

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 55/09

BEFORE: THE HON. MR. JUSTICE SMITH, J. A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN EILEEN BEVERLEY STERLING APPELLANT
AND FRANK ARTHUR STERLING RESPONDENT

Gavin Goffe instructed by Myers Fletcher and Gordon for the Appellant

The Respondent unrepresented and not appearing

July 27 and November 13, 2009

SMITH, J.A.

1. This is an appeal against the decision of Beswick J. made on the 27th April 2009 in which she refused the appellant's application for "the court [to] determine the terms of the default judgment to be entered against the defendant".

BACKGROUND

2. The parties to this appeal were married in Toronto, Ontario, Canada in 1976. They separated in 2001. The appellant applied for divorce in Canada in 2003. Before the hearing of the divorce petition, both parties arrived at an agreement in respect of the division of the matrimonial

property. Also included in this agreement was an order restraining the respondent from communicating directly or indirectly with the appellant. This agreement was reduced to writing in "Minutes of Settlement" and an Order on Consent was entered in respect of this agreement. The terms of the "Minutes of Settlement" were subsequently incorporated into a Divorce Order of the Canadian court dated March 1, 2006.

3. For the purposes of this appeal, the pertinent terms of this agreement were that:

- "1. The Respondent [Frank Sterling] shall transfer to the Applicant his interest in the jointly owned property in Jamaica known as part of Warwick Mountain in the parish of Saint Ann...
2. The Applicant [Eileen Sterling] shall transfer to the Respondent her interest in the jointly owned property in Jamaica known as part of Union Pen called Rocky Hill in the parish of Saint Ann ..."

4. The appellant has executed all the required documents to transfer her half share in the Rocky Hill property to the respondent. The respondent has refused to execute the required documents to transfer his share in the Warwick Mountain property.

5. On 18th February, 2008, the appellant commenced proceedings by way of claim form and particulars of claim in the Supreme Court of Jamaica. The relevant portion of the particulars of claim reads:

- "4. Before the hearing of the divorce petition in Canada on March 1, 2006, both parties agreed, signed and filed Minutes of Settlement in the Canadian Court, a copy of which is annexed hereto and marked "EBS2".
5. The Divorce Order, dated March 1, 2006, reflects the consensus arrived at between the parties, a copy of which is annexed hereto and marked "EBS3".
6. The Divorce Order, at paragraph 2, provides that the Defendant shall transfer to the Claimant Warwick Mountain. Paragraph 8 of the Divorce Order also provides that, "the parties shall execute all required documents to give effect to this Order".
7. The Defendant has never transferred Warwick Mountain to the Claimant despite great efforts by the Claimant to have the Defendant sign the transfer documents."

Among the orders sought were the following:

1. "... the Claimant is entitled to sole ownership of all that parcel of land part of Warwick Mountain in the parish of Saint Ann...
2. An order that the Defendant transfer to the Claimant his interest in all that parcel of land part of Warwick Mountain in the parish of St. Ann...
3. ...The Defendant execute all the required documents to effect the above transfer.
4. "...The Registrar of the Supreme Court be empowered to sign all documents

necessary to effect the transfer of the said property, part of Warwick Mountain in the parish of St. Ann, if the Defendant refuses or is unable to do so.

5. ...the costs attendant on the transfer of the said property, part of Warwick Mountain in the parish of St. Ann, to the Claimant be borne by the Claimant."

6. The appellant subsequently obtained permission to serve the documents on the defendant outside the jurisdiction and on July 18, 2008, filed a Request for Default Judgment on the bases that the defendant had failed to acknowledge service and to file a defence. The appellant also filed the application for court orders previously mentioned in paragraph 1. The learned judge in dismissing the application gave no written reasons for her decision. However, counsel for the appellant informed this Court that the learned judge orally expressed the view that the order ought to have been enforced by the Canadian court.

