



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. SU2020CD00449**

<b>BETWEEN</b>	<b>CAVELL PALMER</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MAUVELETTE DAYES</b>	<b>DEFENDANT</b>

**Application for Interlocutory Injunction – Whether arguable claim with real prospect of success - Whether Claimant entitled to 60 percent share of property – Whether Will valid - Proprietary and/or equitable estoppel- Whether promise made in deceased’s lifetime can bind estate- Whether damages an adequate remedy- Justice of the case.**

**Leonard Green, instructed by Chen Green & Co., for Claimant.**

**Lambert Johnson, instructed by Johnson & Co., for Defendant.**

**In Chambers.**

**Heard (by Zoom) on the 22<sup>nd</sup> & 23<sup>rd</sup> December 2020.**

**BATTS J.**

[1] Wessell Dayes (now deceased) and Mauvellette Dayes (the Defendant) seem to have been rather successful business people. The couple, during the lifetime of Mr. Wessell Dayes, operated a farm store which had outlets in Montego Bay and Savanna-la-Mar. They also acquired a small hotel, as tenants in common, in that town. It is this property, and the Kibo Hotel operated thereon, which forms the subject matter of this application.

- [2] The Claimant asserts that she has a legal and/or beneficial interest in the property. She has at all material times, and even prior to its acquisition by the Dayes, been the manager of the Kibo hotel. The Claimant maintains that she had been on intimate terms with the Defendant's husband who, I have said, is now deceased. Further that, prior to the commencement of that relationship, she was instrumental in the decision by him to acquire the hotel. The Claimant says that, because of her role in that regard, it was at all material times agreed between Mr Wessel Dayes and herself that she had a proprietary interest in the hotel (see paragraphs 4,5,6 and 7 of Claimant's "Ex Parte Affidavit" filed on the 3<sup>rd</sup> November 2020). This agreement and/or representation caused her to, work without remuneration, move onto the hotel property to live, and work to expand the hotel from 17 to 32 habitable rooms (see allegations at paragraph 25 of the Particulars of Claim). Indeed, an adjoining property, owned by the Claimant, is used as part of the business of the hotel (see letter dated 30<sup>th</sup> July 2020, exhibit MD 6 to the Affidavit of the Defendant filed on the 24<sup>th</sup> November 2020).
- [3] The Claimant says further that, in accordance with his promise, the deceased made a devise of his 60% share of the hotel to her. This Will is attached, as exhibit CP2, to her "Ex Parte Affidavit" filed on the 3<sup>rd</sup> November 2020. After the death of Mr. Wessell Dayes, on the 23<sup>rd</sup> day of April 2020, she continued in her role as manager. The Claimant complains that the Defendant stopped signing cheques necessary to pay the expenses of the business and interfered with the running of the hotel (paragraph 18 of Claimant's "Ex Parte Affidavit" filed on the 3<sup>rd</sup> November 2020). She admits forming a company and creating an account with intent to divert income from the hotel to that account. She admits that was not the correct way, to assert her claimed legal or beneficial right to control the business, and says at the time she had not yet had the benefit of legal advice.
- [4] The Claimant brought this action after the Defendant and/or her agents attended the hotel property and attempted to forcibly evict her (see "2<sup>nd</sup> Ex Parte Affidavit" filed on the 3<sup>rd</sup> November 2020 at paragraphs 3,4,5 and 7). This was done on the same day a letter dated 30<sup>th</sup> October 2020 (exhibit CP2 to "2<sup>nd</sup> Ex Parte Affidavit"

filed on the 3<sup>rd</sup> November 2020) was presented to her. The letter, purported to suspend her employment. By way of an interlocutory application the Claimant asks this court to prevent her dismissal, and removal from the premises, until the trial of the action.

