[2023] JMCC COMM 48

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00564

BETWEEN	**PARADISE CONSORTIUM LIMITED t/a Jungle Fyah**	**CLAIMANT**
AND	**FRANKLYN MASON t/a "Jungle Fiah"**	**DEFENDANT**

IN OPEN COURT

Mr. Keith Bishop and Ms. Roxanne Bailey instructed by Bishop & Partners for and on behalf of the Claimant

Mr. Leroy Equiano of Counsel for and on behalf of the Defendant

Dates Heard: July 4, 5 & 7, 2022, November 21 & 22, 2022, June 26, 2023 and November 2, 2023

Civil Practice & Procedure – Tort – Passing Off – Whether the Defendant has breached the tort of passing off by using the name 'Jungle Fiah' – Elements of Passing Off – Whether the Claimant has established goodwill or reputation in the name "Jungle Fyah" – Whether the Claimant has demonstrated a misrepresentation by the Defendant to the public by using the name 'Jungle Fiah' – Whether the Claimant suffered or is likely to suffer damage due to misrepresentation – What remedies, if any, are available to the Claimant - Remedies – Whether the Claimant is entitled to an Order for recovery of possession – Whether the Claimant is entitled to recover rent – Costs

PALMER HAMILTON, J

BACKGROUND

[1] By way of a Claim Form filed the 9th day of October, 2018, the Claimant claims against the Defendant for an injunction to restrain the Defendant from passing-off restaurant business with the use of the words *'Jungle Fiah'* or business names usually similar to '*Jungle Fyah'* and other consequential orders, recovery of possession and an order for the payment of outstanding rental. The following Orders are being sought:

> *(a) An injunction to restrain the Defendant, whether acting by himself, his servant, agent or otherwise however from doing any of the following acts:*
>
> *(i) Passing off restaurant business(es) with the use of the words* ***'Jungle Fiah',*** or other business names which are visually or aurally similar to '**Jungle Fyah'**, not being the restaurant business of the Claimant; and
>
> *(ii) Enabling, assisting, causing, procuring or authorizing others to any of the acts aforesaid.*
>
> *(b) An order for the delivery up and/or destruction upon oath of all pamphlets and advertisement material with the use of the words* ***'Jungle Fiah'*** *or business names which are visually and aurally similar to* ***Jungle Fyah, 'Jungle Fiah',*** *printed or written, labels, other articles in the possession, custody or control of the Defendant, the use of which would be a breach of the forgoing injunction.*
>
> *(c) An inquiry as to damages or at the Claimant's option an account of profits and an Order for payment of all sums due with interest.*
>
> *(d) Recovery of possession forthwith or alternatively 30 days from the date of the Order.*
>
> *(e) An Order for the Defendant to pay the Claimant the sum of $1,301,400 being outstanding rental from October 21, 2017 to September 1, 2018 is owed and continuing.*
>
> *(f) Costs, interests and any other relief.*
>
> *(g) Further and other relief.*

THE CLAIMANT'S CASE

[2] The Claimant is alleging that on or about the 21st day of December, 2010, the parties entered into a rental agreement titled "Concession Agreement" which allowed the Defendant to occupy the premises known as Lots 4 and 5 [Shop # 5, AMC Plaza] Congrieve Park Pen, Port Henderson, Portmore, in the parish of St. Catherine being part of parent title registered at Volume 1041 Folio 309. The Claimant further alleges that $100,000.00 per month was agreed for payment of rent and this was paid in full by the Defendant between January 1, 2011 to March 1, 2016. From that sum, the Defendants were to pay a certain amount to the owner(s) of Lot 5 on behalf of the Claimant, as the Claimant had a rental agreement with the said owner(s) of Lot 5.

[3] It was further alleged that in April 2016 the rent was increased to $200,000.00 for the first time using a revenue based formula, which estimated the monthly revenue at $2,000,000.00 per month and a concession fee of 10%. A discount of $40,000.00 was given and the rent per month was at $160,000.00. The payment to the owner(s) of Lot 5 was also increased and the Defendant was still required to pay it. This rental period ran from April 1, 2016 to July 1, 2018. During this period the Defendant only paid the sum of $50,000.00 to the owner(s) of Lot 5 and owes to the Claimant the sum of $917,400.00 for the period October 21, 2017 to July 1, 2018.

[4] By way of a notice to the Defendant, the Claimant again increased the rental effective the 1st day of August, 2018 using the revenue based formula to arrive at a rent of $242,000.00. As at the 1st day of September, 2018 the Defendant owed the Claimant rent in the sum of $384,000.00. During this rental period, the Defendant was paying rent to the owner(s) of Lot 5. The total rental owed to the Claimant by the Defendant now stands at $1,301,400.00.

[5] On or about the 20th day of November, 2017, the Claimant caused a Notice to Quit to be served on the Defendant for recovery of possession and a Letter of Demand

for non-payment of rent to be delivered to the Defendant. Since this was done, the Claimant alleges that the Defendant has refused and/or neglected to make any further rental payment. Due to the lack of rental payment by the Defendant, the Claimant states that it has been difficult to meet monthly and annual obligations associated with the business. The Claimant needs the premises for its own use and occupation because it wishes to embark on a business venture using the premises.

