

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 8084/87

BETWEEN	LYLE BARNES	PLAINTIFF
AND	JOSCELYN BENNETT DALTON BARNES MICHAEL BARNES	DEFENDANTS

SUIT NO. C.L. 8129/87

BETWEEN	JOSCELYN BENNETT DALTON BARNES MICHAEL BARNES	1ST PLAINTIFF 2ND PLAINTIFF 3RD PLAINTIFF
AND	LYLE BARNES	DEFENDANT

(CONSOLIDATED)

Alonzo D. Manning for Lyle Barnes
Dennis Coffe and Paul Dennis for Joscelyn Bennett, Dalton Barnes & Michael Barnes

Heard: October 10, 11, 12, 13, 18, 19, 20,
December 12, 1989 and July 26, 1991

CHESTER ORR, J.

These consolidated actions relate to the fortunes of "Champion Muffler" a business concerned with the installation of and repairs to mufflers. It had its genesis as a small enterprise with one ramp and ended up as a going concern with a gross weekly income of some \$15,000.00.

The question for decision is whether this business is owned solely by Lyle Barnes or is the property of a partnership consisting of himself, his sister Mrs. Joscelyn Bennett, nee Barnes and his brothers Dalton and Michael Barnes.

Mrs. Joscelyn Bennett, who is described as Joscelyn Bennett in the pleadings, is the eldest of seven living children of the Barnes family. The mother Mrs. Edna Barnes is alive. Mrs. Bennett migrated to the United Kingdom in 1961. She later left for Canada and finally resided in New York, U.S.A. where she obtained American citizenship and along with her husband acquired a home.

In keeping with the tradition of Jamaica migrants she sponsored two of her brothers Michael and Dalton to Canada and the U.S.A. respectively. Lyle Barnes unfortunately suffered from a disability and had to receive treatment at the Mona Rehabilitation Centre. Despite this he was able to work and

acquired a skill as regards Mufflers at Ryan's Muffler Company. He started a muffler business which was carried on at various locations and finally at 76 Constant Spring Road which premises was acquired by all four parties involved in the actions. The business flourished. Mrs. Bennett, Dalton and Michael Barnes maintain that they contributed to the business and are joint partners with Lyle - this he denies.

This dispute as to ownership of the business resulted in the ramps being blocked, the intervention of the police and the obtaining of an Injunction. Efforts at a settlement proved futile. Battle was joined. Lyle Barnes fired the first salvo in suit B.084/87 in which he claimed against Joscelyn Bennett, Dalton and Michael Barnes.

Joscelyn Bennett and Michael Barnes were not served with the Writ of Summons and the case proceeded against Dalton Barnes alone.

The relevant part of the Statement of Claim is as follows:

- "1. The Plaintiff is the Managing Director of Champion Mufflers Limited with postal address at 76 Constant Spring Road, Kingston 10 in the parish of Saint Andrew.
2. The Plaintiff claims from the Defendants the sum of Two Hundred and Ninety Five Thousand, Four Hundred and Eighty Eight Dollars and Fifteen Cents (\$295,488.15) as monies advanced by the Plaintiff on behalf of the Defendants for the purchase of a property situated at 76 Constant Spring Road, Kingston 10 in the parish of Saint Andrew.
3. ALTERNATIVELY being the agent and surety for the Defendants in respect of the purchase of the said property, the Plaintiff now claims monies advanced by him on behalf of the Defendants.
4. The Agreement was that the Defendants would pay the above-mentioned amount within 12 months of the Agreement to purchase property at 76 Constant Spring Road in the parish of St. Andrew."

The Defence of Dalton Barnes is as follows:

- "1. The 2nd Defendant admits paragraph 1 of the Statement of Claim.
2. The 2nd Defendant denies paragraph 2 of the Statement of Claim.
3. The 2nd Defendant does not admit paragraph 3 of the Statement of Claim.
4. The 2nd Defendant denies paragraph 4 of the Statement of Claim.
5. The 2nd Defendant denies paragraph 5 of the Statement of Claim."