[5] It is the case for the Defendant that the Claimant has no legal and/or beneficial interest in the premises. The alleged Will is challenged, on affidavit by counterclaim and by caution filed on the 12<sup>th</sup> November 2020 (see exhibit MD 3, and paragraph 54 of the Affidavit of the Defendant filed on the 24<sup>th</sup> November 2020), as being forged. The Defendant contends that it was the pooled resources of herself and her husband, and mortgages they jointly entered into, which allowed for the purchase of the property. The property she says was introduced to them by, Jasset Dayes, her husband's daughter (paragraph 13 Affidavit of the Defendant filed on the 24<sup>th</sup> November 2020). The property, it is agreed between the parties, was registered to herself and her husband as tenants in common with 60% to Mr Wessell Dayes and 40% to the Defendant. The title, to the premises, has not been exhibited by either party to this litigation. The Defendant says the Claimant, was at all material times employed and paid as a manager at the hotel and that she, commenced living there as she was a victim of domestic abuse. The Claimant, the Defendant contends, moved there to separate from her own husband (see paragraphs 31 and 34 of Defendant's Affidavit filed on 24<sup>th</sup> November 2020). The Defendant asserts that, after the death of Mr Wessell Dayes, she discovered that the Claimant was not operating the business in a trustworthy manner. Although initially money earned was paid over to the Defendant this either stopped or was drastically reduced. It was in consequence of these irregularities that, she says, steps were taken to place the Claimant on administrative leave so that an audit could be done (paragraphs 61, 62 and 63 of the Defendant's Affidavit filed on the 24<sup>th</sup> November 2020).

[6] On the 3<sup>rd</sup> November 2020 I made an interim order restraining the Defendant until the 26<sup>th</sup> November 2020. The Defendant's attorneys, although present on the 3<sup>rd</sup> November 2020, had not had sufficient time to prepare a response. That order

was therefore in the nature of an opposed ex parte Order. On the 26<sup>th</sup> November the order, with slight modification, was extended to the 17<sup>th</sup> December 2020. The Claimant's attorney complained, about the form of as well as the late service of the Defendant's affidavit and its relevance, whilst the Defendant's attorney complained about the operation of the interim order and that his client was uncomfortable with the hotel's former attorney at law acting for the Claimant. On the 17<sup>th</sup> December the application was further adjourned, and the interim Orders extended, to permit the filing of further affidavits. The court also asked the parties to have Mr. Richard Perry (the person agreed upon to arbitrate the business expenses) attend by Zoom on the next occasion.

[7] On the 22<sup>nd</sup> December 2020, when the application came on for hearing, the court was advised that Mr. Richard Perry was unable to be present. I was told it was his birthday. Neither party had filed any affidavit suggesting that the interim Orders in place were not working or workable and the complaint about the Claimant's legal representation, while not withdrawn, was not then pursued. However, before me on that date also was an application, filed by the Claimant on the 21<sup>st</sup> December 2020, seeking leave to appeal my ruling on the 17<sup>th</sup> December (that the Defendant's affidavit filed on the 24<sup>th</sup> day of November 2020 should stand and permitting the Claimant time to respond thereto). The Claimant also applied for a stay of proceedings pending the appeal.

[8] I refused permission to appeal, with consequential denial of the application for a stay, for the following reasons:

- a. my ruling was one made in the course of proceedings and is more appropriately challenged as a ground of appeal after the application for injunction is determined.
- b. The inter partes hearing, of the application for an interlocutory injunction, had not yet occurred and the opposed ex parte order is now in place. It would be unfair, to the Defendant, to further postpone their right to be heard on the application for interim relief.

- c. There is no merit in the appeal as the Defendant filed that affidavit in these proceedings. Although it is erroneously entitled "*Affidavit Mauvellette Dayes in support of counterclaim*" it deals with the allegations in this matter and responds to the Claimant's affidavits in support of the application and it addresses relevant issues.

[9] I ruled that the hearing of the application for interim relief should proceed. Mr. Green, for the Claimant, then applied for permission to cross-examine the Defendant. I refused to permit same because I am not required, in this matter, to make any findings of fact. I do not intend to do so save and except where a particular fact is agreed or is, as they say, common ground between the parties. Cross-examination of the affiants is unnecessary.

[10] The legal representative of each party was permitted to make oral submissions before me. Each agreed that one hour would suffice. It is fair to say that, in the result, the arguments took the better part of 3 hours to be completed. I then stood the matter over to the 23<sup>rd</sup> December 2020, on which date, I made the following orders:

1. *Upon the Claimant through her attorneys at law giving the usual undertaking as to damages the Defendant is restrained whether by herself, her servants or agents or, otherwise howsoever from entering the Kibo Hotel property located at 28 Lewis Street in Savanna la Mar Westmoreland and from interfering with the Claimant and/or the staff of the hotel while engaged in the day to day operation and running of the Kibo Hotel until the trial of this action or further order of the court.*
2. *The Claimant shall deposit all income received with respect to the operation of the Kibo Hotel including but not limited to income received from the rental of rooms and the sale of food items in the canteen and the bar into the Kibo Hotel account number*

*06011 – 93 at the Bank of Nova Scotia Jamaica Ltd., until the trial of this action or further order of the court.*

