

NMLS

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO. 39 OF 2000**

**BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.  
THE HON. MR. JUSTICE LANGRIN, J.A.  
THE HON. JUSTICE PANTON, J.A.**

<b>BETWEEN</b>	<b>LILIA NEUMAN</b>	<b>DEFENDANT/APPELLANT</b>
<b>A N D</b>	<b>DELROYE SALMON</b>	<b>PLAINTIFF/RESPONDENT</b>

**B. Veronica Warren** for the appellant  
**Patrick Foster and Kamina Johnson** instructed by  
**Clinton Hart & Co.** for the respondent

**July 3, 4, 5, 2001 and June 23, 2003**

**LANGRIN, J.A.**

This is an appeal from a judgment of Harris, J. in which she gave judgment for the plaintiff against the defendant as follows:

1. That the Plaintiff be granted recovery of possession of that property known as 14 Churchill Avenue, Coral Gardens, in the parish of St. James, comprised in Certificate of Title, registered at Volume 843, Folio 5 of the Register Book of Titles.
2. That the defendant pay to the plaintiff mesne profits in the sum of \$2,635,554.62 with interest thereon at the statutory rate of 12 per cent per annum from the date of judgment until payment.
3. That the counterclaim of the Defendant be dismissed.

The plaintiff is an attorney-at-law, with over 25 years experience. He is the registered owner of the property situated at Coral Gardens, Ironshore, St. James. This property is comprised of three (3) buildings. The main building is a villa operated as a guest house, registered with the Jamaica Tourist Board. There is also a one-bedroom flat in front of an outbuilding, a gazebo with pool bar, a large swimming pool and garden with floodlights.

The plaintiff and the defendant entered into an agreement on the 18<sup>th</sup> December, 1987, whereby the plaintiff agreed to sell and the defendant agreed to purchase 13 Churchill Place, Carol Gardens, in the parish of St. James for the sum of \$2,000,000.00. Under the agreement for sale the defendant was obliged to pay a deposit of \$200,000.00 on the 18<sup>th</sup> December, 1987; a further deposit of \$200,000.00 on the 25<sup>th</sup> February, 1988, and the balance purchase price was payable by way of mortgage to be provided by the plaintiff. The mortgage attracted a rate of interest at 12.5 per cent computed from the date of possession. It was agreed that possession was to pass on payment of first installment of \$200,000.00, made on the signing hereof and on execution of the mortgage mentioned hereunder. The plaintiff had let the defendant into possession of the property on or about 31<sup>st</sup> December, 1987 and she remained in possession.

It should be observed that the address stated by the defendant in the agreement was 238 Albion Road, Rexdale, Toronto, Canada. The consent of the Minister or of the Bank of Jamaica was not then or at any time obtained. It is the contention of the defendant that the plaintiff was acting in contravention of the law by not seeking the necessary consent of the Minister and was therefore committing an offence.

By statement of claim dated 26<sup>th</sup> August, 1991, the plaintiff set out that he is the registered proprietor of premises situated at Coral Gardens, Ironshore Estate in the parish of Saint James and being the land comprised in Certificate of Title, registered at Volume 843 Folio 5 of the Register Book of Titles. The defendant is in possession of the said premise comprised in Certificate of Title registered at Volume 843, Folio 5 without any title thereto and refuses to give up possession. The plaintiff claims against the defendant:

"(a) An order for Recovery of Possession of premises comprised in Certificate of Title registered at Volume 843 Folio 5 now known as 14 Churchill Place, Coral Gardens, Saint James.

(b) Mesne Profit of \$18,982,255.50 made up as follows: 9 rooms at US\$80.00 per day; Net profit of US\$30 per day for each room gives US\$270 for the said villa:

(A) 16/5/89 – 31/12/89 for 228 days  
 US\$61,560.00 at J\$5.75  
 to US\$1 - J\$ 353,970.00

(B)	1990 US\$98,550.00 at J\$7.18 to US\$1 -	J\$ 707,589.00
(C)	1991 US\$98,550.00 at J\$12.85 to US\$1 -	J\$1,266,367.50
(D)	1992 US\$98,550.00 at J\$23.01 to US\$1 -	J\$2,267,635.50
(E)	1993 US\$98,550.00 at J\$25.68 to US\$1 -	J\$2,530,764.00
(F)	1994 US\$98,550.00 at J\$33.35 to US\$1 -	J\$3,286,642.50
(G)	1995 US\$98,550.00 at J\$35.54 to US\$1 -	J\$3,502,467.00
(H)	1996 US\$98,550.00 at J\$35.40 to US\$1	J\$3,488,670.00
(I)	1/1/97 – 16/6/79 US\$45,090.00 at J\$35.00 to US\$1 -	<u>J\$1,578,150.00</u>
	Total US\$796,500.00	<u>J\$18,982,255.50</u>

(c) Interest thereon at the going commercial rate or at such as to the Court seem just."

In light of the contention advanced by the defendant, it is necessary to refer to the relevant paragraphs of the Amended Defence and Counterclaim. They are as follows:

"8. That pursuant to the agreement for sale aforesaid a mortgage document for an indebtedness of One Million Six Hundred Thousand Dollars (\$1,600,000.00) was signed by the Defendant and returned to the Plaintiff to be duly stamped and registered with the understanding that the Defendant's name would be endorsed on the Title.

9. That the Defendant made the first deposit on or about the 18<sup>th</sup> day of December 1987 and entered into possession on or about the 31<sup>st</sup> day of December, 1987 and has since then effected substantial repairs and improvements to the premises.

10. That on or about the 4<sup>th</sup> day of April, 1989 the full purchase price for the said property was paid by your Defendant.

11. That the Plaintiff misrepresented to the Defendant that he had complied with the matters referred to in paragraph 8 of this defence by issuing memoranda dated the 31<sup>st</sup> December 1987 and the 25<sup>th</sup> day of February, 1988.

12. That ~~to the date hereof~~ the Plaintiff has failed to have the document stamped so as to effect the registration of the said property in the Defendant's name.

13. That the Defendant is the equitable owner in possession and the Plaintiff is not entitled to possession.

### **COUNTERCLAIM**

14. That the Defendant repeats paragraph 3-13 inclusive of the above defence and says that she entered into an agreement with the Plaintiff to purchase the property aforesaid together with its business assets for the sum of Two Million Dollars (\$2,000,000.00).

15. **THAT IN THE PREMISES THE DEFENDANT CLAIMS:**

- (1) Specific Performance of agreement for the sale of the said property with its business assets by the Plaintiff to the Defendant.

- (2) An order that the Plaintiff present to the Defendant a registrable instrument of Transfer in respect of the said property together with the Duplicate Certificate of Title."

The relevant paragraphs of the Amended Reply and Defence to Counterclaim of the Plaintiff are set out as follows:

"3. As to paragraphs 5 and 6 of the Amended Defence, the Plaintiff will say that under the agreement dated the 15<sup>th</sup> day of December, 1987, no reference was made to the payment of \$1,000.00 but in computing the sum of \$401,000.00 which the Defendant admitted was the only amount paid by her under the said agreement she was given credit therefor.

4. As to paragraph 7, the understanding was that the Defendant's name would only be endorsed on the title if she faithfully performed her obligations under the said agreement by making due payments under the said agreement; this the Defendant failed to do, even after the proper notice was served on her.

5. As to paragraph 9 of the Amended Defence and Counterclaim, the Plaintiff will say that the Defendant accepted that the said agreement had been properly cancelled and agreed to accept compensation for the alleged repairs and improvements; that she was requested to substantiate the said repairs and improvements by furnishing bills, receipts and vouchers for moneys alleged to have been spent but that she was unable to produce any such bills and/or receipts and/or vouchers and accordingly no compensation was paid to her. That since the 14<sup>th</sup> day of April, 1989, the date that the Defendant admitted that she made the last payment, she has made no further payment and has been occupying the said premises without paying for her occupation thereof.

6. As to paragraph 10 of the Amended Defence and Counterclaim, the Plaintiff will say that the Defendant by herself her attorney-at-law have admitted that she had paid only the sum of \$401,000.00 out of the purchase price and/or that the full purchase price was never paid.

7. As to paragraph 11 of the Amended Defence and Counterclaim, the Plaintiff will say that the Defendant well knows that no misrepresentation was made to her as alleged or at all as he give her the memoranda in response to her entreaties to have them for use at the Embassy of the United States of America.

### **DEFENCE TO COUNTERCLAIM**

8. The Plaintiff denies that the Defendant performed her obligations under any of the agreements and/or mortgage as alleged or at all. The Plaintiff repeats his Statement of Claim and Amended Reply.

9. In the premises, the Defendant is not entitled to any relief as claimed or at all.

10. Save as is hereinbefore expressly admitted, the Plaintiff denies each and every allegation contained in the Counterclaim as if the same were hereinbefore set out separately and traversed seriatim."

The issue which arises in the litigation is whether the plaintiff could by legal proceedings recover possession of certain lands from the appellant.

Certain statutory provisions must now be mentioned: The Exchange Control Act (hereinafter referred to as "The Act") in section 33(1), in so far as is relevant, provides:

"**33.**-(1) Except with the consent of the Minister it shall not be lawful in the Island –

(a) for any person resident in the scheduled territories to transfer or do any act forming part of a series of acts calculated to result in the transfer by way of sale, exchange, gift or mortgage of any land, buildings or other hereditaments situated in the Island or any instrument or certificate of title thereto to a person resident outside the scheduled territories; or

...