7. Two grounds of appeal were filed:

"(a) The Learned Judge in Chambers erred in not granting the Claimant's application for default judgment as the Claimant is entitled, on the Particulars of Claim, to have the land comprised in Certificate of Title registered at Volume 1259 Folio 614 of the Register Book of Titles transferred to her as sole owner.

(b) The Defendant having failed to file an Acknowledgement of Service giving a notice of intention to defend, the Claimant is entitled to a default judgment once she has

supported the application with evidence on affidavit of her entitlement to the order sought."

Counsel for the appellant, Mr. Goffe, also sought and obtained this Court's permission to amend the orders sought in the Notice of Appeal to include:

- "g. If the Respondent fails to deliver up the requisite Certificate of Title and to execute all the necessary documents to effect the above transfer, then the Registrar of Titles is empowered to cancel the duplicate Certificate of Title registered at Volume 1259 Folio 614 and to issue a new Certificate of Title in the name of the Appellant.
- h. Permission ...to serve a copy of the Courts (sic) order by registered post on the Respondent at his last known address outside of the jurisdiction."

8. In his written submissions, counsel for the appellant, Mr. Goffe, pointed out that the language of Part 12 of the Civil Procedure Rules (CPR) that deals with default judgment is mandatory in that it states that the registry, at the request of the claimant, **must** enter judgment against a defendant once the conditions outlined in the relevant sections of the CPR are met. Before this Court, he submitted that since this was not a case where the judgment was for a sum of money, default judgment could not be entered by the Registrar and in accordance with Part 12.10(4) the court should determine the terms of the default judgment to which the claimant is entitled, having regard to the particulars of claim.

He further submitted that if the claim form and the particulars of claim have been served in the manner provided by the CPR and the defendant fails to acknowledge service or file a defence within the appropriate time, once the court satisfies itself that it has jurisdiction and that the Rules have been complied with, it ought properly to determine the terms of the default judgment. Therefore, he argued, since the claimant/appellant had complied with the requirements of the CPR relating to default judgments, she was entitled to default judgment against the defendant/respondent on terms to be settled by the judge. In the alternative, he submitted that if Part 12.10(4) conferred a discretion, the learned judge had wrongly exercised her discretion in refusing the application as she had jurisdiction and the claimant had established by affidavit evidence that she had a good cause of action.

9. In my view, this appeal raises two questions:

(a) Was the claim which gave rise to the default judgment justiciable in this jurisdiction?

If the answer is in the affirmative, then,

(b) Does Rule 12.10(4) mandate a court/judge to determine the terms of a default judgment where all the prerequisites for entry of such a judgment have been complied with?

Was the claim which gave rise to the default judgment justiciable in this jurisdiction?

10. This question necessarily arises by virtue of the fact that the land giving rise to the claim is located in Jamaica and concerns parties residing in a foreign jurisdiction in which the rights of the parties in respect of this land were determined but for which no judgment had been registered in the Jamaican court. Mr. Goffe submitted that the Canadian court had jurisdiction to determine the rights and interests in the property because the parties were domiciled in Canada. To support this submission, he relied on the case of **Chiwell v Carlyon** (1897) 14 S.C. 61. Relying also on the case of **Earl Nelson v Lord Bridport** (1845) 8 Beav 527, he further submitted that the Canadian court did not have jurisdiction to compel a transfer of the property because the general principle is that questions relating to the transfer of property rights in immovables are governed by the *lex situs*. The Jamaican court is therefore the only court with jurisdiction to effect the transfer, he argued.

