IN THE SUPREME COURT OF JUDICATURE OF JAMAICA IN EQUITY

E 338/1993

IN CHAMBERS

BETWEEN: MILTON ROBINSON Plaintiff/Applicant

AND

JUDY ELIZABETH ROBINSON Defendant/respondent

IN THE MATTER OF THE MARRIED WOMENS PROPERTY ACT

SUMMONS TO DETERMINE INTEREST IN PROPERTY

Alton Morgan and Robin Sykes instructed by Alton Morgan and Co. for the applicant

Miss Pamela Benka-Coker Q.C. and Mrs. Arlene Harrison-Henry for the respondent

Hearing on July 4,5,6,19,21, 1994 and 29th September 1995.

Bingham J

JUDGMENT

The parties in this matter are husband and wife. They were married on 2nd January 1972. At present they are now separated the applicant having left the matrimonial home, 17 Arcadia Circle, Kingston 8 since

15th October 1993. (paragraph 13 of applicant's affidavit sworn to on 16th May 1994).

Although described in his affidavit as a businessman the applicant has done very little by way of work since his marriage to the respondent, for apart from the period October 1976 to 1981 when he was employed at First National City Bank as a Loans Officer, he has survived mainly from the receipt of generous hand-outs from the respondent and from sums obtained in his capacity as her Investment Manager for certain funds which the respondent had in certain financial institutions in the United States of America for which the applicant had the authority to transact business on the respondent's behalf.

By this present claim the applicant sought the following reliefs:-

(i) The determination of their proprietory interests in the matrimonial home at 17 Arcadia Circle. In this regard the applicant in the originating summons dated 20th September 1993 sought the following declarations:-

(i) It be declared that the applicant and the respondent are equally beneficially entitled to real property situated at and known as 17 Arcadia Circle Kingston 8 in the parish of Saint Andrew comprised in Certificate of title registered at Volume 1103, Folio 118 of the Register Book of Titles.

(ii) It be declared that the applicant and the respondent are equally beneficially entitled to the household appliances and furniture in the

matrimonial home at 17 Arcadia Circle, Kingston 8 Saint Andrew save and except the items of furniture listed in paragraph 3 hereof.

(iii) It be declared that the applicant is solely beneficially entitled to the household appliances and fittings as follows :-

(a) Mahogany chest of drawers

(b) 2 twin beds

(c) 20 inch Toshiba colour television with remote

(d) Ken Abendana Spencer oil painting

(e) 3 drawer metal filing cabinet with side locker.

(f) Cedar wood bookcase.

(g) Matching two seater and three seater upholstered sofa set.

(h) Small battery electric bedside radio.

In response the defendant by way of a counterclaim filed on June 28th, 1994 sought the following reliefs:-

"(a) a declaration that the respondent is the sole beneficial owner of premises known as 17 Arcadia Circle in the parish of Saint Andrew and

Registered at Volume 1103, Folio 118 of the Register Book of Titles.

(b) a declaration that subsequent to the purchase of the said premises in the joint names of the applicant and the respondent in July 1977, the applicant and the respondent orally agreed that the applicant would sell his half-share of the land the subject of this suit to the respondent for valuable consideration.

(c) a declaration that acting on the terms agreed the respondent duly paid the applicant the sum of $25,000 US for his half-share of the premises.

(d) a declaration that the respondent partly performed the said oral contract entered into between the applicant and the respondent.

(e) an order that the applicant do specifically perform the said oral contract by transferring his registered share to the respondent by signing all documentation necessary to effect such a transfer.

(d) a declaration that the applicant wrongly withdrew $65,000 U.S. from the respondent's account in the United States without the consent of the respondent.

(g) an order that the applicant do refund the said amount of $65,000US to the respondent with interest at a rate that the Honourable Court may deem fit.

(h) a declaration that the respondent is the sole owner of all the items of furniture enumerated in the applicant's originating summons dated 20.9.93.

There was also a claim for such reliefs as may be necessary and for costs.

