

NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M-093 OF 1995

BETWEEN	VERONICA MELVILLE	PLAINTIFF
A N D	DANIEL MELVILLE	1ST DEFENDANT
A N D	CHUKKA COVE FARMS LIMITED	2ND DEFENDANT
A N D	MELVILLE ENTERPRISES LIMITED	3RD DEFENDANT

R. B. Manderson-Jones, Patrick Foster and  
Judith Harrison for the Plaintiff,  
instructed by Clinton Hart & Co.

David Henry and Winsome Marsh for  
the Defendants, instructed by Nunes,  
Scholefield, DeLeon & Co.

Heard: April 24, 25, 26, 27,  
May 1, 2, 3, 4, and 12, 1995.

REASONS FOR JUDGMENT

Reckord J.

On the 12th of May 1995, I delivered judgment in this case and promised to put my reasons in writing. This I do now.

The plaintiff in this action is the former wife of the 1st defendant who is the Chairman of the Board of Directors of the 2nd and 3rd defendants, two small private family companies.

Up to the time when the action was filed the plaintiff resided in Villa No. 1 at Chukka Cove in the parish of St. Ann. The property on which this villa is situate is owned by the 2nd defendant.

This action was began by Originating Summons and from the affidavit evidence presented, it appears that the plaintiff was living in this villa from 1987. The plaintiff and the 1st defendant got married in 1989 and occupied the said villa as man and wife. For all intent and purposes this was their matrimonial home.

The marriage broke down and the parties separated in 1992, when the 1st defendant left the villa leaving the plaintiff in sole occupation.

Consequent on the breakdown the parties had discussions concerning a settlement. Following upon these discussions the 1st defendant wrote a letter to the plaintiff dated May 13, 1993 with a proposal which "would represent the terms of the financial aspect of our separation as well as any resultant divorce. It would therefore be in lieu of any maintenance payments or other financial arrangement between us."

The proposal included the following:

1. That they would continue to manage Chukka Cove Limited; that she would continue to occupy the villa as its Manager.

That the 1st defendant would arrange for the plaintiff to control fifty percent (50%) of the shares in the 2nd defendant company for the balance of her life time.

Further discussions took place between the parties and their Attorneys-at-law and it was suggested by the plaintiff's Attorney that the proposal was to be incorporated in three documents, namely, a Property Settlement document, a Management Contract and a Power of Attorney over shares transferred.

In the meantime the 1st defendant had petitioned for divorce and the plaintiff had made a claim for ancillary relief. In keeping with the proposal and at the request of the 1st defendant's Attorney-at-law, the plaintiff withdrew her claim for ancillary relief under the Matrimonial Causes Act and made no claim under the Married Woman's Property Act.

The Management agreement and the Power of Attorney were duly drawn up and executed by the parties. The plaintiff was requested by the 1st defendant and signed a deed that 1st defendant had unrestricted access to the property except Villa No.1 "to which I shall be entitled to to undisturbed possession".

The plaintiff claims that in breach of the agreements, the 2nd defendant, in a letter signed by the 1st defendant, and dated February 23, 1995 purported to terminate her employment as Managing Director with immediate effect. She was to vacate the villa by the 27th of February 1995, and to tender her resignation as a Director of the 2nd defendant company. The reasons given for her dismissal were:

- (i) failure to provide breakdown of expenses in respect of Chukka Cove Villa and,

- (ii) failure to attend meeting summoned by the Chairman.

Based on these, the letter claimed, "it is now clear that you have no intention of co-operating with the Chairman of the Board of Directors in the operation of the enterprise".

Having received this letter the plaintiff fearing that efforts would be made to evict her from the villa which she occupied, took out an Originating Summons in this Court on the 6th of March, 1995 asking for certain declarations and for an order restraining the defendants from interfering with her possession.

In response, the defendant took out a summons to strike out the originating summons as being frivolous or vexatious or otherwise an abuse of the process of the Court. This summons was heard by Mr. Justice Smith and dismissed on the 23rd of March 1995 with costs against the defendants.

Thereafter, the originating summons was set down for hearing. However, before the hearing and obviously smarting from the dismissal of their summons the defendants on the 5th of April, 1995 forcedly evicted the plaintiff from the villa which she had been in undisturbed possession for over eight years on the pretext that her employment had been terminated and she therefore had no right to be there. They had stolen a march on the Court.

The originating summons came before me for hearing on the 24th of April, 1995. Before the plaintiff opened her case, counsel for the defendant applied for an adjournment pending the hearing of the appeal ~~against~~ the judgment of Smith J. In response, counsel for the plaintiff submitted that the application was not bonafide, but was intended to delay the hearing of the summons. No application for stay of proceeding had been filed. Defendant's counsel asked for time to file the judgment of Smith J. This application was refused and I directed the plaintiff's counsel to proceed with the summons.

The amended originating summons dated 6th March, 1995, on which the hearing began before me sought the following:

1. A declaration that the purported termination by the First and Second Defendants of the Plaintiff's employment as Managing Director of Chukka Cove Farm Limited is in breach of the Management Agreement and invalid;

2. A Declaration that the purported termination by the First and Third Defendants of the Power of Attorney granted to the Plaintiff in respect of the portion of the Third defendant's shares in Chukka Cove Farm Limited is invalid and of no effect;
3. A Declaration that the occupation by the Plaintiff of the Villa at Chukka Cove Farms Limited does not come within the terms and scope of the Management Agreement of 24th May, 1994, made between the Second Defendant and the Plaintiff is not governed by the Management Agreement;
4. A declaration that YVONNE VERONICA MELVILLE is and/or is entitled to remain:-
  - (a) Managing Director of the Second Defendant CHUKKA COVE FARMS LIMITED under the terms of a Management Agreement dated 24th May, 1994 notwithstanding the purported termination of employment by letter dated 20th February, 1995, from the Second Defendant to her which is invalid and of no effect for the purpose of terminating her employment as Managing Director under the said Management Agreement;
  - (b) in undisturbed occupation of the Second Defendant's Villa at Chukka Cove, Priory P.A., Saint Ann;
  - (c) in possession of the Power of Attorney dated 24th May, 1994, which was granted to her by the Third Defendant MELVILLE ENTERPRISES LIMITED notwithstanding the purported termination of the power by letter dated 20th February 20, 1995, from the Third Defendant to her consequent on the purported and invalid termination by the Second Defendant of her employment as Managing Director.
5. An Order that the First, Second and Third Defendants be and are hereby restrained by themselves their servants, agents or otherwise howsoever from interfering with the Plaintiff's occupation of the said Villa (No. 1) at Chukka Cove, Priory P.A. in the parish of Saint Ann and with the exercise by her of the said Power of Attorney granted to her on 24th May, 1994, by the Third Defendant MELVILLE ENTERPRISES LIMITED;
6. An Order that the costs of this application be to the Plaintiff to be agreed or taxed."

