

NAKES

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.111 OF 1996

|         |                  |           |
|---------|------------------|-----------|
| BETWEEN | LESLIE HARDING   | PLAINTIFF |
| A N D   | DORRETTE HARDING | DEFENDANT |

Bert Samuels for Plaintiff.

Miss Raquel M. Ridgard for Defendant.

Heard: 27th May, 1997, 10th June, 1997 and 16th September, 1997.

SMITH, J.

By Originating Summons dated the 30th March, 1996, the plaintiff seeks the following:

1. A declaration as to the parties' respective rights and interest in a bar and cafe business situate at Rock Hall, Red Hills, in the parish of St. Andrew.
2. A declaration that the plaintiff is the beneficial owner of one-half ( $\frac{1}{2}$ ) the furniture and fixtures in the said business.
3. An Order that one-half ( $\frac{1}{2}$ ) of the net profit of the said business be paid to the plaintiff.
4. An Order that the defendant render an account of the profits of the business from August, 1995 to present.
5. An Order that the defendant be restrained from acting with regard to the said bar and cafe to the prejudice of the plaintiff.

The parties met in 1978 whilst they were both employed to the Combined Tobacco Company (C.T.C.). They were married on the 22nd day of December, 1979. The marriage produced two children born in April 1980 and December 1981. The relationship became strained in 1994 and in August 1995 they separated.

In December 1980 a bar and cafe business situate in Rock Hall was started. The parties differ as to who paid the rent for the premises which accommodate the business. The husband/plaintiff claims that the business is jointly owned. The wife/defendant denies this and says the business is hers and hers alone.

### The Plaintiff's Case

The plaintiff's case is contained in two affidavits dated 20th March, 1996 and 7th November, 1996 and viva voce evidence given in chambers on the 27th May, 1997. He is a painter and business man and now resides at 142 Molyne's Road, Kingston 19.

In his first affidavit he stated that in December, 1980 he and his wife rented a restaurant and bar in Rock Hall and started a joint business. His wife "gave her labour to the business during the day time and he worked in the days to return in the evening and assist in the business by selling to customers."

He claims to have done all the maintenance work on the business place including carpentry, plumbing and electrical works. His contention is that the business was started with "partner draw money" of \$1,500 of which he contributed \$10.00 per week.

In 1981 he resigned his job with C.T.C. He received \$1500 from C.T.C. and used this amount "along with monies from the business" to purchase an Iceberg Deep Freezer. This deep freezer was sold in 1983 and a larger one bought in its place.

He worked as a salesman for a chicken farm in Coopers Hill for two years. For every one thousand pounds (1,000 lbs.) of chicken sold we would receive one case of chicken. In this way he would give two to three cases of chicken to the business each week.

After the two years as a salesman he took up painting and worked with several companies as such.

### The defendant's case

This is contained in affidavits of the defendant dated 26th June, 1996 and 2nd August, 1996, affidavit of Blandel Curtis and viva voce evidence.

The defendant is a business woman residing in Rock Hall, St. Andrew. Whilst working at C.T.C. she joined a partner throwing \$10 per week from her salary. After marriage she joined a second partner.

About August, 1978 she approached one Miss Joyce Sinclair the owner of a shop whom she had known for several years with a proposal to rent and operate the shop.

It was agreed that Miss Sinclair would open a pastry shop and the defendant would work with her in the business.

In June, 1980, Miss Sinclair opened the business. The defendant resigned her job at C.T.C. and started working with Miss Sinclair. She nonetheless continued to be a member of the partner at C.T.C.

After 10 months Miss Sinclair could not continue and offered to rent the premises to the defendant. According to the defendant with personal savings and moneys obtained from the partner draws she purchased the existing stock and new stock. She agreed to pay Miss Sinclair \$400 monthly for rental.

In support of this she exhibited a statement dated May 19, 1996 signed by Miss Sinclair.

The business started out "as a tuck shop selling fried chicken and small food items." She was the only person working in the business initially and was "responsible for the entire management and operation of the business."

In 1981, she said, the plaintiff was earning very little whilst her business was expanding. She suggested that the plaintiff resign his job at the C.T.C. and work with her in the business. He agreed and in December, 1981 he left C.T.C. and began working in the business.

The defendant claims that the plaintiff was "adequately compensated" for the assistance he gave "as he took money from the cashier and goods from time to time."

