will be rented out at a fair market value in Jamaica, and the rental proceeds shall be paid into the trust.
>
> And you understand that the money that's paid to the trust for the rental will be used to pay the legal fees and costs associated with creating the trust, getting a TRN number for the trust, and having any other documents that need to be effectuated that puts the trust in existence and determines who manages the trust. Is that your understanding?
>
> [Mr Miller]: Yes. …
>
> …"

[53] The testimony before the learned judge in the court below would have been purely self-serving, bearing in mind the passage of time and the subsequent developments.

[54] The main difficulty with Mr Miller's stance, as it has been advocated by Dr Jackson, is that he seeks to treat the portion of clause 15, which deals with Top Hill, as a discrete agreement, and not, as it clearly is, an integral part of a whole bundle of rights and obligations that the parties have divided between themselves and settled upon.

[55] This is not a case of a crucial aspect of an agreement being left undecided and, consequently, the entire agreement fails. Nor is it a case where the parties have not each given consideration for what they have respectively received or have directed should obtain. Mr Miller seeks to avoid performing an obligation, to which he committed himself, and for which he received consideration. The consideration is, admittedly, not isolated to a particular act or gift by Mrs Miller. It is woven into the tapestry of the separation agreement.

[56] Critically, the separation agreement is not merely one, which is to be executed; it has been carried out, albeit with complaints of non-compliance, on individual facets, from either side. The children have grown, they have been cared for and the parties have otherwise moved on, in respect of their other property transactions.

[57] It is for those reasons that the cases cited by Dr Jackson are inapplicable to this case. **Western Broadcasting v Seaga** is distinguishable from the Millers' case. In

Western Broadcasting v Seaga, the proposed agreement was the settlement of a dispute over a case of defamation. The amount of monetary compensation and the method of paying it had been resolved, but the form of apology, the number of times for the publication of the apology, and the persons who would be party to the settlement were matters left unsettled. The Privy Council found that those were critical issues, which prevented the conclusion of an agreement.

[58] Whereas the matters left undecided in that case were integral to the conclusion of the agreement between those parties, that, for the reasons set out above, is not the situation in the Millers' case.

[59] **In re Lysaght**, also does not support Mr Miller's case. By her will, Mrs Lysaght sought to create a trust to benefit medical students. The Royal College of Surgeons of England, which was the named trustee, refused to accept the bequest because it was subject to a condition that excluded Jews and Catholics. The court held that the bequest was of a generally charitable nature and that it was possible to excise the offending condition.

[60] In similar manner, the contract in this case plainly contemplated the later creation of a trust. The settlement agreement did not purport to create a trust. The absence of a named trustee in the agreement did not destroy the main intention of the parties. The uncertain aspect of the contract was capable of being made certain. That certainty could have been achieved by either further agreement between the parties, as guided by the separation agreement, or, failing agreement, by litigation.

[61] **Total Gas Marketing Ltd v Arco British Ltd and others** is also distinguishable from the present case. That case involved an agreement, which contained a condition that the obligation of the intended buyer of gas was conditional on the intended suppliers having received a specific allocation by a certain date. The date passed without the allocation having been made. The House of Lords held that the buyer was not bound by the agreement. There were no other aspects of the agreement, as in the Millers' case, between the parties that would have made it untenable for the buyer to seek to avoid the contract.

[62] **Barbudev v Eurocom Cable Management Bulgaria EOOD and others** is similarly, distinguishable. In that case, although the parties did have contractual relations in which they carried out a separate transaction involving the sale of shares, their "side letter", associated with that contract, was held to be an agreement to agree. It was, therefore, unenforceable. The relevant portion of the side letter provided that as soon as "reasonably practicable" after the signing of the share purchase agreement, the purchaser would offer the vendor "the opportunity to invest in the Purchaser on the terms to be agreed" and set out in an investment and shareholder's agreement (ISA). The letter stated that the purchaser agreed to negotiate those terms in "good faith" with the vendor. The headnote to the report shows that the Court of Appeal of England found that the terms of the side letter:

> "…was not the language of a binding commitment and no amount of taking account of the commercial context and the [vendor's] concerns and aims could make it so."