(2) Subsections (2) and (3) of section 20 shall apply in relation to a transfer or conveyance prohibited by this section as they apply in relation ~~to a transfer prohibited by this Act of a security.~~"

Section 20(1), (2) and (3) of the Act read as follows:

"**20.** – (1) The title of any person to a security for which he has given value on a transfer thereof, and the title or all persons claiming through or under him, shall, notwithstanding that the transfer, or any previous transfer, or the issue of the security, was by reason of the residence of any person concerned other than the first-mentioned person prohibited by the provisions of this Act relating to the transfer or issue of securities, be valid unless the first-mentioned person had notice of the facts by reason of which it was prohibited.

(2) Without prejudice to the provisions of sub-section (1), the Minister may issue a certificate declaring, in relation to a security, that any acts before the issue of the certificate purporting to effect the issue or transfer of the security, being acts which were prohibited by this Act, are to be, and are always to have been, as valid as if they had been done with the



permission of the Minister, and the said acts shall have effect accordingly.

(3) Nothing in this section shall affect the liability of any person to prosecution for any offence against this Act".

Of such significance is section 36(1) and (2) of the Act which reads:

**"36. – (1)** It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Minister is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:

Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason.

(2) Notwithstanding anything in the Bills of Exchange Act, neither the provisions of this Act nor any condition, whether express or to be implied having regard to those provisions that any payment shall not be made without the permission of the Minister under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note".

At the time of the agreement for sale of the land, the Exchange Control Act was in force. At the time the action was brought before the Court, the Act was in operation but was repealed in 1992.

The learned judge allowed the plaintiff's claim for recovery of possession on the basis that there is nothing to show that either the

contract for sale of the land or the contract for the mortgage excluded the implied terms that the ministerial consent was necessary for the contracts' performance.

She said:

"It is my firm view that the contracts between the parties are in keeping with the principles with respect to the formation of a contract. There is no evidence that the proviso to section 36(1) is applicable. I unhesitatingly adopt the conclusion of Douglas J in **Watkins v Roblin** (supra), in that, where the agreement is not caught by section 36 (1) of the Exchange Control Act, the Act goes to performance of the contract and not to formation. There is no dispute that Section 20 of the Act permits the ratification by the Minister of transactions which had been initiated without his authorization. Ministerial consent is relevant at the time of the performance of a contract, not at the time of its formation. It cannot therefore be recognized that there is any illegality touching the formation of the contracts between the plaintiff and defendant.

I must also emphasize that it is mystifying that a defendant who seeks to enforce a contract of sale by way of specific performance, now urges the court to pronounce on the illegality of the contract. In my opinion, if the defendant had genuinely wished to have raised the question of the illegality of the contract of sale, any illegality which she alleges ought to have been pleaded in the alternative, in her counter-claim.

Evidence was presented by the plaintiff only. The defendant failed to give evidence notwithstanding that an adjournment had been granted on the 16<sup>th</sup> December, 1999 to enable her to be present in court on such date as the matter was next scheduled for hearing. On the 7<sup>th</sup> January, 2000 when the matter was fixed for

continuation she attended court but refrained from giving evidence."

On appeal the defendant had filed several grounds of appeal but in my view the two fundamental issues are firstly, whether the plaintiff could recover possession without reference to the agreement and secondly, whether there was any injustice caused to the defendant as a consequence of the refusal to adjourn the matter initially.

Although the plaintiff had indicated in his pleading that he had entered into agreement with the defendant in respect of the land, his right to claim possession did not depend on the agreement. His claim was based independently of the agreement. The plaintiff was able to rest his claim on his registered ownership of the property. The defendant did not have and could not show any right to the property. Indeed, there was no challenge by way of evidence since the defendant did not give evidence and rested her case at the end of the plaintiff's case.

The trial judge in my view quite properly, ruled that the opinion of the proposed defence witness was not relevant to the proceedings before her and was not based on any pleadings by the defendant.

The defendant could not point to or rely on any agreement, as justifying any right to remain in possession and without doing so she could not defeat the plaintiff's claim to possession. The occupation of the land was therefore contrary to law.

**A fortiori**, the defendant did not seek to rely on her counterclaim for specific performance of the contract since to do so would be to rely on an illegal contract. Until the consent is given by the Authority, whether the Minister or the Bank of Jamaica, the transaction remains unlawful therefore contrary to law.

The maxim, "*in pari delicto potior est conditio possidentis*" as a principle of law is established not for the benefit of plaintiffs or defendants but is founded on the principle of public policy, which will not assist a plaintiff who has handed over property or money in pursuance of an illegal contract to recover it back. The courts will not assist in an illegal transaction.

In ***Tinsley v Milligan*** (1993) 3 All E.R.65 the House of Lords examined the authorities laying down the circumstances under which a legal proprietary interest acquired under an illegal transaction will be enforced by the Courts. The Court per Lord Browne-Wilkinson stated that the authorities revealed:

- (1) Property in chattels and land can pass under a contract which is illegal and therefore would have been unenforceable as a contract.
- (2) A plaintiff can at law enforce property rights acquired under an illegal contract provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right.

- (3) It is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: ... (emphasis supplied).

In the present case the plaintiff claims under a registered title and has testified in court in relation to this loss without any reference to the agreement.

In my judgment the authorities when applied clearly show that the plaintiff was entitled to recover possession because his right to possession did not depend on the illegal agreement, but rested on his registered ownership of the land.

Miss Warren, for the defendant, also argued that the transfer which was signed gave an equitable interest in the property even though it was not dated or lodged with the Registrar of Titles. To this, Mr. Foster for the plaintiff, replied that the transfer confers no rights in and of itself until it is registered. The transfer is therefore inextricably linked to the illegal agreement for sale. I accept the arguments advanced by Mr. Foster on the plaintiff's behalf.

Turning now to the question of mesne profits the learned judge had this to say:

"There remains to be considered, the plaintiff's claim for mesne profits. It has been established by the authorities, that damages are recoverable by a plaintiff in an action for mesne profits brought in a joint suit for recovery of possession. Such damages are restricted to the loss sustained during the period of wrongful

occupation of the plaintiff's land by the defendant.

Ordinarily, the measure of damages is the market value rental of the property occupied or used by the defendant. In **Swordheath Properties Ltd. v. Tabet and Others** [1979] 1 All E.R. page 241, it was held that the measure of damages would be the value to the trespasser of the use of the property, during the period of his trespassing, which, in the absence of anything special in a particular case, is the ordinary letting value of such property.

The property which forms the subject matter of this action, is a ten bedroom villa. At the time the defendant took possession, it was fully furnished and had been operated by the plaintiff as guest house. It was the plaintiff's evidence that it was agreed that the defendant would purchase it as a going concern. He stated that during the time of his operation of it, nine rooms were available for rental. Each room was rented for US\$80.00 daily and after meeting expenses he realized a net daily income of US\$30.00 per room.

It is my view that the plaintiff must establish strict proof of his loss of US\$30.00 daily for the rental of each room. He has not done so. He has not adduced sufficient evidence to demonstrate that he has sustained such loss. It is insufficient for him to have merely stated that this amount was his loss. He ought to have produced documentary or other evidence to substantiate his declaration that he had been deprived of US\$30.00 per room per day during the period of the defendant's occupation of the property as a trespasser.

He gave evidence however that since May, 1999, the defendant has paid him the sum of \$30,000.00 per month for use and occupation of the property, which sum he had been

accepting up to October, 1999. It would seem that it would be fair for me to use the sum of \$30,000.00 as the proper letting value of the property.

The Plaintiff would therefore be awarded \$30,000.00 monthly, as the sum representing the ordinary rental value of the property. Such sum is payable from May, 1989 to February, 2000 which amounts to \$3,870,000.00 for that period. The plaintiff has waived payments for the period May, 1989 to May, 1991, which amounts to \$720,000.00. This waiver is in recognition of the fact that the defendant had carried out some repairs to the property. The plaintiff having waived his right to this sum, that amount must be deducted from the full amount due and owing by the defendant. The defendant's indebtedness to him must also be reduced by the sum of \$180,000.00 which represents the payment of \$30,000.00 monthly to him by the defendant, from May to October, 1999. Up to May, 1989 the defendant had paid to the plaintiff \$420,000.00 with respect to deposit on purchase money and interest on the balance purchase money. In May, 1989 the plaintiff returned the sum of \$85,442.62 to the plaintiff as shown by cheque dated 24<sup>th</sup> May, 1989 and letter to the defendant's bankers of even date with receipt from the bankers endorsed thereon. The defendant must also be credited with the difference between the amounts she paid and that which had been refunded to her. The sum of \$334,557.38 would be due to her, and this is deductible from the sum to which the plaintiff is entitled. The defendant's liability to the plaintiff for use and occupation of his property should be discounted by a total amount of \$1,234,557.38.

The plaintiff claims interest at commercial rate. The plaintiff had not proffered evidence (in light of the fluctuation of the commercial interest rates over the years) which would enable the court to properly assess interest at commercial

rate. Interest will be awarded at the statutory rate.

