JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 58 and 59/91

MOTION NO. 3/93

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	LYLE BARNES	APPLICANT
AND	JOYCELYN BENNETT	
AND	DALTON BARNES	
AND	MICHAEL BARNES	RESPONDENTS

R.N.A. Henriques, Q.C. and Allan Wood instructed by Williams and Williams

Dennis Goffe, Q.C. and Miss Minette Palmer instructed by Myers, Fletcher & Gordon

March 8, 9, 16 and 22, 1993

DOWNER, J.A.:

Mr. Henriques moves this court for a consequential order pursuant to the order made on December 18, 1992, in Lyle Barnes v. Joycelyn Bennett et al 58 and 59 of 1991 delivered March 15, 1993. The order reads:

"Appeal allowed in part.

Declaration (i) in order of Court below affirmed.

Declaration (ii) varied to read: 'In June 1985'

Declaration (iii) varied to read: 'In November 1986'

Award for loss of profits set aside.

Action remitted to Registrar Supreme Court for an account to be taken and for an enquiry as to profits.

Half costs in Court below to the Appellant.

Costs of Appeal to Appellant to be taxed if not agreed."

(Reasons to be put in writing at a later date).

On the issue of partnership, I dissented in part from my brothers Carey, P. (Ag.) and Wright, J.A. but the consequential order sought must be on the basis of the order of the court. Since this motion is appropriate it must be that the order sought is within the intendment of the slip rule as provided for in section 269 of the Judicature (Civil Procedure Code). Although the order of this court stipulated that the appeal was allowed in part, it accidentally omitted to deal expressly or by necessary implication with the entire order in the court below. Moreover, this court did not state that any part of the order below was affirmed. To appreciate the force of this submission, it will be necessary to refer to the order of the Supreme Court. It states:

> "(b) that in suit C.L. 129/87 Judgment be entered for the plaintiffs whereby it was adjudged:-
>
> (i) A declaration that a partnership existed between Joscelyn Bennett, Darlton 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 purcher or purchaser at such sale of the said land.
>
> (ix) Damages for loss of profits assessed at $3,221,985.00 to be paid by Lyle Barnes. Costs to be taxed or agreed."

The declarations at paragraphs (i), (ii) and (iii) concern the dissolution of a partnership, but the learned judge below did not resort to section 43 of the Judicature (Supreme Court) Act which

would have necessitated a reference to the Registrar to take accounts and make enquiries concerning advances and capital pursuant to his powers under the Judicature (Supreme Court) Additional Powers of the Registrar Act.

The orders and declarations in the court below at paragraphs (iv), (v), (vi) and (vii) refer to 76 Constant Spring Road, the site of Champion Mufflers, which was held on a legal joint tenancy. The order of this court omitted to deal expressly with the joint tenancy. So the order must be amended to repair this unintentional omission. Further, the sale which the learned judge below ordered ought to be postponed until the Registrar has taken accounts. He will then, upon investigation, be able to determine the appropriate share to be allocated to the two parties who on the evidence contributed to the purchase and mortgage payments for the property. The receipts by way of rental as well as expenditure must, of course, also be taken into account. The result of this exercise is that paragraphs (iv), (v) and (vii) below are affirmed and paragraph (vi) varied.

Are the orders and directions sought in the motion appropriate?

As the paragraphs (i-vii & ix) above have been examined, it is appropriate to state the orders sought on this motion. Here it should be stated that at the close of the hearing the motion was adjourned to enable counsel to study the reasons for decision and make further submissions, if necessary, in the light of those reasons. The orders read:

> "(i) (as amended) Pursuant to an Order made by the Court of Appeal on 13th December, 1992 allowing in part the Appeal from the Judgment of the Honourable Mr. Justice Chester Orr dated 26th July, 1991, that the Writ of Seizure and Sale issued in execution of the said Judgment and the consequent execution and sale to the respondents or Cleveland Bennett be set aside.
>
> (ii) Directions that in taking accounts, the contributions of each party to the acquisition of the land, 76 Constant Spring Road, should be accounted for

" and appropriate deduction made from the proceeds of the sale of such land;

(iii) An order that there be no sale of the aforesaid property until an account is taken as ordered by the Court;

(iv) That the costs of this Application be paid by the Respondents;

(v) Such further or other relief as may be deemed just."

As regards paragraph (i) the respondents exercised their rights to enforce the judgment by the issue of a writ and seizure of sale against assets which by virtue of the judgment may well have been partnership assets. They are listed:

"(a) 9 pairs of ramps;

(b) 1 Circle cutter;

(c) 1 Container and wire."

In any event, since the award for loss of profits has now been set aside there is now no basis for a levy. The principle that restitution of money with interest must be ordered where a judgment is reversed is stated in Alexander Rodger and anor v. The Comptoir D'Escompte De Paris (1871) L.R. 3 P.C. 465. The learned authors of Halsbury's Laws Vol. 17 4th Edition paragraph 461 note 3 point out, however, that the successful party cannot recover both the proceeds of sale and the property itself. The applicant's case for restitution is based on these authorities. See Doe v. Thorn (1813) 1 M & S 425 or 105 E.R. 160.