11. In my view, it is necessary first to determine which court had jurisdiction to determine the property rights of the spouses and secondly, which court has jurisdiction to enforce/effect a transfer in the property. In **Chiwell v Carlyon** (*supra*), a husband and wife who were domiciled in South Africa got married there. They made a joint will disposing of their joint property which was subject to the South African regime of

community property. Subsequently, they both became domiciled in England and the husband then acquired property in England. After both had died, the English court was asked to decide whether the land in England had been disposed of by the joint will. The answer to this question depended on whether the land was subject to the South African regime of community property. The English court sent the case for the opinion of the South African Court since both parties were domiciled there at the time of their marriage. It was held that the land in England was held in community, whether or not the spouses had acquired English domicile. The case may therefore be regarded as authority for the principle that the rights of spouses in terms of immovable property are governed by the law of the matrimonial domicile. I agree with counsel for the appellant that Canada being the jurisdiction in which both parties were domiciled at the time of their marriage and with which the parties had the closest connection, the Canadian court did have jurisdiction to determine the rights of the appellant and the respondent in respect of the property. It had the jurisdiction to determine the divorce proceedings between the parties and by common law (**Chiwell v Carlyon**) to incorporate the parties' agreement regarding the division of matrimonial property into the Divorce Order.

12. However, although the Canadian court may determine the property rights of the parties, it cannot enforce the transfer of interests in property situated in this jurisdiction. The learned authors of **Jaffey on the Conflict of Laws** at page 442 refer to the case of **Earl Nelson v Lord Bridport** (supra) as authority for:

“The general rule ... that questions as to the transfer of proprietary rights in immovables are governed by the *lex situs*.”

The case of **Anstruther v Adair** (1834) 39 ER 1040 also illustrates this principle. In that case, Mr. and Mrs. Anstruther entered into an antenuptial contract in a form that was valid in Scotland where the parties were domiciled and married; the contract was not valid in England. Under the contract, Mrs. Anstruther “assigned, disposed and made over to and in favour of the Plaintiff James Anstruther, and herself, and the survivor...all and sundry goods, gear and debts, and sums of money ...that were then belonging or resting owing to her...during the subsistence of the said marriage...” Under a settlement made on the said marriage of her parents, Mrs. Anstruther became entitled, on attaining twenty-one years, to an absolute interest in stock held in the names of the trustees, subject to her mother's life interest. Upon the death of Mrs. Anstruther's mother, Mr. Anstruther applied to the surviving trustee, who resided in England, to have the stock transferred to him. The English court held that the respective rights of the parties under the marriage contract had to be

determined by reference to the Scottish law and referred the matter to the Scottish court for the determination of Mr. Anstruther's rights to the stock. Upon the Scottish court determining that Mr. Anstruther was entitled to the stock, the English court made an order that the stock be transferred to him. It therefore follows that the Jamaican court is the court that has jurisdiction to enforce the transfer of rights in the properties which are located in Jamaica.

13. It seems to me that regardless of whether the agreement had been included in the Divorce Order of the Canadian court, the Minutes of Settlement as endorsed by that court has the same effect and operates in the same way as a consent order does in this jurisdiction. Breach of a consent order is a breach of an agreement. It follows that upon the occurrence of a breach of that agreement, it was, at the very least, open to the appellant to apply to the Canadian court for enforcement of that agreement. That course of action, however, would have been of limited utility for the reason that the appropriate remedy sought would be for the necessary orders to be granted to effect the transfer. This would, of course, involve seeking orders including those that the appellant in fact sought in her claim filed in the Supreme Court, that is, an order requiring the defendant to take the necessary steps to effect the transfer or that the Registrar of the Supreme Court and the Registrar of Titles be empowered to take the necessary steps to effect the transfer. This would

well be impossible since the Canadian Court has no jurisdiction over the Registrar of the Supreme Court or the Registrar of Titles in Jamaica. However, since the subject matter of the agreement is located in Jamaica, Jamaica is the *lex situs* and the agreement can therefore be enforced in this jurisdiction. It follows then, in my view, that the logical course of action would be to apply to the Jamaican court as the court of the *lex situs* to effect the transfer.

14. In my judgment therefore, the claim that was commenced on February 12, 2008 was properly before the Supreme Court of Jamaica by application of common law principles, there being no judgment that was and that could have properly been registered in the Supreme Court of Jamaica pursuant to the Judgments (Foreign) (Reciprocal Enforcement) Act. Having been properly commenced, the claim was subject to the rules of procedure, including those relating to default judgment.

