Neutral Citation Number: [2021] EWHC 2957 (Ch)

Claim Nos: PT-2021-000287 & PT-2021-000928

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 12 November 2021

Before :

DEPUTY MASTER DRAY

- -

Between :

DUDLEY HESLOP **Claimant**

- and –

(1) MONA HESLOP **Defendants**
(2) JENNIFER SEALES

- -
- -

Alexander Hill-Smith (instructed via direct access) for the **Claimant**
The First and Second Defendants in person

Hearing date: 28 October 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand down is deemed to be 12 November 2021, 10.30am.

DEPUTY MASTER DRAY:

1. Pearline Albertha Hylton ("the Deceased") was born in Jamaica on 25 December 1927. She migrated to England in or around 1948. She was domiciled in England until around 2015 when she went to live in Scotland, initially with one of her daughters, the Second Defendant who is, and has been since about 2014, domiciled in Scotland.

2. The Deceased died in a care home in Scotland on 4 December 2018. She had 4 children: the Claimant, Dudley Heslop (born 1954 and domiciled in England); the First Defendant, Mona Heslop (born 1955, also domiciled in England); the Second Defendant, Jennifer Seales (born 1969, domiciled in Scotland, as above); Monica Aitcheson (born 1963 and not a party to this litigation).

3. By her last will dated 13 March 2012 the Deceased appointed the Claimant as executor. She also purportedly devised and bequeathed her estate and interest in Lot 168, Coral Gardens, Saint James, Jamaica (registered at Volume 1388 Folio 102) ("the Property") between her 4 children (each receiving 22%) and one of her grandchildren (Chloe Hylton, daughter of the Second Defendant, receiving 12%). She made like provision as regards her residuary estate.

4. I say 'purportedly' because there is a dispute (outlined below) as to whether the Deceased actually had any estate or interest in the Property which she could pass by will. Separately, insofar as a testamentary gift was effectively made of the Property, the gift to the Claimant will have been void by virtue of section 15 of the Wills Act 1837 (because the Claimant was a witness to the will) and to that extent a partial intestacy will have arisen.

5. The Claimant obtained a grant of probate on 17 July 2019. The Deceased's estate has, however, yet to be administered and distributed. This is because of a dispute in relation to the beneficial ownership of the Property, outlined below.

6. Pursuant to a transfer (number 1575933, registered on 29 December 2008 at the Jamaican Land Registry) the Property was acquired by the Deceased and the Second Defendant as joint tenants for a recorded consideration of £135,500 (pounds sterling).

7. The purchase appears to have come about because when visiting Jamaica in or around October 2008 the Deceased saw the Property, liked it, and decided to buy it. The Property was purchased using Clark, Robb & Co, attorneys based in Montego Bay, Jamaica.

8. The Deceased and her family have never lived at the Property. It has apparently been rented out. As indicated above, none of the parties to the litigation is domiciled in Jamaica.

9. Since the death of the Deceased the legal title to the Property is held by the Second Defendant alone.

10. What is more, it is the Second Defendant's case that the Property was held by the Deceased and her as beneficial joint tenants and that she now owns the Property exclusively by right of survivorship following the death of her mother. In the alternative, she maintains that, if the 2012 transfers to which I refer below effectively severed the joint tenancy in equity, she owns 50% of the Property. In the latter scenario she will also be entitled to inherit her share of whatever equitable interest the Deceased retained in the Property at the date of her death.

11. Conversely, the Claimant contends, firstly, that the Property was held by the Deceased and the Second Defendant for the Deceased alone beneficially. His case is that this was pursuant to a purchase money resulting trust which he says arose on the acquisition of the Property in 2008 because, he claims, the Deceased alone funded the purchase. His case is

disputed by the Second Defendant who says that she paid £100,000 towards to the purchase.

12. Further or alternatively, the Claimant's case is that, even if the equitable interest in the Property was initially held beneficially by both the Deceased and the Second Defendant as joint tenants: (a) by dint of a transfer by way of gift executed in England on 3 April 2012 the beneficial joint tenancy was severed and 43% of his mother's share in the Property passed to him (with a further 43% to the First Defendant); (b) pursuant to a further transfer by way of gift executed on 26 April 2012 (and, unlike the other transfer, registered at the Jamaican Land Registry on 6 November 2012) he received a further 6% (as did the First Defendant).

