IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P079/1998

BETWEEN	DWIGHT PHILLIPS	1st PLAINTIFF
A N D	DWIGHT PHILLIPS & DOROTHY ROBINSON (TRADING AS SHAVON'S LOUNGE	2nd PLAINTIFF
A N D	LIONEL SCOTT	1st DEFENDANT
A N D	L. A. SCOTT ENGINEERING & CONSTRUCTION LIMITED	2nd DEFENDANT

Miss C. Davis instructed by
Davis, Bennett & Beecher-Bravo
for Plaintiff.

Miss T. Small instructed by
Kelly McLean for Defendant.

Heard: 2nd, 3rd and 10th July, 1998.

HARRIS, J.

This is an application by the plaintiff for an injunction. By an amended summons issued on the 29th June, 1998 the following reliefs were sought:-

1. The defendants their servants or agents, by themselves, or in conjunction with each other, be restrained from renting to any person or persons other than the 2nd Plaintiff the part of premises and grounds at 2 Mannings Hill Road, Kingston 8 leased to the said Shavon's Lounge on or about July 1997 and hitherto occupied by them, being 3 rooms and the section of the front lawn not used for parking and shared use for parking of the other section of the front lawn, until the trial of the matter herein.

2. The Defendants, their servants or agents by themselves or in conjunction with each other, be restrained from operating or permitting to operate on premises known as 2 Mannings Hill Road, Kingston 8 in the parish of St. Andrew, a bar and entertainment business known or to be known as Flex or any other entertainment business except the Plaintiffs' business, until the trial of the matter herein.

3. That the Applicant gives the usual undertaking as to damages.

The claim of the plaintiffs against the defendants was couched in the following terms:-

> The Plaintiffs' claim against the Defendants arises out of the Defendants' breach of contract on/or breach of covenant of quiet enjoyment on/or about 1998 relating to the sale of a business known as Shavon Lounge and the Plaintiffs rental of premises known as 2 Mannings Hill Road, Kingston 8 in the parish of Saint Andrew. And the Plaintiffs claim against the Defendants
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> 1. Damages
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> 2. Interest
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> 3. AN INJUNCTION that the Defendants, their servants or agents, by themselves or in conjunction with each other, be restrained from leasing to any person or persons other than Shavon Lounge the part of premises and grounds at 2 Mannings Hill Road, Kingston 8 leased to the said Shavon Lounge on or about July 1997 and currently occupied by them for a period of 10 days from the date hereof.

4. An injunction that the Defendants, their servants or agents by themselves or in conjunction with each other, be restrained from operating or permitting to operate on premises known as 2 Mannings Hill Road, Kingston 8 in the parish of St. Andrew, a business known or to be known as Flex or any other entertainment business except Shavon Lounge for a period of 10 days from the date hereof.

5. Further or other relief.

The properties forming the subject matter of the action are a business known as Shavon!s Lounge and part of premises known as 2 Mannings Hill Road in st. Andrew. The business which was registered in October 1997 is owned by the first plaintiff and Dorothy Robinson who had previously been a partner in that business with the first defendant. 2 Mannings Hill Road is owned by the first defendant.

It was the averment of the first plaintiff that in or about January 1997 the first defendant offered to sell to him, his 50% shares in the business Shavon's Lounge, falsely representing to him that the business was a profitable concern. The agreed sale price was $400,000 payable by instalments, the last of which he paid in June 1997 and was thereupon given possession of the business.

Before the commencement of the business it was agreed that the plaintiffs would pay a rental of $9,000.00 monthly which would remain unchanged for 6 months. The 1st defendant reneged on the agreement and increased rental to $18,000.00 three weeks after final deposit on purchase money paid. After protestations by the plaintiffs, the rental was reduced to $15,000.00.

He further statedthat in January 1998 the 1st defendant served on the plaintiffs a notice to quit for non payment

of rent notwithstanding they were not in arrears of rental. In that same month one Mr. Vernon Clarke approached the plaintiffs seeking a sub-lease of the business. He was directed to the 1st defendant.