Does Rule 12.10(4) mandate a court/judge to determine the terms of a default judgment where all the prerequisites for entry of such a judgment have been complied with?

15. Part 12 of the Civil Procedure Rules (CPR) deals with default judgments.

Rule 12.1 states:

“(1) This Part contains provisions under which a claimant may obtain judgment without trial where a defendant-

- (a) has failed to file an acknowledgement of service giving notice of intention to defend in accordance with Part 9; or
 - (b) has failed to file a defence in accordance with Part 10;
- (2) Such a judgment is called a "**default judgment**"

Rule 12.2 specifies the circumstances in which the claimant "may not" obtain a default judgment. Rule 12.3 speaks to the circumstances in which the permission of the court is required before default judgment may be obtained. Rules 12.4 and 12.5 deal with the conditions that must be satisfied for entry of a default judgment for failure to acknowledge service and failure to defend respectively; they include the mandate that at the request of the claimant, the registry "must enter judgment" once these conditions are satisfied.

16. Rule 12.10 is concerned with the types of default judgments and the form of the default judgment to be applied for in respect of each type. In particular, Rule 12.10(1) provides the form to be applied for where the claim is for money (specified or unspecified) or for goods. Rule 12.10(4) provides for the form of the default judgment where the claim is not for money or goods.

It reads:

- "(4) Default judgment where the claim is for some other remedy **shall** be in such form

as the court considers the claimant to be entitled to on the particulars of claim." [emphasis supplied].

Also, Rule 12.10(5) states:

"(5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit..."

17. Rule 12.1 defines a default judgment and sets out the general circumstances under which it may be obtained. It clearly confers on a claimant the right to obtain a default judgment. Rule 12.2 indicates that this right is circumscribed by the cases or circumstances stated in that rule. In such circumstances, default judgment may not be entered even where no acknowledgement of service or defence has been filed. Rule 12.3 imposes on the registrar a duty that is the corollary of the right created by Rule 12.1. Save and except for the circumstances enumerated in Rule 12.2, the claimant has an entitlement to default judgment provided that the prerequisites have been satisfied. Thus, if a claim does not fall within Rule 12.2 and the conditions outlined in 12.4 and 12.5 are satisfied, a claimant is entitled to have default judgment entered in his/her favour.

18. It is clear that the form of the default judgment differs according to the remedy sought. Where the claim is for a specified sum of money, the registrar **must** enter default judgment for that specified sum. Where the

claim is for an unspecified sum, judgment is to be entered for a sum to be determined by the court and where the claim is for goods, judgment should be for their delivery or for the payment of their value. Where the claim is for a remedy other than the foregoing, judgment is for a remedy to be determined by the court. The claimant must file an application for court orders supported by affidavit evidence and the court **shall** enter judgment in the form it considers appropriate based on the particulars. In my judgment then, the judge is under an obligation to determine the form of the default judgment. Any discretion that the judge has is limited to determining the form the default judgment should take, provided that the particulars of claim discloses a justiciable claim. I agree with counsel for the appellant that the learned judge was obliged to determine the terms of the default judgment once she was satisfied that the prerequisites stipulated by the Rules had been fulfilled and she had jurisdiction.

19. It follows that once the learned judge was satisfied that the relevant prerequisites enumerated in Part 12 had been met, she was obliged to examine the particulars of claim and determine the terms upon which the default judgment should be entered. The following indicated that the necessary prerequisites stipulated by the Rules had been satisfied:

- (i) The appellant provided evidence to show that permission was sought to serve out of the jurisdiction.

- (ii) There was affidavit evidence to show that the defendant had been served.
- (iii) No defence or acknowledgement of service was filed.
- (iii) There was no evidence that the divorce order had been appealed or that the respondent was impugning the validity of the agreement.