The hearing in this matter commenced on 4th July 1994 and lasted through to 6th July, and continued on 19th and 21st July when the matter was adjourned sine die for counsel for the parties to prepare and deliver written submissions which were to be submitted by August 18th, 1994. This deadline was, however, surpassed and it was not until November 8, that the court was finally notified by letters from the attorneys for the parties that their submissions were now completed and that the court could then proceed with the examination of the submissions and the authorities and deliver its judgment. The fact that this judgment is only at this stage being prepared for delivery is due in no small measure to the very taxing court schedule to which one is subject which regrettably leaves very little time for writing judgments.

The originating summons and the counterclaim although seeking a number of reliefs focussed on two main issues namely:-

(1) What is the respective interests if any of the parties in the matrimonial home, 17 Arcadia Circle?

(2) Did the plaintiff wrongfully withdraw any money from the respondent's foreign accounts in the United States of America and if so, what is this sum?

There was also a claim and counterclaim by the parties in respect of the furniture then in the matrimonial home but that matter was resolved by the parties and their attorneys during the course of the hearing and the court was not troubled with any oral or written submission on that matter. A brief mention as to how that issue is to be treated will be commented upon later on in this judgment.

The Claim to the Matrimonial Home

The facts out of which the respective claims arose are in the main not disputed. There is no issue that the matrimonial home at 17 Arcadia Circle was purchased in 1977 by the respondent with her own funds and that all payments towards principal, interest and sinking fund with respect to the mortgage as well as for improvements carried out on the premises, the latter being very substantial, have to a large extent been met by the respondent with the exception of the period when the applicant worked at the First National City Bank at which time he paid the mortgage. With this situation in mind, although the title was transferred into the joint names of the parties the respondent as the wife had she desired could have contended that the applicant's (plaintiff's) name was merely placed on the title by way of convenience only, being done to satisfy the usual preconditions laid down by most financial lending institutions as part of their lending

policy in financing the purchase by married couples of real property. That she had chosen to admit that the premises was bought by her in their joint names and that she intended at the time of its purchase that the plaintiff should acquire a joint beneficial interest in the property is a factor that can only redound to her credit worthiness as to not only what she has deponed to in her affidavits but equally as to how her demeanour falls to be weighed, assessed and evaluated when her oral evidence was tested under cross-examination during the hearing of the matter.

The respondent has deponed to and testified that the beneficial interest which the plaintiff came to be possessed of as a joint fee simple owner of an undivided halfshare in 17 Arcadia Circle, was divested by way of an agreement whereby the respondent agreed to purchase the plaintiff half share in the matrimonial home in 1985 and which transfer was prepared for the parties at the offices of Mr. John Graham, an attorney-at-law. He testified at the hearing that after he had received instructions from both parties who attended at his offices, he drew up the documents of transfer and handed it to one of them with instructions to execute same. He was of the view from the time of the conversation which he had with the parties that the plaintiff had received valuable consideration for the transaction which resulted in the document being drafted.

The applicant is saying that it was the respondent to whom the transfer document was handed. The respondent is saying that it was the applicant who took it from Mr. Graham.

Mr. Graham's account when he came to testify in the matter was that he formed the impression that the applicant was the dominant partner and so he believed that the document was handed to him.

Given the conduct of the applicant throughout the marriage there is no reason to doubt the respondent's account. One would only have to call to mind the applicant's removal of the registered title from the matrimonial home after the mortgage had been repaid by the respondent and a sizeable loan obtained by the applicant from the bank unknown to her. Later on when the marriage was now threatened with breakdown, the title to the house goes missing and turns up in the custody of the applicant's attorneys. One need hardly mention his exploiting the respondent to extract $1,000,000 from her on the sale of the building constructed on Shortwood road by claiming to have spent $500,000 on wiring the premises when he had spent only $37,000. With this sort of conduct exhibited by him, the taking of the transfer document from the attorney after it had been drawn up and the possible destruction of it to remove any documentary proof of its existence would not be out of character with the modus operandi of the applicant. The respondent on the other hand had the document been handed to her she certainly would have had no plausible motive or reason to destroy or conceal it.