9. The business was duly moved from 5 Red Hills Road and set up at 76 Constant Spring Road under the name CHAMPION MUFFLERS and began operation. The first Plaintiff spent a further sum of \$2000. U.S. for the preparation of the place and the 3rd Plaintiff gave a further \$3,000 Canadian to the Defendant to help set up the operations at the new site and it was agreed that these sums would be repaid from profits.
10. The business continued to be successful and the Defendant bought a Carina motor car out of its profits for \$66,000.00.
11. The Plaintiffs and the Defendant agreed to convert the partnership into a limited liability Company, in which the said four partners would be members, and to that end on or about the 12th day of November 1986 they went to an Attorney-at-Law to implement the agreement; but at that stage the Defendant backed out and refused to form a Company, and repudiated the partnership, and claimed the business as his own.
12. The Defendant has operated the business profitably and has refused to keep proper books, nor to disclose to the partners the earnings and expenditure of the Partnership to them.

Wherefore the Plaintiffs claim:

- (i) A declaration that a partnership existed between themselves and the Defendant.
- (ii) A declaration as to when the partnership started.
- (iii) A declaration as to when the partnership ended.
- (iv) An Order declaring the joint tenancy severed.
- (v) A declaration as to the respective beneficial interests of the owners.
- (vi) An Order for sale of the land and that the net proceeds of sale be distributed in accordance with the declaration as to the respective beneficial interests of the owners.
- (vii) An Order that the Plaintiffs and the Defendant are to be at liberty to bid for and become the purchaser or purchasers at such sale of the said land.
- (viii) An Order that in respect of the period from December 1986 until the sale of the said land, the Defendant do pay to the Plaintiff three quarters of such sum as represents a fair rent which would be the amount assessed under the Rent Restriction Act without regard to any other provisions of the said Act and if such sum be not agreed between the parties an Order that an enquiry be conducted by the Registrar of the Supreme Court into the rent payable on that basis.
- (ix) Damages for loss of profits from the respective investments by the Plaintiffs in the business.
- (x) Further and other relief as the Court may deem just."

The Defence to this Claim was as follows:

- "1. The Defendant admits paragraphs 1 and 2 of the Statement of Claim.
2. The Defendant denies paragraphs 3 - 12 of the Statement of Claim.
3. The Defendant says that the agreement between the parties was limited to the joint acquisition of the premises at 76 Constant Spring Road as a family investment which would provide members of the family with a site for the establishment wherever desired of individual businesses.
4. The Plaintiffs have not complied with the terms of the agreement relating to the said purchase and as a result on February 18, 1987, the Defendant filed the action Suit No. C.L.B. 57 of 1987 in the Supreme Court. The Defendant will seek leave to refer to the said proceedings.
5. The welding business of the Defendant had been started by him alone in 1979 and he has never agreed to share it with the Plaintiffs, nor invited them to participate in it.
6. Save as is hereinbefore expressly admitted, the Defendant denies each and every allegation in the Statement of Claim appearing.
7. In the premises, the Plaintiffs are not entitled to the reliefs claimed or any relief."

The Case for Lyle Barnes

He was employed at Ryan's Muffler Company where he learned his skill. He left this employment sometime about October 1979. While so employed he built a ramp at 2 Marverley Avenue and did work there. He remained at Marverley Avenue for about 4 years and then built another ramp. These premises could not accommodate two ramps so he removed to 5 Red Hills Road; while there he acquired another ramp. These premises were sold and he relocated at Hagley Park Road, then at the Corner of Dunrobin Avenue and Constant Spring Road. While there he began negotiations for the purchase of premises 76 Constant Spring Road.

