

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B_337 OF 1990

BETWEEN	NEVILLE BALLIN	FIRST PLAINTIFF
A N D	VIRNA BALLIN	SECOND PLAINTIFF
A N D	JAMES BROWN	DEFENDANT

R. Codlin and E. Hall for the Plaintiffs.

Crafton Miller and Miss N. Anderson for Defendant.

HEARD: 24th January, 1994, 25th January, 1994;
11th April, 1994; 12th April, 1994; 14th
April, 1994; 15th April, 1994; 26th
September, 1994; 27th September, 1994;
27th February, 1995; 28th February, 1995;
2nd March, 1995; 3rd March, 1995; 20th
March, 1995; 22nd March, 1995; 24th March,
1995; 25th September, 1995; 26th September,
1995; 29th September, 1995; 2nd October,
1995; 3rd October, 1995 and 3rd October, 1996

ELLIS J:

The plaintiffs say that by a written Agreement made in November, 1989 between the defendant and themselves it was agreed:-

- (i) they would become part owner to the extent of 25% of all land at Port Henderson in St. Catherine and registered at Volume 1063 Folio 926 in the Register Book of Titles;
- (ii) pursuant to the agreement they paid the defendant various sums of money part of which was used by defendant to complete the purchase of land which had been conveyed to him prior to the agreement. The plaintiff also say that they expended funds to acquire fittings and appliances for use in the business.
- (iii) that it was agreed that plaintiffs and defendants would sell and transfer the aforesaid property and entity called Ocean Terrace Inn Limited a company in which the defendant held 51% and the plaintiffs 49%;
- (iv) that in the event of defendant's death before the sale and transfer of the property the plaintiffs would have the option to continue the business for which Ocean Terrace Inn was formed for 20 years on a lease;

- (v) that the defendant has breached the agreement and has refused to carry out the terms of the agreement with the consequence that the plaintiffs have suffered loss and damage.

In the premise the plaintiffs claim the following reliefs:

- (a) Specific Performance of the Agreement or damages in addition to or in lieu thereof;
- (b) return of a total sum of \$1,736,870 paid to the defendant;
- (c) interest on the sum of \$1,736,870;
- (d) Injunction restraining the defendant from disposing the property the subject of this action;
- (e) an order for the preservation of goods.

The defendant denies the plaintiffs' allegations concerning their part ownership in the land and says that the allegations as to transfer of property to Ocean Terrace Limited and continuation of business on a lease were mere proposals and were not made into agreement.

The alleged sums were paid to ocean Terrace Inn Limited and not to the defendant and consequently, the defendant denies owing any money to the plaintiffs.

The items of fittings and appliances bought by the plaintiffs were brought into Ocean Terrace Inn Limited as their consideration to obtain shares in that company. In any event, he says some of those items were already owned by the aforesaid company.

The Evidence

Virna Ballin in evidence said that she first met the defendant in 1988 and several times thereafter at LaRoose Restaurant.

The defendant told her that he was erecting building in the area of the LaRoose Restaurant and she was invited to look at the place.

She accepted the invitation and was shown an unfinished building. The defendant told her of the plans he had for the building sometime later in the year 1988 and had business discussion with him either at her house in Allerdyce or at her place of business in New Port West.

There were several such business discussions and on one occasion defendant informed her that he was having cash flow problems. He had some difficulty in liquidating his mortgage debt on the property and his funds were being depleted. She lent him \$10,000.00 on that occasion which has been repaid.

At a subsequent meeting the defendant told her that he was looking for someone to join him in the proposed business and she understood him to be seeking someone to put money in his business.

The defendant suggested two options open to entrance to the business, either to buy shares in a company or to put money in the business and own part of the premises.

Mrs. Ballin said she discussed the matter with her husband. Her husband and herself and the defendant looked at the premises and the building when still under construction. The defendant repeated the options to her husband.

At another meeting, her husband and herself indicated to defendant that they were interested in investing in the equity of the business and in the entire premises. They also indicated that they would liquidate the mortgage debt on the land. That mortgage debt was duly liquidated by cheque drawn in favour of Elizabeth King and dated 14th September, 1989 - see Exhibit 2.

Subsequent payments were made by the plaintiffs at the request of the defendant in relation to the purchasing of equipment and fixtures for the proposed business. Mrs. Ballin said that these payments were made on the sole understanding that the plaintiffs owned an interest in the entire property. Mrs. Ballin stated that after the plaintiffs had expended funds for the acquisition of fixtures they made two further agreements with the defendant.

One agreement was to the effect that on the payment of \$600,000.00 by the plaintiffs they would secure a 25% share in the entire property. This was before the buildings on the property was completed. The other agreement was that a company called Ocean Terrace Inn should be incorporated with the plaintiffs holding 49% and the defendant holding 51%.

The title would then be transferred from the defendant to the company.