The circumstances leading up to the preparation of the transfer document is not in issue. There is, however, an issue as to the sum which the respondent claims was the consideration paid for the plaintiff's half share in the property and the sum that the plaintiff

is saying was the amount paid to him. There is also an issue as well as to the subject matter of the transaction. The plaintiff is contending that the sum he received was an amount of $17,500 US and that this was paid to him by way of a loan, which as there is no issue that he is now possessed of the requisite means, he has to date failed to make repayment to the respondent of this amount. The respondent of on the other hand has denied that the sum which she is asserting was $25,000 US was a loan made to the plaintiff towards supporting this claim. She has adverted to the fact that during the period of the marriage that the parties were living together numerous sums were advanced by her to the plaintiff, a fact which has been admitted by the plaintiff as being "possibly over a hundred such occasions," a situation brought about by the plaintiff's refusal or dislike for work. He was in short what may properly be referred to as "a kept husband."

Before examining the issues as to the parties claim to the matrimonial home it maybe be convenient to consider some of the evidential background as to the situation of the parties and how their relationship developed during the marriage.

From the affidavits sworn to by the parties the chronology of events revealed that the parties were married in January 1972. The plaintiff it would seem was totally unprepared to shoulder the responsibility that came with his newly found status of marriage. He was then a student pursuing a degree in Economics as a full time undergraduate at the University of the West Indies Social Science Faculty at Mona

and he was so occupied for the next four years. During this period of time he was unable to shoulder his responsibilities as a husband and the respondent assisted him financially as well as providing her with the use of her motor car, a gift from her mother, to enable him to commute between the campus at Mona where he resided at Taylor Hall and May Pen Clarendon where the respondent continued to reside with her parents following the marriage. This pattern of the plaintiff's failure to take on the responsibility of assisting in the maintenance of his family is something which continued throughout the entire period of the marriage. In short it was the respondent who has consistently carried the financial burden of maintaining the household and it would appear that it was the plaintiff who did not mind being cast in this role of a kept husband. It was this situation which no doubt prompted learned counsel for the respondent Mrs. Benka-Coker in her written submission to contend that "the marital relationship between the parties was an abusive one. One in which the applicant consistently subjected the respondent to inexcusable verbal and physical abuse. The applicant on his own evidence demonstrates himself to be a domineering and manipulative man who shamelessly exploited the respondent and the marital relationship for his own financial gain". This caricature of the applicant has to be viewed in stark contrast to that of the respondent. In that regard she is described again by her counsel, and this is bourne out by the evidence as being " a woman who clearly sets great store in good family life and one who strived to preserve her marriage even in the face of the applicant's unkindness and infidelity". It was his infidelity in fathering a child in 1981 a fact unknown to the respondent at that

time that may have been what upon discovery prompted her to summon up the necessary will and strength of purpose to contest these proceedings brought by the plaintiff.

As I observed her demeanour during her testimony while being cross-examined on her affidavit evidence by junior counsel for the plaintiff Mr. Sykes, the deep emotional hurt and the mental anguish which she was undergoing at that time was clearly apparent. When pressed by counsel as to why in the face of the plaintiff's attitude towards her and with the marriage threatened with collapse, she choose in 1981 to adopt a child she responded by remarking that "I adopted Sophia because I wanted a child. I wanted a family." This was in again in stark contrast to the plaintiff who when challenged by counsel for the respondent about incidents of his verbal and physical abuse towards the respondent he could only react with an air of almost total resignation in saying that "if she (referring to the respondent) says I said it then I said it." It was this situation which prompted learned counsel for the respondent to submit that what was being portrayed here was "a relationship in which one party was domineering, cruel and took while the other was dominated, kind and gave in order to preserve and maintain some semblance of decency in the marriage". Being from a family with considerable financial resources, it would not be difficult for the respondent who inherited a large share of that wealth to be kind and generous to the person one to whom she had taken a vow to "love, cherish, honour and obey" these words I have not the least doubt clearly meant something sacred and precious to her.

It is against this background that I now turn to examine what is the most critical issue in this case. The issue has been touched on briefly at the outset of identifying the issues but this now needs to be explored in greater detail at his stage.