[6] On the 16th day of February, 2015, the Claimant successfully registered the business name 'Jungle Fyah' in accordance with the Registration of Business Names Act and this was renewed on the 18th day of February, 2018. The Claimant alleges that its agents have worked assiduously to develop a reputation of the 'Jungle Fyah' brand in the restaurant business generally and jerked food in particular. Agents of the Claimant would regularly host weekend food events to advertise and promote its brand in the Portmore and wider St. Catherine, did a media blitz to ensure that the brand would be known to all households in St. Catherine through the use of mobile public address systems, printing of pamphlets and flyers, social media network and emails. It is due to this that the Claimant alleges that it has built up and owns a valuable goodwill in the name of 'Jungle Fyah' when used in relation to the restaurant business and in particular the jerked food business. Accordingly, whenever members of the public see trade name and/or brand 'Jungle Fyah' on any advertisement or anything similar thereto they take the same to be the restaurant business of the Claimant.

[7] On the 1st of November, 2017 the Defendant successfully registered the business name 'The Jungle Fiah Buffet Restaurant Limited' and started operation in several areas of St. Catherine. On the 19th day of December, 2017, the Claimant's agents caused a cease and desist letter to be written to the Defendant regarding the use of the recently registered business name. The Defendant placed advertisements for chefs at his 'Jungle Fiah' locations and by doing so would have caused the public to believe that the advertisements were sponsored by the Claimant's trade name 'Jungle Fyah.'

[8] The Claimant further alleges that the aforesaid acts of the Defendant misled members of the public to believe that 'Jungle Fiah' is one and the same as 'Jungle Fyah' as they are visually, aurally and conceptually similar to the casual and unwary customer. It is further alleged that the Defendant has passed off and/or attempted to pass off and/or enabled, assisted, caused or procured others to pass off 'Jungle Fiah' not being the restaurant business of the Claimant, as the Claimant's trade name restaurant business called 'Jungle Fyah.' The words 'Jungle Fiah' have no natural connection to the Defendant and the words at the date of adoption by the Defendant were very distinct and well known to be associated with the Claimant.

[9] The Claimant called two (2) witnesses in support of their claim, namely, Mr. Audley Deidrick and Mr. Carvell McLeary, who are both directors of the Claimant.

THE DEFENDANT'S DEFENCE

[10] The Defendant stated that he was never a tenant of the Claimant but had a Concession Agreement with the Claimant. The Defendant further stated that he never entered into any mutual agreement with the Claimant in respect of Lots 4 and/or 5, Shop # 5, AMC Plaza. By way of this agreement, the Defendant was allowed to use the facilities, being the equipment that were being used by the Claimant at Shop 5, Lot # 5 at a concession fee of $100,000.00 monthly. The Defendant admitted that he paid a rental on an agreement with the owner of Shop # 5, Lot 5 and never made any such payment on behalf of the Claimant as he, that is the Defendant, had a rental agreement with the owner of Shop # 5, Lot 5, Miss Annie McBean.

[11] The Defendant denied that there was an agreement between himself and the Claimant regarding an increase in the monthly concessionaire fee, as there was never any such agreement between the parties. The Defendant further stated that he is not indebted to the Claimant.

[12] The Defendant admitted that a Notice to Quit was served on him on or about the 20th day of November, 2017, however, he stated that the Claimant has no right or authority to give notice for recovery of possession or demand for money for rent as the Claimant is not in occupation of any premises as tenant. In fact, the Defendant is now the legal owner of Shop # 5, Lot 5, AMC Plaza, Congrieve Park Pen, Port Henderson, Portmore, in the parish of St. Catherine.

[13] The Defendant contended that when the Claimant's business commenced in 2009 it was in operation for no more than nine (9) months and had to close as it was not profitable due to low customer patronage. The Defendant stated that he took over a business that was closed and without any recognition whatsoever. The name 'Jungle Fyah' was unregistered and the Defendant expended money to promote the business causing it to grow and become profitable after about three (3) years of losses. The Defendant admitted that he registered his business name as 'The Jungle Fiah Buffet Restaurant' because of the success of his business at other locations. The Defendant and his team promoted the business extensively causing the customer base to expand. The Defendant's business became well known and customers associated with the service would always refer to the service of the manager and owner, being the Defendant, and no reference would be made to the Claimant and/or the trade name.

[14] The Defendant further contended that his business name 'The Jungle Fiah Buffet Restaurant Limited' is not similar to the Claimant's 'Jungle Fyah.' The Defendant stated that he has not had any negative feedback from his customers in respect of the quality product or service offered. In fact, it was the Defendant's personal involvement, promotion and insistence on the quality of the product and service which caused the success of his business. The Defendant stated that he does not trade as 'Jungle Fiah' but as 'The Jungle Fiah Buffet Restaurant.' The Claimant would not and could not have suffered any loss by virtue of the use of the Defendant's trade name.

[15] The Defendant further stated that the breakdown in the relationship with the Claimant occurred because the Claimant is attempting to enter in a sales agreement to purchase Lot 4 and the business for $28,000,000.00. The Defendant then learned that Lot 4 was never owned by the Claimant but was owned by Mr. Montaque, who the Claimant had entered into an arrangement with to occupy a section of the Lot.

[16] The Defendant himself gave evidence and called two (2) other witnesses, namely, Ms. Annie McBean and Mr. Garfield Mason.