The learned judge should therefore have proceeded to consider the terms of the default judgment to be entered. The learned judge had before her the particulars of claim as outlined earlier in this judgment as well as the following supporting documentary evidence:

- i. Certificate of title to Warwick Mountain;
- ii. Minutes of settlement;
- iii. Divorce Order;
- iv. Document transferring Rocky Hill from the appellant to the respondent; and
- iv. Letters written by the appellant's attorneys seeking to enforce the order, to which, there appears to have been no response.

It would not, I think, have been unreasonable in these circumstances, to order that the default judgment be entered in the terms sought by the appellant.

20. I would therefore allow the appeal, set aside the order of the court below and grant the orders prayed/sought.

HARRIS, J.A.

21. This is an appeal from an order of Beswick, J. in which she refused an application by the appellant to enter a default judgment in respect of an action grounded on a foreign judgment.

22. The parties were married on May 8, 1976 in Toronto, Canada. On July 23, 2003 the appellant filed a petition for divorce in the Superior Court of Justice of Ontario. Included in the petition was a requisition for an equalization of Net Family Property, in accordance with the laws of the province of Ontario. The Net Family Property comprises properties owned by the parties in Jamaica which were purchased by them during the marriage.

23. The following are the Jamaican properties:

- (a) 4321.288 square metres of land part of Union Pen called Rocky Hill in the Parish of Saint Ann, comprised in Certificate of Title registered in Volume 1310 Folio 167,

- (b) 2 Roods 4 Perches and six-tenths of a Perch of land at Warwick Mountain comprised in Certificate of Title registered at Volume 1259 Folio 614.

24. Both parties signed "Minutes of Settlement" and by consent an order was made on March 1, 2006, by the Ontario Court, the court having heard submissions by counsel on behalf of the parties. It was ordered that the divorce would take effect on the expiration of thirty one (31) days after March 1, 2006. There has been no appeal against that part of the order relating to the divorce. Other terms of the order which are relevant to this appeal are as follows:

- "2. The respondent shall transfer to the Applicant his interest in the jointly owned property in Jamaica known as part of Warwick Mountain in the parish of Saint Ann containing by survey Two Roods Four Perches and Six-tenths of a Perch as comprised in Certificate of Title registered at Volume 1053 Folio 196.
- 3. The Applicant shall transfer to the Respondent her interest in the jointly owned property in Jamaica known as part of Union Pen called Rocky Hill in the parish of Saint Ann containing by survey Four Thousand Three Hundred and Twenty-one Square Metres and Two Hundred and Eighty-eight Thousandths of a Square Metre as registered in Volume 1310 Folio 167.
- 4. The Applicant shall pay the cost of transferring the property set out in Item 2 above.
- 5. The Respondent shall pay the cost of transferring the property set out in Item 3 above.

6. The Respondent shall pay to the Applicant the sum of \$19,361.79 as equalization of Net Family Property.
7. Within seven (7) days of the date of this Order, the Respondent shall sign the necessary documents to transfer to the Applicant the funds standing to the credit of the parties in Jamaica National Building Society Savings Account No. 3642106 in at least the amount of JN \$8,780.98 and Time Share Account No. 676373006 in at least in the amount of JN \$194,841.64 in partial settlement of the equalization payment by the Respondent.
8. The parties shall execute all required documents to give effect to this Order."

25. In obedience to the order, the appellant executed all requisite documents to effect the transfer of her interest in the Rocky Hill lands to the respondent but he has refused to execute the necessary documents to effect the transfer of his interest in the Warwick Mountain lands to the appellant. Efforts for him so to do have proven futile.

26. On February 18, 2008 the appellant, by way of a claim form, commenced action against the respondent with respect to the lands at Warwick Mountain. She sought the following:

- "1. An order that the Claimant is entitled to sole ownership of all that parcel of land part of Warwick Mountain in the parish of Saint Ann being part of the land comprised in Certificate of Title registered at Volume 1053 Folio 196 and now registered in Certificate of Title registered at Volume 1259 Folio 614 of the Register Book of

Titles, currently owned by the Claimant and Defendant as joint tenants, pursuant to the Order of the Superior Court of Justice of Ontario, Canada dated March 1, 2006.