Judgment for the plaintiff against the defendant. It is ordered that the defendant deliver up to the plaintiff, possession of 13 Churchill Avenue, Coral Gardens, Saint James, registered at volume 843 Folio 5. It is further ordered that the defendant pay to the plaintiff mesne profits of \$2,635,554.62 with interest thereon at the rate of 12% per annum. The counter-claim is dismissed. Costs to the plaintiff on the claim and the counter-claim to be agreed or taxed."

Again, the trial judge accepted the evidence of the plaintiff in relation to the mesne profits and there was no necessity to rely on the purported illegal agreement. This made it easier for the judge to reach her conclusion since the defendant had not given any contradictory evidence, thereby resting her case.

I am not impressed by the submission that the judge exercised her discretion incorrectly when she made the decision to begin the trial despite the defendant's application for an adjournment. The circumstances did not warrant an adjournment and the record reveals that the plaintiff remained in the witness box on the 17<sup>th</sup> and 18<sup>th</sup> December, 1999 at which time the case was adjourned partheard to the 7<sup>th</sup> January, 2000. This period ought to have given counsel adequate time to prepare her case for further cross-examination. Instead when the case resumed on January 7, 2000, the defendant rested her case. In my judgment the learned judge was correct in exercising her discretion to



begin the case because the defendant was subsequently afforded adequate time to prepare her case.

The result therefore will be that the appeal will be dismissed and judgment entered for the plaintiff. The defendant must pay the costs of the appeal .

**PANTON, J.A.**

I agree with Langrin J.A. that this appeal should be dismissed. I have nothing to add to the reasons he has given.

**DOWNER, J.A: (Dissenting)****How the case was argued on Appeal**

One way of understanding the gist of the appellant's case is to summarise the legal principles adduced on her behalf to show that she has an equitable estate in Coral Gardens.

She was put in possession on 4<sup>th</sup> November 1987 by the respondent Delroye Salmon who owned the legal estate as evidenced by his registered title. Delroye Salmon is an attorney-at-law. Once he put her in possession as a purchaser, then by the process of law she became an equitable owner in possession and he the trustee who held the legal title. It was contended that she remained in possession until she was wrongly dispossessed by the order of Harris J. in the Supreme Court on February 29, 2000. It was further contended on her behalf that, in order to dispossess her the respondent Salmon relied on a contract which was illegal as performed. It was argued that there should have been no transfer of the legal or equitable estate without the permission of the Bank of Jamaica pursuant to the provisions of the Exchange Control Act (The Act). No permission was ever sought or obtained by the respondent Salmon, the attorney-at-law who had carriage of the sale, pursuant to the contract.

If the above submissions are correct in law, it matters not that the illegality was not pleaded by the appellant. The Court could of its own motion raise the issue. The evidence of the illegal performance of the contract was however relied on by the respondent Salmon as plaintiff in the Court below to recover possession. The appellant Neuman gave no evidence and she did not rely on her pleadings to ground her case. She merely stated that the respondent Salmon could expect no assistance from the Court in proceedings for recovery of possession.

The reliance on the inherent jurisdiction of the Court was the basis of the appellant's case to demonstrate that she was entitled as an equitable owner in possession to call on the respondent Salmon to deliver up the registered title to her. A good definition of the inherent jurisdiction is to be found in **Connelly v. Director of Public Prosecutions** 1964 A.C. 1254 at 1301 where Lord Morris of Borth-y-Gest said:

"There can be no doubt that a court which is endowed with a particular **jurisdiction** has powers which are necessary to enable it to act effectively within such **jurisdiction**. I would regard them as powers which are **inherent** in its **jurisdiction**. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

As to whether the appellant was correct was the legal problem which Harris J. in the Supreme Court had to resolve. She decided in favour of the respondent Salmon, by ruling thus at page 11 of the Record:

"Judgment for the plaintiff against the defendant. It is ordered that the defendant deliver up to the plaintiff, possession of 13 Churchill Avenue, Coral Gardens, Saint James, registered at Volume 843 Folio 5. It is further ordered that the defendant pay to the plaintiff mesne profits of \$2,635,554.62 with interest thereon at the rate of 12% per annum. The counter-claim is dismissed. Costs to the plaintiff on the claim and the counter-claim to be agreed or taxed."

In so deciding she ignored the rule in **Saunders v Vautier** which will be explained hereafter. The appellant was aggrieved by that decision, so she has appealed to this Court to set aside the order made against her in the Court below, restore her to possession and order Salmon to transfer the registered title to her. Such an order may require consequential orders which may be provided for by Liberty to apply.

### **The facts relevant to determine the appeal**

Section 33(1) of the Exchange Control Act, (the "Act"), which governs the sale of land and transfer of titles, prohibits a resident in Jamaica such as Delroye Salmon from performing any act calculated to transfer realty to someone like Lilia Neuman, the appellant who resides in Canada, without the consent of the Bank of Jamaica. The Minister has delegated his statutory powers to the Bank of Jamaica. The object of the provision was to enable the Bank of Jamaica to regulate the flow of foreign and local currency so as to maintain the value of the currency. Section 45 of the Act demonstrates the enormous powers conferred on the Minister when it is necessary or expedient to act in the interest of the economy.

The Act empowered the Bank of Jamaica to enlist the powers pursuant to the Act to regulate monetary policy both directly and indirectly where foreign currency is involved or where the payment of money is made to the credit of a person resident outside of Jamaica. See paragraph 2 of the Fourth Schedule to the Act. The Minister may direct such payments to be made to a "Blocked Account": See section 35 and the Third Schedule to the Act. For an instance of this see **Grant v. Edwards** [1987]24 J.L.R. 297 at 307.

For these controls to be effective the Attorney-at-law who has carriage of sale of the property, as Delroye Salmon had, must have obtained the permission of the Bank of Jamaica to perform the terms of the contract so as to prevent evasions of the provisions of the Act. In the course of his dealings with Mrs. Neuman he refunded \$82,235.22 into her account without informing the Bank of Jamaica or seeking its permission. See page 115-116 of the Record.

It was submitted by Ms. Warren that Salmon in accepting \$200,000 with respect to the contract for sale and draft transfer and mortgage were illegal acts which were relied on in order to dispossess the appellant Lilia Neuman. They were illegal because Salmon did not seek the permission of the Bank of Jamaica to perform those acts pursuant to the contract. Also his principal contention in the Court below was that the appellant was in breach of the terms of the contract.

The Statement of Claim at page 68 of the Record reads thus:

**"STATEMENT OF CLAIM****SUIT NO. C.L.S. of 1991/S-222****IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW**

**BETWEEN                      DELROYE SALMON      PLAINTIFF**  
**AND                              LILIA NEUMAN              DEFENDANT**

- 1.** The plaintiff is the registered proprietor of premises situated at Coral Gardens, Ironshore Estate in the parish of Saint James and being the Land comprised in Certificate of Title registered at Volume 843 Folio 5 of the Register Book of Titles.
- 2.** The Defendant is in possession of the said premises comprised in certificate of title registered at Volume 843 Folio 5 without any title thereto and refuses to give up possession.
- 3.** The Plaintiff claims against the Defendant
  - (a) An order for the Recovery of Possession of premises comprised in Certificate of title registered at Volume 843 Folio 5 now known as 14 Churchill Place, Coral Gardens, St. James.
  - (b) Mesne Profit
  - (c) Further and/or other relief

Dated the 26<sup>th</sup> day of August, 1991."

There are particulars in what appears to be an amended Statement of Claim but they need not detain us. Suffice it to say that as regards paragraph 2 above the appellant is saying that she has an equitable interest in Coral Gardens and that she is entitled to call for the legal estate.

It is convenient to mention that the Act was not repealed until 17<sup>th</sup> August 1992 by the Exchange Control (Repeal) Act 1992. For the effect of the Repeal see section 25 (2) of the Interpretation Act which reads:

"(2) Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not –

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed.
- (c) Affect any right, privilege, obligation, or liability, acquired, accrued, or incurred, under any enactment so repealed."

Despite the austere nature of the Statement of Claim, it was argued that the pleadings, the documents exhibited in the agreed bundle, and the evidence of Delroye Salmon establish that he relied on the illegal act pursuant to the contract as the basis to dispossess the appellant. The learned judge below rejected these submissions.

The appellant Lilia Neuman, gave no evidence in the Court below. She is not relying on the Amended Defence and Counter Claim filed on her behalf, or on any reference in the Agreed Bundle of documents which adverts to the illegal performance of the contract. She is saying that Salmon put her in possession. She paid a deposit and is accordingly an equitable owner who carried out extensive improvements since she has been in possession. Salmon has relied on illegal acts pursuant to a contract, which he claims was breached

by the appellant, to dispossess her. The appellant therefore claims that the order of the Court below was erroneous and she has appealed to have that order reversed so as to be restored to possession. Also she calls on Salmon to deliver up the legal title.

In relying on such a submission the appellant is invoking the inherent jurisdiction of the Court which will not assist a claimant who relies on prohibited acts to dispossess an equitable owner in possession. Rather, it will declare that Salmon holds the legal title in trust for the appellant and the appellant is entitled to ask for the legal title on the basis of the dictum "let the estate lie where it falls" **Chettiar v Chettiar** (1962) 2 W.L.R. 549 at 552. Additionally, sections 33 and 36 of the Act are applicable to the facts of this case and section 20(2) and (3) in Part III governs section 33.