There is I repeat for the sake of emphasis no issue of fact as to how the house which served as the matrimonial home was acquired for although the plaintiff deponed to being actively involved in the purchase of the house this involvement seemed on the evidence of the respondent to have been limited to him signing the legal documents necessary to effecting the transfer of the title from the vendors to the respondent and himself as purchasers. The unchallenged evidence is that it was the respondent alone who from her own funds provided the entire proceeds for financing the acquisition of these premises. She nevertheless admitted however that she intended the applicant to share equally in the beneficial ownership of the property.

The law is clear in this regard insofar as their proprietory interests would have been determined at the time of the acquisition of the house. There is no challenge being made therefore by learned counsel for the respondent as to how the beneficial interest of the parties stood at the time in 1977 when the house was bought. There are issues of fact that arise and fall to be resolved from this transaction between the parties in 1985. The manner of its resolution thus will call for the consideration of certain legal questions that will naturally follow from that situation.

The applicant's position

The plaintiff is saying that it 1985 he needed a loan from the respondent to assist him in a commercial venture to carry on the business of importing consumer goods. The respondent who had in the past given financial assistance on numerous occasions maybe one hundred times or more loaned him $17,500 US for that purpose. There was a transfer drawn up by Mr. John Graham but it was never done with the intention of transferring his beneficial interest in 17 Arcadia Circle to the respondent but was drawn up as security for a loan. This account I do not accept for the reason that had this been true it would in my view have been totally out of character with someone who in the past had been extremely kind generous and supportive to the plaintiff. The plaintiff would also have one believe that although he regarded the sum as a loan he never intended that the transaction should have created legal relations between himself and the respondent. It is indeed of some significance that despite the fact that there is unchallenged documentary evidence establishing that the plaintiff was the beneficiary from a sizeable lottery winnings of over $171,000 US on June 24, 1992 a date prior to these proceedings, he has not sought to repay this sum to the respondent.

The respondent's position

She asserts that the plaintiff sold her his half-share in the matrimonial home in 1985. In this regard she has deponed in her affidavit sworn on 28th June, 1994 at paragraph 59 et sequor that "in

July - August 1985 the applicant commenced a program of harassment demanding that I pay him his half-share of the house. The applicant told me that he wanted to go into a fishing business and demanded his money from the house."

The respondent further deponed at paragraph 62 of the said affidavit that "when the applicant demanded that he be paid I had very little money. I was forced to utilise funds held in the United States of America which I had inherited from my mother who by then had died. It was because I did not have sufficient funds here that the applicant was paid in U.S. dollars. The applicant did not ask for a loan of U.S dollars $17,500."

At paragraph 63 she then asserted that "the applicant was not paid U.S. $17,500 but U.S. $25,000. The Bank of Jamaica exchange was U.S. $1 to J.A5.88 in August 1985."

Further on at paragraph 64 she deponed that "It was the applicant who valued 17 Arcadia Circle for about $300,000 based on the sale of a similar nearby unit in the same scheme which was sold around that time. He calculated his half-share to be U.S. $25,000 and that was the sum he demanded and that was the sum he was paid."

Both the respondent account as well as the circumstances surrounding the nature of the transaction in relation to the drawing up of the transfer documents evidencing the transfer of the applicant's share of 17 Arcadia Circle is significant in relation to the plaintiff's

evidence that the transfer was drawn up in respect of a loan which he had obtained from the respondent. Had it been a loan he had obtained why was there the necessity for a transfer to be drawn up? A demand note or some memorandum of the agreement and its subject matter could equally have been sufficient evidence in that regard. It was based upon facts not too dissimilar to those in this case that prompted Viscount Dilhorne L.C. to remark in Steadman v. Steadman [1976] A.C. 536 at 553 h to the effect that

> "one does not send a document for execution which transfers title to property unless there has been some prior agreement with regard thereto."

This is exactly what the respondent in saying was the nature of the transaction. It is faced with this situation and given the fact there is no issue that valuable consideration was demanded by the plaintiff and paid by the respondent that the plaintiff has through his attorneys-at-law raised what has been described by learned counsel Mrs. Benka-Coker as "prayed in aid every conceivable defence in order to use this Honourble Court as an instrument of fraud, and to perpetrate fraud on the Court ....."