2. An order that the Defendant transfer to the Claimant his interest in all that parcel of land part of Warwick Mountain in the parish of Saint Ann being part of the land comprised in Certificate of Title registered at Volume 1053 Folio 196 and now registered in Certificate of Title registered at Volume 1259 Folio 614 of the Register Book of Titles.
 3. An order that the Defendant execute all the required documents to effect the above transfer.
 4. An order that the Registrar of the Supreme Court be empowered to sign all documents necessary to effect the transfer of the said property, part of Warwick Mountain in the parish of Saint Ann, if the Defendant refuses or is unable to do so.
 5. An order that the costs attendant on the transfer of the said property, part of Warwick Mountain in the parish of Saint Ann, to the Claimant be borne by the Claimant.
 6. The Claimant estimates that the value of the said property, part of Warwick Mountain in the parish of Saint Ann, is One Million Dollars (\$1,000,000.00).
 7. The Claimant certifies that the amount of this claim exceeds the sum of \$250,000.00.
 8. The Claimant certifies that all facts set out in this Claim Form are true to the best of my knowledge, information and belief.
 9. Costs."
27. Particulars of claim were also filed. Both the claim form and the

particulars of claim were sent to the respondent on May 16, 2008 by registered post. They were served on the respondent on June 2, 2008 after several previous attempts at delivery failed. The respondent failed to file an acknowledgement of service. On July 18, 2008 the appellant made a request to enter a default judgment pursuant to Part 12.10 (4) of the Civil Procedure Rules (C.P.R.). This request was accompanied by a Without Notice Application For Court Orders in which the appellant sought an order, that:

"The court determine the terms of the default judgment to be entered against the defendant."

28. No reasons were given by the learned judge for refusing the application. This notwithstanding, this court is empowered to review the application and make a determination.

29. The following are the grounds of appeal:

- "a. The Learned Judge in Chambers erred in not granting the Claimant's application for default judgment as the Claimant is entitled, on the Particulars of Claim, to have the land comprised in Certificate of Title registered at Volume 1259 Folio 614 of the Register Book of Titles transferred to her as sole owner; and
- b. The Defendant having failed to file an Acknowledgment of Service giving a notice of intention to defend, the Claimant is entitled to a default judgment once she has supported the application with

evidence on affidavit of her entitlement to the order sought. "

30. It was submitted by Mr. Goffe that the claim form and particulars of claim had been served on the respondent in the manner prescribed by the rules and the respondent had not filed an acknowledgment of service or a defence within the prescribed time. It follows, he argued, that once the court is satisfied that it has jurisdiction and that there has been compliance with the rules, the appellant would have been entitled to a default judgment, the terms of which ought to have been settled by the learned judge.

31. Under Rule 12.1 (1) of the C.P.R. a claimant may obtain default judgment where a defendant has failed to file an acknowledgment of service. Rule 12.4 outlines certain conditions which must be satisfied before judgment can be entered. The rule reads:

"12.4. The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if —

- (a) the claimant proves service of the claim form and particulars of claim on that defendant;
- (b) the period for filing an acknowledgment of service under rule 9.3 has expired;
- (c) that defendant has not filed —

- (i) an acknowledgment of service;
- or
- (ii) a defence to the claim or any part of it;
- (d) ...
- (e) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and
- (f) (where necessary) the claimant has permission to enter judgment."

32. Rule 12.10 (4) empowers the court to enter a default judgment where the claim is for a remedy other than one for the payment of money or for goods. The terms of the judgment shall be determined by the court. The rule provides:

"12.10 (4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the particulars of claim."

Under Rule 12.10 (5) an application under Rule 12.10 (4) need not be on notice but it must be supported by an affidavit. The rule reads:

"12.10 (5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 (service of application where order made on application made without notice) does not apply."

33. Rule 11.15 provides for service of a copy of the without notice

application and evidence in support thereof on all parties, subsequent to the court's adjudication on the application.