13. Consequently, the Claimant's position is that the vast majority of the equity in the Property falls outside the Deceased's estate (and rests with him and the First Defendant). On this basis he says that only a very small part of the value of the Property falls to be distributed pursuant to the Deceased's will/intestacy. The Claimant rejects the notion that the Second Defendant: (a) has any independent entitlement to the Property (independent, that is, of the will/intestacy); (b) thus has anything other than a 22% share of the very limited residual part of the equity in the Property which he asserts the Deceased held at the date of her death.

14. It can thus be seen that there is a fundamental dispute regarding the beneficial ownership of the Property. This dispute needs to be resolved in order to allow the estate to be distributed.

15. Against the above background the Claimant has instituted the two sets of proceedings with which I am now concerned:

    (1) First, on 25 June 2020 the Claimant issued proceedings in the county court at Central London under claim no. G01CL579 (which was later transferred to the Chancery List by Order of HHJ Monty QC dated 7 August 2020 and given claim no. G10CL331). By an order dated 3 August 2021 (sealed 4 August 2021) Master Clark directed that

this claim be transferred to the High Court, to be case managed and heard with the below claim. This claim (so transferred) now bears claim no. PT-2021-000928.

(2) Secondly, on 1 April 2021 the Claimant issued proceedings in the High Court, claim no. PT-2021-000287.

16. Both claims are brought against the same Defendants and it is apparent from the nature of the claims and the relief sought (outlined below), and was so confirmed by the Claimant at the hearing, that the First Defendant is joined simply to be bound by the result of the proceedings and that the real contest is, as foreshadowed above, between the Claimant (and First Defendant, whose interests are effectively aligned with the Claimant) on the one hand and the Second Defendant on the other hand.

17. As regards the two claims with which I am directly concerned:

(1) In G01CL579 (now PT-2021-000928) the Claimant (as an alleged beneficiary of the alleged trust) alleges that the Property is held on trust by the Second Defendant. He seeks the following relief:

a. The appointment of himself and the First Defendant as trustees in place of the Second Defendant.
b. Orders requiring the Second Defendant to produce an account of rental income received since 2012, and copies of tenancy agreements.

(3) In PT-2021-000287 the Claimant (as executor of the estate of the Deceased) seeks:

a. A declaration as to the Second Defendant's beneficial interest in the Property, in particular a declaration that she has no beneficial interest therein (by reason of the asserted resulting trust).
b. An order for sale.
c. An order that the Second Defendant sign a power of attorney empowering the Claimant to sell the Property.

18. It may be noted that the cumulative relief sought is not, or at least may not be, all internally consistent. For instance, if the Claimant (and the First Defendant) were

appointed trustees, it would not be necessary for the Claimant to be given a power of attorney to effect a sale (that being predicated on the Second Defendant retaining ownership of the Property). However, nothing turns on this for present purposes.

19. Incidentally, it seems that the Claimant has in fact brought multiple – no fewer than 8 – sets of proceedings against the Second Defendant and/or the Deceased, at least some of which have related to the Property, including a claim as far back as 2010 (claim no. HC10C03654) which was discontinued in 2011. It is not my function in this judgment to determine whether the multiplicity of claims has any wider consequence, although (if this matter goes further) it is conceivable that, if any point is taken, consideration may need to be given to this. I merely record the history of the matter.

20. The overall essence of what is sought by the Claimant is clear. The primary relief claimed is the declaration concerning the Second's Defendant equitable interest to the Property, this being based on the fact that she is said to hold the Property on trust. The other heads of relief claimed are subsidiary to that and are consequential on the existence and administration of the asserted trust.

21. The proceedings were served by the Claimant on the Second Defendant in Scotland without the permission of the court, the Claimant relying on CPR 6.32 in this regard and filing a notice in form N510 in accordance with CPR 6.34. I record that (as noted in the order of Master Clark) the Second Defendant (who, as noted below, has filed a witness statement and participated at the hearing) does not dispute service and accepts that she has been validly served with the proceedings. I thus need not examine whether CPR 6.32 was in fact engaged. I simply proceed on the footing that there is no issue regarding service.

22. By his order of 7 August 2020 in claim no. G01CL579, which order was made on reviewing the court file, HHJ Monty QC directed that the court would consider whether the court has jurisdiction. No doubt this was because the proceedings concern land in Jamaica.