He spoke by telephone with his sister, Mrs. Bennett, who was then in New York, requesting her help in the purchase. She did not give a definite reply. He spoke with his mother and again to his sister who said she would assist him. She indicated that she would consult with their brothers, Dalton and Michael who were then living abroad, and if they agreed the Title for the premises would be in the names of the four of them - Mrs. Bennett, Dalton, Michael and Lyle Barnes. On her instructions he consulted a Mr. Samuels who gave evidence. Mr. Samuels introduced him to Motta and Oppenheim, Attorneys

who prepared an Agreement for sale which he Lyle signed on behalf of the purchasers. This Agreement was exhibited as Exhibit 7. Under the Agreement, the purchase price is \$367,500.00 with a deposit of \$55,000.00 on signing by the purchasers and a further payment of \$212,500.00 on delivery of title and executed transfer to the Purchasers' Attorney-at-Law. By special condition 4 it was agreed that the Purchaser would apply to Tower Investment Limited or another institution approved by the Vendor for a loan of not less than \$100,000.00 on the security of the property. If a commitment for such loan was not obtained by the 31st July, 1985, either party was entitled to rescind the Agreement.

He paid the deposit. The Vendor was pressing for the balance of the purchase money. He telephoned his sister who advised that he should obtain a mortgage. This he did. Dalton was then in Jamaica. His sister and Michael came to Jamaica and all signed the necessary documents.

As regards the final payment of \$212,500.00 he obtained U.S.\$24,000.00 from Mrs. Bennett which yielded J.\$90,000.00. The balance came from his private funds. While she was in Jamaica Joscelyn said that she would collect the amounts due for mortgage payments from the other two brothers and remit to his bank via the Bank of Jamaica. He has not received any money from Joscelyn or his brothers toward the mortgage payments and had been making these payments himself. His contribution to the purchase price was \$178,000.00 which he obtained from his personal Bank Account.

The amount of \$295,408.15 for which he sued represents the amount which the other purchasers should have paid towards the mortgage.

The only amount he received from them was U.S. \$24,000.00. He had never received any equipment from his brothers. He never agreed to enter into any partnership with the other purchasers. After the Agreement was signed he had agreed in a telephone conversation with Joscelyn that if any of the three purchasers who then resided overseas decided to return to Jamaica such person could use the premises for his or her own business provided such business was not similar to the muffler business.

He registered the business in 1983 in his own name as sole proprietor. A copy of Application for Registration under the Business Name Act was tendered as

Exhibit 21. In the application the date of commencement of the business is stated as 17.9.83. The application is dated 12.6.84. A current Certificate of Registration in the name of Lyle Barnes with Business Name "Champion Muffler" was tendered - Exhibit 6.

In November 1986, the other three purchasers desired to register the business as a company with each entitled to 25% of the shares. He disagreed because the land and the business were separate. As a result his sister and the two brothers blocked the entrance to the ramps with a container thus preventing him from doing business. He obtained the assistance of the police but this was ineffective so he obtained an Injunction.

Dalton has set up a rival muffler business at 34 Eastwood Park Road.

Under cross-examination he admitted having written a letter - Exhibit 8 to Michael Barnes. He denied however that he had written Exhibit 9, a letter to Michael. Both letters appear to be in the same handwriting and read as follows:

Exhibit 8

"Lyle Barnes
16 College Crescent
Kingston 10.

Hi Michael

How is every thing, I hope you are fine as for me things is not so good. When Dalton was down here last time I and him talk about setting up a muffler company down here but from he left, I only hear from him one time and I write him three times and don't get any answer from him. He even send me a pair of welding-guage but Michel from that time I dont hear anything from him. Michel find out from him what is happening for the place where I was working closed down and I am not working now. The money I saved some of it by tools. Please tell him not to buy the pipe-cutter and the pipe-vice and jack because I buy those as for the welding plant what I was using at the work place my boss offer to sell me it so Michel please tell Dalton if he could send me Three Thousand Dollars I could almost get a nine thousand for it and that could buy the welding plant - a build the ramp - Michel please tell him send and tell me what he think about it and Michel please try and help him because it in the interest of all of us. Michel please tell him if he is sending money he must send it in U.S. money. Please try and help him for me. Nothing more to say until I hear from you, your brother Lyle.

Send me your phone number."

Exhibit 2

"4.6.1983
16 College Crescent
Kingston 20.

