



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00239

BETWEEN	GENUS PHARMACY LIMITED	CLAIMANT
AND	KISA McLEISH	1ST DEFENDANT
AND	FORTY-TWO TRADERS LIMITED	2ND DEFENDANT

Contract – Whether oral or in writing - Whether agreement to share profits as franchisee- Whether agreement to sell stock and fixtures - Documentary evidence- Whether signed document a sham – Whether Defendant in business on her own account - Burden of proof – Factual findings.

Craig Carter instructed by Althea McBean & Co. for Claimants

Clive Munroe Junior and Romario Adams instructed by Munroe & Munroe for Defendants

Mrs. E. Ewart an interested Party representing herself.

Heard: 9th and 15th April, 2024

In Open Court.

Cor: Batts J.

[1] On the 18th April 2024, having considered the evidence and the Claimant's counsel's submission, I dismissed the claim with costs to the Defendants to be taxed or agreed. I promised then to put my reasons in writing at a later date. This judgment is the fulfilment of that promise.

- [2] The claim was brought against the Defendants for damages for breach of contract arising from a verbal agreement. The Particulars of Claim assert that the 1st Defendant agreed to inject \$4,000,000 into the Claimant company and, in return, manage and control the Claimant's branch at Braeton, St. Catherine while continuing to trade under the Claimant's name as a franchisee. The Claimant and 1st Defendant were to share equally the profits from the said branch at Braeton. The \$4,000,000, it is further alleged, was acquired by way of a loan to the 1st Defendant and was used to buy stock for all the Claimant's locations. It is alleged that in breach of the agreement the 1st Defendant incorporated the 2nd Defendant and has failed to account to the Claimant for profits earned at the Braeton location. Various declarations were sought as well as damages being 50% of profits derived from the operation of the branch at Braeton.
- [3] The Defendants pleaded that the 1st Defendant is a pharmacist who was employed to the Claimant until early 2012. At that time, she purchased the branch at Braeton from the Claimant. The purchase price was \$3,500,000 and that agreement was in writing. It is alleged further that, at the time of purchase, it was orally agreed that she would be permitted to continue using the Claimant's name at the Braeton Branch. The Defendants deny any agreement to share profits or that any franchising agreement existed.
- [4] It is common ground that the 1st Defendant is the niece of Mr. Adrian Genus the principal of Genus Pharmacy Limited which is the Claimant in this matter. He was the first witness for the Claimant. He is a registered pharmacist. His witness statement dated 25th March 2024 supported the allegations in the claim. He states that in 1986 he caused the Claimant to be incorporated, continuously operated the pharmacy in that name until the present and,

“6. The Claimant has garnered a strong reputation and goodwill through its operations especially in the parish of St. Catherine. The Claimant has maintained a strong customer base over its years of operation.”

[5] Mr. Genus further stated that in 2012 his relative Kisa McLeish, who is the 1st Defendant, was employed to the Claimant as a pharmacist and worked in the branch at Braeton. In that year she entered into an oral agreement to purchase “...some equity in the operation of the Braeton Branch...” [see paragraph 8 of his witness statement]. He also stated, paragraph 9, “We specifically agreed that she would inject a sum of Four million dollars \$4,000,000 in the business of the Claimant as working capital by taking out a personal loan. This sum of \$4,000,000 was to be utilised to purchase stock directly from suppliers for restocking the branches of Genus Pharmacy Limited including the Braeton branch.” In return, for the injection of capital, he said, the Claimant agreed to turn over the management, control and, operation of the branch at Braeton to the 1st Defendant. It would be operated as a franchise and the profits were to be shared between the Claimant and the 1st Defendant equally. An accounting was to be done at the end of each calendar year.