As to the pleadings, the Respondent's Amended Reply, and Defence to Counter Claim in paragraphs 3 and 4 read at page 34 of the Record:

"3. As to paragraphs 5 and 6 of the Amended Defence, the Plaintiff will say that under the agreement dated the 15<sup>th</sup> day of December, 1987, no reference was made to the payment of \$1,000.00 but in computing the sum of \$401,000.00 which the Defendant admitted was the only amount paid by her under the said agreement she was given credit therefor.

4. As to paragraph 7, the understanding was that the Defendant's name would only be endorsed on the title if she faithfully performed her obligations under the said agreement by making due payments under the said agreement; this the Defendant failed to do, even after the proper notice was served on her."



Here are the relevant clauses of the Agreement of 15<sup>th</sup> December 1987  
at page 82 of the Record:

"THIS AGREEMENT is made 15<sup>th</sup> day of December 1987  
BETWEEN DELROYE SALMON of Mandeville, Manchester,  
Attorney-at-Law hereinafter called "the vendor(s)" and LILIA  
NEUMAN of 238 Albion Road, Rexdale, Toronto Ontario,  
Canada, Housewife.

Herein called "the Purchaser(s)" WHEREBY the Vendor(s)  
agree(s) to sell and the Purchaser(s) agree(s) to purchase ALL  
THOSE PROPERTIES more fully described in the Schedule upon  
the terms set out therein.

---

#### SCHEDULE

---

Description of Land FIRSTLY: All THAT parcel of land part of  
CORAL GARDENS formerly  
part of IRONSHORE ESTATE  
in the parish of SAINT JAMES  
being the LOT numbered SIX  
HUNDRED AND FIFTY THREE  
on the plan of part of Coral  
Gardens aforesaid of the  
shape and dimensions and  
butting as appears by the  
said plan and being all the  
land comprised in Certificate  
of Title registered at Volume  
843 Folio 5

SECONDLY ALL THOSE Business Assets  
mentioned hereunder in the  
Schedule hereto

Consideration TWO MILLION DOLLARS apportioned  
hereunder:  
Land for \$1,000,000.00  
Business Assets for \$1,000,000.00

Nature of Possession Possession to pass on payment of first  
instalment of \$200,000.00 made on the

signing hereof and on execution of  
Mortgage mentioned hereunder

Terms of Payment \$200,000.00 on the signing of this agreement.  
A further \$200,000.00 within ten weeks of  
the signing hereof. Balance to be held on an  
open first mortgage carried by the Vendor  
for five years with interest thereon at 12½%  
per annum computed from the Date of  
possession."

It was inappropriate to include the provisions as regards the sale of the land and the fixtures in one contract. If the sale of the fixtures was to be secured by a mortgage, this could have been done by a Bill of Sale. There was none. However, possession of the fixtures was transferred to the appellant by virtue of the illegal contract as performed.

Be it noted that the appellant is not saying that the contract as formed was necessarily prohibited. She is claiming that the performance of the contract by Salmon was prohibited. Further, it was contended that as the Attorney-at-law having the carriage of sale it was his duty to ask the Bank of Jamaica for permission to perform the terms of the contract shortly after the contract was formed. It was also correctly submitted that if Salmon calculated to perform the contract without the permission of the Bank of Jamaica, then it would have been illegal from its inception and would be unenforceable by him: see **The Law of Contract** Cheshire and Fifoot 6<sup>th</sup> edition at page 330 and **J.M. Allan (Merchandising) Ltd. v Cloke** [1963] 2 Q.B 340 at 348.

The legal position is aptly summarized by Luckhoo J.A. in **Bank of London and Montreal v Sale** (1967) 10 J.L.R. 319 at page 359-360 thus:

"I think that DEVLIN, J., in **St. John Shipping Corpn. V. Joseph Rank, Ltd.** [1956] 3 All E.R. 683; [1957] 1 Q.B. 267 puts the matter very clearly ([1957] 1 Q.B. 267, at p. 284):

'On a superficial reading of **Anderson, Ltd. v. Daniel** [1924] 1 K.B. 138 and the cases that followed and preceded it, judges may appear to be saying that it does not matter that the contract itself is legal, if something illegal is done under it. But that is an unconsidered interpretation of the cases. When fully considered, it is plain that they do not proceed upon the basis that in the course of performing a legal contract an illegality was committed; but on the narrower basis that the way in which the contract was performed turned it into the sort of contract that was prohibited by the statute'."

The respondent's Defence to the Counterclaim at page 35 is also relevant to show that he is relying on the appellant's breach of contract to recover possession. It reads, inter alia, as follows:

"8. The Plaintiff denies that the Defendant performed her obligations under any of the agreements and/or mortgages as alleged or at all. The Plaintiff repeats his Statement of Claim and Amended Reply."

As for the relevant documents in the Agreed Bundle here are two representations coming from the respondent Delroye Salmon at pages 53 and 55 of the Record:

"This certifies that Ms. LILIA NEUMAN of Toronto, Canada is the registered owner of that Land (with buildings thereon) at 14 Churchill Place, Coral Gardens, White Sand Beach P.O. Montego Bay being the lot numbered 653 part of Coral Gardens aforesaid comprised in Certificate of Title registered at Volume 843 Folio 5 of the Register Book of Titles and became

entitled to possession thereof on the 31<sup>st</sup> day of December 1987."

Then at page 55 of the Record there is this further representation:

"RE: PREMISES – CORAL GARDENS formerly part  
of IRONSHORE ESTATE, SAINT JAMES –Lot  
No. 653 – Registered at Volume 843 Folio 5

---

This serves to confirm that Ms. LILIA NEUMAN is now the owner of the above-mentioned premises and as such is entitled to POSSESSION of the said premises to receive RENTS and PROFITS therefrom and is liable for all outgoings as from the 31<sup>st</sup> day of December 1987."

These two representations by the respondent Salmon, confirm the appellant's equitable interest, and demonstrate that in law he is the trustee of her equitable interest. The authorities to support her claim as an equitable owner in possession are **Lysaght v Edwards** (1876) 2 Ch.D 499 at 506-516, and **Abigail v Lapin** [1934] All E.R. Rep. 720 at 724-725.

Mr. Foster, for the respondent Salmon submitted that the appellant was in breach of the terms of the contract. On the other hand Ms. Warren's recurring theme was that, the contract was illegal as performed, and that the respondent Salmon, from the very inception of the contract, calculated to transfer the property to the appellant without the consent of the Bank of Jamaica. The appellant acquired possession through an illegal transaction and the respondent could not properly seek the assistance of the Court to recover possession. She relied on these two representations to show how the implied

trust came into being and argued that no explanation by him could alter the force and effect of those written representations.

The registered title reads as follows at page 150 of the Record:

"Registrar of Titles.

Transfer No. 440623 registered on the 16<sup>th</sup> of August, 1985 to DELROYE ASTON SALMON of Mandeville, Manchester, Attorney-at-Law, Consideration money Three Hundred Thousand Dollars.

Registrar of Titles."

The Draft Transfer prepared by the Respondent and signed by both parties reads as follows at page 90 of the Record:

"TRANSFER OF LAND UNDER THE  
REGISTRATION OF TITLES ACT

I, DELROYE ASTON SALMON of Mandeville Manchester, Attorney-at-Law being registered under the Registration of Titles Act by Certificate of Title entered in Volume 843 Folio 5 of the Register Book of Titles as the proprietor of an estate in fee simple in the land comprised in the said Certificate of Title subject to the incumbrances notified thereon: IN CONSIDERATION of the sum of TWO MILLION DOLLARS (the receipt of which sum is hereby acknowledged) paid to me by LILIA NEUMAN

(hereinafter called "THE TRANSFEREE") DO HEREBY TRANSFER to the Transferee

ALL my estate and interest which I am entitled or able to transfer or dispose of in ALL THAT parcel of land more particularly set out in the Schedule hereto:

"SCHEDULE:

ALL THAT parcel of land part of CORAL GARDENS formerly part of IRONSHORE ESTATE in the parish of SAINT JAMES being the LOT SIX HUNDRED AND FIFTY-THREE on the plan and part of Coral Gardens aforesaid of the shape and dimensions and butting as appears by the said plan and being ALL the land comprised in Certificate of Title registered at Volume 843 Folio 5.

DATED THIS                      DAY OF                      198

SIGNED by the said DELROYE ASTON SALMON

In the presence of:

SIGNED by the said LILIA NEUMAN

In the presence of:

... "

This is a remarkable document. Salmon acknowledged that he received \$2,000.000.00 for the estate.

It is sufficient to quote the commencement of the Draft Mortgage prepared by the respondent Salmon. At pages 95 and 99 of the Record it reads thus:

"THE REGISTRATION OF TITLES ACT

THIS IS AN INSTRUMENT OF MORTGAGE under the Registration of Titles Act MADE BETWEEN LILIA NEUMAN

(who and whose heirs, executors, administrators and assigns are hereinafter referred to as ("MORTGAGOR(S)")) on the ONE PART and DELROYE SALMON of Mandeville in the parish of Manchester, Attorney-at-Law (who and whose heirs, executors,

administrators and assigns are hereinafter referred to as ("THE MORTGAGEE") of the OTHER PART"

Then it continues:

WHEREAS the Mortagor(s) is by Certificate of Title in Volume 843 Folio 5 of an unencumbered estate in fee simple in the land therein and hereinafter mentioned and described in the Registry of Titles registered as the Proprietor(s)

AND WHEREAS the Mortgagor(s) is now indebted to the Mortgagee in the sum of ONE MILLION SIX HUNDRED THOUSAND DOLLARS which the Mortgagee has consented to have repayment thereof with interest thereon secured in manner hereinafter appearing."