The property (realty) at the time of this latter agreement was valued at \$2.4M. She said that the plaintiffs put in majority of the capital and \$600,000.00 was a loan from Mutual Security Bank, \$400,000.00 of that amount was paid to the defendant and the cheque was encashed by him. The business was opened in March, 1990.

In June and July, 1990 the plaintiffs had meetings with defendant and his attorney. The matter of the transfer of the property was raised. Defendant was requested to effect the transfer and a date 16th August, 1990 was given by defendant for the transfer. He also said the plaintiffs would be invested with 49% of the shares.

Mrs. Ballin said that the parties agreed to share the cost of transfer. No transfer took place on 16th August, 1990 and after several requests to have the property transferred, she was asked by defendant to leave the property.

Finally, on the 30th August, 1990 defendants' attorney requested her to leave the property. She did so on the advice of her attorney on 30th August, 1990 after taking her personal property.

The property is being operated as Arizon Inn by the defendant since that date and use is being made of all the fixtures and appliances which the plaintiffs installed.

To date the plaintiffs have had no transfer of the property. They have had no allotment of 49% of shares. They have had no refund of their expenditure and they have had no account of the business or any promise of such account. The plaintiffs have had no notice that the company Ocean Terrace Inn has been wound up.

Several documents and encashed cheques in support of plaintiffs case were tendered in evidence to a total of 28 exhibits. Mrs. Ballin was cross examined by Mr. Miller.

She said she had no knowledge that the premises were owned by the defendant and Oretta Majors jointly. What she was told by defendant was that he owned premises.

When she bought the equipment and expended money she did so in

order to own 49% of the business. She did so on the basis that the second plaintiff and herself were invited to put in equipment and money in the business to become owners of 49% in the real estate and business.

She admitted that a figure of \$20,000.00 per month as rental was mentioned pending transfer of the property. She denied paying any money to the defendant on behalf of Ocean Terrace Inn Limited.

On being asked what the plaintiffs were claiming Mrs. Ballin said \$1,736,000. Certain items of expenditure were put to her and she replied that those expenditures and cheques drawn form part of amount of \$1.736M claimed.

Neville Ballin the second plaintiff gave evidence that he met the defendant in 1988. They had general discussions about the possibilities of entering into business.

He saw an unfurnished partly-completed building on the premises.

Subsequently he again met the defendant who told him that he needed someone to come in and help to finance the building and to start business. He deduced that defendant needed a partner. That business was to be a hotel, restaurant and bar.

He said he decided with Mrs. Ballin to go in as partners in the realty and the business. He said the plaintiffs were required to inject \$600,000.00 and to pay off the purchase price of the land in U.S.\$14000.

The U.S.\$14000 was duly paid and there was an agreement that the plaintiffs would allotted 49% of land and all assets on their being transferred to a company called Ocean Terrace Inn Limited. The land and assets have not been transferred to Ocean Terrace Inn Limited. The plaintiffs he said entered into partnership expecting to get 49% share in realty and whole business.

To his knowledge the equipment which the plaintiff bought are being used by the defendant in business called Arizon Inn.

He was not aware of any lease agreement with an entity called Ocean Terrace Inn Limited and the defendant.

The defendant's case opened by Mr. Miller, contended that the

proper defendant in the case should be Ocean Terrace Inn Limited. All equipment and fixtures were purchased by the plaintiffs for Ocean Terrace Inn Limited.

Mr. Miller in his opening did not deny the proposed ownership of the Company in the ratio of 51% to defendant and 49% to plaintiffs. He however denied that the proposed ownership included realty.

The defendant said he met Mrs. Ballin in June 1988. At that time, he was building a home on Port Henderson Road and intended to add rooms to the building for time sharing. Mrs. Ballin told him that that was a good idea and she would be interested in the venture.

He said he told Mrs. Ballin that he was having cash flow problems and he needed cash to purchase and instal fixtures. Mrs. Ballin agreed to lend him money and did so to nearly U.S.\$4000.00.

He repaid the loan. A subsequent loan of U.S.\$14,000.00 was made to him. He should have repaid that amount at the rate of J\$7.00 to U.S.\$1.00 and that amount of \$98000 has not been repaid.

The only money which he owes the plaintiff is U.S.\$14000 or its Jamaican equivalent of \$98,000.00.

He was cross examined by Mr. Codlin and admitted that he gave Mrs. Ballin lists of equipment and fixtures and requested her to purchase the items (Ex. 7). He said the items bought were bought by the plaintiffs as shareholders in the business. As owner of the real estate the defendant said he was entitled to rent from Ocean Terrace Inn Ltd. and did receive 4½ months rental to the amount of \$90,000. In answer to questions from Mr. Codlin the defendant said the tenancy of Ocean Terrace Inn Limited was terminated in October, 1990. On the termination of that tenancy, he opened another business and rented the fixtures and equipment for use in that business which is called Arizona Inn. The rental of those fixtures, and equipment was orally communicated to the plaintiffs although he admitted that they held 49% of the shares.

He denied that there was any agreement to transfer real estate to Ocean Terrace Inn Limited.