At this stage Mr. Henry for the defendants indicated he wished to make a preliminary objection. He invited the Court to look at Sections 531 and 532 of the Judicature (Civil Procedure Code) Law. The declaration and Orders sought he said could only be dealt with by reference to substantial issues and facts which were in dispute and ought not to be dealt with on an originating summons but instead on a Writ of Summons.

The objection was over-ruled and Mr. Manderson-Jones opened the plaintiff's case by reading the plaintiff's affidavit dated 6th of March, 1995.

The affidavit of the 1st defendant on behalf of himself and the 2nd and 3rd defendants and dated the 10th of March, 1995 were next read. Mr. Manderson-Jones submitted that there were no disputes of any substance between the parties. One dispute as to duration of her remaining in the villa had no bearing on the summons as all the plaintiff was asking for was a declaration that the occupation of the villa did not come within the terms and scope of the Management Agreement dated 24th March, 1994 and is not governed by the agreement.

The three documents that the plaintiff was asking the Court to base its findings on are:

1. The Management Agreement dated 24th May, 1994
2. The Power of Attorney dated 24th May, 1994
3. The letter of termination dated 20th February, 1995.

Re - The Management Agreement

Mr. Manderson-Jones pointed out that under paragraph 10.2.2 the Company may terminate the employment of the Managing Director after 26 weeks absence due to incapacity.

Even if the Managing Director cease to be a director "her employment shall continue." Under paragraph 2 - the Managing Director may terminate by giving two months notice. The Company did not have this right. Mr. Manderson-Jones submitted that the obvious intention in denying the company of such a right is that the plaintiff had given consideration for her employment in lieu of financial provision and in lieu of ancillary relief.

Under paragraph 5.1, the Managing Director could not voluntarily resign while under paragraph 5.2 she could do nothing whereby her office became vacant - virtually Director for life - save for Article 100 of the Articles of Association.

Re - Termination of Employment

Under paragraph 13.1, the Company could terminate the employment of the Managing Director without notice or payment in lieu of notice if 13.1 - the Managing Director is guilty of any gross default or misconduct, or 13.1.2 - in the event of any serious or repeated breach or non-observance by the Managing Director of any of the material stipulations in this agreement.

Mr. Manderson-Jones pointed out that there is no provision in the agreement for termination of the plaintiff's employment as Managing Director by notice or by payment in lieu of notice for any of the reasons given in the letter of termination. The very fact he said that the letter of termination gave pay in lieu of notice is tantamount to be an indication that it is not within Clause 13. Mr. Manderson-Jones submitted that it was clear that plaintiff could terminate at any time by two months notice in writing but so long as she did not exercise that right her employment as Managing Director could not be terminated by the company other than under Clause 13.1.1. or 13.1.2 or under Clause 10.2.2 due to incapacity. Further, the Power of Attorney expressed to be for as long as she remained Managing Director could therefore have been in the power of the plaintiff for life if she choose not to resign or put herself within the provisions of Clause 13.

Even if General Meeting purported to remove her as Director pursuant to Article 100 she would retain her present contractual benefits. The contract was therefore aimed at giving her maximum security of tenure of the position of Managing Director for her life-time.

Plaintiff's attorney further submitted that the purported termination of her contract was a monumental and transparent attempt by her former husband and Chairman of the company to defeat this security of tenure and renege on his undertaking in their earlier arrangements as set out in his letter.

Counsel then indicated special circumstances in the plaintiff's case which he submitted gave strong support for the declarations sought.

This is not an ordinary master and servant relationship. The two agreements taken together must be seen as the grid for securing the plaintiff financially in lieu of maintenance payments or other financial arrangements to which she may have been entitled in their divorce proceedings for which she gave good valid considerations by her withdrawal of claim for ancillary relief as demanded by the defendant's lawyers.

Other considerations include the questions of damages. He submitted that the plaintiff could not be adequately compensated in damages.

If her employment as Managing Director was terminated invalidly she would have lost the financial provision bargained for - \$156,000.00 per annum; right of Power of Attorney controlling ten percent (10%) shares. With her sons shares, she would control fifty percent (50%) occupation of the villa. Also any claims for ancillary relief. It would be too late to get compensation under the Married Woman's Act or claim to property.

Where could the plaintiff find a job giving her all these she had under this contract?

Counsel for the plaintiff questioned as a matter of law whether the letter of termination and reasons for termination come within Clause 13 of the Management agreement. If not, does it come within any other provision of the Management Agreement? Was the termination valid or a nullity. Does the defendants have a common law right of termination which overrides the provision of the contract. If termination invalid, is the plaintiff entitled to declarations sought?

Counsel submitted that the letter of termination disclosed no grounds which could possibly come within the meaning of gross default or misconduct (Clause 13.1.1.). Neither was there any breach whether serious or repeated of any of the stipulations material or otherwise of the agreement (Clause 13.1.2). He said that the termination letter was invalid. The Board had given no approval for audit to be done and the note to proceed with the inventory of the villa was sent on the 14th of February, 1995, six days before meeting of the 20th of February when the plaintiff's employment was terminated.

The appointment of a Managing Director may only be revoked in accordance with the terms of agreement appointing her. At common law there is a presumption that an agreement for services which does not provide for termination expressly or by implication can be terminated by reasonable notice and there is no such thing as a common law right of termination. In this case it does not arise as there are expressed terms for termination as well as for notice.

