60. In the *Athlete's Foot* case, Walton, J., made it clear (at page 349, lines 9–26) that a company which grants others the right to operate a business in its name cannot rely on the operation of those others as giving them the right to bring actions in those countries. At line 20, the (earned judge said:

"But the operation of the franchisees are not, and never at any stage are, or could be, the operations of the plaintiffs. The franchisees are carrying on their own respective businesses and not that of the plaintiffs."

61. The evidence in this case shows that the Plaintiff is in the same position. Mrs. Patricia Isaacs-Green makes it clear in paragraph 1 of her Affidavit fat page 215 of Bundle 2) and Mr. Hadland confirms it at paragraph 16 page 10 of Bundle 1, that the Montego Bay restaurant is being operated by Three Rivers Management Limited and not by the Plaintiff,. . .

It is now necessary to quote in full Walton's, J., analysis again in *The Athlete Foot* case [1980] RPC 343 at p. 349:

"More importantly, however, it appears to me that the facts of the present case that is to say, all the relevant facts are virtually undisputed, and are most unlikely to be changed by any evidence led at the trial. And, on those facts, it appears to me quite clear that the plaintiffs' case is, if not exactly unarguable, very nearly so.

There are, I think, two main questions of law involved. The first one is whether the plaintiffs are entitled, when the extent of their activities in England and Wales is being considered, to take the benefit of the activities of Ravel to which I have already referred. Despite an attractive argument from Mr. Evans to the effect that they should be, because obviously to some extent the plaintiffs must take the benefit of the activities carried on by their franchisees. It appears to me quite clear that they are not so entitled.

It must always be borne in mind that the activities of the plaintiffs are service activities: they provide franchises. Now doubtless the readiness of persons to accept a franchise from the plaintiffs will in large part depend upon the reputation established by the existing franchisees of the plaintiffs, and to that extent clearly the plaintiffs do obtain a benefit from the operations of their franchisees. But the operations of the franchisees are not, and never at any stage are, or could be, the operations of the plaintiffs. The franchisees are carrying on their own respective businesses, and not that of the plaintiffs. But in the present case one never even gets as far as that. For the acts done by Ravel were acts in preparation for their accepting a franchise which they never in fact accepted, at any rate down to date; and their acts were not the acts which would enure for the benefit of the plaintiffs in any event, because they were the activities of buying and not of selling; of acquiring stock, not of disposing of it."

In this case the incomplete evidence suggests that the multinational would benefit from the operations of Three Rivers but it seems Three Rivers are also an essential party to these proceedings. To my mind, if the multinational were properly registered as well as Three Rivers Management Co Ltd, it would be necessary for both of them to be plaintiffs and It would also be prudent for them to exhibit the franchise.

So by a preferred and obligatory alternative route, I would set aside the injunction granted by Orr, J., and his order for costs, and affirm the refusal of the injunction sought. The learned Judge had no jurisdiction to grant injunctive relief against a party who was not competent to institute proceedings. Moreover, it was brought to his attention in written submissions which were reiterated in this court. The injunction granted could not operate to preclude Three Rivers Management Co Ltd from using the registered trade mark of McDonald's in the Corporate Area. There can be no order for costs either here or below. Presumably, the parties will be better prepared in the light of these proceedings for the next round. The next round might either be a further interlocutory appeal or the full scale trial. If the choice is a trial, I would grant an order for a speedy trial in view of the important commercial and investment implications which arose in this case. I must pay tribute to the comprehensive research and able arguments by counsel on both sides in these interesting interim proceedings.

GORDON, J.A.: I have read the draft judgments of Rattray, P., and Downer, J.A., I agree with the conclusions arrived at in the judgment of Rattray P., and in Part I of the judgment of Downer, J.A., save that as to costs I hold that costs should be costs in the cause. Costs of the appeal to appellants to be taxed if not agreed.

RATTRAY, P.: The Order of the Court is as follows: Interlocutory Injunction to restrain until trial the appellant (McDonald's Corporation) from opening business and trading in the Corporate Area under the name 'McDonald's' discharged and the order as to costs.

Costs of hearing injunction to be costs in the cause.