34. By an order of May 7, 2008, the appellant was granted permission to serve the claim form and the particulars of claim on the respondent who was resident out of the jurisdiction. Leave was also granted for the documents to be served by registered post. An affidavit of Dale Palmer sworn on July 17, 2008 provided proof of service. It was also ordered that the period for filing the acknowledgement of service be twenty-eight (28) days from the date of posting. The time for filing acknowledgment of service expired on June 13, 2008. An acknowledgment of service has never been filed.

35. A request for default judgment was made in compliance with Rule 12.7. In addition, a without notice application was filed by the appellant and in obedience to Rule 12.10 (2) an affidavit in support of the application was also filed.

36. It cannot be said that the appellant had not proceeded in conformity with the relevant rules. However, bearing in mind that the appellant had brought a claim founded on a foreign judgment, would the Jamaican court be empowered to entertain the claim? The resolution of this question requires a determination as to whether the Jamaican court is seized of jurisdiction to enter a default judgment

founded upon the order of the Ontario court.

37. It was argued by Mr. Goffe, in the alternative, that the learned judge had jurisdiction to hear the claim and had wrongly exercised her discretion by refusing to grant the default judgment, as, the appellant has shown by her particulars of claim that she is entitled to an order transferring the Warwick property to her as owner. It was further contended, by way of written submission, that there is in existence a valid contract between the parties for the transfer of the property but the Canadian court is precluded from exercising jurisdiction over the transfer as such transfer is governed by the *lex situs* which is Jamaican law. The cases of **Re Smith** [1916] 2 Ch 206 and **Anstruther v. Adair** (1834) 39 ER 1040, among others, were cited in support of this submission.

38. In my view, the determination of the present case does not attract the invocation of the principles of private international law. It is unnecessary to venture into the realms of that arm of the law. I think that it is also necessary for me to add that the order would not fall within the scope of the Judgments (Foreign) (Reciprocal Enforcement) Act. That Act would not apply as there is no treaty between Jamaica and Canada for the mutual recognition of judgments.

39. The parties who are resident in Canada entered into a binding

and enforceable agreement for the transfer of the Jamaican property by the respondent to the appellant as approved by an order of the Canadian court. The common law confers on the appellant a right to commence proceedings in the Jamaican court for the enforcement of that order by the method employed by her.

40. The case of **Abouloff v. Oppenheimer & Co.** [1881 – 1885] All E. R. Rep. 307, is clear authority that a claimant may initiate proceedings in this country to enforce a judgment obtained in a foreign court. In that case, a judgment was pronounced against the defendants by a Russian court. An action was subsequently brought by the plaintiff against them in the English Divisional Court to enforce an obligation created in his favour by the judgment. A defence was raised that the foreign court was misled by fraud. The court held that the defendants had a good defence to the action and a demurrer raised by the plaintiff was overruled and judgment was given for the defendants. The judgment was affirmed on appeal.

41. Lord Coleridge C.J., in enunciating that the English courts will entertain an action to enforce obligations created by a foreign judgment, said at page 309:

“It is not necessary to inquire at present as to what is the accurate mode of stating the way of enforcing foreign judgments in the courts of this country. The law as to this question has been

elaborately discussed by PARKE. B., in *Williams v. Jones* (1845), 13 M. & W. 2 Dow. & L. 680; 1 New Pract. Cas. 227; 14 L.J.Ex. 145; 4 L.T.O.S. 318; 153 E.R. 262; 11 Digest (Repl.) 527, 1401 and BLACKBURN, J., in *Godard v. Gray* (1870) L.R. 6 Q.B. 139; 40 L.J. Q.B. 62; 24 L.T.89; 19 W.R. 348; 11 Digest (Repl.) 505, 1220. and *Schibsby v. Westenholz* (1870) L.R 6 Q.B. 155; 40 L.J.Q.B. 73; 24 L.T. 93; 19 W.R. 587; 11 Digest (Repl.) 505, 1220, but for the purpose of the present case I think it is enough to say that the courts in this country will enforce obligations created by foreign judgments, and it is an answer to an action brought to enforce such an obligation to say that the judgment in the foreign court has been obtained by the fraud of the person who is seeking to enforce it here."