#### Re - Power of Attorney

Counsel for the plaintiff submitted that the purpose of the Power of Attorney was to give the plaintiff fifty percent (50%) control over the company.

Provided the plaintiff has not elected to accept a wrongful termination of her employment she should be entitled to a declaration that she continues to have a Power of Attorney over these shares. It was the intention of the 1st defendant that she have the shares for her life-time. That was his representation on which she relied when she withdrew her application for ancillary relief and undertook not to make any financial claim against the 1st or 2nd defendants. He submitted that these defendants are therefore estopped from denying the plaintiff's interest in these shares and ought not to be allowed to defeat that interest by being a party to the wrongful or invalid termination of her contract or employment. It was counsel's view that financial arrangement made for the life-time of the plaintiff has evaporated by this invalid termination of her contract. The Court should therefore grant a declaration that the plaintiff was entitled to hold the Power of Attorney.

Re - Occupation of Villa

Mr. Manderson-Jones pointed out that there was nothing in the Management Agreement referable to the plaintiff's occupation of the villa. There was nothing in the agreement to justify that she should vacate residence on termination of her position as Managing Director. If no basis under the Management Agreement to justify the terms of the letter that she vacate the villa then her eviction from the villa by the company was unlawful. In view of her eviction counsel applied to further amend the originating summons seeking an order to revert to the status quo.

Counsel for the defendants objected. This he said was effectively an application for mandatory injunction which is only granted in special or exceptional circumstances but in any event cannot be granted on an originating summons. The amendment was granted as prayed.

There is no dispute that the plaintiff was in exclusive possession of the villa for several <sup>years</sup> from 1987, plaintiff's attorney said. It is admitted by defendants that she was lawfully in the premises prior to eviction in exclusive possession. He submitted that that fact alone presumes that she had either the right of a tenant or an equitable interest in the property.



He referred to the case of Binions and Another v Evans (1972) 2 AER 70.

Mr. Manderson-Jones submitted that the plaintiff in the instant case was in exclusive possession and therefore is presumed to be a tenant. He referred to the Rent Restriction Act, Section 27(1). If the plaintiff was not a tenant she was there lawfully with their consent and in exclusive possession as part of terms of a financial agreement between herself and her former husband. In those circumstances she had an interest in the property as indicated by Lord Denning in the Binions' case and entitled to protection.

On the facts before the Court, Counsel submitted that there was consideration flowing from the plaintiff in respect of the occupation of the villa by financial claims she had given up by agreement not to claim an interest in the company. He referred to the case of Warder & Another v Cooper 1970) 1 AER 1112.

In the instant case there was no agreement between the plaintiff and the 2nd defendant as to the occupation of the villa. Any agreement as to occupation was with the 1st defendant. The 2nd defendant was erroneous in giving her notice to quit and compounded the error by evicting her. In Drane v Evangelou & Others (1978) 5 AER 437, the landlord unlawfully evicted the tenant, the trial judge referred to the eviction as "monstrous behaviour". When the matter reached the Court of Appeal Lawton L.J. said the defendant's behaviour was reprehensible. Lord Justice Goff said "The conduct of the landlord was completely outrageous."

In closing Mr. Manderson-Jones submitted that once a matter is properly before the Court whether by way of writ originating summons or otherwise the Court is entitled to exercise all facets of the power granted to a judge of the Supreme Court including all forms of equitable relief including injunctive relief which since end of the nineteenth century has been fused with common law reliefs. The judge has widest discretion to grant consequential injunctive relief where the justice of the case requires it. The plaintiff, he submitted, was entitled to the declaration and injunction.

On behalf of the defendant Mr. Henry opened his submissions by saying "this is a very straight-forward case and plaintiff's remedy, if any, is for damages. Consequently, the case as framed before the Court by originating summons is misconceived and must fail". He referred to the local case of Nola Gowe v Fay Lurch SCCA No. 42/86 (unreported) and to observation of Carberry J.A. that it was not appropriate to use an originating summons to bring contentious disputes before the Court.

He submitted that the Court has to construe and make findings of fact in a number of areas. Correspondence between the parties; Articles of Association of 2nd defendant company; Minutes of Directors Meeting; issues of fact in the several affidavit before Court; whether plaintiff is guilty of gross default or misconduct; whether 1st defendant as chairman of the Board of 2nd defendant has acted ultra vires his powers in light of the provisions of the articles of the company in particular whether the proposal for audit or inventory was from the Board or Chairman in his personal capacity. On the question of the dismissal Mr. Henry referred to paragraph 300 of Halsbury's Laws of England 4th Edition, volume 16 headlined Grounds for dismissal subsequently.

"The common law rule relating to wrongful dismissal is that provided good cause for dismissal in fact existed, it is immaterial whether or not it was known to the employer at the time of dismissal. A summary dismissal can therefore be justified by facts only ascertained by the employer subsequently to the dismissal, and on grounds differing from those alleged at the time ....."

Mr. Henry submitted that the principal issue before Court is essentially a master and servant. This relationship is founded upon trust and confidence of the employer in the employee. Paragraph 20 of the 1st defendant's affidavit of the 10th of March, 1995, is a statement that the defendant has lost trust and confidence in the plaintiff with respect of the management of its affairs. Faced with this situation a Court will not order specific performance as a private law remedy.

The plaintiff's uncooperativeness in complying with reasonable request for an internal audit illustrates her stance of defiance. The financial management by the plaintiff is being questioned.

Defendant discovers that the company is in a position of loss and takes steps to resolve. Plaintiff takes away horses tack, sells herself company property. This is gross misconduct. The plaintiff has failed to provide an inventory as required and failed to attend meeting. Because of her attitude and conduct, the 2nd defendant had to terminate the management agreement. Other areas of misconduct include burning of papers in defendant's office, taking defendant's reliable vehicle removing files and increasing her salary without the Board's approval.