Order of Court below refusing the application to restrain McDonald's Corporation Limited (the respondent) from continuing its business at 1 Cargill Avenue affirmed. Costs to be costs in the cause.

Costs of appeal to the appellant to be taxed if not agreed. (Downer, JA., dissenting).

WESSELL GEORGE PATTEN *v.* FLORENCE EDWARDS

[COURT OF APPEAL (Rattray, P., Patterson and Bingham, JJ.A.) October 28, 29 and December 20, 1996]

Land Law - Tenants-in-common - One co-owner expending money for improvement of property - Claiming accretion in share of property.

The respondent acquired a one-half interest in property with her husband pursuant to the terms of settlement of a matrimonial property dispute. She entered into an agreement with her husband to purchase his interest, but did not have enough money to complete. She approached the appellant, her brother, and sought financial help to complete the purchase. The property was transferred to the respondent and the appellant as tenants in common. The respondent commenced an action for a declaration that she was sole proprietor of the property. The trial judge concluded that only one-half of the property was sold to the respondent and the appellant and that their respective interests were in 50% each, thus the appellant was tenant-in-common with the respondent in the proportion of 75% to the respondent and 25% to the appellant.

The trial judge also found that substantial repairs were effected to the premises and a considerable amount of the costs of these repairs were borne by the appellant. He claimed an added equitable interest in the property to the extent of the expenditure; the trial judge rejected this claim and he appealed.

Held: where one co-owner expends money for the improvement of property enjoyed by him in common with another co-owner, in which they hold the legal estate and equitable interest as tenants-in-common, the value of the individual share of each tenant-in-common will increase but the proportion in which they hold their respective shares remains constant: the money expended by one tenant-in-common to effect the improvement can be rewarded

in a suit for partition or on a distribution of the value of the property when the tenancy in common is brought to an end.

Appeal dismissed.

Cases referred to:

(1) *Muetzel v. Muetzel* [1970] 1 W.L.R. 188; [1970] 1All E.R. 443
(2) *Plimmur v. The Mayor of Wellington* [1884] 9 App. Cas. 699; [1881-5] All E.R. Rep. Ext. 1320; 51 L.T. 475
(3) *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129; 12 Jur. NS 506, 14 WR 926
(4) *Brickwood v. Young and Others* [1905] 2 C.L.R. 387

Appeal from judgment of the Supreme Court (Langrin, J.) in an action for a declaration.

Dennis Forsythe for appellant.
Carleen McFarlane for respondent.

PATTERSON, J.A.: This appeal by Wessell George Patten ("the appellant") arose out of an action commenced by Originating Summons, whereby Florence Edwards ("the respondent") sought the following declarations and orders:

"(a) That FLORENCE EDWARDS is the sole proprietor of All That Parcel of Land part of Runaway Bay in the Parish of Saint Ann registered at Volume 677 Folio 51 of The Register Book of Titles of Jamaica.

(b) That WESSELL GEORGE PATTEN has no beneficial interest in the said parcel of land registered at Volume 677 Folio 51.

(c) That the name WESSELL GEORGE PATTEN be removed from The Register Book of Titles as Tenant-in-Common along with FLORENCE "EDWARDS upon such terms and conditions as this Honourable Court thinks fit.

(d) That this Honourable Court will declare the respective interest of the Plaintiff and the Defendant in the property registered at Volume 677 Folio 51."

Langrin, J., heard the matter and made the following order and declaration on the 31st March, 1995:

"(1) Judgment for the Applicant/Plaintiff.

(2) Both parties are Tenants-in-common in the land in proportion of 75% to the applicant and 25% share to the Respondent/Defendant.

(3) No Order as to costs."

It is against that judgment that the appellant appealed seeking an order that "the shares of the parties in the property are equal by virtue of the appellant's expenditures for improvements and repairs" and also "that the respondent do pay the costs of the action and of this appeal, to be agreed or taxed." On the 29th October, 1996, we dismissed the appeal and our reasons for so doing follow.