The profession and address of the respondent is given. No such details are given as regards the appellant. It is an unusual document. The contract has the price of the realty as \$1,000,000.00. The draft transfer has the realty being transferred as \$2,000,000.00 and then there is a mortgage \$1,600,000.

At page 99 the Schedule reads:

"SCHEDULE

ALL THAT parcel of land part of CORAL GARDENS formerly part of IRONSHORE ESTATE in the parish of SAINT JAMES being the LOT NUMBERED SIX HUNDRED AND FIFTY-THREE on the plan of part of Coral Gardens aforesaid of the shape and dimensions and butting as appears by the said plan and being ALL the land comprised in Certificate of Title registered at Volume 843 Folio 5

DATED THIS                      DAY OF                      1988

SIGNED by the said LILIA NEUMAN )  
In the presence of: . . . "

Then here in part is a significant letter from Delroye Salmon to the Attorneys-at-law for the appellant at pages 111-112 of the Record:

"April 21, 1989

Messrs. Ripton McPherson & Company  
Attorneys-at-Law  
11 St. James Street  
P.O 72  
Montego Bay  
St. James

Dear Sir

Attention: Mr. Ripton McPherson

Re: Lot 653, Coral Gardens, St. James

...  
Kindly note that all sums received from her so far including the present cheque for \$5,000.00 have been paid to us in local currency; hence we were never put in position to apply for Bank of Jamaica's approval, as previous to your representation of her, she was represented by Mr. Kenneth McLeod, Attorney-at-Law.

We recognize that considerable sums have been spent on the premises following the damage done thereto by the hurricane against which the building was insured. Note must be also taken of the fact that she has been operating the premises as a guest house.

Kindly forward to us a statement of the sums so spent on IMPROVING the premises also the sum collected from the Insurance company used to finance the cost of repairs and/or improvement arising from damages caused by the hurricane, or from any other insurable cause.

Yours faithfully  
Delroye A. Salmon & Associates."



As for the evidence of the respondent Salmon the following extracts are of importance at pages 2-3 of the Supplementary Record:

"I decided to let her have possession at the beginning whereby Locksley Woolery moved in on the 4<sup>th</sup> November, 1987. We agreed that she would pay \$400,000 down initially. She was then going off to Canada immediately. About 2 weeks later she returned.

She and I met at office of her Attorney Mr. Kenneth McLeod on 15<sup>th</sup> December, 1987. She said she did not have the \$400,000 to deposit, all she had was \$200,000. She promised if I gave her 10 weeks within that 10 weeks she would pay another \$200,000.

The first \$200,000 was paid 18<sup>th</sup> December 1987. The 10 weeks to pay the other \$200,000 ran from 18<sup>th</sup> December, 1987 to 25<sup>th</sup> February 1988. Because she was already in possession and the assets needed protection I allowed her to go on those terms.

This agreement was embodied in document I drafted on agreement and showed it to Mr. McLeod. He okayed it. The agreement was drafted in Mr. McLeod office on the 15<sup>th</sup> December, 1987. I had it redrafted. I showed it to Mr. McLeod on 18<sup>th</sup> December, 1987. It was executed on the 18<sup>th</sup> December, 1987."

At page 4 the Respondent said:

"She was a very cautious person. No cash payments were made to me. Her attorney and I advised her that all payments she made had to go to Bank of Jamaica. No payments were made to me in any other currency than Jamaican currency."

There is no evidence that the Bank of Jamaica was informed of the contract or the payments. Yet the Respondent's evidence states at page 4 of

the Supplementary Record that she was a very cautious person and paid in Jamaican currency.

The Respondent must have been acquainted with the Exchange Control Act. Here is the evidence at page 8 of the Supplementary Record:

"Prior to giving her possession of property, when I operated it as guest house, I used to rent each bedroom for U.S. \$80 daily. It had 10 bedrooms. The Manager occupied one. We rented 9 bedrooms."

He would have had to comply with section 3 and 4 of the Act which prohibited him from dealing in foreign currency and obliged him to sell his foreign currency to an authorized dealer.

**The law in relation to the above facts**

Reference has already been made to section 33 of the Act. It reads thus:

"33.-(1) Except with the consent of the Minister it shall not be lawful in the Island –

(a) for any person resident in the scheduled territories to transfer or do any act forming part of a series of acts calculated to result in the transfer by way of sale, exchange, gift or mortgage of any land, buildings or other hereditaments situated in the Island or any instrument or certificate of title thereto, to a person resident outside the scheduled territories; or

(b) . . . "

Then section 33(2) reads:

"(2) Subsections (2) and (3) of section 20 shall apply in relation to a transfer or conveyance

prohibited by this section as they apply in relation to a transfer prohibited by this Act of a security."

Section 36 is also applicable. It reads:

"36.-(1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Minister is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:  
..."

The proviso reads:

"Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason."

It is clear having regard to his calculated acts that the proviso did not apply to the respondent Salmon.

Be it noted that when sections 33 and 36 are read together, it is clear that they strike at the performance of prohibited terms of the contract. The contract was not necessarily illegal as formed. It is the acts pursuant to the contract which are prohibited. These provisions were interpreted in **Barbara Grant v Derrick Williams** (1987) 24 J.L.R. 297 which approved the previous case of **Watkis v Roblin** [1967] 6 W.I.R. 533 and **Bank of London and Montreal v Sale** 10 J.L.R. 319.

Section 20(1) and (2) of the Act is applicable to section 33 and permits prohibited acts to be validated by the Bank. Section 20(1) reads:

"20.-(1) The title of any person to a security for which he has given value on a transfer thereof, and the title of all persons claiming through or under him, shall, notwithstanding that the transfer, or any previous transfer, or the issue of the security, was by reason of the residence of any person concerned other than the first-mentioned person prohibited by the provisions of this Act relating to the transfer or issue of securities, be valid unless the first-mentioned person had notice of the facts by reason of which it was prohibited."

Then 20(2) reads:

"(2) Without prejudice to the provisions of subsection (1), the Minister may issue a certificate declaring in relation to a security, that any acts done before the issue of the certificate purporting to effect the issue or transfer of the security, being acts which were prohibited by this Act, are to be, and are always to have been, as valid as if they had been done with the permission of the Minister, and the said acts shall have effect accordingly."

There is no evidence by the respondent explaining his failure to seek such a Certificate. There is no evidence that the Bank of Jamaica would have approved the payments or that it controlled the foreign currency which ought to have been brought into the Island. There is no evidence that the appellant Neuman knew that Solomon acts were prohibited. He had carriage of the sale and was responsible for seeking permission from the Bank.

**Friend v. Tulloch** P.C. Appeal No. 54 of 1992 delivered 24<sup>th</sup> January 1994 is distinguishable on the law and on the facts of the instant case. Here is how Lord Templeman showed that the proviso to section 36 was applicable to the circumstances of that case at page 3:

"Mr. Frankson gave evidence that he asked Miss Friend if she would on completion pay the whole or part of the purchase price in American dollars. Permission to transfer currency abroad to the vendor would have been more likely to be obtained if American currency had been paid into Jamaica.

The Court of Appeal held that the contract and completion were unlawful and that there was no implied condition making them lawful, if and when the consent of the Minister was obtained, because in terms of the proviso to section 36 the vendor and Miss Friend were engaged in evading the provisions of the Exchange Control Act and that Mr. Frankson was party to a conspiracy for that purpose. It is true that the vendor wished to be paid in American dollars and that Mr. Frankson wished Miss Friend to complete wholly or partly with American dollars but there was no secret about the contract, the vendor was represented by Queen's Counsel practicing in Jamaica, Miss Friend was represented by American attorneys, the deposit had been paid in Jamaican dollars in Jamaica and in these circumstances their Lordships are not satisfied that the parties were acting in contemplation of breaches of the Act. The contract was lawful but could not be completed until the consent of the Minister was given or ceased to be necessary."

The case of **Grant v. Williams** (supra) anticipated **Friend v Tulloch** in which Lord Templeman said at pages 2-3:

"By section 7 of the Exchange Control Act, except with the permission of the Minister, no person shall *inter alia* make any payment to or for the credit of a person resident outside Jamaica. By section 33 of the Act it was not lawful for land in Jamaica to be sold or purchased without the consent of the Minister if the vendor was resident outside Jamaica. Section 36 of the Act, however, provided as follows:-

'(1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or

consent of the Minister is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:

Provided that this sub-section shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason.'

Accordingly there was an implied condition in the contract of sale between the vendor and Miss Friend that the contract should not be completed without first obtaining the consent of the Minister. Miss Friend's counsel said that consent of the Minister was not required or sought because down to the date of the hearing by the Court of Appeal Miss Friend took the view, and it was supported by the trial judge, that both the vendor and Miss Friend were resident in Jamaica and that exchange control consent was not required. Mr. Frankson gave evidence that on completion he proposed to obtain the consent of the Bank of Jamaica acting for the Minister to the payment of the purchase price or part of the purchase price to the vendor in the United States of America...".