He continued by stating that in March 1988 he observed the construction of a bar, a jerk pit and a screen to show movies on part of the grounds occupied by Shavon's Lounge. Tables were removed from that outdoor section which formed the most popular area of the business and the parking area which was previously used by the customers was no longer accessible. Mr. Clarke and the 1st defendant informed them that they intended on the 1st May, 1998 to open a new business called "Flex."

Dorothy Robinson stated that the business was started in 1992 and part of the lawn was occupied as part of the demised area. Meetings of Kiwanis were held in a room on the premises previously occupied by a business called Jam Cuisine and after the meetings the Kiwanians would patronize Shavon's Lounge.

She further reported that there was no agreement to pay increased rent and she had frequently objected to the construction that was done on the lawn area.

The 1st defendant Lionel Scott reported that in 1992 Dorothy Robinson became an equal partner with him in the operation of a bar under the name of Shavon's Lounge. This facility occupied 3 rooms and shared bathroom with a restaurant in the building called Jam Cuisine, which offered food, drinks and alcholic beverages for sale.

Miss Robinson was a paid manager of the business. In 1996 he became aware that the creditors were not being paid and he told her he wished to sell his share of the business. She introduced the first plaintiff as being interested in purchasing his share. A sale price of $600,000 was agreed but $400,000 was paid over a 6 month period, at which time

he delivered up possession to the plaintiffs.

He further averred that it was he who had installed tables and chairs on the lawn to accommodate Kiwanian meetings. However, Shavon Lounge's guests would from time to time be allowed to use the facilities when not used by him, although, this area was not included in the space rented by Shavon's Lounge.

In determining whether an injunction ought to be grated, cognizance must be taken of the well known principles pronounced in **American Ceyanamid Co. v. Ethicon Ltd. (1975) 1 ALL ER 504** wherein I must first consider whether there is a serious question to be tried. The plaintiffs are contending that the area of their tenancy includes three rooms, shared bathroom and the lawn adjacent threto. This the 1st defendant has denied. He declared that the grounds are excluded from their tenancy. The extent of the area rented to the plaintiff raises a serious question of dispute which ought to be resolved at a trial.

Although there is a serious question to be determined, it is also necessary to consider whether the plaintiffs could be adequately be compensated in damages should they succeed at the trial. The claim relates to breach of contract with respect to the sale of Shavon's Lounge and the rental of part of the premises from which the busines's is operated and also to a breach of quiet enjoyment. The question therefore arises as to whether any damages to which the plaintiffs would be entitled, if successful, would be quantifiable. Losses such as the value of the plaintiff's shares in Shavon's Lounge and their additional investments are easily ascertainable. Similarly, their loss of profits would be calculabe. The plaintiffs are under a duty by law to keep record of accounts from which they can obtain information relevant to profits and loss. Further, Miss Robinson had been a shareholder and a managerof the business since 1992. She would have been privy to all information relative to its financial status.

At time of purchase books of accounts were in existence.

Miss Davis urged that damages would be an inappropriate remedy as there would be loss of business reputation by the introduction of the new business called 'Flex." She also submitted that damage for disruption of the business would be very difficult to assess. To support her submission she relied on the case of **Merchant-Adventurers Ltd. v McGraw and co. Ltd. (1/a EMESS LIGHTING) 1975 CH 242.**

This case relates to an infringment of a copyright resulting from the defendant's reproduction and sale of electric fittings identical to those specified in drawing by the plaintiffs who had paid the legal owner to make the drawings. In granting the injunction, Graham J asserted:-

> **"It would be not be right to allow the defendants, pending trial to build up a business in these fittings and inevitably to some extent disrupt the established business of the plaintiffs, such disruption being a matter which is extremely difficult to quantify in damages."**

The foregoing case must be distinguished from the present one. In **Merchant-Adventurers Ltd. v. McGraw and Co. Ltd. (t/a EMESS LIGHTING)** the plaintiffs were owners in equity of copyright in drawings which were used by the defendants. In the circumstance of that case, the infringement of the copyright would lead to some amount of disruption of the plaintiff's business resulting in damages which would be difficult if not impossible to establish with certainty.