The undisputed facts of the case can be simply stated: William Edwards was the registered proprietor of the land in dispute ("the property") which is situate at Runaway Bay and registered at Volume 677 Folio 51 of the Register Book of Titles. The respondent was his wife up to sometime in 1985 when they were divorced. Pursuant to the terms of settlement of their matrimonial property, the respondent acquired a one-half interest in the property. The said William Edwards was desirous of disposing of his remaining one-half interest in the property, and in 1986 he entered into an agreement with the respondent for the sale of the said property to her. The consideration was stated as follows:

"THREE HUNDRED THOUSAND DOLLARS ($300,000.00) of which the Vendor acknowledges to have received the sum of One Hundred and Fifty Thousand Dollars ($150,000.00). The balance is to be paid as to not less than Fifty Thousand Dollars ($50,000.00) on execution hereof by the Vendor and Purchaser and the outstanding balance subject to Mortgage as set out in the Special Conditions herein."

It is quite clear that the said William Edwards was disposing of his one-half interest valued at $150,000. But the respondent did not have enough money to complete. It was then that she approached the appellant, her brother, and sought financial help to purchase the one-half interest of William Edwards. There was some dispute as to what payments were made by each party, but the learned judge came to the following conclusion, which Mr. Forsythe readily conceded to be unassailable:

"My conclusion on the evidence is that I find as a fact that only one-half of the property valued at $300,000.00 was sold to both parties. Accordingly, the interest of the respondent at the very outset was a share in 50% of the property. I came to this conclusion based on the admission he made not only in this affidavit but under cross-examination.

I find that both parties contributed equally in paying the deposit and the mortgage in that one-half share."

The property was transferred to the respondent and the appellant as tenants in common. It was not given in evidence whether the certificate of title stated the proportion of the undivided share that each held, but, as Langrin, J., correctly stated, the beneficial interest of the appellant could only be in one-half of the property.

A further unchallenged finding of fact was that substantial repairs were effected to the premises, and a "considerable amount" of the costs of such repairs was borne by the appellant. The repairs were done subsequent to the offer for sale made by William Edwards to the respondent. The improvement arising from such repairs was effected without the express or implied agreement of the parties. Mr. Forsythe submitted that the amount expended by the appellant for the repairs was $1,854,500, and that the respondent did not refute that. Therefore, so he said, the appellant was entitled to an added equitable interest in the property to the extent expended for the improvement. He submitted that the learned judge "was bound by the spirit of equity to search for a solution to suit the case, and he failed to do so."

The learned judge did consider the question of whether the applicant was entitled to an equitable interest in the property over and above the 25%. He relied on the principle enunciated in *Muetzel v. Muetzel* [1970] 1 All E.R. 443, where Edmund Davis, L.J., said:

". . . the fact that one spouse spends money on extension of that house does not mean that the other can claim no part of the increased value of the property resulting from the extension. On the contrary, in the absence of a specific agreement, the extension should be regarded as accretions to the respective shares of each and not as affecting the distribution of the beneficial interests. In other words, the division must stand whether applied to the house in its original or in its extended form."

In light of that principle, the learned judge concluded that the proportion of the appellant's beneficial interest could only be increased if a constructive trust could be inferred. His conclusion that in the circumstances of this case, "the door to the creation of a constructive trust remains closed" cannot be faulted. Counsel for the appellant did not contend that there was a constructive trust in the circumstances of this case, but submitted that "equity should have been satisfied in the circumstances by an application of the principle of proprietary estoppel." He referred to the judgment of their Lordships in *Plimmer v. The Mayor of Wellington* (1884) 51 L.T. 475. I did not find that case to be of much help. The expenditure in that case was made by Plimmer on land which belonged to the Crown under a revocable licence from the Crown, and all improvements were made with the knowledge and at the

instance of the government. The principle which the appellant seemed to rely on is stated in the headnote as follows:

> "The equity to arise from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated."