It is the defendant's contention that the plaintiff started gambling and "was friendly with several school girls." Sometime around 1985-86 during a quarrel the defendant was stabbed in the chest by one of these girls. She was hospitalised for four weeks.

During the time of her hospitalisation, the plaintiff, she said, mismanaged the business. When she returned, the business was in "near ruins." She was forced to borrow money to buy stock and rebuild the business. She employed someone to run the business and told the defendant to find a job.

In cross-examination she agreed with Mr. Samuels that she

treated the plaintiff "like a husband who is a part owner."

Submissions of Counsel

Both attorneys-at-law submitted written arguments.

Mr. Samuels for the plaintiff invites the court to find that plaintiff acted to his detriment in the reasonable belief that in so acting he was acquiring a beneficial interest in the Restaurant/Bar when he:

- (i) resigned his job at the request of the defendant to give full-time service to the business;
- (ii) paid for certain items in the restaurant;
- (iii) gave the termination payment from C.T.C. to the business in 1981;
- (iv) gave personal service for years to the business;
- (v) provided security;
- (vi) supplied vegetables from his farm to the business.

He asks the court to reject the defendant's evidence that:

- (i) the plaintiff was an employee of the business from the time he resigned his job at C.T.C.
- (ii) the plaintiff did not work at the chicken farm for two years but only for two months and did not give any chicken to the business.

Miss Ridgard for the defendant asks the court to accept the defendant's evidence that the business was hers from the start. That the plaintiff was a paid employee who brought the business to "near ruins" during the defendant's absence and as a result was asked to leave the business.

It is her contention that that there is no common intention that the plaintiff was to derive an interest in the business. That the business was established long before the plaintiff resigned his job to work with the defendant. That at that time the plaintiff left C.T.C. he knew that he was not being vested with a stake in the business but that he would be paid and was in fact adequately compensated for his labour.

Was the business jointly acquired or was it acquired as the sole property of the Defendant?

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In his first affidavit the plaintiff claimed that the business was jointly acquired. Mr. Samuels, however, seems to have conceded that the legal estate in the business is vested in the defendant/wife.

I say this because he is inviting the court to find that the plaintiff acted to his detriment with the belief that he would be acquiring a beneficial interest when he resigned his job at the request of the defendant to give full time service to the business.

Apart from this concession, however, the evidence before me does, on the balance of probabilities, support the contention that the defendant alone acquired the business.

The defendant in her affidavit swore that in February, 1981 from her savings and partner money she acquired the said business from Mrs. Joy Sinclair with whom she had worked for sometime. She also acquired certain equipment from Mrs. Sinclair. She paid a rental of \$400 per month to Mrs. Sinclair. She gave further details and submitted a statement from Mrs. Sinclair in support.

The plaintiff on the other hand, in his first affidavit did not give a detailed account as to the circumstances of the acquisition of the business. Under cross-examination he admitted that apart from a stove he could not remember other items of equipment. He did not know the cost of the equipment and contrary to what Mrs. Sinclair and the defendant stated he said the initial rental was \$100 per month, not \$400.

It is clear to me that the plaintiff did not know much about the acquisition of the business or about the rental of the premises or the agreement to purchase equipment on the premises.

I agree with Miss Ridgard that in this regard the plaintiff's demeanour when he was being cross-examined was not impressive. I therefore accept the defendant's claim that she acquired the business. It was her business as its name "Paulette's Restaurant and Bar" would indicate (the defendant's nickname is Paulette).

### The Law

Most matrimonial property law concerns disputes over interests in land.

Neither counsel referred to any distinctive rules relating to other property such as a "business" as in the instant case.

Both attorneys-at-law rely on Gissing v. Gissing (1970) 2 All E.R. 790, (1971) A.C. 886 and Grant v. Edwards (1986) 2 All E.R. 426, (1980) Ch. 688. Both these cases concern interests in land. However these cases were followed by our Court of Appeal in Azan v. Azan S.C.C.A. 53/87 - where the dispute was over interests in shares. This court is certainly bound by the decision in Azan v. Azan.

The law applicable to this case may be stated thus:

The legal estate in any property (real or personal) prima facie carries with it the whole beneficial interest - Gissing v. Gissing (supra). Any claim to a beneficial interest by the party in whom the legal estate is not vested must be based on the existence of a trust whether express, implied, resulting or constructive (Gissing v. Gissing).