The crucial question which emerged from the evidence both oral and as contained in the affidavits given the fact that there is no dispute that the applicant has received valuable consideration in respect of a transaction relating to his beneficial interest in 17 Arcadia Circle, a situation in which on a balance of probabilities the evidence clearly favours the respondent's account as to the nature of the

transaction and the consideration paid, in the absence of the written transfer document evidencing this fact, can a Court of Equity give effect to what in the circumstances of this case clearly expresses what was the true intention of the parties?

Learned counsel for the plaintiff has submitted that there is no evidence of an oral agreement as the common essentials required to arrive at this are not present. He further submits that even if I were to find that there was an agreement for a transfer of the plaintiff's share in the matrimonial home in the absence of the written agreement (the transfer) the acts of part performance being relied on are insufficient to prove the existence of a contract of the sort alleged. In support of his submissions he sought to adopt the narrow legislatic approach relied upon by learned counsel for the appellant in S.C.C.A. 23/84 George White v. Esmena Morris an unreported judgment of the Court of Appeal of Jamaica (Kerr P.(acting) Ross and Campbell J.J.A.) delivered on 18.12.85. Counsel in his written submissions adopted this case as supporting his contentions. In so doing he seemed to have ignored the fact that the arguments advanced by learned counsel for the appellant were rejected by the court in favour of the more broad and liberal approach with respect to the doctrine of part performance being now relied upon by the respondent.

Learned counsel for the respondent sought to rely on the dicta of the House of Lords in Steadman v. Steadman [1974] 2 All. E.R. 977 [1976] A.C. 537 in which their Lordships took the broad and liberal approach

in applying the doctrine and ordering specific performance of an oral agreement between husband and wife's interest in the former matrimonial home for an agreed consideration price. It is trite law that section 40 of the Law of Property Act 1975 (England), a section which is in pari materia with our section 4 of the Statute of Frauds provides for an agreement for the sale or other disposition of land to be in writing or evidenced by writing in proof thereof. Such contracts can however, be saved from being rendered unenforceable by invoking the equitable doctrine of part performance. A Court of Equity acting in personam in such circumstances if there is clear evidence of the agreement as alleged will come to the aid of the wronged party to compel the other party to the agreement to perform their part of the bargain in order to carry the agreement made between the parties into full effect. Moreover parol evidence of the agreement is admissible towards establishing the contract in the absence of a written document provided valuable consideration is proved in the transaction.

In my opinion as learned counsel for the respondent has rightly observed the respondent having paid over $25,000 US to the applicant on the basis of his promise to transfer his half-share in 17 Arcadia Circle to her, he cannot now seek to set up the provisions of the Statute of Frauds as a means of avoiding the contract as to allow him to do so would be to permit the statute to be used as an instrument to perpetuate fraud. It was also based upon the absence of a written contract in White v. Morris (referred to supra) that in advancing the proper approach that a court might take in resolving such rival

contentions that Mr. Justice Kerr P (ag) at p. 10 expressed himself thus:-

> "The statement of principle in my view should not be so narrowly applied as to fetter the court in its pursuit of substantial justice. It is as stated in Kingswood Estate Co.Ltd v. Anderson [1963] 2 Q.B. 169 by Willmer L.J. at p 181.
>
> "I do not understand however, that part performance must necessarily be referable to the agreement, and only the particular agreement relied on. I cite from Anson, 21st Ed. p. 75 where the principle is stated as I think correctly in the following terms:
>
> The acts of performance relied upon must of themselves suggest the existence of a contract such as it is desired to prove, although they need not established the exact terms of that contract. As I understand it if there is evidence of such part performance that is sufficient to warrant the admission of oral evidence to prove what the exact terms of the contract were."
> (underlines mine)

The underlined words clearly are not supportive of the proposition advanced by learned counsel for the applicant insofar as he sought to contend that the essentials of an agreement required to form the basis for applying the doctrine of part performance were not in existence in this case. Both on the weight of the evidence and on the authorities referred to by both counsel there is in my view sufficient evidence to cause a court of Equity to lend its aid by invoking the doctrine of part performance to compel the plaintiff to transfer his half-share in the former matrimonial home in keeping with the agreement made between the parties.