[6] Mr. Genus, in his witness statement, explains that a document entitled “*Agreement for Sale of Stock and Fixtures*” was signed by himself, not on behalf of the Claimant to sell anything but, in furtherance of the 1st Defendant’s loan application and to provide proof of the purpose of the loan. He referenced the following as support for the existence of the oral agreement:

- 1) The sign Genus Pharmacy Limited remained in place outside the Braeton location from 2012 to 2023
- 2) The staff continued to wear Genus Pharmacy branded shirts
- 3) Receipts to customers were in the name Genus Pharmacy Limited
- 4) Receipts for point-of-Sale system for credit and debit cards were issued with name Genus Pharmacy.
- 5) Prescription pads remained branded with name Genus Pharmacy
- 6) The NHF account continued under the name Genus Pharmacy Ltd

- 7) There continued to be mutual support in terms of stock movement between the Braeton location and the other branches

In his witness statement Mr. Genus also admitted to certain correspondence which I consider below.

- [7] When cross-examined Mr. Genus was shown exhibit 1. This is an agreement for sale of

“all these fixtures and stock of pharmaceutical items and in Genus Pharmacy Texaco Retail Facility Braeton in the parish of St. Catherine and listed on the schedule attached hereto.”

The price stated is \$3.5 million being two million dollars for stock and one and a half million dollars for fixtures. The agreement stated that “*possession*” would be upon payment of the sum of 3.5 million and completion of the inventory. Carriage of sale was by John G. Graham & Company attorneys at law. Consistently with his witness statement Mr. Genus explained away the document by saying

“This agreement was only to facilitate loan. I did not sell her anything.”

- [8] Mr. Genus was also shown exhibit 2. It is a letter dated 28th February 2017 addressed to the Companies Office of Jamaica. The relevant portions of which read as follows:

“I hereby wish to inform you that the board of Directors for Genus Pharmacy Limited has agreed that Miss Kisa McLeish who is registered as a sole Trader be authorised to trade under the name Genus Pharmacy Braeton.

Miss McLeish is a registered pharmacist, who has been practicing at the Braeton location for past ten (10) years and is desirous of operating her own business.

During this period she has exhibited a high level of responsibility, honesty, dedication and professionalism, making her the perfect candidate to trade and operate business under Genus Pharmacy's name.

Genus Pharmacy is aware of all the legal obligations and responsibilities that are required from both parties, and so, it is with these in mind that we have decided to offer her the opportunity to do so. We are looking forward to a smooth transaction and a long-lasting relationship"

Mr Genus admitted signing this letter and said,

"Q: this was to allow registration of name Genus Pharmacy Braeton.

A: yes

Q: [letter read to him] "her own business"

A: yes

Q: you wrote letter understanding she was registering Genus Pharmacy Braeton in her own name

A: Yes

Q: She was operating her own business

A: yes

[9] Mr. Genus was also shown exhibit 3. This is a letter addressed to Sagicor Life Jamaica Limited. It read:

"I hereby wish to inform you that Miss Kisa McLeish, a duly Registered Pharmacist is now the owner and operator of

Genus Pharmacy Limited, Braeton Miss McLeish is anxious in doing business with your organization and as such we are asking that you kindly extend to her your normal courtesies.”

Once again Mr. Genus admitted signing this letter. In evidence as exhibit 4 is an unsigned letter dated 31st January 2012 from the 1st Defendant and addressed to the Pharmacy Council. The Claimant relied on it in paragraph 28 of Mr. Genus’s witness statement. The letter says the 1st Defendant intends to operate as a franchisee of the Claimant. In its first and third paragraphs the letter reads.

“This serves to inform you that I, Miss Kisa McLeish, a registered pharmacist, intend to purchase the branch of Genus Pharmacy located at the Texaco retail Facilities, Braeton, Portmore, St. Catherine....

I would also like to inform you, that in agreement with Mr. Adrian Genus, I will continue to trade in the Genus Pharmacy name as a franchisee.”