In the instant case the inference is that the Respondent intended to evade and did evade the provisions of the statute. He unilaterally terminated the contract as he held that the appellant was in breach. He gave no evidence that he had intended to seek the permission of the Bank of Jamaica to perform the contract.

As for the authority dealing with an equitable owner in possession the speech of Lord Browne-Wilkinson in **Tinsley v Milligan** [1993] 3 All E.R. 65 is appropriate. The following passages are relevant to the issue to be resolved in

this case. At page 88 the genesis of the modern law is stated thus at pages 88-89:

"Yet in **Ayerst v Jenkins** (1873) 16 Eq 275 Lord Selborne LC apparently treated a party to the illegality as being entitled to enforce express trusts against trustees. In that case, the settlor transferred investments to trustees and executed a settlement for the sole benefit of the defendant, with whom he was about to go through a ceremony of marriage which, to the knowledge of both, was illegal, ie the settlement was made in contemplation of unlawful cohabitation. After the death of the settlor, his personal representative sought to recover the investments from the trustees, claiming that the express trusts were invalid and that there was therefore a resulting trust to the settlor. The claim failed, partly on the ground that there was no equity in the settlor to recover from the trustees in whom the legal title was vested, but also on the ground that there was a fully executed trust vesting in the defendant the 'immediate and absolute beneficial interest' (see LR 16 Eq 275 at 284-285 for the explanation of **Rider v Kidder** (1805) 10 Ves 360 at 366, 32 ER 884 at 886). The whole case proceeded on the footing that the defendant, even if a party to the illegality, was entitled to enforce against the trustees her equitable rights as beneficiary under the express trusts. This view would be quite inconsistent with a general rule such as that propounded by Lord Eldon LC that a court of equity will never enforce equitable proprietary interests as the suit of a party to an illegality."

Be it noted that the appellant in the instant case was an innocent party to the transaction. It was Salmon the respondent who knew of the illegality. He refused to seek the permission of the Bank of Jamaica even when he sought to terminate the contract. By section 20(2) of the Act Salmon could

have sought a Certificate from the Bank of Jamaica to validate the acts he had performed without its permission.

Then the reasoning of Lord Browne-Wilkinson continues thus at page

90:

"In my judgment, the explanation for this departure from Lord Eldon LC's absolute rule is that the fusion of the administration of law and equity has led the courts to adopt a single rule (applicable both at law and in equity) as to the circumstances in which the court will enforce property interests acquired in pursuance of an illegal transaction, viz the **Bowmaker** rule (see **Bowmaker Ltd v Barnett Instruments Ltd** [1944] 2 All ER 579, [1945] KB 65). A party to an illegality can recover by virtue of legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality. In cases where the presumption of advancement applies, the plaintiff is faced with the presumption of gift and therefore cannot claim under a resulting trust unless and until he has rebutted that presumption of gift: for those purposes the plaintiff does have to rely on the underlying illegality and therefore fails." (Emphasis supplied)

In the instant case the appellant was not a party to the illegality. She is saying that she paid money on a contract which was ex facie legal and was put in possession. She was therefore an equitable owner in possession. She was not responsible for Salmon's refusal to seek the permission of the Bank to enter into and perform the contract.

His Lordship continues thus at pages 90-91:

"The position is well illustrated by two decisions in the Privy Council. In the first, **Sajan Singh v Sardara Ali** [1960] 1 All ER 269, [1960] AC 167 a plaintiff who had acquired legal title to a lorry under



an illegal transaction was held entitled to succeed against the other party to the illegality in detinue and trespass. The Board approved the **Bowmaker** test. Two years later in **Chettiar v Chettiar** [1962] 1 All ER 494, [1962] AC 294 the Board had to consider the case where a father, who had transferred land to his son for an illegal purpose, sought to recover it under a resulting trust. It was held that he could not, since he had to rely on his illegal purpose in order to rebut the presumption of advancement. The Board distinguished the decision in **Haigh v Kaye** (1872) LR 7 Ch 469 on the following grounds ([1962] 1 All ER 494 at 497, [1962] AC 294 at 301):

'It appears to their Lordships, however, that there is a clear distinction between **Haigh v. Kaye** and the present case. In **Haigh v Kaye** the plaintiff conveyed a freehold estate to the defendant. In the conveyance it was stated that a sum of £850 had been paid by the defendant for it. The plaintiff proved that no such sum was paid and claimed that the defendant was a trustee for him. Now in that case the plaintiff had no reason to disclose any illegality and did not do so. It was the defendant who suggested that the transaction was entered into for a fraudulent purpose. He sought to drag it in without pleading it distinctly and he was not allowed to do so. In the present case, however, the father had of necessity to disclose his own illegality to the court and for this reason: He had not only to get over the fact that the transfer stated that the son paid \$7,000 for the land. He had also to get over the presumption of advancement for whenever a father transfers property to his son, there is a presumption that he intended it as a gift to his son: and if he wishes to rebut that presumption and to say that his son took as trustee for him, he must prove the trust clearly and distinctly, by evidence properly admissible for the purpose, and not leave it to be inferred from slight circumstances; see **Shephard v. Cartwright** ([1954] 3 All ER 649 at 652, [1955] AC 431 at 445)'."

Continuing his speech Lord Browne-Wilkinson said at page 91:

"Further, the Board distinguished **Sajan v Sardara Ali**. It was pointed out that in **Sajan Singh v Sardara Ali** the plaintiff founded his claim on a right of property in the lorry and his possession of it. The Board continued ([1962] 1 All ER 494 at 498, [1962] AC 294 at 303):

'[The plaintiff] did not have to found his cause of action on an immoral or illegal act. He was held entitled to recover. In the present case the father has of necessity to put forward, and indeed, assert, his own fraudulent purpose, which he has fully achieved. He is met therefore by the principle stated long ago by LORD MANSFIELD: "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act" ( see **Holman v. Johnson** ((1775) 1 Cowp 341 at 343, [1775-1802] All ER Rep 98 at 99)).'

In my judgment these two cases show that the Privy Council was applying exactly the same principle in both cases although in one case the plaintiff's claim rested on a legal title and in the other on an equitable title. The claim based on the equitable title did not fail simply because the plaintiff was a party to the illegal transaction: it only failed because the plaintiff was bound to disclose and rely upon his own illegal purpose in order to rebut the presumption of advancement. The Privy Council was plainly treating the principle applicable both at law and in equity as being that a man can recover property provided that he is not forced to rely on his own illegality."

When these principles are applied to the instant case, the conclusion must be that the respondent Salmon in his pleadings, and his evidence demonstrated that he was relying on his illegal acts to recover possession from the appellant. He averred and sought to prove that the appellant was in breach of contract and so he was entitled to repossess the estate.

It seems that the learned judge below erred because she ruled at pages

7-8 of the Record as follows:

"It is my firm view that the contracts between the parties are in keeping with the principles with respect to the formation of a contract. There is no evidence that the proviso to section 36(1) is applicable. I unhesitatingly adopt the conclusion of Douglas J in **Watkins v Roblin** (supra), in that, where the agreement is not caught by section 36(1) of the Exchange Control Act, the Act goes to performance of the contract and not to formation. There is no dispute that Section 20 of the Act permits the ratification by the Minister of transactions which had been initiated without his authorization. Ministerial consent is relevant at the time of the performance of a contract, not at the time of its formation. It cannot therefore be recognized that there is any illegality touching the formation of the contracts between the plaintiff and defendant."

But there were:

"...a series of acts calculated to result in the transfer by way of sale, exchange, gift or mortgage of any land, buildings or other hereditaments situated in the Island or any instrument or certificate of title thereto, to a person resident outside the scheduled territories."

These series of acts were performed by the respondent Salmon. It is true that the appellant signed the agreement for sale transfer and mortgage, but she does not rely on those acts. She relies on the fact that she is an equitable owner in possession. Further, she says Salmon the respondent cannot rely on his illegal acts to dispossess her.

To reiterate, the contract, draft transfer, draft mortgage and representations, demonstrate that the appellant had an equitable interest. Also Salmon put the appellant in possession. As previously explained the way in which Salmon acted, "turned it into the sort of contract that was prohibited by the Statute." In this context the following passage from the opinion of Lord Morris of Borth-y-Gest in **Mistry Amar Singh v Kulubya** [1963] 3 All ER 499 at 504 is helpful:

"In his judgment in **Scott v. Brown, Doering, McNab & Co., Slaughter and May v. Brown, Doering, McNab & Co.**, [1891-94] All E.R. Rep. 654; [1892] 2 Q.B. 724, LINDLEY, L.J. [1891-94] All E.R. Rep. at p. 657; [1892] 2 Q.B. at p. 728 thus expressed a well-established principle of law:

'Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality the court ought not to assist him.'

LINDLEY, L.J., added [1891-94] All E.R. Rep. at p. 657; [1892] 2 Q.B. at 729 'Any rights which he may have irrespective of his illegal contract will, of course, be recognized and enforced'. A.L. SMITH, L.J. [1891-94] All E.R. Rep. at p.660; [1892] 2 Q.B. at 734 said:

'If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action.'