ISSUES

[17] The main issues for my determination are:

(a) Whether the Defendant's use of the name 'Jungle Fiah' is in breach of the tort of passing off;

(b) What effect, if any, does the registration of the company 'The Jungle Fiah Buffet Restaurant Limited' has on the Court proceedings?

(c) Whether the Claimant is entitled to an Order for recovery of possession of the premises known as Lots 4 and 5 [Shop # 5, AMC Plaza] Congrieve Park Pen, Port Henderson, Portmore in the parish of St. Catherine; and

(d) Whether there is any rent owed by the Defendant to the Claimant.

SUBMISSIONS

[18] I wish to thank Counsel for their submissions and supporting authorities which provided valuable assistance in deciding the issues. They were thoroughly considered and will be dealt with under each issue below. I also wish to note that I do not find it necessary to address all the submissions and authorities relied on but I will refer to them to the extent that they affect my findings.

LAW

PASSING OFF

[19] Rattray P in **McDonald's Corporation v McDonald's Corporation Limited & Vincent Chang** (unreported) Supreme Court Civil Appeal No. 69/96 delivered December 20, 1996, stated that, *"the law with respect to passing off essentially relates to the right possessed by a business which has established reputation and goodwill in a jurisdiction not to be exposed to the risk of injury by another business which adopts features so closely resembling that of the first business as to create the misrepresentation made by passing off one person's goods as the goods of another."*

[20] The law in relation to passing off was succinctly dealt with by Evan Brown J in **St. Ann Kite Festival Limited v Friends of St. Ann Company Limited** [2020] JMSC Civ 172, where he stated that:

> *[47] The tortious action of passing off had its birth in the 19th century and is grounded in the following legal proposition, one trader is not to sell or offer for sale his goods or services under the pretext that they are the goods or services of another (**Winfield & Jolowicz on Tort** 18th edition at para 18-44). To express the principle in the language of **Clerk & Lindsell on Torts** 19th edition, at para 27-01, "it is an actionable wrong for a trader so to conduct his business as **to lead to the belief that his goods, services or business are the goods, services or business of another". In essence, one man may not pass off his goods, services or business as that of another.** Broadly, the tort is part of a wider corpus of laws aimed at providing relief in the face of unfair competitive business practices. This creature of the common law has been preserved by the **Trade Marks Act**, section 4 (3). It is there declared that nothing in the Act shall be construed to affect the law relating to passing off.*
>
> *[48] The locus classicus in this area is **Reckitt & Coleman Products Ltd v Borden Inc (No. 3)** [1990] 1 All ER 873 (HL) (**Reckitt & Coleman**). In that case, Lord Oliver of Aylmerton sought to refine the elements or parameters of the tort which had been earlier laid down by Lord Diplock **in Erven Warnink B.V. v J. Townsend & Sons (Hull) Ltd ("Advocaat")** [1979] AC 731. In the **Advocaat** the tort was said to express itself in the presence of five elements:*

> ***"(1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to the business or goodwill of the trader by whom the action is brought".***

[49] In ***Reckitt & Coleman*** *Lord Oliver reduced the ingredients to three:* ***goodwill or reputation, misrepresentation and damage, which have become known as the classic trinity.*** *At page 880, the claimant's task in a passing off claim was articulated as follows:*

> ***"First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's [claimant's] goods or services. Second, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the plaintiff [claimant]. Third, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff [claimant]".***

[50] Nourse LJ in ***Consorzio del Prossciutto di Parma v Marks & Spencer plc*** *[1991] RPC 331, at page 368, weighed Lord Diplock's five criteria and found them wanting in analytical rigour vis-a vis the classic trinity. In his opinion, borne of experience, the five-point analysis does "not give the same degree of assistance in analysis and decision as the classical trinity". His previous reticence in expressing an opinion gave way to the current boldness in the face of the speeches in* ***Reckitt & Coleman****, supra, and the assistance the classic trinity provided in the case before him.*

[51] Lord Diplock's five principles methodology in the ***Advocaat*** *was also eschewed by Millett LJ in preference for the classic trinity in* ***Harrods Limited v Harrodian School Limited*** *[1996] RPC 697 (****Harrods Ltd****). Millett LJ (at page 711) gave two reasons for his choice. First, the classical trinity makes it clear that the*

claimant/trader has a duty to establish that there is a reputation or goodwill attached to goods or services which he supplies by association with the brand name or get-up of his business, and not a reputation in his brand name or get-up. Second, the classic trinity condenses Lord Diplock's first (misrepresentation) with his fourth (calculation to injure the business or goodwill of another trader). In brief, Lord Oliver simplified the Lord Diplock's means of analysis without a dilution in analytical integrity in the resultant classical trinity. I will employ the classic trinity as the analytical methodology in this judgment.