In the instant case, the question of a licensee did not arise. An estoppel will protect a licensee in circumstances where he has been permitted or encouraged by the licensor to act to his detriment. The classical statement which clearly shows the basis of estoppel comes from the dissenting judgment of Lord Kingsdown in the celebrated case of *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129 at page 170:

> "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

The appellant in the instant case expended money for the improvement of property enjoyed by him in common with the respondent and in which they both held the legal estate and equitable interest as tenants in common. It was quite clear to me that the question of estoppel did not arise. Any amount expended by the appellant to improve the property must be regarded as an accretion to the value of the property as a whole. It cannot be regarded as an accretion to the appellant's undivided share alone with the resultant diminution in that of the respondent. If that was the position, then one tenant in common could effectively acquire the entire interest in the property by making improvements without the consent of the other tenant in common.

The true position is this: The value of the undivided share of each tenant in common will increase but the proportion in which they hold their respective share remains constant. But the money expended by one tenant in common to effect the improvement can be recovered in a suit for partition or on a distribution of the value of the property as was decided in *Brickwood v. Young* [1905] 2 C.L.R. 387 (H.C.), a case from the High Court of New South Wales. The headnote reads as follows:

> "A tenant in common who at his own cost repairs or improves the property cannot recover from other tenants in common a proportionate part of the cost. But if the tenancy in common is brought to an end by partition, sale by order of the Court, compulsory acquisition, or the like, the tenant who has expended money on the property is entitled to a lien for the amount by which he increased the value of the shares of the other tenants in common."

In my judgment, the learned judge arrived at the right decision by declaring the interest of the appellant and the respondent to be 25% and 75% respectively. I therefore concurred in the dismissal of the appeal, affirmed the judgment of the court below and ordered that the appellant pays the respondent's costs of this appeal, such cost to be taxed if not agreed.

REGINA *v.* IAN BAILEY

[COURT OF APPEAL (Rattray, P., Gordon and Bingham, JJ.A.) November 7 and December 20, 1996]

Criminal Law - Evidence - Unsworn statement - Proper direction to jury.

The complainant, a 9 year old girl was sent walking by the appellant's home, he being her neighbour, she was held by him and forcibly dragged into his house to a room where she was sexually assaulted. Medical evidence confirmed that sexual intercourse had taken place. She made a report to her mother and later to her step-father and subsequently to the police. At the trial, the appellant, in an unsworn statement, denied committing the offence.

In his summing up to the jury, the trial judge gave the following direction on the effect of his unsworn statement: "But this is his testimony and although the highest court says you must give it what weight you think it deserves because it is not tested by cross-examination you must realise that he has not said anything because the only evidence that you have heard in this case comes from K.C. and the other people who gave evidence and the doctor. What he tells you is not evidence. He made a statement."

The appellant was convicted of carnal abuse and appealed.

Held: a judge should in plain and simple language make it clear to the jury that the accused is not obliged to go into the witness box, he can make an unsworn statement; the judge could go on to say why he might make an unsworn statement and the jury must be told that it is exclusively for them to make up their minds whether the unsworn statement had any value and what weight to attach to it, and it is for them to decide whether the evidence for the prosecution has satisfied them of his guilt, beyond reasonable doubt, and they should give his statement only such weight they may think it deserves; in the instant case, the direction went too far and amounted to a material misdirection.

Appeal allowed, conviction quashed, sentence set aside, new trial ordered.

Case referred to:
D.P.P. v. Walker (Leary) (1974) 12 J.L.R. 1369

Appeal from conviction for carnal abuse at the Clarendon Circuit Court (Ellis, J., and a jury).

Dennis Morrison, Q.C. for the appellant.
Brian Sykes and *David Fraser* for the Crown.

BINGHAM, J.A.: On 9th January, 1996, at the Clarendon Circuit Court held at May Pen, the appellant was convicted for carnal abuse of a girl under the age of twelve years. He was sentenced to imprisonment for five years at hard labour.

He now appeals against his conviction by leave of a single judge.

On 7th November, having heard the arguments of counsel, we reserved our decision. What now follows is our decision and the reasons therefor.

The facts, for reasons which will appear later, may be briefly summarised as follows: On 2nd January, 1995, the complainant, a young girl aged nine years, was in the daylight hours sent by her mother on an errand to purchase groceries at a shop in the district where they lived. On her return journey and while walking by the appellant's home, he being their neighbour, she was held by him and forcibly dragged into his house to a room where she was sexually assaulted. Medical evidence at the trial confirmed that sexual intercourse had taken place.