In the earlier case of **Taylor v. Chester** (1869), L.R. 4 Q.B. 309 it was said (1869), L.R. 4 Q.B. at 314:

'The true test for determining whether or not the plaintiff and the defendant were in *pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party'."

Lord Morris continued thus on the same page:

"In that case it became impossible for the plaintiff to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. He was therefore defeated by the principle which is expressed in the maxim "*in pari delicto potior est conditio possidentis*". That was a case, therefore, where a plaintiff was forced, in order to support his claim, to plead the illegality of a contract. The case was referred to in the judgment of the Court of Appeal in **Bowmakers Ltd. v. Barnett Instruments, Ltd.** [1944] 2 All E.R. 579; [1945] K.B. 65, where it was said [1944] 2 All E.R. at p. 582; [1945] K.B. at 71:

'In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim'."

Another passage worth citing in this context comes from **North Western Salt Co. Ltd. v Electrolytic Alkali Co. Ltd.** 1914 A.C. 461. The

relevant passage is cited by Diplock L.J. as he then was in **Snell v. Unity Finance Ltd.** [1963] 3 All E.R. 50 at 59. It reads thus:

"One special case should perhaps be noticed. It is possible to conceive a case in which a fact comes to light in the course of the trial which of itself renders an agreement illegal on grounds which nothing could cure. In such a case the court would act upon it. But this is no exception to the general rule. Amendments of the pleadings and permission to the plaintiff to call evidence would *ex hypothesi* be useless in such a case, because the fact is conclusive of the illegality."

This is the answer to the following passage in the judgment of the learned judge below at page 8 of the Record which reads:

"In my opinion, if the defendant had genuinely wished to have raised the question of the illegality of the contract of sale, any illegality which she alleges ought to have been pleaded in the alternative, in her counter-claim."

The appellant is entitled to possession firstly on the principle expressed by Lord Denning in the passage cited by Lord Goff in **Tinsley v Milligan** [1993] All E.R. 65 at 72 thus:

"In **Sajan Singh v Sardara Ali** [1960] 1 All ER 269 at 272-273, [1960] AC 167 at 176-177 the principle was explained by Lord Denning in the following passage:

'There are many cases which show that, when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose – and one of them transfers property to the other in pursuance of the conspiracy – then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has

been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin . . . The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it – he cannot throw over the transfer. And the transferee, having got the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality – it has no power to do so – so it says, in the words of LORD ELDON, L.C.: "Let the estate lie where it falls"; see **Muckleston v. Brown** (1801) 6 Ves 52 at 69, [1775-1802] All ER Rep 501 at 506'."

If Salmon the legal owner cannot dispossess the appellant she has an equitable title against the whole world. She is also entitled to terminate the implied trust and call for the legal title.

This principle is exercised by virtue of the Rule in **Saunders v Vautier** (1841) Cr. 1 PH. 240 or 41 E.R. 482. The basis of it is that an equitable owner in possession is entitled to all the benefits of possession, and as a standard text book on The Law of Real Property puts it, it is "pointless to keep the legal and equitable interest separated where only one person is entitled to the beneficial interest:" **Megarry** and **Wade** second edition at page 438.

In this context it is also pertinent to refer to sections 60 and 74 of the Registration of Titles Act to examine how the Act recognizes trusts and then empowers an appellant as Lilia Neuman who has the beneficial interest to secure the use of the name of the trustee if she is involved in

litigation concerning the trust property. Later in this judgment specific references will be made to section: 48(d) and (g) of the Judicature (Supreme Court) Act.

Section 60 reads:

"60. The Registrar shall not enter in the Register Book notice of any trust, whether express, implied or constructive; but trusts may be declared by any document, and a duplicate or an attested copy thereof may be deposited with the Registrar for safe custody and reference; and the Registrar, should it appear to him expedient so to do, may protect in any way he may deem advisable the rights of the persons for the time being beneficially interested thereunder, or thereby required to give any consent; but the rights incident to any proprietorship or to any instrument, dealing or matter, registered under this Act, shall not be in any manner affected by the deposit of such duplicate or copy, nor shall the same be registered."

Then section 74 states:

"74. The proprietor of any land, or any lease, mortgage or charge, shall, on the application of any beneficiary or person interested therein, be bound to allow his name to be used by such beneficiary or person in any action, suit or proceeding, which it may be necessary or proper to bring or institute in the name of such proprietor concerning such land, lease, mortgage or charge, or for the protection or benefit of the title vested in such proprietor, or of the interest of any such beneficiary or person, but nevertheless such proprietor shall, in any such case, be entitled to be indemnified in like manner as if, being a trustee, he would before the commencement of this Act have been entitled to be indemnified in a similar case of his name being used in any such action, suit or proceeding, by his *cestui que trust*."



In the light of this analysis the following passage from the judgment of the Court below cannot stand. It reads at page 10 of the Record:

"It is clear that the defendant is in breach of the agreement for sale. She has neglected to complete her part of that agreement as she has not paid the requisite deposit on the purchase money. She has remained in occupation of the plaintiff's property notwithstanding that her obligation under the contract remained unfulfilled and had continued to occupy the plaintiff's property despite a Notice to quit and deliver up possession of the property. The plaintiff is undisputably entitled to recover possession of his property."

As for the grounds of appeal, the appellant filed nine grounds. I shall try to summarise seven of them thus:

1. The learned judge erred when she ruled that the performance of the contract of sale was not in contravention of the provisions of the Exchange Control Act.
2. The learned judge erred when she ruled that in the circumstances of the instant case the appellant was bound to plead the illegality of the performance of the aforesaid contract.

Counsel for the appellant argued these grounds successfully. She also added that the respondent Salmon could have been prosecuted in proceedings instituted by the Director of Public Prosecutions pursuant to Part II of the Fifth Schedule to the Act, and could still be prosecuted in the light of section 25(2)(e) of the Interpretation Act.

Once Counsel has succeeded on these grounds, then the owner of the beneficial estate, the appellant Lilia Neuman can call for the registered title which contains the legal estate of which Salmon is the trustee. This Court can so order on the basis of its inherent jurisdiction which was explained earlier.

There were in substance, two other grounds. The first complained that a request for an adjournment was rejected. The second pertained to the learned judge's refusal to hear Mr. David Coore Q.C., a former Attorney-General and Finance Minister, as a witness for the appellant on the issue of illegality. To my mind there was no need to address those grounds in order to dispose of the appeal. They were in any event devoid of any merit.

**Section 28 of the Act and section 26(8) of the Constitution.**

Section 28 of the Act reads:

"28.-(1) Where a person –

- (a) has made any payment which is prohibited by this Act; or
- (b) being bound under this Act to offer or cause to be offered any specified currency to an authorized dealer, has otherwise disposed of that currency,

the Minister may direct him to sell or procure the sale of any property which he is entitled to sell or of which he is entitled to procure the sale, being property which represents, whether directly or indirectly, that payment or that specified currency, as the case may be, and may by the same or a subsequent direction specify the manner in which, the persons to whom and the terms on which the property is to be sold.

(2) Without prejudice to the generality of the provisions of subsection (1), the power conferred thereby on the Minister to give directions shall extend to the giving of directions that the property shall be assigned to the Minister or to a person specified in the directions."

To my mind the appellant did not make any payments to the respondent Salmon which were payments prohibited by section 33 or Part II of the Act. Out of an abundance of caution, I will deal with payments to Salmon as if they were prohibited by the Act. The Act was enacted in 1954 and repealed by the Exchange Control (Repeal) Act 1992. It was therefore an "existing law" or a "law in force" at the commencement of the Constitution on August 6<sup>th</sup> 1962.

Section 4(1) of the Jamaica (Constitution) Order in Council 1962 might, be applicable and section 26(8) of the Constitution is certainly applicable, as section 28 of the Act permits the Minister to give directions to sell property obtained by order of the Court. The enjoyment of property is a Fundamental Right protected by Chapter III of the Constitution. The property in this case is a valuable ten room guest house situated on choice real estate on the North Coast.

The issue to be determined is whether section 28 of the Act is saved on the basis that it is deemed to be consistent with Chapter III of the Constitution and so consistent with section 18 which enshrines the enjoyment of property as a Fundamental Right. Section 4(1) of the Order in Council has recently been construed by Lord Bingham in **Director of Public Prosecutions v. Kurt Mollison No 2** Privy Council Appeal No. 88 of 2001. It is now necessary to

construe section 26 (8) of the Constitution, the other savings clause where the law in force is inconsistent with Chapter III of the Constitution, but by virtue of section 26(8) must be deemed to be consistent with it. **Director of Public Prosecutions v. Nasralla** (1967) 10 J.L.R. 1 construed section 26(8) of the Constitution in relation to section 20 (8) where that section enshrined the common law of double jeopardy. The common law was consistent with section 20(8) of the Constitution which reads:

"(8) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence."

**Nasralla** is an oft' quoted case and lawyers make the mistake of treating the language of the judgment as if it were the words of a statute.