23. Claim no. G10CL331 (as it had become) came before HHJ Lethem on 21 October 2020. By his order dated 23 October 2020 he recorded that the court was considering striking out the claim for want of jurisdiction in the light of the overseas location of the Property and in view of the purchase documentation having been prepared and executed in Jamaica. He ordered that the Claimant should file and serve a witness statement setting out the basis on which the court has jurisdiction to try the case. He also listed the matter for a 1 day hearing.

24. As it happened, the question of jurisdiction was never determined by the county court because of the transfer to the High Court.

25. By her order of 3 August 2021 Master Clark also directed that the following issue be determined as a preliminary issue:

> "Whether the Court has jurisdiction to determine these proceedings."

26. In the light of the direction in the same order that the two claims be heard together, I interpret the preliminary issue as relating to both claims. At the hearing the Claimant said he was happy for me to proceed on this basis and the other parties did not dissent.

27. The preliminary issue was heard by me on 28 October 2021. The hearing was a hybrid hearing. The Claimant was represented by Mr Hill-Smith of counsel. They were both in the court room. The First Defendant also appeared in person. The Second Defendant attended by video-link.

28. I also received, and have had regard to, lengthy witness statements from the Claimant in claim no. G10CL331 dated 1 October 2020 and 5 November 2020 (the latter being filed in response to the order of HHJ Lethem) and a witness statement from the Second Defendant made in both claims and filed on 28 October 2021. However, save insofar as those statements present the general (and I believe uncontroversial) background to the litigation which I have summarised above merely to set the scene, the wide-ranging factual accounts presented therein do not really bear on the jurisdictional issue with which I am concerned. I am not deciding disputes of fact and determining conflicts of evidence.

I note that (in the light of the orders made in the county court) the Claimant's witness statements also make legal submissions regarding the court's jurisdiction. These contentions are essentially replicated in his skeleton argument and counsel's submissions (as to which see below).

29. For his part, the Claimant maintains that this court has jurisdiction to, and should (if his assertions are proved at trial), grant the relief sought. He is strongly resistant to the notion that the claim can only (or ought to) be dealt with in Jamaica. Indeed, he told me at the hearing that he has previously attempted to bring a claim in Jamaica but has not met with success in his quest to institute such litigation.

30. The First Defendant takes a similar stance. She does not want the proceedings heard in Jamaica. That would be inconvenient for her and would, from her perspective, require any hearing to be conducted remotely since she would not wish to travel there. She is happy for the case to be tried here.

31. As for the Second Defendant, it emerged that she too is not averse to this court determining the claims, provided that it has jurisdiction to do so. Certainly, she does not actively want the dispute to be determined in Jamaica (or elsewhere). She has no objection to a trial in England, if the court decides it has jurisdiction. However, she told me that she was advised by a Jamaican lawyer that only the courts in Jamaica can deal with the claims.

32. Against the above background I must determine whether the court has jurisdiction to determine the two claims.

33. For the avoidance of doubt, I record that I am not deciding what the governing law of and applicable to the alleged trust is. If there is any dispute between the parties in that regard (and I do not suggest that there is), that will need to be determined separately, if I decide that this court has jurisdiction to determine the proceedings.

34. At the hearing Mr Hill-Smith, who had presented a supplemental skeleton argument, made oral submissions on the law and put before me various authorities on the question

of jurisdiction, as had the Claimant himself in a skeleton argument filed before the hearing. In what follows I focus on the presentation of the Claimant's case by Mr Hill-Smith, who did not press some of the points advanced by the Claimant himself in writing.

35. Both Defendants explained to me their factual positions and their general stance in relation to jurisdiction (as recorded above) but, unsurprisingly given that neither is a lawyer, they did not address me on the legal issues as such. Therefore, the hearing was effectively one-sided, although Mr Hill-Smith took appropriate care to draw to my attention to all potentially relevant points and authorities and to present matters in a balanced way. I am grateful to him for so doing.

36. There is a rule known in this country as the *Moçambique* rule (after *British South Africa Co v Companhia de Moçambique* [1893] AC 602) under which the English court will not, as a matter of its own limits to jurisdiction, by and large determine matters of title to foreign land. The purpose of the rule is the maintenance of comity and the avoidance of conflict with foreign jurisdictions: *Lucasfilm Ltd v Ainsworth* [2011] 1 AC 208 @ [106]. It can also be justified on the ground that a judgment in rem given by an English court would be ineffective unless it were accepted and implemented by the authorities where the land is situated: *Hamed v Stevens* [2013] EWCA Civ 911 @ [16].