The headnote went on to state:

> "Moreover, the offer to negotiate in good faith made it clear that the terms of the ISA were not agreed. Even if that conclusion was wrong, the side letter could not be invoked as a complete and enforceable agreement because the essential terms for what the parties contemplated, viz an investment and shareholder agreement, were not dealt with and it was therefore not sufficiently certain to be an enforceable contract…"

[63] It is to be noted, however, that their Lordships, in **Western Broadcasting v Seaga**, accepted that there were cases, in which aspects of an agreement that had been left unsettled, could be later resolved. They stated at paragraph [19] of their judgment:

> "It is trite law that although parties may reach agreement on essential matters of principle, if important points are left unsettled their agreement will be incomplete: *Chitty on Contracts* (29th edn, 2004) para 2–110. **In some cases it can properly be said that the parties have 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**: see such cases as *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 WLR 1378....In others the remaining details can be supplied by the operation of law or by invoking the standard of reasonableness."

Their Lordships reiterated the point at paragraph [21] of their judgment, saying, in part:

> "There may be cases in which the matter remaining to be negotiated is of such subsidiary importance as not to negative the intention of the parties to be bound by the more significant terms to which they have agreed: *Chitty on Contracts* para 2–127…."

[64] Their Lordships' guidance may be applied to the present case. As has been stated above, by the separation agreement, Mr Miller and Mrs Miller entered into a mutual contract to create a trust. Each provided consideration to the other for the performance of the terms of that contract. Each of them is personally bound to perform the terms of the contract and either one may seek to enforce the performance, by the other, of those terms.

[65] The aspect of the agreement that has not been settled, namely, the naming of the trustees and the identification of their powers, are capable of being settled. If the parties are unable to agree those issues, between themselves, the impasse may be resolved by an application to the court.

[66] Based on that analysis, it must be found that the learned judge was in error to have found that the relevant part of clause 15 was void for uncertainty. Accordingly, ground (d) should succeed.

[67] The discussion of this issue may be concluded as follows:

1. although the separation agreement did not create a trust:
    a. it is open to Mrs Miller, who is a party to the contract to create a trust, to seek to enforce that agreement (see **Cannon v Hartley** [1949] Ch 213); and
    b. the court may grant specific performance of an agreement to create a trust, where the person

claiming that order has provided consideration for the promise to settle the property (see **Pullen v Koe** [1913] 1 Ch 9);

2. where parties have reached an enforceable agreement on a portion of the matters in issue, other issues, depending on the case, may be finalised either by further agreement or through the process of litigation (see **Western Broadcasting v Seaga**);

Summary and conclusion

[68] The learned judge, in treating with the enforcement of the separation agreement, stated that the Supreme Court had the authority, in exercising its equitable jurisdiction, to enforce the separation agreement in respect of Top Hill. She is correct in that regard. The importance of that finding, along with the findings made in this judgment, resonates with what occurred in the Connecticut court.

[69] The parties agreed to, but were not able to settle a trust document. Mrs Miller sought the intervention of the Connecticut court. It ordered that the trust deed be created and, in due time it authorised a judge to sign the trust deed in place of Mr Miller. That is the process, which their Lordships, in **Western Broadcasting v Seaga**, envisaged. The trust deed made certain the aspects that the separation agreement did not finalise. It is unnecessary, therefore, to create a new trust document. What is now required is for the trust deed to be given effect.

[70] The learned judge was wrong not to have recognised the validity of the orders made by the Connecticut court. Mr Miller was subject to the jurisdiction of the Connecticut court when it made each of the three orders.

[71] Mrs Miller's fixed date claim, however, did not seek to enforce the orders of the Connecticut court. The trust deed is not an order of the Connecticut court. It is a document of the parties, but has been signed by Judge Fischer on behalf of Mr Miller. Although it has been created without Mr Miller's direct input, it still binds him.

[72] The second order sought by Mrs Miller in her fixed date claim is for "[a]n order that the trustee KADIAN RODWELL have the powers and obligations set out in Trust Deed dated November 30, 2009". It is sufficient to have allowed the Supreme Court to have made orders enforcing the trust deed.