The reality is that only the ratio is a binding precedent. Citing the ratio on this aspect in **Baker v The Queen** 13 J.L.R. 169 at 177 Lord Diplock said:

"So in order to dispose of the appeal it was necessary for the Board to decide the preliminary question of law: whether Nasralla's rights were governed by s. 20(8) of the Constitution or by the common law rule. Upon his preliminary question LORD DEVLIN, who delivered the opinion of the Board, said this about the effect of s. 26(8) of the Constitution upon the applicability of s. 20(8).

'This chapter [sc. Chapter III of which section 20(8) forms part] . . . proceeds upon the

presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed'."

What this seminal case did not do, was to address the issue of a law in force which was inconsistent with the provision of Chapter III. In this context section 26(8) resorts to the radical canon of construction which deems all laws in force to be compatible with Chapter III, so as to ensure that the laws in force are consistent with the Fundamental Rights provision of Chapter III and with the supremacy clause in section 2 of the Constitution. **Attorney-General of St. Christopher Nevis Anguilla v Reynolds** [1980] A.C. 637, [1980] 2 W.L.R. 171 demonstrates how the judiciary responds to saving clauses which requires laws in force to be compatible with Fundamental Rights clauses. At page 182 Lord Salmon said:

"If the Court of Appeal were right in concluding that no modification or adaptation or qualification or exception could bring the Order in Council into line with the Constitution, then they would have been plainly right in holding that the Order in Council was nugatory and the Emergency Powers Regulations 1967 invalid. Their Lordships cannot, however, accept that the Constitution would have preserved the life of the Order in Council of 1959 for any period if the Order in Council could not be construed under section 103 of the Constitution so as to bring it into conformity with the Constitution. It is inconceivable that a law which gave absolute power to arrest and

detain without reasonable justification would be tolerated by a Constitution such as the present, one of the principal purposes of which is to protect fundamental rights and freedoms. Their Lordships do not consider that there is any difficulty in construing the Order in Council by modification, adaptation, qualification, or exception so as to bring it into conformity with the Constitution. As stated in the judgment of their Lordships' Board in **Minister of Home Affairs v. Fisher** [1979] 2 W.L.R. 889, a Constitution should be construed with less rigidity and more generosity than other Acts."

Section 103 (2) of the St. Christopher Constitution is at page 180 of the judgment. The power accorded the judiciary for the "modification etc". of the laws in force was "as if it had been made under this Constitution by the legislature or as the case may require by the other person or authority".

Section 26(8) accords with the canon of construction - the presumption of constitutionality, which is a logical method of interpreting a Constitution which is the fundamental law.

Section 13 of Chapter III of the Constitution reads:

"13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

- (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
- (b) freedom of conscience, of expression and of peaceful assembly and association; and

- (c) respect for his private and family life,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

From the appointed day "every person in Jamaica is entitled to the fundamental rights and freedom of the individual". Such entitlement can only be enjoyed if the laws in force and future laws are consistent with Chapter III.

Section 18 in so far as relevant reads:

"18.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that –

- (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
- (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of –
  - (i) establishing such interest or right (if any),
  - (ii) determining the amount of such compensation (if any) to which he is entitled; and

- (iii) enforcing his right to any such compensation."

Two of the exceptions may be cited to show that they have no relation to the present case. They read:

"(2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property -

(a) in satisfaction of any tax, rate or due:

(b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence;

The appellant has not ~~been~~ prosecuted for any breach of the Act. There has been no civil process against her with respect to the property in issue. On the other hand this Court is empowered by section 18(2)(h) of the Constitution and by statute to order Salmon to give up the legal estate to the appellant as she is the equitable owner in possession. The Minister can only invoke section 28 of the Act if he relies on compulsory acquisition in the public interest and pursuant to an Act of Parliament which provides for adequate compensation.

It is now pertinent to construe section 26(8) of the Constitution in relation to section 28 of the Act and in so doing we must recognize the context in which section 26(8) appears. It is in the Interpretation clauses of Chapter III. It reads:



### **"Interpretation of Chapter III**

...

26(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

There are several features to note. Section 26(8) is confined to the substantive provisions of Chapter III which is the centerpiece of the Constitution. Chapter III is the centerpiece because for the first time Fundamental Rights and Freedoms were enshrined in the Constitution. There are two distinct provisions within section 26(8). The first refers to the contents of laws in force before the appointed day. The purpose of this part was to ensure that the laws in force and future laws are consistent with Chapter III. Deeming is the most powerful tool in the construction of Statutes and Constitutions and section 26(8) is a classic deeming clause. By the use of double negatives for emphasis, it insists that laws in force which are inconsistent with Chapter III are to be held by the Court as being consistent with that Chapter. So when this clause is examined grammatically it means; nothing in the laws in force are to be held by this Court to be inconsistent with the provisions of Chapter III. Translated to positive language it means all laws in force are to be read as if they are consistent with Chapter III.

Such a clause, like its companion clause, in section 4(1) of the Order in Council is necessary for a Constitution which has evolved from a previous legal

system. Laws in force are not to be declared invalid, they are to be construed to be in conformity with Chapter III. Section 26(8) also makes the laws compatible with the Supremacy Clause. That clause reads in section 2 of the Constitution:

"2. Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Section 28 of the Act must be read subject to section 18 of the Constitution. So the Minister's powers are limited to direct a sale if he is empowered to do so by a law which ensures that the vendor secures adequate compensation and the acquisition is in the public interest. Such provisions are to be found in the Land Acquisition Act, a law in force.

Is there any authority which supports the above analysis? There is **Maloney Gordon v. The Queen** (1969) 15 W.I.R. 359. The ratio is contained in the following passage at page 360. It reads as follows:

"The relevant restriction on punishment is contained in s. 29 (1) of the Juveniles Law, Cap. 189 of the Laws of Jamaica and reads as follows:

'29. (1) Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Law, be liable to be detained in such place (including, save in the case of a child, a prison) and under such conditions as the Governor may direct,

and while so detained shall be deemed to be in legal custody.'

By the Jamaica (Constitution) Order in Council 1962, Second Schedule, s. 20 (7) it is provided:

'No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.'

There was thus no jurisdiction in the court to pass sentence of death upon the accused if he was under eighteen at the time of the commission of the offence."

Section 29(1) of the Juveniles Act as it stood was interpreted by the Court of Appeal in **R. v Michael Wright** (1972) 18 W.I.R. 302 and by the Privy Council in **Baker v The Queen** (supra). These cases decide that the relevant age is at the time of sentencing. By relying on section 20(7) of the Constitution the Privy Council in **Maloney Gordon** determined the relevant age as the time of the commission of the offence. In deciding that section 20 (7) of the Constitution prevailed, the Board was giving effect to section 2 of the Constitution, the Supremacy Clause. As a junior counsel for the Crown I argued against the proposition I have just stated. I now repent.

The second part of section 26(8) pertains to acts done under laws in force. No act done prior to the appointed day can give rise to proceedings for breaches pursuant to Chapter III. It is this feature which saves those prior

acts from being unconstitutional. On this analysis acts done before the appointed day in accordance with the Exchange Control Act cannot give rise to constitutional proceedings for breaches of Chapter III. This aspect of section 26(8) is in the nature of an Indemnity Clause.

There is a specific savings clause in 17(2) of the Constitution which pertains to "Protection from inhuman treatment." The whole clause reads:

"17.-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorise the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

Here again the use of double negatives for emphasis is in operation. Translated to positive language section 17(2) means the laws in force are deemed to be consistent with section 17(1) both as to the contents of those laws and what was done under the authority of those laws. Then there is an important qualification. The deeming provision applies "to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

The other important feature of the Constitution is that its provisions in Chapter III extend to "every person in Jamaica" so that its provisions are not confined to citizens and residents but to all those who are within the

jurisdiction. Furthermore those rights are protected by an independent and impartial judiciary and vindicated by fearless advocates.

Neuman ought to be restored to possession of her guest house and fixtures. She ought to be entitled to **mesne profits** from the time she was dispossessed to the time she instituted proceedings in the Supreme Court. She is entitled to call on Salmon to deliver up the legal title, if she does not wish him to continue as trustee, by virtue of sections 48(d) and (g) of the Judicature Supreme Court Act which reads:

"(d) The Court and every Judge thereof shall take notice of all equitable estates, titles and rights, and all equitable duties and liabilities, appearing incidentally in the course of any proceeding, in the same way as the Court of Chancery would have done in any proceeding instituted therein before the passing of this Act.

...  
(g) The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided."

Although this is a dissenting judgment I am setting out what I hold to be the appropriate order as it may be useful if there is a further appeal. It reads thus:

- (1) Appeal allowed.
- (2) Order below set aside
- (3) Appellant to be restored to possession of 14 Churchill Place, Coral gardens, Ironshore Estate with fixtures forthwith
- (4) Respondent Salmon to execute a registrable transfer and deliver up duplicate certificate of title.
- (5) If the Respondent Salmon an Attorney-at-law and as such an officer of the Court fails to comply with the Order at 4, within 14 days hereof, the Registrar of the Supreme Court is to execute a registrable transfer and give the appropriate directions to the Registrar of Titles.
- (6) There should be liberty to apply for consequential orders.
- (7) The agreed or taxed costs both here and below should go to the appellant.

### **ORDER**

### **DOWNER, JA;**

By a majority [Langrin, Panton JJA] appeal dismissed. Order of the court below affirmed: Downer J.A. dissenting. Costs of the appeal to the respondent to be taxed if not agreed.