Hello Michel

how keeping. I hope you are fine. I tried to phone you and I did not get you I want to know when Dalton is coming down please send and tell me. Michel I almost complete the two ramp now and I am waiting for Dalton to come down. I dont have any more money now I spend the six thousand dollars. I have to make the two ramp so send and tell me when he is coming please tell him to try and get things them for me because they are important to me.

Michel if he dont come by the 11 of June I will call you on the 18 of June at about 9 o'clock to 10 o'clock on Saturday night.

Well nothing more to say until hear from you your brother Lyle."

He denied that letter Exhibit 11 was written on his behalf by his girl friend Selma. This letter is as follows:

"16 College Cres,
Kingston 20,
Jamaica, W.I.
12th April, 1982.

Dear Michael,

I have receive your letter and was happy to hear from you. I hope you and all of the family is in best of health.

Firstly tell Dalton to bring the welding plant because the china man wants more for it and he must bring the pipe cutter too, but he must not buy the Jack and Pipe Vice because I bought those already.

Michael this is what you must buy (2) two lengths of 50 ft. welding hose with torch no guage. (2) two guages and must try and help Dalton with some of the money, welding material is very expensive out here.

I bought some material with the little money I save and start making the ramp but it need some more material. I am not working right now. Bosey and Clive address are the same, it is 63 Homestead Road, Kingston 2.

Michael when Dalton coming please send two dressing shirt and two pants length, Selma says please send two jeans pant (size 14) and a watch (ladies).

Please reply to me before Dalton comes. Tell Dalton to bring U.S. dollar because when you change it you get more.

Your brother

Lloyd.

P.S.

Please send some Avon deodorant when Dalton coming."

He did not recall having telephoned Michael and denied having telephoned Dalton to discuss the business. Indeed he said, he only had his sister's telephone number. He admitted that he had a girl friend Sharon McDonald in 1986 but denied having paid her school fees.

He admitted having bought a car in 1986 for \$66,000.00 for which he paid in cash.

He gave details of the income from the property and the business. In examination in chief he estimated the gross monthly sales at an average of \$30,000.00 or \$40,000.00. In cross-examination however he gave a revised figure of \$15,000.00.

One witness, Detective Inspector Arthur McNeish gave evidence on his behalf. He stated that he had known Lyle Barnes for approximately 10 years. He first met him while he was employed at Ryan's Muffler Company where he worked on his, Mr. McNeish's car. He next saw him doing business at Marverley Avenue about October 1979 and was instrumental in Lyle obtaining the premises at 5 Red Hills Road some time in 1980.

In cross-examination he said it was possible that Lyle had removed to Red Hills Road in 1983 but it was nearer to 1979 than 1983 or 1984.

The case for Mrs. Bennett, Dalton Barnes
and Michael Barnes

Sometime in 1982 Dalton was in Jamaica on a visit from Canada. He and Lyle had a discussion about starting a muffler business. Lyle said he had \$6,000.00 and intended to acquire two ramps. Therefore if Dalton and Michael supplied the necessary equipment, the three of them could form a partnership in equal shares. Dalton thought it was a good idea but returned to Canada to discuss it with Michael.

Michael agreed and both of them contributed the sum of Can. \$3,000.00 with which Dalton purchased a welding machine in Canada, took it to the home of another brother Llocksley also in Canada, photographed the machine and consigned it to Dalton in Jamaica. This was in 1983.

Before its arrival in Jamaica, Dalton sent a pair of gauges, a torch and hose to Lyle.

Dalton came to Jamaica and cleared the welding machine through customs. He was accompanied by Lyle, his girl friend Selma and another brother Fray. The machine was taken to 16 College Crescent where Lyle lived. Dalton saw two ramps under construction on the lawn of the premises. Dalton returned to Canada. About October of that year Lyle telephoned him in respect of premises at 5 Red Hills Road.

In the latter part of December 1984 Lyle telephoned Joscelyn advising her that he had been given notice to leave 5 Red Hills Road and sought her assistance. She was not interested in acquiring land in Jamaica. Their mother, however, persuaded her and she contacted Mr. Samuels, a Real Estate Agent in Jamaica.