- 3. All expenses related to the operation of the Kibo Hotel, including but not limited to the provision for a reasonable cash float and the remuneration usually paid to the Claimant, shall be paid by the Defendant after same is approved in writing by Mr. Richard Perry or if he declines this appointment some other third party agreed upon in writing by the parties and if they fail to agree, or unless otherwise agreed by someone appointed by the court, until the 14<sup>th</sup> day of January 2021.*
- 4. The parties shall, on or before the 14<sup>th</sup> day of January 2021 if possible, agree a named individual to be employed by the Kibo Hotel until the trial of this action as an accountant with the following responsibilities:*
  - a. to establish a system for the keeping of accounts of the hotels income or if a satisfactory system is already in place to certify that system.*
  - b. To oversee the operation of the system of accounts for the Kibo Hotel and report on and document all income and expenses from the 14<sup>th</sup> January 2021 until the trial of this action or further Order of the Court.*
  - c. To prepare a monthly report, for the court, of the operation of the hotel particularly as it relates to the income earned and expenses incurred*
  - d. To approve, prior to disbursement, all expenses for payment related to the operation of the Kibo Hotel*

*until the trial of this action or further order of the court.*

*e. Such other related duties as the parties after prior written agreement shall impose on him or her.*

- 5. The Claimant shall prepare and submit to the Ministry of National Security any and all outstanding invoices for service provided on or before the 31<sup>st</sup> day of December 2020 and thereafter all invoices are to be submitted no later than 14 days after the end of each month.*
- 6. The monthly report at Paragraph 4 (c) above shall be submitted to the Registrar of the Supreme Court of Judicature of Jamaica, Public Buildings North, King Street Kingston on the 7<sup>th</sup> day of each month with respect to the operations for the previous month. Reporting is to commence in February 2021.*
- 7. A copy of the report is to be provided by the accountant to the attorneys at law representing each party to this action.*
- 8. Unless the parties otherwise agree in writing in the event the parties fail, neglect and/or refuse to agree upon a named individual in accordance with paragraph 4 above each party shall file a list of no more than 3 individuals on or before the 15<sup>th</sup> January 2021 along with their consent to act, their qualifications, and experience and proposed remuneration as well as any other material particulars and the Registrar of the Supreme Court shall appoint on or before the 21<sup>st</sup> day of January 2021 appoint an individual from any or either of the lists provided.*
- 9. All expenses including remuneration of the accountant and the cost of preparation of the reports pursuant to Paragraph 4 above shall be borne by the Kibo Hotel business.*

*10. The Case management conference in this matter is fixed for the 12<sup>th</sup> February 2021 at 10:00 a.m. for one hour.*

*11. Mediation is dispensed with*

*12. Liberty to apply to either party generally.*

*13. Costs in the claim*

*14. Claimants attorney to prepare file and serve this Order.*

I promised then to put my reasons in writing at a later date. This judgment fulfils that promise.

[11] The approach of the Court to the consideration of applications for an interlocutory injunction is now well established. The court must first be satisfied that the Claimant has an arguable case that is a cause of action with some real prospect of success. Secondly, the court must be satisfied that, if the injunction is refused but the Claimant is ultimately successful at trial, damages would not adequately compensate the Claimant for the loss incurred. On the other hand, it is also to be considered whether, if the injunction is granted but the Claimant is ultimately unsuccessful, the Defendant will be adequately protected by the Claimant's undertaking as to damages. It is where these considerations are evenly balanced that the court will go on to consider the question of the balance of convenience or, as it is now commonly framed, where the justice of the case resides. This last consideration involves a review of all relevant factors including, but not limited to, the relative strength or weakness of each party's case, see ***Drakulich et al v Karibukai Limited et al* [2020] JMCC Comm 31 (unreported judgment dated 6<sup>th</sup> November 2020)** and the authorities cited at paragraph 7 thereof. It is fair to say that, at this interlocutory stage, the court leans in favour of maintaining the status quo until the trial of the action. The court also prefers not to impose additional costs or expense on a party prior to a determination of the merits of the matter. The court will not embark on anything resembling a trial and, save where



the effect of the grant or refusal of an injunction determines the ultimate issue, leans against making findings of fact at this interlocutory stage.