37. Nevertheless, it has long been established that, before the *Moçambique* rule can apply, the proceedings must raise directly the issue of title to foreign land: *Hamed v Stevens* @ [14]. Hence the *Moçambique* rule is now relatively narrowly confined: *Hamed v Stevens* @ [16].

38. Moreover, as stated by Lloyd-Jones LJ in *Hamed v Stevens* @ [11], the current formulation of the *Moçambique* rule in Dicey, Morris and Collins on *The Conflict of Laws*, 15th Ed., (2012), Rule 131(3) is, in relevant part, as follows:

> "Subject to the Brussels I Regulation and the Lugano Convention, the court has no jurisdiction to entertain proceedings for the determination of the title to, or the right to possession of, immovable property situated outside England, except where:

a) the claim is based on a contract or equity between the parties; ….”

39. There is thus an exception to the *Moçambique* exclusionary rule at common law, by virtue of which (per Lord Mance in *Pattni v Ali* [2007] 2 AC 85 @ [26]):

> “…. it has long been accepted in England that an English court may, as between parties before it, give an in personam judgment to enforce contractual or equitable rights in respect of immovable property situated in a foreign country …”

40. This exception has its origin in the practice of the Court of Chancery which was willing to exercise jurisdiction over a defendant within its jurisdiction so as to compel him to give effect to obligations he had incurred in relation to land situated abroad: Hamed v Stevens @ [19].

41. Cases in which the principle that, although the court cannot act upon the land directly, it can act upon the conscience of the person residing in or subject to its jurisdiction, include: *Lord Cranstown v Johnston* (1796) 3 Ves Jun 170; *Re Courtney, ex parte Pollard* [1835-42] All ER Rep 415 (mortgage of land in Scotland ineffective under the law of Scotland but given effect in England); *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502, CA @ 513-514, 517-518, 523-524 (English contract to give a mortgage on foreign land enforced in personam – decision unaffected by reversal on a different point [1912] AC 52); *In re The Anchor Line (Henderson Brothers) Ltd* [1937] 1 Ch 483.

42. In *Deschamps v Miller* [1908] 1 Ch 856 (in which jurisdiction was in fact declined on the facts of the case) Parker J stated @ 863-864:

> “In my opinion the general rule is that the Court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction. *There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend upon the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of the Court of Equity in this country, would be*

> *unconscionable, and do not depend for their existence on the law of the locus of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the Court may very well assume jurisdiction*. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think that the Court ought to entertain jurisdiction to decide the matter."

(my emphasis)

43. Commenting on the exception, Dicey, Morris and Collins remark (para.23-042) that, though the court has no jurisdiction to determine rights over foreign land, yet where the court has jurisdiction over a person from their presence in England, or from their submission to the jurisdiction, or from its power to serve them with a claim form, though they are out of England, the court has jurisdiction to compel them to dispose of, or otherwise deal with, their interest in foreign land so as to give effect to obligations which they have incurred with regard to the land.

44. At para.23-044 the authors give as an example of a case within the exception to the *Moçambique* rule a claim for a declaration that the defendant holds foreign land as trustee. In support of this they cite (with another case) the two cases to which I refer below.

45. *Chellaram v Chellaram* [1985] Ch 409 concerned a claim to remove the defendants as trustees of property situated overseas and the appointment of new trustees in their place. Scott J held that, even if Indian law was the proper law of the trust, the court had jurisdiction to administer a foreign trust, where the funds were outside the jurisdiction, by ordering the trustees to fulfil their obligations under the trust and, if necessary, to remove

the trustees and appoint new trustees by orders in personam requiring them to resign and to vest the trust funds in the new trustees.