Mr. Henry submitted that it was clear from all these, that the 2nd defendant had more than adequate grounds to terminate the plaintiff's employment. See Clauses 13.1.1 and 13.1.2 and 3 and 4 of the Management Agreement. The directions given to the plaintiff were reasonable and necessary in the interest of the company.

The fact that the employer made a payment to the plaintiff in lieu of notice is irrelevant and immaterial, it was a gratuitous payment (see paragraph 13 of defendant's affidavit dated 10th March, 1995).

Re - Termination

Mr. Henry submitted that as a general rule the Court will not enforce a contract of personal employment. That the instant case the declaration orders sought is effectively to have the plaintiff re-instated as Managing Director. This case does not fall within the exceptional rule whereby the Court will grant such enforcement where there remains a strong element of continuing mutual confidence between the parties. In this case the relationship has been irreparably damaged - see Hill v C. A. Parsons Ltd. (1971) 3 AER 1345. Saunders & Others v Earnest A. Neale Ltd. (1974) 3 AER 327. Since the instant case is an ordinary case of master and servant the repudiation of the contract puts an end to it and the employee's right against the employer, if any, can only be for damages.

Mr. Henry submitted in that in the absence of statute it is not open to this Court to find that the termination was a nullity since it falls in the case of an ordinary contract of master and servant. He referred to two cases of exceptional circumstances arising out of a statutory scheme. See Vine v National Dock Labour Board (1957) A/C 448. Jamaica Broadcasting Corporation v National Workers Union et al - S.C.C.A. 14 & 15/81 (unreported).

Roll of Managing Director in the company

Primary roll of Managing Director is ~~imple~~mentation of Board's decision and policies. She is an employee of the company - takes directions from the officers. Her entitlement to exercise voting rights over shares in the 2nd defendant was hers only so long as she remained Managing Director.

Occupation of Villa

This falls outside of the terms of the Management Agreement. Mr. Henry submitted that there was no onus on the defendant to demonstrate a right to evict or to take possession of its premises. It is the plaintiff who must demonstrate the existence of a right created by some agreement between the parties entitling her to remain in occupation. The plaintiff must satisfy the Court that there has been some legal interest in her favour in the premises granted to her by the 2nd defendant. It is not in the Management Agreement and not in the Power of Attorney. The 2nd defendant's position has always been that it will permit the plaintiff to occupy its villa as long as the plaintiff remains Managing Director. It has never been to create any legal interest to the plaintiff in the villa.

Letter of proposal from 1st defendant to plaintiff dated 13.5.93

Mr. Henry asks the Court to note that this letter came from Daniel Melville in his personal capacity, not from Chukka Cove Limited - 2nd defendant which owns the villa. The considerations spoken of in the letter is to the 1st defendant. The Court must ask whether this letter constitutes any agreement between the 2nd defendant and the plaintiff

The plaintiff's case is that she is a tenant of the 2nd defendant, who are the parties, who is the landlord? The 1st defendant has no authority to bind the 2nd defendant. Any promise made by him must be in his personal capacity. Even if there is presumption that there is a tenancy arrangement between plaintiff and 2nd defendant whereby she would occupy the villa for life the consideration for rental being the withdrawal of her action for ancillary relief, Mr. Henry submitted that the consideration was not paid to the 2nd defendant but to the 1st defendant personally.

Consequently there is no corporate benefit to be derived by the 2nd defendant and therefore that agreement would be void and of no effect - See Rolled Steel Product (Holding) Ltd. v British Steel Corp. & Others (1985) 3 AER 52.

If the plaintiff is not a tenant, she is not protected by the Rent Restriction Act. As the Court is dealing with the creation of an interest in land, it must be supported by evidence in writing in keeping with the provisions of the statute of fraud. As a matter of law the plaintiff had no right to be in the villa notwithstanding Mr. Melville's letter as to reason for the termination of her employment. See Street v Mountford (Supra).

Was the plaintiff's occupation a tenancy or a licence? What was the agreement asked Mr. Henry? Does it grant executive possession for a fixed or periodic term - does it provide for rental? There is nothing before the Court that there was intention to create legal relationship. Although she claims to have a life interest arising from an oral representation, she had said in a previous affidavit that she was a contractual licensee. He submitted she was a mere licensee. There was no quantification in money in respect of rental. See Montague v Browning (Supra).

In the case of Binion's & Another v Evans (Supra) none of the judges held this to be a tenancy but a contracted licensee.

In the case of Warder & Another v Cooper (Supra), the instant case is distinguishable as there is no provision in the Jamaica Statute for a person to be "deemed a tenant". There is nothing in the statute to prevent the 2nd defendant from taking the course it took - it committed no tort.

If there was a tenancy agreement as alleged and the rental payable under that agreement is the giving up by the plaintiff of her rights to claim ancillary relief from the 1st defendant, that agreement would be ultra vires the objects of the 2nd defendant and not enforceable by the plaintiff since the plaintiff had knowledge that the relevant transaction was entered into in furtherance of purposes not authorised by the company.

The Case of Drane v Evangelou & Others (1978) 2 AER, 432 is distinguishable as there is no dispute that this was a landlord and tenant relationship.

Re - Powers of Court to grant Mandatory Injunction

See Halsbury's Laws of England, 4th Edition Volume 24, paragraph 846.

Mr. Henry submitted that a mandatory injunction will normally be granted at trial and in exceptional cases on interlocutory application. The Court would wish to have before it all the evidence and be in a position to weigh the merit of the respective cases in light of the facts before it. It is important for the Court to assess the credibility of the witnesses on both sides as a critical factor in deciding where the truth lies.

In Jamaica the originating summons is restricted by virtue of Section 531, 531D, Civil Procedure Code is confined to the determination of construction arising under an instrument, declaration of the right of persons interested etc. So for the plaintiff to obtain a mandatory injunction on an originating summons, she would have to place before the Court some Deed, Will or other written instrument or some Law or instrument under a Law for the Court's consideration as being the basis for the grant. None of these have been satisfied in the instant case.

In Redland Bricks Ltd. v Morris (1970) A/C 665, the following principles were set out by Lord Upjohn on where mandatory injunction was appropriate.