At page 310 Baggallay, L.J. said:

"If that judgment were properly obtained the plaintiff would be entitled to recover in an action on the judgment in this country ..."

Brett, L.J. at page 311 stated:

"Here the obligation is imposed by the judgment of a foreign court, but I think the proposition would be the same if the original action had been brought in any court where an action could be brought on the judgment, and that the same doctrine would have been applicable. The whole doctrine as to enforcing the obligation imposed by a foreign judgment is an English doctrine."

42. The foregoing authority indubitably demonstrates that as a matter of law, a foreign judgment creates a cause of action which may be adjudicated on by these courts. The court will not, however, entertain a foreign judgment which is unenforceable under its laws. The

appellant having been clothed with the power to initiate proceedings grounded on the order of the Canadian court for the enforcement of the respondent's obligation under that order, the action, when filed, became a Jamaican action and ought to be decided in accordance with Jamaican law.

43. The obligation imposed on the respondent by the Canadian court is one which is recognized by Jamaican law. If the divorce proceedings and settlement of the matrimonial property had been brought in these courts, the outcome could have been the same as ordered by the Canadian court. The Jamaican law permits the division of matrimonial property by consensual arrangement between parties. This may be done with the court's approval. The order made by the Canadian court was valid and enforceable. It follows therefore that the Jamaican court is seized of jurisdiction to hear and determine the relief sought. The appellant, having satisfied all requirements of the relevant rules, is entitled to a default judgment. Such judgment shall be in terms as the court considers the appellant to be entitled on her claim.

44. In my view, the learned judge had wrongly exercised her discretion in refusing the appellant's application brought under her claim. The orders sought under the claim would flow as a direct consequence of paragraphs 1 and 2 of the Canadian court. I can see

no violence being done by making an order in terms of the relief sought in paragraphs 1 – 5 and 9 of the Claim Form.

45. I would allow appeal with costs to the appellant.

DUKHARAN, J.A.

I agree.

ORDER

SMITH, J.A.

1. Appeal allowed.
2. Order of the court below is set aside.
3. The Appellant is entitled to sole ownership of all that parcel of land part of Warwick Mountain in the parish of Saint Ann being part of the land comprised in Certificate of Title registered at Volume 1053 Folio 196 and now registered in Certificate of Title registered at Volume 1259 Folio 614 of the Register Book of Titles, currently owned by the Appellant and Respondent as joint tenants, pursuant to the Order of the Superior Court of Justice of Ontario, Canada dated March 1, 2006;
4. The Respondent is ordered to transfer to the Appellant his interest in all that parcel of land part of Warwick Mountain in the parish of Saint Ann being part of the land comprised in Certificate of Title registered at Volume 1053 Folio 196 and now registered in Certificate of Title

registered at Volume 1259 Folio 614 of the Register Book of Titles.

5. The Respondent shall execute all the required documents to effect the above transfer and have them registered on or before the 19th day of December 2009 and shall deliver up to Messrs. Myers Fletcher and Gordon the Certificate of Title registered at Volume 1259 Folio 614 on or before the 19th day of December 2009.

6. The Registrar of the Supreme Court is empowered to sign all documents necessary to effect the transfer of the said property, part of Warwick Mountain in the parish of Saint Ann, if the Respondent refuses or is unable to do so by the date stated above.

7. If the Respondent fails to deliver up the requisite Certificate of Title and to execute all the necessary documents to effect the above transfer on or before the 19th day of December 2009, then the Registrar of Titles is empowered to cancel the duplicate Certificate of Title registered at Volume 1259 Folio 614 and to issue a new Certificate of Title in the name of the Appellant.

8. Permission is granted to the Appellant to serve a copy of the Courts order by registered post on the Respondent at his last known address outside of the jurisdiction.

9. Costs to the Appellant to be agreed or taxed.