46. In the course of his judgment Scott J said @ pp.425-427:

> "… Mr Miller submitted … that the English courts should have nothing to do with the plaintiffs' claim for the removal of the trustees. You cannot have, he said, English courts removing foreign trustees of foreign settlements any more than you can have foreign courts removing English trustees of English settlements. Tied up in this cri de coeur are, in my view, three separate points. First, there is the question of jurisdiction. Does an English court have jurisdiction to entertain such a claim? Second, there is the question of power. If an English court does have jurisdiction, can it make an effective order removing foreign trustees of foreign settlements? Third, there is the forum conveniens point. Is this an action which the English court should be trying?
>
> I start with jurisdiction. ….
>
> As to subject matter, also there is in my judgment no doubt that the court has jurisdiction. In *Ewing* v. *Orr Ewing* (1883) 9 App.Cas. 34 it was held by the House of Lords that the English courts had jurisdiction to administer the trusts of the will of a testator who died domiciled in Scotland. The will was proved in Scotland by executors, some of whom resided in Scotland and some in England. The assets, the subject of the trusts, consisted mainly of hereditable and personal property in Scotland. An infant beneficiary resident in England brought an action in England for the administration of the trusts of the will by the English courts. It was clear that the proper law of the trusts was the law of Scotland. Nonetheless, the House of Lords, affirming the Court of Appeal, upheld the jurisdiction of the English courts. The Earl of Selborne L.C. said, at pp. 40-41:
>
> > "the jurisdiction of the English court is established upon elementary principles. The courts of equity in England are, and always have been, courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the

> performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the colonies, and in foreign countries: ... A jurisdiction against trustees which is not excluded ratione legis rei sitae as to land, cannot be excluded as to moveables, because the author of the trust may have had a foreign domicil; and for this purpose it makes no difference whether the trust is constituted inter vivos, or by a will, or mortis causa deed."

Lord Blackburn agreed, at pp. 45-46:

> "It was argued that the domicil of the testator being Scotch, the court of Chancery had no jurisdiction at all; that the jurisdiction depended on the domicil of the testator, or at least on the probate in England, and was therefore confined to the comparatively small part of the property that was obtained by means of the English probate. I do not think that there is either principle or authority for this contention. The jurisdiction of the court of Chancery is in personam. It acts upon the person whom it finds within its jurisdiction and compels him to perform the duty which he owes to the plaintiff."

….

Current authority establishes that the court does have a discretion to decline jurisdiction on forum conveniens or forum non conveniens grounds. *But the principle that the English court has jurisdiction to administer the trusts of foreign settlements remains unshaken. The jurisdiction is in personam, is exercised against the trustees on whom the foreign trust obligations lie, and is exercised so as to enforce against the trustees the obligations which bind their conscience.*

The jurisdiction which I hold the court enjoys embraces, in my view, jurisdiction to remove trustees and appoint new ones. …."

(my emphasis)

47. Dealing then with an argument that an order to remove the trustees of a foreign settlement and a vesting order under s.44 of the Trustee Act 1925 would be ineffective to divest the defendants of the ownership of the trust property (the same not being within the territorial jurisdiction of the court), Scott J continued at p.428:

> "*The jurisdiction of the court to administer trusts to which the jurisdiction to remove trustees and appoint new ones is ancillary, is an in personam jurisdiction. In the exercise of it, the court will inquire what personal obligations are binding upon the trustees and will enforce those obligations. If the obligations are owed in respect of trust assets abroad, the enforcement will be, and can only be, by in personam orders made against the trustees. The trustees can be ordered to pay, to sell, to buy, to invest, whatever may be necessary to give effect to the rights of the beneficiaries, which are binding on them. If the court is satisfied that in order to give effect to or to protect the rights of the beneficiaries, trustees ought to be replaced by others, I can see no reason in principle why the court should not make in personam orders against the trustees requiring them to resign and to vest the trust assets in the new trustees. The power of the court to remove trustees and to appoint new ones owes its origin to an inherent jurisdiction and not to statute, and it must follow that the court has power to make such in personam orders as may be necessary to achieve the vesting of the trust assets in the new trustees. This is so, in my judgment, whether or not the trust assets are situated in England, and whether or not the proper law of the trusts in question is English law. It requires only that the individual trustee should be subject to the jurisdiction of the English courts.* It does not matter, in my view, whether they have become subject to the jurisdiction by reason of service of process in England or because they have submitted to the jurisdiction, or because under R.S.C., Ord. 11 the court has assumed jurisdiction. …
>
> Accordingly, and for these reasons, I do not accept Mr Miller's submission that the English courts have no power to remove the defendants as trustees of these two settlements."