Richard Rowe an attorney-at-law who acted for the parties gave

evidence on behalf of the defendant. His evidence was to the effect that there was no agreement that property would be transferred to Ocean Terrace Inn Limited.

As legal adviser to the parties he was aware of a draft lease. He knew that an amount of \$20,000.00 per month should have been paid by Ocean Terrace Limited to the defendant. He could not say with any certainty how much the plaintiffs had invested in Ocean Terrace Inn Limited.

That was the evidence for the defendant.

Is The Defendant A Proper Party To this Action?

Mr. Miller submitted that all the expenditure of money and equipment bought were for the legal entity called Ocean Terrace Inn Limited.

In that circumstance, the proper defendant he said should have been Ocean Terrace Inn Limited or at least Ocean Terrace Inn Limited should have been joined.

I am not in agreement with Mr. Miller's contention. The company Ocean Terrace Inn Limited was duly incorporated by the defendant and he purported to have held 51% a majority of its shares. Nothing was done to transfer the other shares to the plaintiffs.

No real estate was transferred to Ocean Terrace Inn Limited and I find its trading as an entity rather uncertain.

I am concluded that Ocean Terrace Inn Limited was a "mere sham or cloak" to facilitate the defendant's improper conduct relative to the plaintiffs.

I therefore have no hesitation in holding that the defendant is a proper party to the action.

Defendant's Liability

The plaintiffs contend that the agreement between themselves and the defendant contemplated a transfer of 49% of property to them. In that light, Mr. Codlin advocated a claim for Specific Performance. He also claimed damages in addition to Specific Performance or in lieu thereof.

Mr. Codlin as expected put his case for Specific Performance skil-

fully. Mr. Miller for the defendant rose to the task and asked the court to reject Mr. Codlin's contention.

Mr. Miller stated that there can be no order for Specific Performance since the alleged contract is void for uncertainty. In any event, he argued that the alleged contract was not executed by the second plaintiff.

I am of opinion that Mr. Miller's arguments are sound.

It is trite that there must be clear evidence, parol or otherwise, of a "contract" certain and definite in its terms between the parties to found an order for specific performance.

I do not find such a contract in this case and I do not accept any competence on my part to construct any contract for the parties.

It may be argued that the plaintiffs by expending money did acts of part performance of the contract. That argument would fail in that no amount of what would be part performance can make certain a contract which is void for uncertainty.

On the above points, two cases of some antiquity lend support. They are (i) Lackett v. Norman-Wright [1925] Ch. 56 and (ii) Waring v. Gillow Ltd. (1912) T.L.R. 154.

The defendant's liability if any, does not involve his being ordered to specifically perform any contract.

The oral and documentary evidence of the plaintiffs clearly establish that the plaintiffs expended money to the defendant's benefit. That expenditure amounts to \$1,736,870.00 which was claimed by Mrs. Ballin.

I have no hesitation in holding that the defendant is liable to repay the above amount to the plaintiffs with interest.

Mr. Codlin for the plaintiffs mounted a most interesting argument with respect to the indebtedness of the defendant. He argued that the amount of indebtedness should be divided as follows J\$1.3 million and U.S.\$64,441.10.

In that case in addition to J\$1.3 million, he argued that the plaintiffs should be awarded judgment in the amount of U.S.64,441.10.

Since execution of that debt cannot be in U.S.\$ it had to be converted to Jamaican Currency with the conversion date being the date of payment. Reliance was placed on the cases of Woodhouse v. Nigerian Marketing Company [1971] 1 All E.R. 665 and Milliangos [1975] 3 All E.R. 801.

The cases relied on are based on good law. However, I am not convinced that the circumstances of this case and the conduct of the parties would make the principles applicable. I cannot therefore accept Mr. Codlin's contention.

Rate of Interest

Section 3 of The Law Reform (Miscellaneous Provisions) Act empowers a court ^{to order} the payment of interest on a judgment in commercial cases.

The important question therefore, seems to be what should be the appropriate rate of interest?

In Tate and Lyle Food and Distribution Ltd. v. Greater London Council [1981] 3 All R.R. 716 it was accepted that an attempt at restitution in integrum was the principle on which interest is awarded in Commercial Cases.

In British Caribbean Insurance Company Limited v. Delbert Perrier S.C.C.A. No. 114/94 Carey J.A. in his judgment at p. 17 seems to have accepted the principle stated above and stated "If restitution in integrum is the rationale for the award of interest, then the rate at which a plaintiff can borrow money must be the rate to be set by the judge in his award."

In this case, the plaintiffs adduced evidence of a rate at which the plaintiffs could have borrowed money (see the evidence of Robert Gallimore).

I have deduced from that evidence that the average rate of interest up to 29th November, 1990 which is the date of the Writ, was 27%. I therefore award interest at a rate of 27%.

There will be judgment for the plaintiffs in an amount of \$1,736, 870.00 with interest at a rate of 27% from 29th November, 1990.

Plaintiffs to have costs to be agreed or taxed.