It was suggested to Mr. Genus, during cross-examination, that the document was a fabrication. He said it was not a fabrication, but later admitted he could not say whether it was fabricated or not. His witness statement explains that he had found the unsigned document in his files.

[10] In cross-examination Mr. Genus also admitted that after the agreement was executed the 1st Defendant became the employer of the staff at Braeton. He acknowledged that she thereafter used her own accountant. The following exchange, which contradicted in part his witness statement, occurred:

Q: *The National Health fund she has a separate account*

A: *yes*

Q: *Whether point of sale system or machine separate from you*

A: *yes*

Q: *Signage says Genus Pharmacy Braeton*

A: *Yes.*"

Mr. Genus, when it was suggested, denied borrowing money from the 1st Defendant but said it was an "*advance' based on the agreement we had.*"

[11] When his cross-examination was over, I asked:

J: *Did you sign the agreement and letters to deceive the bank and Companies' Office.*

A: *[pause] no, it was not to deceive the bank or the Companies Office. When she apply for the loan the bank said in order to disburse the funds we would have to put an agreement in place. So we did this agreement and list the items. There was another part that show the items so the funds could be disbursed. The funds from the loan would go towards buying stock because I had some problem getting stock from creditors and this was her contribution and my contribution would be the pharmacy that was in operation. So I did not sell entire operation or everything that was in it."*

[12] The Claimant's next witness was Mr. Omar Belinfante. He is a registered pharmacist employed to the Claimant. He gave an account of how the Braeton branch interacted with the other branches of Genus Pharmacy which was consistent with Mr. Genus' account. As he stated: -

"Whilst working at the Braeton branch of Genus Pharmacy under the management of Ms. Kia McLeish the operations continued entirely under the Genus Pharmacy brand, which has been long established in the parish of St. Catherine."

He also described how he worked at both branches and that the branches often referred customers between each other and that drugs and other products would be sent to each other. In paragraph 18 he stated clearly that he was not aware of the details of the arrangements between the Claimant and the 1st Defendant. Interestingly in his final paragraph he stated:

“21. I subsequently left the employ of Ms. Kia McLeish and went to work exclusively at the Port Henderson Road location of Genus Pharmacy Limited.”

- [13] When cross examined, he admitted issuing a letter of resignation to the 1st Defendant. That letter, dated 7th September 2023, reads in its first sentence.

“It is with a deep sense of regret and disappointment that I now have to express that effective September 21st, 2023, I hereby resign from my position of Pharmacist with your organization.”

He admitted, when asked, that he had been employed to the 1st Defendant at Third City Pharmacy.

- [14] At the end of the Claimant’s case therefore the evidence was at best equivocal. There was oral and documentary evidence that the Braeton Pharmacy was owned and operated by the 1st Defendant to the extent that she had her own employees including her own pharmacist. Her employees wore the Claimant’s brand, and the store used the name Genus and was generally branded Genus Pharmacy Braeton. There was also Mr. Genus’ evidence of an oral agreement for a 50% profit share and that this was the consideration for a franchise agreement.

- [15] The Defendants’ sole witness was the 1st Defendant. In her witness statement, dated 25th March 2024, she described Mr. Adrian Genus as her cousin. She was first employed as a pharmacist to the Claimant. She says that by 2011 creditors were threatening the Claimant and suppliers would not honour orders for stock. The landlord at the Braeton location had given a notice to quit. It is in that context, she said, that the Claimant decided to sell the Braeton location to her. It was agreed that she would be allowed to keep the Genus name, but she would operate her business independently. The agreement for sale was reduced to writing in a document prepared by attorneys at law. Since March 2012 “*Genus Pharmacy Braeton*” was registered to the 1st Defendant trading as Forty-Two Traders. In

paragraph 12 she describes how her pharmacy operated separately from the other branches. Even the uniform they wore, although branded with the Genus name, was paid for and made by her. Paragraphs 13 and 14, of her statement, I will quote in full:

“13. In the years after registration of Genus Pharmacy Braeton the Claimant would from time to time, through its principal Mr. Genus, seek assistance in procuring goods given its bad credit reputation. I would buy goods for the Claimant and then the Claimant repay me. However, the Claimant’s cheques would consistently be returned for insufficient funds. I subsequently stopped assisting the Claimant in this way as the Claimant would not repay the sums advanced on time or in some cases at all.