Learned counsel for the respondent not content to rely only upon the oral contract and its enforcement by equity has submitted that the conduct of the parties given the respondent's account as to the nature of the transaction, has some sound basis in the Law of Trusts. She submits that the applicant having received the full purchase price of $25,000 U.S. for his half-share of 17 Arcadia Circle and having induced the respondent to act to her prejudice by entering into the oral contract for the sale of his half-share to her now holds the said beneficial interest in trust for the respondent.

Counsel has relied in support on the dictum of Lord Justice Edmund Davies (as he then was) in Carl Zeiss Stiflung v. Herbert Smith & Co. [1969] 2 Ch. p. 276. where the learned judge said:-

> "English Law provides no clear and all embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand." The principle is that where a person holds property in circumstances in which in equity and good conscience it should be held by another, he will be compelled to hold the property on trust for that other."

Both the proposition of counsel as well as the citation in the above case is merely stating what is legal position as between parties to an agreement for sale of real property where the purchase price is paid in full consideration for the agreement entered into between the parties and in which situation the purchaser is notionally to be regarded as the equitable owner is entitled to call for a transfer of

the legal estate to him. A fortiori the respondent in this given the accepted facts has the right to call for the conveyance to her by the applicant of his half-share in the matrimonial home in keeping with the agreement between the parties.

Having seen and heard both parties and observing their respective demeanors under cross-examination as well as when the history of the relationship between the parties is carefully scrutinised I accept the oral as well as the written evidence of the respondent who I found to be a frank, forthright and credible witness. Where her evidence conflicts with that of the plaintiff I accept her account of the facts against that of the plaintiff whose credibility is at his best questionable. I find that the respondent has spoken truthfully not only as to the nature of the transaction being an agreement between the plaintiff and herself in 1985 for him to transfer his half-share in the matrimonial home to her but that the sum to be paid was a consideration price of $25,000 US.

In an attempt to finding an escape hatch and so resisting the enforcement by the respondent of the agreement the plaintiff through his attorneys-at-law has raised the following defences :-

1. He has submitted that the agreement is not one for which specific performance may be ordered.

2. Even if partly performed the agreement is statute barred.

3. It is illegal insofar as it contravenes the Exchange Control Act.

4. In any event it is defeated by delay, laches and acquiescence.

All these defences will therefore have to be examined at a later stage of this judgment.

Illegality

Learned counsel for the plaintiff has submitted that even if the agreement between the parties was to be regarded as a transfer of the plaintiff's half-share in the matrimonial home as the payment of the consideration of the contract was made in United States currency in 1985 this would have been in breach of the Exchange Control Act rendering the agreement void. As such, specific performance could not be ordered by the court as a court would not assist directly to enforce an illegal contract by specific performance any more than it would assist a party to such a contract to enforce it indirectly either by awarding damages or compensation.

The applicant having raised the issue of illegality the onus of proof lies upon him to prove that the contract is illegal. Contrary to what may seem to be the commonly held view of the object of the statute it is not every contract or transaction involving foreign exchange that is caught by the provisions of the Act. What the decided cases

establish is that the effect of the Act was to strike at performance of the contract and not its formation. Per dictum of Douglas J. Watkis v. Roblin 8 J.L.R. p 444. In Bank of London and Montreal v. Sale [1967] 12 W.I.R. 149;10 J.L.R. 319 the view clearly held by the Court of Appeal was that breaches of the Exchange Control Law could be cured by ex post facto approval from the Exchange Control Authority. (Section 20 of the Act).

In the case of Grant v. Williams S.C.C.A. 20/85 an unreported decision of the Court of Appeal Mr. Justice Kerr and Carberry J.J.A. took the opportunity to examine these cases (referred to supra) as well other English authorities in carrying out a comprehensive review of the legal implications of the Act.