1. A mandatory injunction can only be granted when plaintiff has a very strong probability upon the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly, but in the proper case unhesitatingly.
2. Damages will not be a sufficient or adequate remedy if such damage does happen.

In the instant case the plaintiff has lost her job as Managing Director. Her salary is known, therefore any damage is easily quantifiable. The plaintiff has lost voting rights over 10% share holding over 2nd defendant. Evidence would be required to be presented by the plaintiff that this represented in real terms a loss to her which could not be compensated in damages. She still had control over 40% of the shares. The plaintiff must prove substantial damage by reason of the alleged breach. Mr. Henry's application for plaintiff and her son Troy Brennon to attend for cross-examination on their affidavit was refused by the Court.

It was Mr. Henry's submission that the Court in exercising its jurisdiction in a matter of this nature would be granting an equitable remedy. Consequently, the Court must look at the conduct of the plaintiff who is asking for orders on her behalf. It is the uncontrovertible evidence of Mr. Melville that the plaintiff has deliberately pursued a path designed to benefit herself at the expense of the 2nd defendant. This plaintiff has not come to Court with clean hands and a Court of equity will not act in favour of a plaintiff in these circumstances.

Re - Mandatory Injunction

In response, Mr. Manderson-Jones indicated that application was originally made for a prohibitory injunction but the defendants took matters into their own hands, carried out an unlawful eviction while the matter was before the Court in an effort to steal a march on the plaintiff. The Court had a right and duty to put back the plaintiff to restore the status quo anti.

See Warder & Anor. v Cooper (Supra) originating summons. In the Jamaica Broadcasting Corporation case there was no question about the use of an originating summons in obtaining the declaration sought. This was upheld by the Court of Appeal.

The Statute of fraud does not prohibit oral agreement for transfer of lands. It merely requires them to be evidenced in writing and the evidence before the Court are in the letter from defendant dated 13th May, 1993; the letter from Mr. Brooks dated 18th November, 1993 and paragraph 20 of the affidavit of the 2nd defendant dated 28th February, 1995.

Corporate Benefits

In paragraph 35 of the affidavit of the 1st defendant dated 10th March, 1995 he deposed that the basis of the plaintiff's occupation of the villa was to facilitate the management of the 2nd defendant's business.

Re - Consideration

Counsel for the plaintiff pointed out that the 1st defendant's letter of the 13th May, 1993 formed part of the agreement. See also paragraph 18(e) of the 1st defendant's affidavit dated 28th February, 1995.

"That the applicant would not make any claims against me for maintenance or financial support or make any claim against the 2nd defendant or for any interest in it."

This, he submitted, was evidence of consideration moving from the plaintiff to the 2nd defendant.

#### Exclusive Possession

There is the actual fact of possession from which the plaintiff was evicted. She had unrestricted access to the villa - See paragraph 16 of her affidavit dated 10th March, 1995.

#### rent Restriction Act.

Counsel submits that the plaintiff comes within the meaning of 'tenant' for the purpose of this Act. The definition in Clause 2 is not exclusive - would include persons deriving title from the original tenant. This villa was the matrimonial home of the plaintiff and 1st defendant. After the relationship broke down the 2nd defendant makes new arrangements - the plaintiff to remain in the villa. Counsel suggested that even if she was found to be a contractual licensee she would be within the scope of Section 27. By throwing out the plaintiff the defendants have done the mischief which the Act was designed to prevent. If the termination of her employment was wrongful or invalid she should be put back in the villa since her being there did not arise from the management contract and the terms of her employment, but obviously under some other agreement.

#### Grounds of dismissal

All but one of the various allegations made against the plaintiff were known to the defendant before the termination of her services. See Mr. Mellville's affidavit of the 10th March, 1995 paragraph 16-18. The very affidavit of the defendant states that the reasons for the termination are set out in the letter of termination. All other allegations are therefore irrelevant.

#### Exceptional circumstances

1. The employer - the second defendant is a small family company.
2. The employee - plaintiff controlled 50% of the shares and voting rights

The plaintiff was also a director of the Company in an entrenched position where, by the terms of her employment, she could not resign and could not be rotated.



3. The chairman was her husband. He controlled the remaining shares in the company. He acted on behalf of the employer and the employer's business with the employee in that -
  - (a) he signed the Management Contract; he signed the Power of Attorney; he chaired the Board Meeting on the 26.2.95 which considered her removal; he proposed to the meeting that the plaintiff be dismissed; he put the motion for her dismissal; he wrote and signed the letter of dismissal. He is the only officer of the company giving affidavit evidence on behalf of the employer in this issue.
4. The contract of employment was only part of a financial settlement between the husband and wife put in place by the husband as chairman of the company in lieu of maintenance payments and other financial arrangements in return for which the plaintiff withdrew her application for ancillary relief and undertook not to make any further claim against him or the company.
5. The intention of the parties as to which there is no dispute was -
  - (i) she would control 50% of the shares in the 2nd defendant for life;
  - (ii) she would be entrenched as Director;
  - (iii) she would continue to reside at the employer's villa where she resided since 1987 as long as she remained Manager.
6. The management agreement was specifically designed to guarantee the employee as a former spouse total security of tenure indefinitely subject to (a) her voluntary termination (b) summary dismissal on clearly defined grounds (c) incapacity for 26 weeks out of 52. This is why the management agreement did not provide for termination by notice on the part of the employer. There was even a provision (Clause 12) that her employment would continue even if she ceased being Managing Director. In short it was an exceptional contract of employment.
7. Damages not an adequate remedy.

Re - Nulity

Article 112 of the Articles of Association expressly provides that termination of Managing Director contract must be in accordance with the terms of the contract. This provision transforms what would be an ordinary breach into a void act. The company has no power to terminate in breach of the agreement.

Mutual Confidence

There is nothing in the evidence in this case to suggest any lack of mutual confidence between the company as such as distinct from her former husband and the employee. The allegations mentioned in the minute and the letter of termination cannot account to any serious misconduct or any ground for lack of confidence in the plaintiff.