14. I have never had an oral agreement with the Claimant to be a franchisee for the Claimant nor to share any profits or account to the Claimant for any profits. As the Claimant itself has indicated in its letters to Companies Office and Sagikor Life Jamaica, I was the sole trader/owner operating my own business under the name “Genus Pharmacy Braeton.”

[16] When cross examined the 1st Defendant denied that it was the long-standing goodwill of Genus Pharmacy customers which motivated her to trade using the Genus name. There was the following exchange:

“Q: Do you still say agreement for you to use name “Genus” was not substantially oral, an agreement you mention in paragraph 4.

A: Yes sir to use name

Q: *Suggestion the reason for agreement to use Genus name you knew you would benefit from Genus name and customer.*

A: *Disagree.*

The witness denied writing exhibit 4. The witness also denied the alleged oral agreement and the existence of any agreement to pay 50% of her profits to the Claimant.

[17] In re-examination the 1st Defendant was asked why it is she never pursued the Claimant for the money she alleged was owed to her and her response was:

“Truth of the matter is that there were debt collectors at his pharmacy every day when I was there the cheques he sent to pay for goods I ordered for him because his accounts were locked for non or overdue payment, cheques were coming back. So no point in asking as no funds there.”

I asked the 1st Defendant why did she buy a business but keep the name which she thought was so much in debt and her response:

“at time due to the nature of the relationship we shared I honestly felt that keeping the name would help him to stay afloat at least perceived. Did not want to add any more beating to what I saw.”

[18] Having heard the Claimant’s counsel’s submissions, I felt no need to call on the Defendant’s counsel. It is well to remind oneself that he who alleges must prove. The Claimant must do so on a balance of probabilities. This the Claimant has most decidedly not done. The Claimant’s documentary, and some oral, evidence suggests that the 1st Defendant purchased the business at the Braeton location and owned and operated it on her own account. I find as a fact that she requested and was granted permission to do so using the “Genus” band. However, “Genus

Braeton” was hers. I reject the evidence that there was an oral agreement for 50% of the profit to be shared. If this were so one would have expected that in the period 2012 to 2023, there would have been some accounting tendered in that regard. The veiled suggestion that money paid in the period was reflective of this was not supported by any documentary evidence. Nor indeed was the Defendant’s evidence that these payments were loans to the Claimant. However, the burden of proof is on the Claimant. There was no counterclaim in that regard. I find that the 1st Defendant was the more credible witness, and her evidence is preferred to that of Mr. Adrian Genus.

[19] In the final analysis I find as a fact that the 1st Defendant, after being employed to the Claimant for a while, decided to go into business on her own. She offered to buy all the stock and fittings at the Braeton location. The Claimant accepted that offer and, in return for the sum of \$3.5 or \$4 million, allowed the 1st Defendant to own and operate the business at Braeton. This she did so until 2023, under the name “*Genus Pharmacy Braeton*”, with the permission of the Claimant. The arrangement was of benefit to the Claimant, which was having cash flow difficulties, as its brand would continue on display without the financial burden of operating the branch. There was I find no agreement, oral or implied, for the payment of 50% or any share of profits. The 1st Defendant, as she was entitled to do, decided in 2023 that she no longer wished to trade under the brand name “*Genus Pharmacy Braeton*”. She therefore changed the name under which she operated the business she had purchased. These findings are supported by the documentary evidence in this matter much of which emanated from the Claimant.

[20] In the result the Claim was dismissed and costs awarded to the Defendants.

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David Batts
Puisne Judge