Given the facts in this case, however, I have difficulty in determining on the facts that there was any intention on the part of the parties to contravene the provisions of the Act. Both parties were resident in Jamaica, and the consideration of $300,000 was calculated by the applicant as the price he wanted for his half-share interest in the matrimonial home. The fact that he was paid in United States currency was because the respondent as she said had very little money at the time in Jamaica to satisfy the demands of the applicant who was then pressing her to buy out his interest in the house. There is no evidence that the funds which then stood to her credit in the United States of America from which the money paid to the applicant came and which the unchallenged evidence of the respondent is that it represented a part of the property that she had inherited from her

late mother. These were funds of which the original source was not known. There is certainly no evidence suggesting that these funds were not lawfully being kept at the financial institutions in the United States.

In considering the validity of the transactions at least in the cases referred to one is dealing with factual situations in which one of the parties to the agreement either lived or resided abroad. In the recent case of Tulloch v Friend S.C.C.A. 56/90 unreported delivered on 23.9.91, reversed on appeal to the Privy Council sub nom. Friend v. Tulloch [1994] 44 W.I.R. 345 - both parties were residing abroad and the intention of the parties as to how the contract was to be performed was clear. Nevertheless their Lordships held that there was no intention on their part to circumvent the provisions of the Act. (Section 33).

Given the evidence of the parties in this case being resident in Jamaica there appears to me to be nothing in the manner either as to how the contract was formed or performed that would make the contract illegal and void. The applicant had demanded payment for his half-share and the only feasible way for him to get his money was from the respondent funds which she inherited and which was then standing to her credit in an account at a foreign financial institution. Moreover this was not the type of transaction that the statute was passed to prohibit. It is clearly directed at dealings between local residents and persons or corporations resident or situated abroad. It is those transactions if entered into with the sole intention to

divert foreign funds which would ordinarily be transferred into the country and properly be offered for sale to an authorised financial institution or to the Central Bank that were caught by the penal provisions of the Act when the relevant provisions of the statute were in force. It was to such transactions that brought into effect the maxim "in pari delicto." This transaction was on the evidence open and above board. The respondent certainly has sought to conceal nothing. She has made full and frank disclosure. The general rule that "in pari delicto portior est conditio defenditis" certainly cannot be applied to her." I also find it strange that it is the applicant to whom these sums of $4000 U.S., $6,000 and $15,000 U.S. were paid on separate occasions and who based on his training and representing himself as the respondents "Investment Manager" that although raising this defence in an attempt to defeat the respondent's claim, he has not sought to adduce one shred of evidence either in his affidavits or while testifying during his oral evidence under cross-examination. This aspect of the claim therefore fails.

The remaining defences of Limitation, Laches, Waiver and Acquiescence can all be dealt with together as all these defences are raised in relation to what arises out of the relationship of a trust this being the position of the parties following the full payment of the agreed purchase price by the respondent. None of these defences can therefore be relied on by the applicant to avoid the agreement. The cases cited by learned counsel for the respondent afford support for this proposition. It would be horrendous indeed for a trustee to be able to raise such defences against his beneficiary. In relation to Laches

or delay the position is no different. In this regard I borrow the words of Lord Redesdale in Crofton v. Ormsby [1806 2 S.C.H. and Lef. 581 at 603 relied on by counsel for the respondent in support:-

> "The whole laches here consists in not clothing an equitable estate with a legal title and that by a party in possession. Now I do not conceive that this is a species of laches which will prevail against an equitable title. If I should hold it so, it would tend to overset a great deal of property in this country where parties often continue to hold under an equitable contract for forty or fifty years without clothing it with legal title. I conceive therefore that possession having gone with the contract there is no room for objection...
> ... But in the present case there is nothing but a resting on the equitable estate by a person in possession, without clothing it with a legal title which I think never was held to be that sort of laches that would prevent relief."

The statement of Lord Denning in Williams v. Greatrix [1956] 3 ALL .E.R. 705 insofar as it deals with the defences of limitation and specific performance in cases of delay is also worth referring to. In that case specific performance was granted in relation to a contract for sale ten years after it was entered into by the vendor and purchaser. The learned judge at p. 711 said:-

> "Where the contract is substantially executed, and the plaintiff is in possession of the property, and has got the equitable estate, so that the object of the action is only to clothe himself with the legal estate, time either will not run at all as laches to debar the plaintiff from his right or it will be looked at less narrowly by the court."