He eventually secured premises at 76 Constant Spring Road and an Agreement for Sale - Exhibit 7 - was tendered by Lyle.

Joscelyn contributed a total of approximately U.S.\$34,000.00 towards the purchase price. In order to subscribe this amount she obtained a second mortgage on her house in New York.

Dalton and Michael did not contribute to the purchase money, but it was agreed that they would assist her in making payments on the loan obtained by her mortgage. It was also agreed that Joscelyn would become a partner in the existing partnership between Lyle, Dalton and Michael. Each would have an equal share in the business and Lyle would operate the business and make payments due on the mortgage in Jamaica out of the profits of the business.

In 1985 Dalton and Michael purchased a bending machine which they shipped to Lyle in Jamaica.

In 1986 they received information that Lyle had bought a car for \$66,000.00 for which he paid cash. In addition, he was paying the school fees for his girl friend in order that she would become qualified for a position in the business. This infuriated them. They came to Jamaica and along with Lyle went to Attorney Kamsay to have a formal partnership agreement prepared. There was an abortive discussion at which Lyle walked out. Dalton blocked the ramp at 76 Constant Spring Road on two occasions. The police were summoned by Lyle but took no action as they regarded the dispute as a civil matter.

FINDINGS

On the issue as to whether there was any discussion about forming a partnership, I do not accept Lyle Barnes as a witness of truth.

I find that there was such a discussion between Lyle Barnes and Dalton Barnes in 1982. Pursuant to this discussion, Dalton and Michael Barnes discussed the matter and there was an agreement for all three, Lyle, Dalton and Michael to form a partnership.

In accordance with this agreement equipment was sent by Dalton and Michael Barnes to Lyle in Jamaica.

I find that Exhibit 9 of which he denied authorship was written by Lyle Barnes. That this letter and the letter, Exhibit 8, which Lyle Barnes admits having written, both related to the partnership. That the letter, Exhibit 11, was written on behalf of Lyle Barnes.

The absence of any formal document in relation to the partnership is explicable on the basis of the relationship which existed between the parties.

I do not regard the Certificate of Registration under the Business Names Act in the name of Lyle Barnes as conclusive evidence that he was the sole proprietor thereof. He was the only partner resident in Jamaica and he furnished the particulars for registration.

I find that the purchase money for premises, 76 Constant Spring Road, was procured from the business and from contributions by Joscelyn Bennett for and on behalf of herself and Dalton and Michael Barnes and that Mrs. Bennett was made a member of the partnership.

That there was an agreement between the parties that payments in discharge of the mortgage debt should be made by Lyle Barnes out of the profits from the business and that the payments were so made.

I reject the evidence of Lyle Barnes that he only received the amount of U.S. \$24,000.00 from the other parties towards the purchase price of the premises.

That the partnership ended on 18th February, 1987, when Lyle Barnes filed suit.

I find that Lyle Barnes not entitled to the sum of \$395,488.15 which he claims as monies advanced by him for the purchase of the premises.

There will therefore be judgment for Dalton Barnes in suit B084/87 and judgment for the plaintiffs in suit B129/87.

The Reliefs Claimed in Suit B129/87

- (v) A declaration as to the respective beneficial interests of the owners.

Mr. Manning submitted that Dalton and Michael Barnes could not make any claim which would be sustainable in Equity because they had paid no money towards the purchase price of the premises.

In my opinion this submission is misconceived. The evidence discloses that Mrs. Joscelyn Bennett advanced sums on behalf of these persons towards the purchase price. The Title under the Registration of Titles Act shows that all the owners are joint tenants. These proceedings are only concerned with the equitable interests of the others qua Lyle Barnes.

- (viii) An order for Payment of rent by Lyle Barnes

Mr. Goffe based this claim on an ouster by Lyle Barnes of the other co-owners of the premises.

Mr. Manning opposed the claim.