(my emphasis)

48. *Bharmal v Bharmal* [2011] EWHC 1092 (Ch) concerned a claim for a declaration that land in Uganda was still affected by certain trusts, and for a determination of the claimant's beneficial interest in such trust. The defendant contended that the Ugandan courts had exclusive jurisdiction. This contention was rejected by Mann J. At [16] he said:

> "However, that principle [sc: the *Moçambique* rule] does not apply to the claimant as made in this case. This case does not challenge anybody's title to land in Uganda. It in fact asserts that the defendant has acquired title to land in Uganda. What it does is assert that that property is subject to trusts, and the case of *Chellaram*, to which I have referred, demonstrates that, if that is the nature of the claim, then this court does have jurisdiction. *In Chellaram the English court was invited to remove and replace trustees of a trust governed by Indian law. It held that it could do so. If the court can do that, then it can grant the lesser relief of determining the beneficial interests. That is because equity acts in persona and the obligations imposed on the trustee are treated as being personal obligations which this court will enforce against persons within the jurisdiction. This is a case which is in line with Chellaram. It is not a Mozambique rule type of case.* The Ugandan statutes do not oust the English court's right to decide the matter in Chellaram v Chellaram, and the first way in which Mr Clifford challenges the jurisdiction of this court therefore fails."

(my emphasis)

49. In my judgment, the authorities make good the rule and propositions contained in Dicey, Morris and Collins. The cases establish that the English court can control trustees of a trust of foreign land through orders in personam. Specifically, the English court can: determine the beneficial interests under such a trust; direct the removal and substitution of the trustees by means of injunction; direct that the trustees sell or transfer the property. All such orders are orders in personam. In a case where relief of that nature is sought, the case falls within the exception to the *Moçambique* rule.

50. I add that it is no bar to the exercise of the court's in personam jurisdiction that legal title to foreign land may not pass unless and until, following a transfer, any requisite

registration of title in the foreign jurisdiction is completed. The point is that the trustee can be ordered to effect such a transfer which may then be presented by the transferee for such registration.

51. Turning to the present case, I outlined the relief sought in paragraph 17 above. To my mind, all the relief sought (across the two claims) is relief of an in personam nature in a dispute between the two central protagonists, the Second Defendant (the asserted trustee) and the Claimant (the asserted beneficiary) under the asserted trust. The fact that the land in question is situated in Jamaica does not preclude this court from having jurisdiction to hear the claim and, if the Claimant succeeds, to grant the relief sought against the Defendants who are themselves subject to the court's jurisdiction. These proceedings accordingly fall within the exception to the *Moçambique* rule.

52. The proceedings do not involve any determination of rights in rem. They do not assert a property right which is by its nature enforceable against third parties and they do not purport to bind strangers/third parties. For instance, no possession order, effective against the world at large, is sought (and none could be granted by this court). Neither is any order directed to the Jamaican Land Registry claimed (ditto). The court is only asked to resolve a dispute between those before it, the proceedings being based on an alleged personal (trust) relationship between the Claimant and the Defendants.

53. Although an order for sale is sought, which if granted would (subject to any questions of registration) bring about a transfer of the ownership of the Property, the authorities make it clear that such relief can be achieved by means of an in personam order directed at the individual trustee. Specific performance of a personal obligation to transfer land situated abroad can be ordered, as can the duty of a trustee to transfer such land.

54. There is also nothing to suggest that the law of Jamaica would prevent enforcement of the in personam orders which this court might make if it upheld the claims. There are no grounds for believing that the orders sought by the Claimant would be ineffective. There is no obvious prospect of conflict with the law of Jamaica.

55. For completeness, where the court has jurisdiction, it is immaterial what is the governing law of the trust or what is the location of the trust assets. The governing law of a trust does not determine the question of jurisdiction. It is no objection to the enforcement of a trust that its governing law is not English or that the trust property is not within the jurisdiction. If an order in rem cannot be made (e.g. because the trust property is overseas), nonetheless in personam orders can still be made against the trustees of a foreign trust. This is shown by *Chellaram v Chellaram*. It is also in line with *Wallbrook Trustees (Jersey) Limited v Fattal* [2009] EWHC 1446 (Ch) @ [67] (affirmed on appeal without reference to this point: [2010] EWCA Civ 408). It is further supported by Dicey, Morris and Collins, para.29-073.

56. In my judgment, therefore, this court has jurisdiction to determine these proceedings.

57. Strictly speaking, there might conceivably remain the question as to whether I should as a matter of discretion decline to exercise jurisdiction on the ground that England is a forum non conveniens. I can deal with this briefly.