[52] ***The first element of the classic trinity, goodwill or reputation, telegraphs the raison d'etre of the tort of passing off, that is, the protection of the proprietary interest in the goodwill of the business.*** *In* ***Reckitt & Colman****, at pages 889-890, Lord Jauncey accepted Lord Diplock's pronouncement on the issue in* ***Star Industrial Co Ltd (trading as New Star Industrial Co) v Yap Kwee Kor*** *[1976] FSR 256, at page 269. In that case Lord Diplock said:*

> ***"A passing-off action is remedy for the invasion of a right of property not in the mark, name or get-up improperly used, but in the business or goodwill likely to be injured by the misrepresentation made by passing-off one person's goods as the goods of another. Goodwill, as the subject of proprietary rights, is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached".***

[53] *It is axiomatic therefore, that it must first be established that there is goodwill attached to the goods or services. What, then, is goodwill? Lord Macnaghten's answer was as follows (see* ***Inland Revenue Commissioners v Muller & Co.'s Margarine Limited*** *[1990] AC 217 at pages 223-224 (IRC v Muller)).* ***Goodwill:***

> ***"is the benefit and advantage of the good name, reputation or connection of a business. It is the attractive force which brings in custom*** **[sic]**. ***It is the one thing which distinguishes an old-established business from a new business at its first start".***

This concept of goodwill has stood the test of time and received the approbation of their Lordships in ***Reckitt & Colman****, supra, at page 890.*

[54] *It has been said that a good reputation is like a gong or a bell that calls people to church. Whether you are in the city of Rome or a rural village in the thick of the hinterland in Jamaica, the ringing of the bell is the distinctive sound which tells all of Christendom that a*

church is nearby and all sinners and saints may come and worship. And so it is with goodwill of goods or services. The characteristic which must of necessity imbue goods or services to which it is claimed goodwill attaches, is distinctiveness. So that, in the usual case of passing off, what a claimant must establish is first, the peculiarities in the name or get-up of his goods and second, how the defendant's goods seek to ape those peculiarities or distinctive features (see ***Reckitt & Colman*** *at page 893). It is those peculiarities or characteristics which provide the invisible attractive force that is embedded in the goodwill of the goods or services, which Lord Macnaghten alluded to* ***IRC v Muller****, supra.*

[55] One is therefore in sympathy with the opinion expressed by the learned authors of ***Clerk & Lindsell****, at para 27-09, that it is the use by the claimant of "a distinctive name, mark, description or get-up in relation to his goods, services or business" that generates the goodwill. Therefore, where the defendant uses an indistinct name, mark description or get-up, that is being used by the claimant, no actionable misrepresentation will arise.*

[56] It is therefore small wonder that it is not easy to establish goodwill in a name made up of purely descriptive words. By descriptive words what is meant is that the names chosen merely "indicate the nature of the goods sold and not that they are the merchandise of any particular person or company, such as 'stout'" (see Gilbert Kodilinye ***Commonwealth Caribbean Tort Law*** *3rd edition at page 305). Equally, "a description of goods by geographical origin will not usually give rise to a proprietary interest" (see* ***Commonwealth Caribbean Tort Law****, supra).*

[57] In ***Reckitt & Colman****, at page 886, Lord Oliver considered it a good defence to a claim for passing off that the disputed name consists of ordinary words in common use, which would make it unreasonable to apply the name solely to the claimant's goods or services. To rebut this defence, the claimant would have to go on to demonstrate that the words had acquired a secondary meaning closely associated with the goods in which he trades. These propositions were culled from the judgment of Lord Herschell in the leading case on secondary meaning,* ***Reddaway v Banham*** *[1896] AC 199, at 210; [1895-9] All ER Rep 133 at 140:*

> *"The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A, when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word or device which he had adopted to*

> *distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this I think he would, on well-established principles, be entitled to an injunction".* ***[emphasis mine]***

RECOVERY OF POSSESSION & RECOVERY OF RENT OWED

[21] Section 89 of the **Judicature (Parish Courts) Act** provides that:

> *"When any person shall be in possession of any lands or tenements without any title thereto from the Crown, or from any reputed owner, or any right of possession, prescriptive or otherwise, the person legally or equitably entitled to the said lands or tenements may lodge a plaint in the Court for the recovery of the same and thereupon a summons shall issue to such first mentioned person; and if the defendant shall not, at the time named in the summons, show good cause to the contrary, then on proof of his still neglecting or refusing to deliver up possession of the premises, and on proof of the title of the plaintiff, and of the service of the summons, if the defendant shall not appear thereto, the Magistrate may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the Magistrate shall think fit to name; and if such land be not given up, the Clerk of the Courts, whether such order can be proved to have been served or not, shall at the instance of the plaintiff issue a warrant authorizing and requiring the Bailiff of the Court to give possession of such premises to the plaintiff."*

ANALYSIS

A. *Whether the Defendant's use of the name 'Jungle Fiah' is in breach of the tort of passing off*

[22] In considering this issue, there are several sub-issues which will aide in making a determination. These sub-issues are:

(a) Whether Claimant has established goodwill or reputation in the name 'Jungle Fyah';

(b) Whether the Claimant has demonstrated misrepresentation by the Defendant;

(c) Whether the Claimant suffered or is likely to suffer damage due to misrepresentation; and

(d) What remedies, if any, are available to the Claimant?