Paragraph 13 of the defendant's affidavit of the 10th March, 1995 disclosed that the Chairman and the Company had rewarded the plaintiff for work she had previously done in developing the 2nd defendant's company. There must have been confidence then.

Finally it was submitted by Counsel for the plaintiff, that from the evidence before the Court; one could not infer that there was such a degree of lack of confidence that could possible warrant on the part of the company and could possible constitute reason for the Court not granting the declaration sought by the plaintiff who together with her sons controlled 50% of the company as was the intention at the time the Management Contract was made. She clearly stands to lose the most by the termination of her services in breach of contract and of the articles of association which cannot adequately be remedied in damages.

FINDINGS

This action arose because of two main reasons:

- (i) the plaintiff was dismissed from her post of Managing Director of the 2nd defendant's company and
- (ii) the plaintiff was threatened with ejection by the 2nd defendant from the villa that she occupied on 2nd defendant's property.

With regards to (i) above the terms and conditions of her employment as Managing Director are set out in a document referred to as a 'Management Agreement' dated 24th May, 1994 between the plaintiff and Chukka Cove Farms Limited.

Paragraph 2, under terms of employment is as follows:

"The employment of the Managing Director commences on the 20th day of January, 1994, and is subject to termination by the Managing Director giving to the employer two (2) months notice in writing and as provided below.

Paragraph 5(1) provides that during her employment the Managing Director shall not voluntarily resign as a Director of the company.

Under paragraph 10.2.2 the company may terminate the employment of the Managing Director if due to incapacity she is absent from work 26 weeks in any 52 consecutive weeks.

Paragraph 12 "Termination of Directorship" states as follows:

"If during her employment under this agreement the Managing Director shall cease to be a Director of the company (otherwise than by reason of her death, resignation or disqualification or by statute or court order) her employment shall continue as if it had been in the office of executive manager of the company and the terms of this agreement (other than those relating to the holding of office of director) shall continue in full force and effect and the Managing Director shall have no claims against the company in respect of such ceasing."

Paragraph 13.1 "Summary of Termination of employment" is as follows:

- 13.1. The employment of the Managing Director may be terminated by the Company without notice or payment in lieu of notice.
- 13.1.1. If the Managing Director is guilty of any gross default or misconduct in connection with or affecting the business of the company or any subsidiary or associated company to which she is required by this agreement to render services or
- 13.1.2. in the event of any serious or repeated breach or non-observance by the Managing Director of any of the material stipulations contained in this agreement as ..... (others not applicable).

Paragraph 18 - Entire understanding:

This agreement embodies the entire understanding of the parties in respect of employment of the Managing Director to the Company.....

This agreement followed from a letter from the 1st defendant to the plaintiff dated May 13, 1993 which he proposed "would represent the terms of the financial aspect of our separation as well as any resultant divorce. It would therefore be in lieu of any maintenance payments or any other financial arrangement between us".

She would continue to manage Chukka Cove Limited and occupy the villa as Manager.

He would put in place an arrangement whereby she would control 50% of the shares of the company. The 3rd defendant would execute a Power of Attorney giving her voting rights over 10% of its shares in the 2nd defendant's company.

The 50% made up by 20% each from her two sons and 10% from the 3rd defendant and she would enjoy this privilege for the balance of her life-time.

It is to be noted that when the Power of Attorney was signed the power was "to continue in force for so long as the Attorney shall be the Managing Director of Chukka Cove Farm Limited" and not for "the balance of her life-time" as proposed in the letter of the 13th May, 1993 and agreed to by the plaintiff. (See power of Attorney dated 24th May, 1995 paragraph 2).

What were the reasons given for dismissal?

See letter dated February 20, 1995, from Chukka Cove Farm Limited. Her employment as Managing Director was terminated with immediate effect. The 4th paragraph giving the reasons as follows:

"Based upon the following events, it is now clear that you have no intention of co-operating with the Chairman of the Board of Directors in the operation of the enterprise (a) you have up to now failed to provide the breakdown of the expenses in respect of "Chukka Cove Villa" despite being requested to do so by letter dated January 17, 1995. (b) On the 8th instant I called and arranged a meeting to be held on the 10th instant at the farm at 9:00 a.m. I arrived there only to be informed that you absented yourself on the basis that you had another meeting to attend. You however failed to give any adequate notice of your intention to be absent".

The penultimate paragraph reads:

"As a result of the termination of your employment, you are required to vacate the company's villa by the 26th day of February, 1995."

It is apparent that after the letter of the 17th of January, 1995, there were further discussions between the parties because on February 14, 1995, the following fax message was sent by Mr. Albert Lee, one of the Directors of the Board to the plaintiff:

Re: Inventory of Villa"

"This is to advise that Price Water House does not have a listing of the furniture and Fixtures of the Villa. As such, you may proceed with the Inventory as discussed at the last Board Meeting".

The 14th February, 1995 was a Tuesday. There is no evidence as to when this Fax message was received by her. Wednesday, Thursday and Friday were the only three regular working days left in that week.

From all the relevant evidence it is not difficult to infer that the 2nd defendant knowingly breached the contract and evicted the plaintiff believing that the only remedy was in damages. He said so in his affidavit of the 28th of February, 1995 paragraph 27. The plaintiff was becoming a thorn in their flesh and they were prepared to get rid of her and pay for it.

What are the remedies for Breach of Contract?

The general rule is that in the ordinary case of master and servant the unilateral repudiation of the contract of employment by the master effectively terminated that contract and the only remedy of a servant who had been wrongfully prevented from earning his wages lay in damages.

Along with this general rule there is also a normal rule of practice that a Court will not enforce a contract of employment either by way of specific performance or by the granting of an injunction that would have a similar effect or by way of granting a declaration that a contract still subsists.

While agreeing with these rules the plaintiff claims that this is no "ordinary case", but an exceptional case of wrongful dismissal thereby leaving the contract of employment in existence.

What makes this case exceptional?

The plaintiff claims the 2nd defendant is a small family company. The Chairman was her former husband. She controlled 50% of the voting rights; she was a Director of the company.