58. No party expressly invited me to decline jurisdiction. Indeed, all were fully amenable to this court exercising jurisdiction, if I should decide (as I have) that it does have jurisdiction over the proceedings. None suggested that it would be more convenient to have the case decided in Jamaica (or elsewhere). There was no evidence to that effect. Further, it was clear at the hearing that none was enthralled by the prospect of litigation in the Caribbean.

59. Realistically the only competing jurisdiction would be Jamaica, where the land is. Set against that is not only the above but also the fact that all concerned are, and have at all material times been, domiciled in the UK. In addition, the rent has been remitted to the UK for so long as the Property has been within the family. The administration of the Property has at all times been conducted in England. Moreover, none of the parties now wishes to travel to Jamaica.

60. Even accepting that Jamaica is a forum where the dispute might appropriately be heard, I do not consider that it is the most natural forum in the circumstances. The most suitable

venue so far as the interests of all parties and the ends of justice are concerned is, I believe, England.

61. The onus lies on a party seeking a stay on the grounds of forum non conveniens to show that a refusal of a stay would produce injustice. Since no party has advocated for such a stay and in the light of the factors outlined above, there is no basis for this court to decline to exercise the in personam jurisdiction which it has.

62. As noted above, rule 131(3) in Dicey, Morris and Collins is expressed to be subject to the Brussels I Regulations and the Lugano Convention. I now turn to consider the impact, if any, of these.

63. Matters are somewhat complicated by the UK's exit from the EU and by the fact that the two claims before me have not been consolidated and are thus separate claims, albeit proceeding together, and that the first claim was commenced before the end of the Brexit transition period (IP Completion Day) whereas the second claim was commenced afterwards.

64. Mr Hill-Smith submitted that, at least as regards the first claim in time (PT-2021-000928), by reason of the transitional savings provisions in regulation 92 of The Civil Jurisdiction and Judgments (Amendment) (EU Exit) (Regulations) 2019 (SI 2019/479), the matter remains subject to the Brussels Convention (which convention historically had the force of law in the UK by section 2(1) of the Civil Jurisdiction and Judgments Act 1982). He submitted that the Brussels Convention supports the Claimant's position in relation to jurisdiction.

65. I doubt whether the Brussels Convention as such does in fact apply as regards the first claim. This is because regulation 92 applies in relation to the Brussels Convention "except where it was superseded by Regulation (EU) 1215/2012 [Recast Brussels Regulation] in accordance with article 68 of that Regulation": regulation 92(2)(a). In that regard, regulation 68 of the Recast Brussels Regulation provides that, as between the Member States, it supersedes the Convention, except as regards certain overseas territories of the Member States.

66. However, even if this be so, it may be a distinction without a material difference. This is because: (a) for present purposes, the Recast Brussels Regulation is in similar terms to the Convention; (b) Article 67(1)(a) of the UK-EU Withdrawal Agreement provides that the Recast Brussels Regulation will continue to apply to legal proceedings instituted before the end of the transition period; (c) regulation 93A of the 2019 Regulations provides that nothing in those regulations affects the application of Article 67(1)(a).

67. Therefore I proceed below on the basis that either the Brussels Convention or, as the case may be, the Recast Brussels Regulation applies vis-à-vis the first claim.

68. However, as regards the second claim (PT-2021-00287), notwithstanding Mr Hill-Smith's categorisation of the first claim as the "lead proceedings" (a categorisation that I do not fully endorse) and his implicit suggestion that the two claims be viewed as one, I consider that at this time it is technically a freestanding and distinct claim which falls outside the saving provisions. Further, no party has sought consolidation of the two claims and I have not been addressed as to the consequences of consolidation so far as the application of the Brussels Convention or the Recast Regulation is concerned.

69. Therefore I proceed on the basis that neither the Brussels Convention nor the Recast Brussels Regulation applies in relation to the second claim.

70. In relation to the first claim, I am satisfied that neither the Convention nor the Recast Regulation alters the conclusion which I have reached above; they do not lead to any different result in this case.

71. Article 2 of the Convention (Article 4 of the Recast Regulation) sets a default position. It provides that, subject to the other provisions of the Convention (Recast Regulation), persons domiciled in a Contracting State (Member State) shall be sued in the courts of that State. The UK (as a whole) was until its departure from the EU a Contracting State (Member State). Therefore, if and to the extent that Article 2 (Article 4) is here applicable, it prima facie supports the conclusion that claim PT-2021-000928 should be

heard in the UK. Hence this court assuming jurisdiction over the proceedings is consistent with it.