On the evidence I do not find that there was an ouster by Lyle Barnes.

There was a dispute as to ownership of the business but no assertion by Lyle Barnes that the others were not entitled to the use of the premises.

This relief is not granted.

- (ix) Damages for loss of profits from investments in the business.

Mr. Goffe suggested an average between \$15,000.00 and \$30,000.00 viz. \$22,000.00 gross income per week without deductions for Property Tax and mortgage payments.

Mr. Manning offered no assistance in this regard.

Lyle Barnes gave conflicting figures but \$15,000.00 was the most consistent figure which I accept.

There must however be deductions for mortgage payments as it was agreed that these should be a charge on the business.

The calculations are as follows.

13.

Gross weekly income \$15,000.00

Less expenses --

Wages \$2,500.00

Water rates 80.00

Electricity 150.00

Gas 800.00

Mortgage --
\$3,500.00 monthly

Weekly -- 907.69

\$4,337.69

for easy calculation -- 4,340.00

Net -- 10,660.00

$\frac{3}{4}$ of \$10,660 = \$7,995.00

$\frac{79}{12}$ years from October 1983 to July 1991 = \$3,221,985.00

The following reliefs are therefore granted.

- (i) A declaration that a partnership existed between Joscelyn Bennett, Dalton Barnes, Michael Barnes and Lyle Barnes.
- (ii) A declaration that the partnership started in October 1983.
- (iii) A declaration that the partnership ended on 18th February, 1987.
- (iv) An order declaring the joint tenancy severed.
- (v) A declaration that the equitable estate is held by the owners as tenants in common.
- (vi) An order for sale of the land 76 Constant Spring Road and that the net proceeds of sale be distributed in equal shares.
- (vii) An order that all parties are at liberty to bid for and become the purchaser or purchasers at such sale of the said land.
- (ix) Damages for loss of profits assessed at \$3,221.985 to be paid by Lyle Barnes.

Costs to be agreed or taxed.

All the Defendants in the suit filed suit B.128/87 against Lyle Barnes.

By an amended Statement of Claim they averred as follows:

- "1. The Plaintiffs are brothers and sister of the Defendant.
2. The first Plaintiff is a nurses aid, the second Plaintiff is a mechanic and the third Plaintiff is a male nurse and the Defendant is a welder.
3. In or about the year 1982 the second and third Plaintiffs and the Defendant agreed to set up a family partnership to operate a ruffler specialist manufacturing, installing and repairing business and the business was duly set up and operated at 5 Red Hills Road in the Parish of St. Andrew.
4. The agreement was that the second and third plaintiffs would purchase a welding machine pipe bender machine, additional sets of oxy-acetylene torches and hoses, and that each of the partners would own one-third of the business and earn one-third of the profits, that the defendant would run the operation and be paid by the Partnership for his work in addition to his share of the business and profits.
5. The second and third Plaintiffs duly purchased and supplied the Defendant with the said items at a costs of \$3,000.00 Canadian, \$9,000 U.S., and \$2,000 U.S., respectively, and the business prospered and made profits.
6. The owners of No. 5 Red Hills Road gave Notice to quit and deliver up the premises and the defendant contacted the first plaintiff and sought her help to find a place and to finance the purchase of a place to carry on the business.
7. The first plaintiff found a place at 76 Constant Spring Road Kingston 10 in the Parish of St. Andrew, registered at Volume 1199 Folio 367 and bought it and it was agreed -
 - (a) to buy it in the names of the three Plaintiffs and the Defendant, for the price of \$367,500.00.
 - (b) and to operate the business there on condition that the -
 - (i) partnership would be expanded to four to include the 1st Plaintiff and that the business would be owned by all four in equal shares
 - (ii) the Defendant would continue to manage and operate the business and to be paid by the business paid for by the business.
 - (iii) the place would be for his work as before
 - (iv) the profits would be distributed equally among the partners.
8. The 1st Plaintiff paid a deposit of \$34,000 U.S. on the purchase price and obtained a mortgage for the sum of \$120,000.00 on the security of the said place.