[23] The first sub-issue to be considered is whether the Claimant has established goodwill or reputation in the name 'Jungle Fyah.' Phillips JA in **David Orlando Tapper (Trading as 'Fyah Side Jerk and Bar') v Heneka Watkis-Porter (trading as '10 Fyah Side')** [2016] JMCA Civ 11 relied on the definition of goodwilll was defined by Lord Macnaghten in the House of Lords case of **The Commissioners of Inland Revenue v Muller & Co's Margarine Limited** [1901] AC 217 at page 223-224, where he stated that:

> *"...It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade..."*

[24] Learned Counsel for the Claimant submitted that the clear evidence from Mr. Deidrick, who is the Managing Director of the Claimant, is that the parties entered negotiation, which involved several meetings and at the end of the process the Defendant agreed to continue the Claimant's business and more importantly to, *"keep the physical plant, fixtures, fittings and equipment in good repair to maintain the image, goodwill and continuity of the business."* It was further submitted that the evidential support comes from the Concession Agreement and the Court was directed to paragraph 1 of the said agreement. Learned Counsel further submitted that there is sufficient evidence that prior to December 2010, the Claimant acquired a reputation but it was the duty of the Defendant, pursuant to the Concession Agreement, to develop the business and account to the Claimant. It was contended that the use of the get-up 'Jungle Fiah' is in breach of the Concession Agreement and more importantly, is a blatant attempt to use the get-up, which is the

appearance, look and feel of the product to include marks and the same pronunciation of the name, which is similar to that of 'Jungle Fyah.'

[25] Learned Counsel for the Defendant submitted that the Defendant was in full control and operation of the restaurant with no input from the Claimant and as a part of the operation the Defendant promoted the entity as 'Jungle Fyah' the name of the entity he took over from the Claimant. It was further submitted that the only trading done by the Claimant using the name 'Jungle Fyah' was for a period less than seven (7) months. No evidence was adduced on behalf of the Claimant from which it can be inferred that the Claimant's operation of the entity had developed a specific personality in the form of taste, colour, operation or service that would establish a reputation and goodwill in the community. Learned Counsel contended that there is no evidence that the Claimant traded with the name 'Jungle Fyah' between September 2010 and February 2016, when the said name was registered. However, there is evidence that the Defendant was the one who traded using the name for the period February 2015 to February 2018. Learned Counsel further contended that it was the Defendant who took full control of the business entity, invested in it and grew it. Any goodwill accrued therefore, would have gone to the Defendant and not to the Claimant.

[26] It is not in dispute that the name 'Jungle Fyah' was conceived by Mr. Deidrick, Mr. McLeary and Mr. Nigel Morgan (who is now deceased). It is also not in dispute that the parties had discussions and entered into a Concession Agreement whereby the Defendant would take, *"…full responsibility of managing the business operations of 'Jungle Fyah Restaurant & Jerk Center' situated at Shop 5, AMC Plaza, Congrieve Park Pen, Port Henderson Road."* This agreement was signed by the parties and dated the 21st day of December, 2010. There is also no doubt that there is goodwill attached to the name 'Jungle Fyah.' However, the question that arises is who does this goodwill attach to, that is whether the goodwill rests with the Claimant or the Defendant.

[27] It is clear in my mind that the Claimant has established goodwill or reputation in the name ‘Jungle Fyah.’ Even though it is unfortunate that the Defendant had expended so much money in the business during this time, he did so at his own risk. In cross-examination, it was evident that the Defendant understood what a Concession Agreement is and he even agreed with Learned Counsel for the Claimant that as part of that agreement he had the privilege to use the name ‘Jungle Fyah.’ The Concession Agreement, which I remind myself is not in dispute, clearly states that the Defendant is to manage and operate the business for a period of two (2) years with an option to renew afterwards. An inference could be made that this contractual arrangement covers the goodwill established while the Defendant operates ‘Jungle Fyah’ for the period of two (2) years in the first instance, as there is nothing in that agreement which vests ownership of any part of ‘Jungle Fyah’ to the Defendant.

[28] I agree with Learned Counsel for the Defendant that being the creator of a name does not necessarily vest the creator with any rights (see **Gill v Frankie Goes to Hollywood Limited** [2008] ETMR (2007) 77), which means that no rights would have been automatically vested in Mr. McLeary, Mr. Deidrick and Mr. Morgan simply because they conceptualized the name ‘Jungle Fyah.’ However, I cannot ignore the fact that there is a Concession Agreement and there was even a time when the Claimant attempted to sell the Defendant ‘Jungle Fyah.’ That in my mind, shows that the intention between the parties was always that the Defendant would operate the business of ‘Jungle Fyah’ which is owned by the Claimant. There is no evidence before me to suggest otherwise. Respectfully, I think Learned Counsel for the Defendant is misconceived in his understanding of the relationship between the parties. The parties are not denying that they entered into an agreement regarding the use of the name ‘Jungle Fyah’ and its operations. Therefore, it logically follows that anything regarding the use of the name ‘Jungle Fyah’ and its operations must be in accordance with the said agreement and that agreement clearly states that the Claimant is the owner of ‘Jungle Fyah.’

[29] I don't find it necessary to look beyond the four corners of the document to find the terms of the contract. In the case of **Alex Duffy Realty Ltd v Eaglecrest Holdings Ltd** (1983) 44 A.R. 67 the Honourable Chief Justice McGillivray stated at paragraph 45 that the Court does not make contracts for the parties. The Court is not to impose its idea of fairness and interpret the plain wording of a contract to give it a meaning other than that which the language can bear because a Court thinks that this would be a fair method of handling this matter. It is of no moment whether the only trading done by the Claimant using the name 'Jungle Fyah' was for a short period of time. I agree with Learned Counsel for the Claimant that it was the duty of the Defendant pursuant to the Concession Agreement to develop the business and account to the Claimant. In fact, one can assume that the reason why the name chosen by the Defendant was visually and aurally similar to that of the Claimant's business name was because the name had built up a reputation in the parish of St. Catherine. It is therefore my judgment that any goodwill or reputation established in 'Jungle Fyah' must be vested in the Claimant.