72. I say 'if and to the extent that Article 2 (Article 4) is here applicable' because there is room for debate as to whether in a case where (as here) the land in question is not situated in a Convention State (Member State) the Convention (Recast Regulation) *requires* the UK courts to exercise jurisdiction if (as here) the defendant is domiciled in the UK. Mr Hill-Smith relied on the ECJ decision in *Owusu v Jackson* [2005] QBD 801 (a case concerned with an accident in Jamaica) in support of such a conclusion. However, this "most interesting point" was left open by the Court of Appeal in *Hamed v Stevens @* [26] and, since its resolution makes no difference to the outcome of the present case, I refrain from making any decision on it, except to note that in *Kennedy v National Trust for Scotland* [2019] EWCA Civ 648 the Court of Appeal confirmed that the *Owusu* case did not preclude a stay on grounds of forum non conveniens (albeit that *Kennedy* was a case concerned with a contest between England and Scotland as the forum for the litigation, and lacked an international dimension).

73. Article 16 (Article 24) qualifies Article 2 (Article 4) in that it provides for the courts of the Contracting State (Member State) in which immovable property is situated to have exclusive jurisdiction in proceedings which have as their object rights in rem.

74. To come within Article 16 (Article 24), a claim must be based on a right in rem and not on a right in personam. But as to this, it appears that there is, or may be, an unresolved dispute as to the scope of Article 16 and the meaning and application of the condition "proceedings which have as their object rights in rem".

75. In *Pollard v Ashurst* [2001] Ch 595, CA it was held – applying the ECJ decision in *Webb v Webb* [1994] QB 696 – that an order for sale of Portuguese property was an order in personam made in enforcement of a trust and was not a claim in rem within the scope of Article 16 of the Convention. In *Webb* it had been held that a claim for a declaration that another person holds immovable property on trust and for an order requiring the execution of documents to vest ownership in the claimant was outside the ambit of Article 16.

76. In this case the Claimant himself relied heavily on these decisions in his written submissions before the hearing. However, Mr Hill-Smith properly drew my attention to *Magiera v Magiera* [2016] EWCA Civ 1292. In that case the Court of Appeal, applying the more recent ECJ decision in *Komu v Komu* [2016] 4 WLR 26 (decided in relation to Article 22 of the Brussels I Regulation, which had replaced Article 16 of the Convention), held that a claim for an order for sale of property held under a trust could fairly be described as having as its object rights in rem.

77. Mr Hill-Smith submitted that it is not necessary for me to determine how the various Convention/Regulation cases fit together (if indeed they do) because Article 16 (Article 24) is not engaged in the present case in any event. This is because, even if (for such purposes) the proceedings are to be regarded as having as their object rights in rem, here the land is in Jamaica and hence the property is not situated in the court of a Contracting State (Member State). Thus no court has exclusive jurisdiction under Article 16 (Article 24).

78. I agree that this is so. Article 16 (Article 24), whatever its reach, is not in play in this case. Therefore, it is not necessary for me to decide whether this case is within *Webb* or *Komu*.

79. I add that (in agreement with Mr Hill-Smith) I do not read the decision in *Magiera* as qualifying or limiting the extent of the exception to the common law *Moçambique* rule, i.e. as stating that the court does not have the power to make in personam orders in connection with real property sited in a foreign jurisdiction. *Magiera* was concerned only with the scope of Article 22 (of the Brussels I Regulation) which lays down a similar but not identical rule to the *Moçambique* rule itself.

80. In the circumstances I conclude that nothing in the Brussels Convention (or the Recast Regulation) alters my conclusion that this court has jurisdiction to determine the proceedings.

81. For completeness, although I was not addressed on it, I add that the 2007 Lugano Convention (preserved in relation to claim PT-2021-000928 by regulation 92 of the 2019 Regulations) does not lead to any different result either. Article 2(1) thereof mirrors Article 2 of the Brussels Convention. Article 22(1) mirrors Article 16.

82. I thus answer the preliminary issue in the affirmative; the court has jurisdiction to determine these proceedings.

83. I shall hand down this judgment remotely without the need for attendance. I request counsel for the Claimant (after consultation with the Defendants) to CE-file a draft order reflecting this judgment for my approval and dealing with any consequential matters by 4pm on 19 November 2021. If the parties cannot agree any consequential matters, I shall deal with them by way of brief written submissions and I shall give directions in that regard if invited to do so.