The counter-claim for $65,000 U.S.

The evidence being relied upon in support of this claim is to be found at paragraph 97 of the respondent's affidavit sworn to on 28th June 1994. In it she deponed to searching the Metal Cabinet at 17 Arcadia Circle following the applicant's departure from the matrimonial home in October 1993 and of "finding several receipts for cash the applicant received from his U.S. Visa Card. On making my discovery on the telephone I told him I discovered he had exploited my account to the tune of U.S.$65,000. The applicant begged me not to tell anyone about it as he would repay me."

The applicant in his affidavit sworn on 8th July 1994 denies wrongfully withdrawing any sums from the respondent's overseas accounts. At paragraphs 12 and 13 he deponed in particular that:

> "That I refer to paragraphs 97 and 98 (supra) and state that I made several trips to the United States to purchase various items. That I used my credit card to obtain cash advances, some of which were repaid by cheques drawn by respondent. That all sums received from the respondent's overseas accounts were paid to me by cheques drawn by her. That I have never drawn any cheques from my wife's account to service my visa or other credit card or for any other purposes."

The applicant under cross examination has sought to deny that he had any authority to withdraw funds from the respondent overseas account. The credit card slips exhibited to the respondent's affidavit can only go towards establishing that the applicant withdrew funds from his

visa account using his credit card. There is no evidence from any source establishing that the funds in that account came from the respondent's account, or to establish that unauthorised withdrawals were made from her account and if so by whom and the amount involved. For the respondent at paragraph 97 to depose that "the cash he received totalled US $65,000 covering the period 1988 to 1993," this in my view leads nowhere and takes the matter no further and amounts to a mere conjecture or suspicion on her part. The burden of proof resting as it does on her to establish this fact there has been no evidence brought by her to establish that which she asserted. This is a matter in respect of which some documentary evidence could have been furnished by her as the account holder along with an affidavit from a responsible officer from the particular financial institution supporting her claim that her overseas account had been depleted in the manner she claims and if so by whom and to what extent. In the absence of any such evidence the contents of her telephone conversation which formed the basis for her discovery that "her account had been exploited to the tune of $65,000 US" cannot substitute as evidence in proof of her claim being at best in the nature of hearsay evidence and so inadmissible. In the absence of any proper and admissible evidence therefore this claim must fail.

The claim for furniture

As the respective affidavits and the submissions make clear this area of the action has been determined by the fact that the parties have laid claim to certain items of furniture, the right to which has not been challenged by the other side. In this regard their respective

proprietory interests can be regarded as no longer in dispute.

The only remaining question to be determined is as to the form that the order in respect to the matrimonial property ought to take.

Learned counsel for the respondent has submitted that a finding in favour of the respondent being based upon the validity of an agreement to transfer the applicant's interest in 17 Arcadia Circle, this court following the principle laid down in Steadman v. Steadman (supra) that the court is empowered to order that the agreement between the parties be carried into effect by an order for specific performance. The applicant's attorney on the other hand has submitted that there is no statutory provision whereby a court can order one spouse to transfer his share to the other. Sections 16 and 17 of the Married Womens Property Act insofar as it provides the machinery for determining the rights of spouses to matrimonial property real or personal in this respect is limited to a declaration of such rights.

This submission is not it would seem to me to be in conflict with the reliefs sought by the respondent insofar as apart from paragraph (e) of the respondent's counterclaim which asks for an order of specific performance all the other reliefs sought are declarations as to the rights of the respondent. The power of this court to order specific performance which is derived from Section 49 (J) of the Judicature (Supreme Court) Act cannot properly be called into question at this stage of our jurisprudential development. Having declared therefore that the only practicable method of ensuring that the respondent

obtains the benefit of her claim is to grant the order which she has sought in her prayer for reliefs as to do otherwise would make the declaration granted a nugatory and empty ground of relief. In that regard therefore the reliefs sought by the respondent at paragraphs (a) to (e) and (j) of the Counterclaim are granted.

Dated 18th September 1995

D.O. Bingham
Judge