[30] Having found that the goodwill rests with the Claimant, I must now consider whether there was misrepresentation on the part of the Defendant in using the name 'Jungle Fiah.' Evan Brown J in **St. Ann Kite Festival Limited** stated at paragraph 118 that:

> *According to Winfield & Jolowicz, at para 18-46, the core question in every case is whether the name or description given by the defendant to his goods or services is one that creates a probability that a substantial section of the relevant public will be misled into believing that his goods or services are the goods or services of the claimant. Misrepresentation is therefore a question of fact for the tribunal.* ***The misrepresentation must be likely to damage the claimant's goodwill:*** *Clerk & Lindsell, at para 27-14.* ***Accordingly, any misrepresentation that is calculated to damage the claimant's goodwill will be sufficient. The view has been expressed that liability is strict.*** *Therefore, all the claimant needs to show is that the defendant's actions were calculated, that is, likely, to deceive: Commonwealth Caribbean Tort Law, at page 306. However, mere confusion will not suffice: Clerk & Lindsell, supra.* ***[emphasis mine]***

[31] In my view, it was the Defendant's intention to misrepresent the public by leading them to believe that the goods and services offered are the goods and services of

the Claimant. It is clear that the words 'Jungle Fyah' and 'Jungle Fiah' are visually and aurally similar. I don't think it is in issue that 'fyah' and 'fiah' are the Jamaican Patois spelling and pronunciation of the word 'fire.' The Defendant in cross-examination agreed with Learned Counsel for the Claimant that the 2 business names are pronounced the same way, the difference being that the business name belonging to him is followed by "Buffet Limited" at the end. However, he further admitted in cross-examination that he does not always ensure that two (2) words, being "Buffet Limited", are always included in promotion of his business. Therefore, promotions for either business would say 'Jungle Fyah' or 'Jungle Fiah', which when spoken there is no difference in how they sound.

[32] I am guided by the case of **Nathan Haddad (T/A Peppa Tree Jamaica West Indies) v Tony J Limited & John Jeremy McConnell (T/A Pepperwood Jerk Pit) [2019] JMCC COMM. 13** where Laing J in hearing an injunction matter relied on the Privy Council case of **Coca-Cola Company of Canada Limited v Pepsi-Cola Company of Canada Limited** [1942] 1 All ER 615 stated, *"…that the principle sometimes employed in the evaluation of similarity of marks, that if two marks are very similar or identical at the beginning they are more likely to be confusing than if the similarity is in their endings…"*

[33] The Defendant's position as I understand it is that in taking over operations of 'Jungle Fyah' the business became associated with him. However, in entering into an agreement with the Defendant for operating the business, the Defendant must have known that anything that he did would have gone to the owner of the business, that is to the Claimant. Not only did the Defendant give his business a name that is visually and aurally similar to that of the Claimant, the business operates in the parish of St. Catherine, which is where the Claimant's business operates as well. The acts of the Defendant in my view are calculated as instead of naming his business something else, he changed the spelling of a word and has been using that. The actions of the Defendant would have led the public to believe that the goods and services were that of the Claimant. By using a name that is visually and aurally similar to that of the Claimant's business name, the Defendant

must have foreseen that it would have misled the public. Even if the public was not privy to the Concession Agreement, it can be inferred that the Defendant's actions caused confusion, whether or not it was intentional, due to the similarity in the business names.

[34] However, mere confusion is not enough in satisfying this element, as the Claimant has to show that the misrepresentation must be likely to damage their goodwill. (see **Clerk & Lindsell** para 27-14). The evidence from Mr. Deidrick was that a Director of the Claimant received at least two (2) complaints from customers regarding medical issues they suffered after visiting the Defendant's business, that is 'Jungle Fiah.' He further stated that one of the said customers contacted the said Director through a mutual friend. In my view, it is clear that this misrepresentation is likely to damage the goodwill of the Claimant's business. Evan Brown J relied on **Reckitt & Colman** at page 890 and stated that, *"…for the purposes of this tort, it is enough if the defendant's misrepresentation is such that damage to the claimant's goodwill is a reasonably foreseeable consequence."* I so find that the Defendant's actions in this case were highly likely to cause more than just mere confusion to the public and the use of the word 'Fiah' by the Defendant was nothing more than a tactic to keep a name that is similar to the business that he was operating on behalf of the Claimant pursuant to the Concession Agreement. I also find that it is a reasonably foreseeable consequence that this misrepresentation by the Defendant would cause damage to the goodwill or reputation that the name 'Jungle Fyah' acquired.