The contract of employment was only a part of a financial settlement put in place by her former husband in return for which she withdrew her application for ancillary relief; she gave an undertaking not to make any further claim against the 1st or 2nd defendants.

The Management Agreement was specifically designed to guarantee the plaintiff security of tenure indefinitely (see Clause 12). She could not resign as a Director - (Clause 5.1).

She was not subject to retirement by rotation - (Clause 5.3).

Damages would not be an adequate remedy.

The defence contends that since the personal relationship and confidence between the parties had broken down it would be wrong to enforce a contract which is based on confidential relationship - See Hill v C.A. Parsons Co. Ltd. (1971) 3 AER page 1345.

In the affidavit of the 10th of March, 1995, at paragraph 13 the 1st defendant complimented the plaintiff for work she had previously done in assisting him to develop the 2nd defendant's property. It seems from subsequent events that the relationship between the 1st defendant and plaintiff had deteriorated. But what of the relationship between the plaintiff and the company 2nd defendant? The Board of Directors runs the company. Save for the contents of the letter of termination of her employment dated 20.2.95 there is no evidence of any lack of confidence of the Board of Directors in the plaintiff.

There is no evidence of the age of the plaintiff, but it is obvious she is not a young person. She is the mother of two children both being Directors of the company. The likelihood of her finding suitable employment with the benefits provided under this contract and other benefits enjoyed e.g. the undisturbed occupation of the villa, is extremely remote. It is clear therefore that damages will not suffice and I so find. I further find that this is not the ordinary case of master and servant and that because of the special circumstances existing I grant the declaration that the relation of master and servant is still subsisting and grant an injunction to stop the 2nd defendant treating it as at an end.

This question was discussed in the Court of Appeal in the case of The Jamaica Broadcasting Corporation v National Workers Union & Others S.C.C.A Nos. 14 and 15 of 1981 (unreported) where under a contract of personal service an injunction was granted restraining the Jamaica Broadcasting Corporation from dismissing some of its workers although the relationship of mutual confidence between the employer and employees had ceased to exist. See also Saunders and Others v Ernest A. Neale Ltd. (1974) 3 AER 327 where the Court found that no exceptional circumstances existed for all mutual confidence had been destroyed.

Consequent upon my declaration that the relationship is still subsisting, the plaintiff's right to exercise voting rights under the Power of Attorney is also still subsisting and the purported termination by the 3rd defendant is of no effect.

I next turn to the question of the occupation of the villa. The attorneys for all the parties agree that the occupation by the plaintiff of the villa does not come within the terms and scope of the Management Agreement. Therefore the declaration sought in this regard is hereby granted.

What are the circumstances under which the plaintiff occupied the villa? From the affidavit evidence she began residing there shortly after it was built in 1967. She got married to the 1st defendant in 1969 and they both occupied the villa as their matrimonial home. The marriage broke down and the 1st defendant left the villa in 1992. Since then the plaintiff has been living there alone. The villa is owned by the 2nd defendant. The plaintiff says in her affidavit of the 23rd February, 1995, paragraph 6, that she had numerous discussions with the 1st defendant in his capacity as Chairman of the 2nd defendant and on his own behalf, and it was agreed, inter alia, that she would occupy the villa for the duration of her life time. In his affidavit of the 10th of March, 1995, the 1st defendant states that the basis on which the plaintiff occupied the villa was that she was the Managing Director of the company.

In what capacity was the plaintiff occupying the villa? Was she a tenant, contractual licensee or trespasser? The defendants contend that eight days after the letter of termination of her services, she failed to vacate the villa and thereafter she became a trespasser which entitled them to evict her. On the other hand the plaintiff claims to be a tenant and entitled to the protection of the Rent Restriction Act from eviction without an order of the Court.

"To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodic payments. The grant may be express, or may be inferred where the owner accepts weekly or other periodic payments from the occupier." See Street v Mountford (1985) 2 AER 289 Per Lord Templeman at 294.

There is no dispute that the plaintiff enjoyed undisturbed possession of the villa - (See the proviso to the Deed signed by the plaintiff dated 6th of April, 1994). There is no dispute that the 1st defendant offered her control of 50% of the shares in the company for the balance of her life time - (see letter dated May 13, 1993).

In this same letter he would be happy for her to continue to manage and occupy the villa while she was manager with a proviso not to marry or enter into any common law relationship. There is no dispute that the parties had subsequent discussions.

The proviso was removed (see paragraph 8 of the 1st defendant's affidavit of the 10th March, 1995).

Arising from these discussions the plaintiff contends that the 1st defendant orally offered her occupation of the villa for life in keeping with a similar offer regarding the shares. The 1st defendant has denied making this offer. However, based on the exceptional contract of employment entered with the plaintiff, I accept her evidence that she was offered life occupancy of the villa by the 1st defendant which she accepted.

Was there any consideration? The second paragraph of his letter of the 13th of May, 1993, to the plaintiff, the 1st defendant stated:

"This proposal would represent the terms of the financial aspect of our separation as well as any resultant divorce. It would therefore be in lieu of any maintenance payments or other financial arrangements."

In paragraph 18(e) of his affidavit dated 28th February, 1995, the 1st defendant expanded on the letter by stating that he agreed with the plaintiff "that the applicant (plaintiff) would not make any claims against me for maintenance or financial support or make any claims against the 2nd defendant or for any interest in it".

Accepting these proposals the plaintiff not only withdrew her claim against the 1st defendant for maintenance which had been filed in Court under the Matrimonial Causes Act but also refrained from taking action which was open to her under the Married Woman's Property Act against either the 1st or 2nd defendants.

Counsel for the plaintiff submits that this forbearance to sue represented evidence of consideration moving from the plaintiff to the 1st and 2nd defendants. In Montague and Another v Browning and Another (1954) 1 W.L.R. 1030 Denning L.J. (as he then was) said at page 1046,



"Rent is usually quantified in money and paid in money, but it is not necessary in Law that it always should be so".

he continued at page 1047,

"It seems to me that even under the Rent Acts, in cases when rent is not payable in money but in kind as in goods and services, then so long as the parties have by agreement quantified the value in terms of money, the sum so quantified is the rent of the house within the meaning of the Rent Restriction Act."