In the present case the plaintiffs will, in my opinion, encounter great difficulty in proving that it had an exclusive right to operate the type of business it now conducts on the premises. There is no disclosure by way of the evidence which demonstrates that there was an express or even implied agreement between the parties that the 1st defendant would not operate, or permit the operation of any competing business. Interestingly, evidence exists to show that a somewhat similar business Jam

Cuisine, offering food and alcoholic beverages had been in operation simultaneously with Shavon's Lounge on the premises.

Miss Davis further urged that this matter also relates to quiet enjoyment of property and it would be exceedingly difficult to assess damages in this regard. She cited the case of **Inglis v Graham S.C.C.A. 84/89.** In this case the plaintiff and defendant were lessee and lessors respectively, as well as management partners of certain villas. The defendant purported to have exercised his right of re-entry pursuant to the plaintiff's failure to pay rent. The court, taking into account the fact of the defendant's acknowledgement of liability as a lessor to the plaintiff, found that there was a distinct probability that the re-entry under the forfeiture clause in the lease was unlawful and granted the injunction.

Paragraph 9 of the affidavit of the 1st plaintiff sworn on the 30th April, 1998 reads:-

> :9. - On or about January 1998 Mr. Vernon Clarke approached Miss Robinson who wished to sublease the business Shavon Lounge from myself and Miss Robinson. They however wished a larger area of the grounds than that occupied by us. I advised them that they would have to discuss this with Mr. Scott. They said that that we could not sublease the property to them. In the circumstances discussions between myself and Mr. Clarke proceeded no further."

Here the 1st plaintiff reveals that Mr. Clarke was desirous of renting the business and an area of the grounds. He approached one of the plaintiffs about a sub-lease. She referred him to the 1st defendant. There is no evidence that they were not allowed to sublet the area occupied by them without permission of the 1st defendant. If the area of the grounds Mr. Clarke required formed a part of the leased premises, it would not have been necessary for them to have made the referral.

It is therefore highly probable that the area from which the new business known as 'Flex' was due to commence operation was on the grounds, which, was not under the control of Shavon's Lounge but under the control of the 1st defendant.

In my opinion the plaintiffs will unlikely be able to establish that their right to enjoyment of that part of the property has been infringed.

I will now consider whether the balance of convenience favours the grant of an injunction. The plaintiffs declare that they have been clothe with the exclusive right to occupy a certain area of the grounds by virtue of the lease of that part of the premises to them. This has been refuted by the 1st defendant.

There is no written agreement for the lease. The duration of the tenancy is not determinable from my persual of the records. However, the affidavit of the 1st defendant indicates that there was an agreement for an annual increase of the rent. It is therefore reasonable to assume that the tenancy was yearly. The lease commenced on or about July 1997. The current term would therefore expire sometime during the course of this month. There may have been a renewal or perhaps an impending renewal of the lease for a further year.

A trial of this action is not likely to take place for at least another three years. The grant of injunctive relief to the plaintiff would create major risk of hardship on the part of the defendants, as, the imposition of a restraining order would deprive the 2nd defendant of his right to deal with or utilise his property as he deems fit. Any loss sustained by him, were he to be successful at the trial, would either not be quantifiable or difficult to ascertain. Miss Davis had submitted that any loss which he might suffer is estimable, as loss would be the rental he would have lost between now and the time of trial. In my opinion his loss would not be

confined to rental which he could have obtained but did not, but would include any loss consequent on his not been able to make use of the property other than for rental, or to conduct business.

The summons is dismissed with costs to the defendants.

Leave to appeal granted.