[73] The learned judge was also in error in finding that the Supreme Court was precluded from granting orders that would give effect to the parties' agreement in respect of Top Hill. The portion of the separation agreement that dealt with Top Hill was an integral part of that agreement. It should not be treated as if it was independent of all the other aspects of the separation agreement. The absence of a named trustee, and the details of the powers of the trustee, cannot nullify that portion. The deficiencies are capable of being corrected. As indicated above, it may be done, either by the agreement of the parties, or, failing agreement, by an order of the court.

[74] The Connecticut court followed the latter process. Judge Fischer signed on behalf of Mr Miller. The trust deed is the act of the parties and should be given effect. By

extension, the transfer documents signed by Judge Fischer are also the acts of Mr Miller. They should be ordered to be recognised by the Registrar of Titles and the Island Record Office.

[75] The orders that should be made in this appeal are:

1. The appeal is allowed.
2. The orders of the learned judge, made herein on 13 February 2015, are set aside.
3. Mr Miller shall, on or before 7 October 2019, deliver to the trustee Kadian Rodwell:
    a. the duplicate certificate of title for all that parcel of land part of Top Hill in the parish of Saint Elizabeth being all the land registered at Volume 1290 Folio 958 of the Register Book of Titles (the registered land); and
    b. all documents of title and conveyance in respect of all that parcel of land containing by estimation 2015 square metres more or less and butting and bounding on the north by the 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 Clyrice Nelson (the unregistered land).

4. The said Kadian Rodwell is hereby authorised to have the title to the said lands, set out above, transferred to and registered in her name upon the trusts set out in the trust deed dated 18 December 2009 and signed on 30 November 2009.

5. The Registrar of Titles is hereby directed to give effect to this order by registering the instrument of transfer, dated 18 December 2009, in respect of the registered land.

6. The Island Record Office is hereby directed to give effect to this order by registering the deed of conveyance, dated 18 December 2009, in respect of the unregistered lands.

7. Each party shall, on or before 7 October 2019, execute and deliver all such documents as are necessary to have the said lands transferred to the trustee.

8. Mr Miller shall, on or before 7 October 2019, account for and pay over to the trustee income from Top Hill from 1 December 2009 to the date of payment.

9. Mr Miller shall pay to Mrs Miller the costs of the appeal and the costs in the court below.

McDONALD-BISHOP JA

[76] I have read in draft the judgment of Brooks JA. I agree with his reasoning, conclusion and the orders that he has proposed. There is nothing that I could usefully add.

SINCLAIR-HAYNES JA

[77] I too have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing further to add.

BROOKS JA

ORDERS:

1. The appeal is allowed.

2. The orders of the learned judge, made herein on 13 February 2015, are set aside.

3. Mr Miller shall, on or before 7 October 2019, deliver to the trustee Kadian Rodwell:

a. the duplicate certificate of title for all that parcel of land part of Top Hill in the parish of Saint Elizabeth being all the land registered at Volume 1290 Folio 958 of the Register Book of Titles (the registered land); and

b. all documents of title and conveyance in respect of all that parcel of land containing by estimation 2015 square metres more or less and butting and bounding on the north by the 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 Clyrice Nelson (the unregistered land).

4. The said Kadian Rodwell is hereby authorised to have the title to the said lands, set out above, transferred to and registered in her name upon the trusts set out in the trust deed dated 18 December 2009 and signed on 30 November 2009.

5. The Registrar of Titles is hereby directed to give effect to this order by registering the instrument of transfer, dated 18 December 2009, in respect of the registered land.

6. The Island Record Office is hereby directed to give effect to this order by registering the deed of conveyance, dated 18 December 2009, in respect of the unregistered lands.

7. Each party shall, on or before 7 October 2019, execute and deliver all such documents as are necessary to have the said lands transferred to the trustee.

8. Mr Miller shall, on or before 7 October 2019, account for and pay over to the trustee income from Top Hill from 1 December 2009 to the date of payment.

9. Mr Miller shall pay to Mrs Miller the costs of the appeal and the costs in the court below.