Mr. Samuels, in his written submissions, states that -

"as regards the beneficial interest in the Bar/Restaurant, the plaintiff does not seek to rely on                      neither is there any express agreement between the parties as to their beneficial interest."

Indeed there is no evidence of any express agreement between the parties when the business was acquired that it should be jointly owned. Neither is there any subsequent express agreement.

On the evidence before me I am not satisfied that the plaintiff made any initial contribution to the acquisition of the business. I cannot therefore infer a common intention at the time of acquisition that the business should be jointly owned.

However the court may infer a fresh agreement reached after the original purchase that a party should acquire a beneficial interest - Gissing v. Gissing (supra) at p. 793 e-f.

Thus the crucial question is: Was there a subsequent understanding that there should be a joint ownership?

For the court to infer and give effect to such fresh agreement

the plaintiff must establish a constructive trust by demonstrating a common intention that they should both have a beneficial interest in the business and also that he had acted to his detriment on the basis of that common intention and in the belief that by so acting he would acquire a beneficial interest.

Common Intention

Here too there is no oral or written declaration of any common intention. The court must look to the conduct of the parties from which the intention can be inferred.

Mr. Samuels submitted that following facts which are not disputed are referable to a common intention that both parties have beneficial interests.

- (1) The defendant asked the plaintiff to resign his job at C.T.C. and to give full time service in the business. The plaintiff did so.
- (2) The plaintiff used a part of the \$1,500 which he received from C.T.C. as a gift along with money from the business to purchase an Ice-berg Deep Freezer. Later when the deep freezer was sold the plaintiff gave the defendant \$200 from the proceeds of sale.
- (3) After the shop was broken into the plaintiff provided security.
- (4) The defendant added the plaintiff's name to an account at the National Commercial Bank. To this account funds from the business was lodged from time to time.
- (5) The plaintiff for a short time supplied the shop with vegetables.
- (6) The defendant agreed with counsel for the plaintiff that she treated the plaintiff like a husband and part-owner.

The mere quitting by the plaintiff of his job to work in the business may not be referable to a common intention.

The law is not so cynical as to infer that a party will only quit his job to work in a business if he understands that he is to have an interest in the business. But when viewed in the light of the conduct of the parties at the time and subsequently, and the admission of the defendant that she treated him as a part owner, it is, in my opinion, strong evidence of a fresh agreement that the plaintiff should acquire a beneficial interest in the business.

I must bear in mind that "a distinction is to be made between conduct from which the common intention can be inferred on the one hand and conduct which amounts to an acting on it on the other." However in the circumstances of this case the most of the factors referred to above are not only evidence from which the parties' intention can be inferred but also evidence which shows the claimant acted to his detriment in reliance on the common intention.

I am satisfied on the balance of probabilities that although there was no common intention between the parties when the business was acquired that it should be jointly owned there was a subsequent understanding that there should be joint ownership. I find that the plaintiff had acted to his detriment in reliance on this understanding and in the belief that by so acting he would acquire a beneficial interest.

The plaintiff's share

Having found that the plaintiff is entitled to a beneficial interest in the business, the quantification of that interest must be decided by taking into account the direct and indirect contributions made by the parties to the acquisition and operation of the business. In other words the court must have regard to the "course of conduct" of the parties.

As said before I have found that the initial stock and equipment were purchased by the defendant and paid for on a monthly basis.

It is agreed that the plaintiff bought a deep freezer and that he contributed vegetables. The plaintiff's association with the business lasted for sixteen (16) years. It is also agreed that for sometime he provided security for the business. I also find as a fact that he assisted in the physical maintenance of the premises which housed the business.

In respect of the equipment and fixtures I find that the defendant made the greater contributions.

Indeed it is clear that the defendant made the greater contribution to the business and its operation.

In all the circumstances I assess the respective beneficial interests as follows:

Plaintiff 25%

Defendant 75%



Accordingly the court grants the following declarations:

1. That the plaintiff is beneficially entitled to one quarter share/interest in the Restaurant/Bar business at Rock Hall in the parish of St. Andrew.
2. That the plaintiff is the beneficial owner of one quarter share of such equipment and fixtures of the said Restaurant/Bar as there were up to the time of separation.

I order that:

3. an account be taken of the net profit of the said business from August, 1995 to the present.
4. the defendant do pay to the plaintiff one quarter of such net profit if any.
5. Liberty to apply

No Order as to costs.