I accept the plaintiff's contention that this forbearance to sue represented a financial benefit to the 1st and 2nd defendants that this benefit is quantifiable in terms of money and although the exact sum was not arrived at, the arrangement was agreed upon by the parties. I find therefore that this sum, whatever it may be, represented the rent paid by the plaintiff to the 2nd defendant for the occupation of the villa.

Based upon my findings of exclusive possession, fixed period of time for life and rent, I hold that the plaintiff is a tenant within the meaning of the Rent Restriction Act. She therefore enjoys the protection of Section 27 of the Act which prevents eviction without an order of the Court.

In Drane v Evangelou & Others (1978) 2 AER P. 437, where the landlord unlawfully evicted the tenant, the trial judge referred to the eviction as "Monstrous behaviour". In the Court of Appeal, Lord Justice Lawton in giving the judgment of the Court, said "I am surprised that this appeal has been made to this Court. The defendant's behaviour was reprehensible --- it is right and just that the plaintiff should be put back where he is entitled to be ... this Court should take every step it can to see that landlords who behaved like the defendant in this case has behaved should get no benefit whatsoever from what they have done". At page 443 of the judgment the learned Lord Justice continued,

"To deprive a man of a roof over his head, is in my judgment, one of the worst torts which can be committed. It causes stress, worry and anxiety. It brings the law into disrepute if people like the landlord can act with impunity in the way he did .... Parliament has said that this kind of conduct is sufficiently serious to be made a criminal offence".

Lord Justice Goff said that "the conduct of the landlord was completely outrageous".

I respectfully adopt these words as my own.

This is the position where the plaintiff is a tenant. What would be the position, if on review it turns out that the occupation was under a licence rather than as a tenant?

In Warder & Another v Cooper (1970) 1 A.E.R. P. 1112 the employee who had exclusive possession of premises otherwise than as a tenant was "deemed" to have been a tenant under the English Rent Act. Our law makes no such provision.

However, in the case of Binnions & Another v Evans (1972) 2 A.E.R. P. 70 there was agreement by the employer for the widow of the employee to occupy a house rent free for life, and it was held that the agreement conferred on her a contractual licence to occupy the cottage for the rest of her life - that as a contractual licensee she had acquired an equitable interest in the cottage which the Court would protect by injunction.

As stated before, I accept the evidence of the plaintiff that the 1st defendant and herself had agreed for her to occupy the villa for the rest of her life. Adopting the principles in the Binnions' case, the agreement, if not constituting a tenancy it did confer on her an equitable interest in the villa which the Court would protect by granting an injunction to restrain the defendants from turning her out.

As the subsequent events show, before the hearing of the application to restrain the defendants came up, the defendant forcibly evicted the plaintiff from the villa which she had been in undisturbed possession for over eight years. They had stolen a march on the Court. I entertain no doubts that an injunction would have been granted. The defendants must have had similar fears, hence their pre-emptive action.

In my oral judgment, I referred to the action of the defendants as "outrageously wrong" and continued - "this is even more so when from all appearances the defendants were acting under legal advice. Even as we speak today there are lawyers who are supporting this utterly inequitable and illegal action by the defendants". I have had no reason since then to change this view.

Finally, in dealing with this aspect of the case, on the evidence and submissions made, the question of estoppel must be considered. When the 1st defendant wrote the plaintiff on the 13th of May, 1993, concerning the financial aspects of their separation, their marriage had been on the rocks for some time.

They had separated in 1992. It appeared the 1st defendant wanted to make good by his estranged wife. He offered her the following:

- (i) To continue being the Manager of Cnukka Cove Limited.
- (ii) Occupation of the villa as the Manager
- (iii) Control of 50% of the shares in the company for life by exercising a Power of Attorney.

In return for these she was required to withdraw her claim for maintenance under the Matrimonial Causes Act. She was not to make any claim against the 1st defendant for division of property under the Married Woman's Property Act. She was not to make any claim on the 2nd defendant for any property it held on behalf of the 1st defendant.

This seems to have suited the plaintiff down to the ground for she promptly withdrew her maintenance claim and made no other claims. She kept her side of the bargain.

Their marriage was dissolved in March, 1994 and with it went all rights of action which the plaintiff had under the Acts mentioned above. On the 20th of February, 1995, three members of the Board of Directors at a meeting purported to terminate the services of the plaintiff as Managing Director on flimsy and spurious grounds in breach of the Management Agreement. The defendants had failed to keep their side of the bargain. She had acted to her detriment based on the representations made to her by the 1st defendant. The plaintiff had lost all her interest under the contract and those in the letter because of wrongful termination of her contract of employment by the defendants. The defendants are therefore estopped from denying the plaintiff all the privileges she enjoyed on acting on their representation.

In closing there is just one other aspect of the case to be discussed. From the very outset the defendants have contended that this was not a proper action to be brought by Originating Summons. Mr. Henry referred to the 1985 Edition of English Supreme Court Practice, Order 5/4; and Halsbury Laws of England 4th Edition, Volume 37, paragraph 130; and submitted that the facts and issues disclosed in the affidavits were substantially disputed and that these could only be properly dealt with on a Writ of Summons.

He further submitted that applications were being made for Specific Performance and injunction and that these could not be granted on an Originating Summons. Later on in the proceedings Counsel for the defendants referred the Court to the Jamaica Broadcasting Corporation case. As it turned out this case was commenced by Originating Summons and injunction was granted and received the approval by the Court of Appeal. That put paid to that contention and accordingly, the action continued as it began by Originating Summons.

As stated in my oral judgment I find that the 2nd defendant's purported notice terminating the plaintiff's employment amounted to a wrongful repudiation of her Management Agreement.

Damages would certainly not be an adequate remedy.

If ever there is a case that qualifies as exceptional circumstances calling for mandatory injunction this one surely does.

Accordingly, the declaration and orders sought in paragraph 1 - 6 of the originating summons as further amended on the 2nd of May, 1995 are granted as prayed.