[12] There is no doubt that the Claimant has an arguable claim. There is firstly the possibility of a proprietary and/ or promissory estoppel. It is established law that a promise made to and acted upon to by a promisee to his detriment, even if made by the promisor prior to death, can bind the promisor's estate, see ***Thorner v Major [2009] UKHL 18***, recently applied in ***Wills v Sowray [2020] EWHC 939 Ch (High Court), unreported judgment dated 15<sup>th</sup> April 2020***). If, as alleged in this case, the deceased in his lifetime induced, encouraged or caused the Claimant to act to her detriment by the promise of an interest in the property, the Claimant may be able to maintain an action against the estate. Secondly the claim, which relies on an alleged Will, is also arguable because the property is owned jointly by tenants in common, and therefore, Mr Wessell Dayes (the deceased) was legally able to devise his share. Thirdly the alternative claim, for breach of contractual licence, also has merit. It is arguable that after many years as a licensee summary eviction may be in breach of an implied contractual term. Each of these possible claims arise on the facts alleged in the Particulars of Claim filed on the 30<sup>th</sup> November 2020.

[13] On the question of the adequacy of damages and related considerations it seems to me that, as the property is now the Claimant's home for herself and her child, damages may hardly suffice (see paragraph 34 Defendant's Affidavit dated 24<sup>th</sup> November 2020). She has lived there for approximately 10 years. Her own house, the evidence reveals, is used as part of the hotel to accommodate guests. She is also now the manager and, as she claims, a part owner. If evicted other management will be put in place. The court cannot say whether new management will be more or less successful however, if the latter and the business fails, it is unclear how the Claimant can be compensated. The consequence for her in terms of income, lifestyle and ability to survive, may be difficult to assess. Conversely if the status quo remains, by the Claimant continuing to operate the business with the necessary controls in place, the Defendant's loss is likely to be minimal and

should be calculable. All that would mean is a delay in the time in which the Defendant, and the estate of Mr. Dayes, can take over the operation of the hotel. Manifestly, the consideration as to damages, favours the grant of injunctive relief. The Claimant has given evidence of a house owned by her and, as the controls put in place by my order are intended to reduce the likelihood of diversion of hotel funds, the undertaking as to damages is adequately secured.

[14] If I am wrong in that assessment it does seem that the justice of the case also favours the grant, rather than refusal, of injunctive relief. The allegations against the Claimant are grave and include her, allegedly, proffering a forged will. They are also not without some evidential support in that, the deceased was literate yet chose to have his will read to him and marked by an "x". The fact, that by letter dated 30<sup>th</sup> July 2020 (exhibit MD 6 to the Defendant's Affidavit filed on the 24<sup>th</sup> November 2020) the Claimant made no claim to ownership but admitted that the deceased was "*owner and operator*", is also significant. On the other hand, the Will is prepared by a reputable firm of attorneys at law. The witnesses to it are, or purport to be, police officers. The Claimant says, by way of explanation, that on the date of its execution Mr. Dayes was unwell and was hospitalised the following day. These are issues for a court at trial to resolve. The evidence does not weigh so heavily, one way or the other, as to impact a consideration of the balance of convenience.

[15] The Claimant's confession, apology, and promise not to repeat the effort to divert hotel revenue, are in her favour. The court can understand that in the wake of the death of Mr. Dayes, with whom she had been on intimate terms, certain anxieties emerged. The Claimant would understandably be concerned to protect preserve or secure, that which she believed is her entitlement. Similarly, the Defendant would have been anxious to do likewise. Hence, perhaps, the attempt at summary eviction. It seems to me that justice is achieved by maintaining the status quo and allowing the Claimant to continue to operate the business with which she is familiar. She has every reason to make it succeed because, if she is ultimately successful at trial, she will continue a profitable venture. Provided the requisite

safeguards are in place there is no real danger of the estate's assets being diverted. In all the circumstances, and in particular the fact that the Claimant has been in occupation as manager for so many years, it would be unjust to dislocate herself and her family at this interlocutory stage.

- [16] I contemplated appointing a receiver/manager for the estate. However, this may involve great expense. Furthermore, such an order could adversely impact the business because creditors, guests, and potential guests, may be apprehensive about it. The service industry is notoriously fickle and sensitive. Furthermore it may not be easy to find a professional receiver, with the necessary *savoir faire* to operate the venture, in this time of the "Covid" pandemic or in that location. The best compromise in this imperfect situation, is to as far as possible maintain the status quo. My order contemplates that, by the 14<sup>th</sup> January 2021, the parties will agree upon and employ an accountant. He or she will establish appropriate accounting systems and report on the conduct of the business to the court, and the parties, until the trial of the action. The parties of course have liberty to apply.
- [17] The orders, made on the 23<sup>rd</sup> December 2020, were motivated by the thought process hitherto outlined.

**David Batts**  
**Puisne Judge**  
**12<sup>th</sup> January 2021.**