Do these authorities apply where there is a sale and the purchaser of the items of equipment was Dalton Barnes, one of the parties to the action? I think not and Exparte Villars In re Rogers (1873-74) Ch. L.R. 432 cited by Miss Palmer is helpful. The headnote reads:

"The sheriff may make a valid sale by private contract of goods seized under an execution to the execution creditor."

By parity of reasoning, the bailiff may make a valid sale of partnership assets to a former partner directly or as an agent for his brother-in-law Cleveland Bennett. It is true that the

order authorising the sale has been reversed but it was permissible at the time of the sale and the purchaser is protected thereby. When the accounts are being reconciled,the Registrar will make the appropriate adjustments. So the funds, less the expenses, which must be paid over to the Accountant General by the baliff would be available for the credit of the suit. See section 609 Civil Procedure Code. The unsold goods must be returned and this is the reason for setting aside the Writ of Execution pursuant to section 597 of the Civil Procedure Code. It is in this limited way that paragraph (i), as amended, is a proper prayer.

It was contended by Mr. Goffe that this court had no jurisdiction to hear this motion, firstly, because in substance it was a prayer for a stay of execution and should be first raised in the Supreme Court. See Rule 22(4) of the Court of Appeal Rules Proclamation Rules and Regulations, 1962. And, secondly, because this court was functus.

The consequential orders sought in this motion could not have been sought when the order of the court was delivered on December 18, 1992, for two reasons. Firstly, the panel who heard the case differed from the panel who handed down the order of this court. Secondly, as Mr. Henriques pointed out, the reasons for judgment were not delivered at that time. This motion was precipitated, it was submitted, by the respondents' assertion that they were taking "steps to have the property sold in accordance with the court order." One implication which must be spelt out in this court's order concerns the specific provision in the order which reads:

> "Action remitted to the Registrar, Supreme Court for an account to be taken and for an enquiry as to profits."

At page 11 of the reasons for decision, Carey, P. (Ag.) said:

> "The land was being purchased to house the business which was to be operated with a view to profit."

Then earlier on page 10, to demonstrate the distinction between Champion Mufflers and the property, Carey, P (Ag.) said:

> "She contributed U.S.$34,000 in total to the deposit on the property at 76 Constant Spring Road in St. Andrew."

Wright, J.A. agreed with these statements and added:

> "What is also clear is that the lion's share in 76 Constant Spring Road belongs to Lyle."

The distinction between Champion Mufflers and the realty on which it was situated appears in the respondents' statement of claim and was also recognised in the order in the court below. Since I found no partnership at any stage, the distinction between the land and Champion Mufflers was even more pronounced in my reasons. With regards to paragraph (iii) in the order of this court, the reference to the Registrar was, therefore, two-fold. Firstly, for an enquiry as to the capital injections, advances and profits of the partnership and, secondly, for accounts to be taken so that the equitable interests of the parties in the land might be determined. It is after this exercise that a sale is to be conducted pursuant to the order of this court and section 622 of the Civil Procedure Code.

As regards the jurisdictional point raised by the respondents, it has to be stated that they exercised a right to execute a levy on goods and machinery on the basis of the orders made by Chester Orr, J. before the hearing of the appeal. As a superior court of record, this court has an inherent jurisdiction similar to that of the Supreme Court to spell out the implications of its orders or to fill in the unintentional gaps in its orders for which there were specific findings in its reasons. For an instance where there was an omission to ask for special costs originally and the matter was adjusted by an application subsequently, see Re Inchcape Earl of (1942) Ch. 394 and Lawrie v. Lees (1881) 7 App. Cas. 19 at 34. The Supreme Court, also, has this jurisdiction by virtue of section 269 of the Civil Procedure Code. By section 9 of the Judicature Appellate

(Jurisdiction) Act and by section 8(2) of the Judicature (Court of Appeal) Law, 1953 edition, and Rule 18(1) of the Court of Appeal Rules, 1962, this court also exercises those statutory powers.

In the light of the foregoing, I would grant the order in terms of paragraph (i), as amended and explained, and paragraphs (ii) and (iii) of the motion and order that there be no order as to costs as regards this application.

GORDON, J.A.:

I have read the judgment of Downer, J.A. and I agree with the reasons and the conclusions. There is nothing useful I can add.

CAREY, P. (Ag.):

For the reasons given by Downer, J.A. I agree with the order proposed but, for emphasis, would add in respect of the order made by Chester Orr, J. that:

> Paragraphs (iv) and (v) are affirmed. Paragraph (vi) be varied - to delete "in equal shares" and that there be substituted "in such shares as the Registrar shall determine having regard to the contribution of the parties."
>
> Paragraph (vii) is affirmed.

There can be little doubt that the order of the court dated 18th December, 1992, is incomplete. It matters not whether the court itself 'ex proprio motu' corrected the slip or one of the parties moved the court, as has occurred in the instant case. From the arguments advanced by Mr. Henriques, Q.C., it is clear that the slip had to be corrected. This court has an inherent power even to vary its own orders so as to carry out its true meaning and to make the meaning plain. See Thynne v. Thynne [1955] P. 272.