[35] The field of activity for the businesses concerning this matter before me is one and the same. Both businesses, according to the Certificate of Registration, are involved in activities of restaurants and lounges. In my view, the Claimant has proved that it is likely to suffer damage by reason of the erroneous belief engendered by the Defendant's misrepresentation. In **St. Ann Kite Festival**, Evan Brown J was of the view that following his finding that, *"…the defendant's clear intention was the passing off of its event as the claimant's, it is axiomatic that both loyal and potential customers could become lost to the claimant were these*

persons to transfer their custom from the claimant to the defendant, in the belief that they were attending the claimant's kite festival." In my judgment, the same view is applicable to the matter before me. Whether or not it was the intention of the Defendant to cause confusion and to mislead the public, a finding can be made that it is clear that such a misrepresentation could lead to loss of both loyal and potential customers of 'Jungle Fyah.' The Defendant maintains that he was the one who brought the customers from his previous restaurant business and he was the one who developed the brand 'Jungle Fyah.' However, as I mentioned earlier the Concession Agreement cannot simply be ignored, whatever actions the Defendant took to develop the brand 'Jungle Fyah' were done at his own risk. I therefore find that the Claimant has proved that it is likely to suffer damage by reason of the erroneous belief engendered by the Defendant's misrepresentation. (see **St. Ann Kite Festival**). It therefore logically follows that the Defendant is in breach of the tort of passing off by using the name 'Jungle Fiah.'

[36] The last sub-issue concerns what remedies are available to the Claimant. Given my earlier findings, I am minded to grant a permanent injunction restraining the Defendant from using the name 'Jungle Fiah' in connection with the restaurant business. The Claimant has sought an order regarding an inquiry as to damages or at the Claimant's option an account of profits and an Order for payment of all sums due with interest. I am also minded to grant this Order to the Claimant.

B. *What effect, if any, does the registration of the company 'The Jungle Fiah Buffet Restaurant Limited' has on the Court proceedings?*

[37] Learned Counsel for the Defendant submitted that the company 'The Jungle Fiah Buffet Restaurant Limited' is a separate entity with its own identity distinct from its subscribers and the relationship with the company 'The Jungle Fiah Buffet Restaurant Limited' and the Defendant and that the said relationship was not explored in cross-examination. It was further submitted that the Claimant's claim in respect of the trade name' Jungle Fiah' failed to recognize that the said trade name is part of the name of a registered company, which is incorporated under the

Companies Act of Jamaica. Learned Counsel for the Defendant contended that the Defendant though he is a shareholder and director of 'The Jungle Fiah Buffest Restaurant Limited,' he stands separate and apart from the company.

[38] While I do not disagree with the submissions of Learned Counsel for the Defendant, there is evidence to show that the Defendant does not always use the full name of the registered company which came out in cross-examination of the Defendant. It is not for the Court to dictate how a Claimant is to bring their case and it might have been prudent for the Claimant to include the company 'The Jungle Fiah Buffet Restaurant Limited' in these proceedings. However, in the light of the evidence, I am satisfied that the Claimant has a case against the Defendant simply by the Defendant's use of the name 'Jungle Fiah' in the promotion of his business which conducts similar, if not the same activities, as the Claimant's business.

C. *Whether the Claimant is entitled to an Order for recovery of possession of the premises known as Lots 4 and 5 [Shop # 5, AMC Plaza] Congrieve Park Pen, Port Henderson, Portmore in the parish of St. Catherine*

[39] At the outset, I must note that Order for recovery of possession in relation to Lot 5 seems to me that it is no longer being pursued by the Claimant. The evidence from the Defendant and his witness, Ms. Annie McBean is that Lot 5, Shop # 5 was sold to the Defendant in September, 2018. Learned Counsel for both the Claimant and the Defendant submitted that in light of the said evidence from Ms. Annie McBean, the Order for recovery of possession would now exclude Lot 5, Shop # 5. The Claimant's position prior to learning that Lot 5, Shop # 5 was sold to the Defendant was that, the Claimant itself had a lease agreement with Ms. Annie McBean and was entitled to recover possession from the Defendant who the Claimant had contracted to operate its business. I find favour with the submissions of Learned Counsel for the Claimant and Defendant regarding the exclusion of Lot 5 from the matter before me. I see no need to delve into a deeper discussion regarding the

recovery of possession as the Agreement for Sale was exhibited, duly signed and dated by Ms. Annie McBean and the Defendant.

[40] In relation to Lot 4, both Mr. Deidrick and Mr. McLeary stated in their witness statements that in 2009, they along with Mr. Morgan entered into an agreement with Mr. Dennis Oliver Montaque for the purchase of the said Lot 4. They further stated that they were put in possession of the land and they all agreed that they would start a jerk centre. As mentioned earlier, they entered into the Concession Agreement with the Defendant. However, this agreement only mentions possession of Shop 5. Respectfully, I find no favour with the submissions of Learned Counsel for the Claimant. However, I do find favour with the submissions of Learned Counsel for the Defendant in relation to how the Court is to treat with Lot 4. Learned Counsel for the Defendant submitted that there is no proof that the Claimant has any proprietorship in Lot 4 as there is no documentary proof of purchase, inheritance, lease, license to occupy or an adverse claim. The Claimant is therefore not in a position to claim and seek possession of the premises as if the Claimant is to succeed with possession he must prove title. Learned Counsel relied on the Court of Appeal case of **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37, where McDonald-Bishop J stated at paragraph 38 that:

> *An examination of the relevant law as it relates to a claim for recovery of possession by a paper owner has rendered that argument of Ms Shaw quite untenable as a matter of law. I say so for the following reasons. The English authorities that have treated with the English 1833 Act have proved to be quite instructive in treating with this issue. They have unequivocally established that when a claimant brings a claim to recover possession, he "must prove that he is entitled to recover the land as against the person in possession. He recovers on the strength of his own title, not on the weakness of the defendant's" (emphasis added): The Laws of England, The Earl of Halsbury (1912) Volume 24, paragraph 609.*

[41] Even though in the abovementioned case, the Court of Appeal was dealing with the issue of adverse possession, I find it to be useful and I am so guided by it. The Claimant has not showed that the strength of his own title in Lot 4 and he cannot therefore rely on the weakness of any proof or lack thereof of the Defendant's title to prove his own case. Section 89 of the Judicature (Parish Courts) Act which deals

with recovery of possession applications states that a plaintiff is to show proof of title. I see no basis for the Claimant to seek an Order for recovery of possession as he has not shown any proof to this Court that he has any proprietorship in Lot 4. Therefore, it is my judgment that the Orders sought by the Claimant in relation to recovery of possession of Lot 4 must fail.

D. *Whether there is any rent owed by the Defendant to the Claimant.*

[42] The Order being sought in relation to rent owed suffers a similar fate to the recovery of possession Orders. I am guided by what the parties agreed pursuant to the Concession Agreement. The agreement was for a concession fee of $100,000.00 to be paid monthly. However, Learned Counsel for the Defendant has submitted that even though the said fee was described as a "concession fee" the fee is a rental fee. However, in my view, the evidence does not support this. The evidence from the Claimant's own witness is that some of the said fee that was described as a "concession fee" was to be paid to Ms. Annie McBean on behalf of the Claimant for rent. Therefore, in my view, the Claimant is not entitled to recover any sums for rent and I agree with Learned Counsel for the Defendant that the Claimant's claim for rent owing is ill-conceived.

COSTS

[43] The aim in relation to costs is to make an order that reflects on the overall justice of the case. The general rule relating to costs is contained in Part 64 of the **Civil Procedure Rule 2002,** as amended (the CPR). Rule 64.6(1) states*: "If the Court decides to make an order about the cost of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party".* Pursuant to section 47 of the **Judicature (Supreme Court) Act**, *"In the absence of express provisions to the contrary, the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court,"* and it is well recognized that the exercise of this discretion should be pursued in a judicial manner.

[44] Rule 64.6 (2) of the CPR goes on to say that the Court may order a successful party to pay all or part of the costs of an unsuccessful party. However, in doing so the court must have regard to all the circumstances which include:

> *(a) the conduct of the parties both before and during the proceedings;*
>
> *(b) whether a party has succeeded on particular issues, even if that party has not been successful on the whole of the proceedings;*
>
> *(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 or 36;*
>
> *(d) whether it was reasonable for a party:*
>
> *(i) to pursue a particular allegation and/or*
>
> *(ii) raise a particular issue*
>
> *(e) the manner in which a party has pursued:*
>
> *(i) that party's case;*
>
> *(ii) a particular allegation or*
>
> *(iii) a particular issue.*

[45] The Claimant has not been successful in its entire claim. However, the Claimant has succeeded on particular substantive issues. The Claimant was successful in relation to his claim for passing off but not in relation to the orders sought for recovery of possession and payment of rent. I took into account that it was reasonable for the Claimant to pursue his claim in relation to passing off, however I cannot say the same in relation to Lot 4. While the Claimant may not have been aware of the sale of Lot 5, there are no documents before the Court in relation to any proprietorship it may have over Lot 4. This is coupled with the fact that the Concession Agreement that the Claimant seeks to rely on does not mention Lot 4. In the light of those circumstances, I am of the view that the Court ought to depart from the general rule relating to costs. It is therefore my judgment that costs should be apportioned as between the parties. This would, in my view, reflect the overall justice of this case.

[46] On the 7th day of July, 2022, the matter was adjourned due to the absence of one of the Claimant's witness. On that day I made the following Order: *"Costs to the Defendant for adjournment for today to be submitted on at end of proceedings."* No submissions were made by either party and as such my Order remains the same.

ORDERS & DISPOSITION

[47] Having regard to the forgoing, these are my Orders:

(1) A permanent injunction is granted restraining the Defendant, Franklyn Mason t/a Jungle Fiah whether acting by himself, his servant(s), agent(s) or otherwise from using the words 'Jungle Fiah' or business names which are visually and aurally similar to 'Jungle Fyah' in connection with the restaurant business.

(2) Upon oath, the Defendant is to deliver and/or destroy all pamphlets and advertisement material with the use of the words **'**Jungle Fiah' or business names which are visually and aurally similar to 'Jungle Fyah', printed or written, labels, other articles in the possession, custody or control of the Defendant, the use of which would be a breach of the forgoing injunction.

(3) Damages to be inquired into or an account of profits to be conducted by the Registrar of the Supreme Court, together with interest at a rate of 6% per annum on the sum found to be due to the Claimant from the 25th day of September, 2018 to the 2nd day of November, 2023.

(4) Costs to the Defendant for adjournment on July 7, 2022.

(5) Costs to be apportioned half (50%) to be paid by the Defendant and the other half (50%) of the costs to be paid by the Claimant, to be taxed if not agreed.

(6) Claimant's Attorneys-at-Law to prepare, file and serve Orders made herein.