IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV02600

BETWEEN	**Donald Rose Silvera**	**1st Claimant**
AND	**Joan Patricia Lindsay**	**2nd Claimant**
AND	**Alphanso Curtis**	**Defendant**

Whether Agreement was Joint Venture or Tenancy – Whether Defendant entitled to Compensation for Infrastructural Works, Buildings, Loss of Income and Profit

Seon Hanson instructed by Abendema & Abendema for the 1st Claimant.

William Hines instructed by Robinson, Phillips & Whitehorne for the Defendant

Heard: 13th, 14th, 15th, 16th & 17th November, 2017, 1st and 27th December, 2017

BROWN, Y J. AG.

Introduction

1. The claimants' claim for recovery of possession of a portion of land known as The Sheerness and Markham Hall Estate situate in the parish of St. Mary, was settled on February 1, 2016, and therefore attracts no further attention.

2. It is the counterclaim of the defendant Alphanso Curtis, which requires the court's intervention. In this counterclaim the defendant alleged that between 1991 and 2010 he was engaged in a joint venture with the 1st claimant Donald Rose Silvera, wherein the latter provided the site for the business while he (defendant)

was responsible for the infrastructural development and operation of this business. The business was a bar and restaurant.

3. According to Mr. Curtis, his engagement in the infrastructural development of the claimants' property for business, spanned the period from 1991 to 2001.

4. The subject property 'The Sheerness and Markham Hall Estate' housed a temporary drinking place which later evolved into a bar and restaurant in 2003 and 2004 respectively.

5. These developments Mr. Curtis said, were carried out independent of the 1st claimant but with his knowledge and consent. He stated that this was an oral agreement between himself and Mr. Silvera whom he called his friend.

6. In 2010, Mr. Curtis said antagonism crept into the joint venture relationship he shared with Mr. Silvera and severed that tie. It also led to Mr Curtis' eviction from the property.

7. It is this series of events which propelled the defendant to file a counterclaim seeking as follows:

    1). An order directing that the 1st claimant pays the defendant for the cost of all infrastructural works and buildings undertaken by the defendant on the land since 1991, such costs amount to $6,275,000.

    2). An order directing that the 1st claimant pays the defendant an amount for business profit and goodwill.

    3. An order that the 1st claimant pays costs, attorney's fees, interest.

The Defence

8. This counterclaim sparked a very lengthy reply and defence from the 1st claimant. Yet, only the most salient points raised by him will be highlighted.

9. The 1st claimant averred that the land in question which was formerly part of a cow pasture, bounded by the sea, a river and the main road, was leased to the defendant for the purpose of conducting business as a cook shop and bar.

10. Further, the 1st claimant stated that having regard to the fact that the defendant was to carry out the required construction at his own expense, it was agreed that no rent would be charged for the first two years and thereafter the rent would be agreed between the parties. He maintained that at no time did he enter into any joint venture agreement with the defendant in relation to the land or at all. Reaffirming that at all times, the land was leased to the defendant, the 1st claimant stated that he and the '2nd claimant' were not required to make any contribution to the defendant's efforts.

11. The 1st claimant stated that the structures on the land, except one, were comprised of sticks and tin roof. It was upon his return to Jamaica on a visit, that he observed the concrete structures and protested to the defendant who explained that he needed the structure for storage supplies. He added that the structures that were in place in 2001- "are the structures that are in place today save that in recent times, the defendant has been carrying out construction on the premises without the claimant's consent..."

12. In denying any knowledge of the defendant's development plans in relation to the subject property, the 1st claimant stated that he was aware that the land was to be used for the operation of a cook shop and bar, but he was unaware of the defendant's present and future development plans.

The Defendant's Case

13. The defendant's witness statement filed on November 11, 2013 was permitted to stand as his evidence-in-chief. Therein, he asserted that in or around 1991, the 1st claimant approached him with a business idea to develop the approximately one acre of rugged seafront land at Robins Bay part of Sheerness in the parish of St. Mary, which belongs to him (1st claimant).

14. This he said, gave rise to an oral agreement between himself and the 1st claimant for a joint venture to be pursued wherein the 1st claimant would provide the said land and he (defendant) would execute all infrastructural development which would transform the land to one suitable for the operation of a bar and restaurant. He maintained that between 1991 and 2001, he had expended all his savings and earnings to transform the said parcel of rugged seafront land to a "well landscaped premises as a place of entertainment."

15. The transformation, he stated, was often interrupted by the occurrence of natural disasters due to the land's close proximity to the Tyrell River. Nonetheless, the defendant said he persevered without any tangible contributions from the 1st claimant. Encouragement to continue with the development was the 1st claimant's sole offering to the joint venture, the defendant averred.

16. He said that in 2001, he had a temporary drinking place on the subject premises and engaged the 1st claimant in discussions to construct a bar and restaurant as well as further infrastructure - "to make the premises be a premier entertainment spot and an attractive place for customers to come for drinking and dining."

17. In reaffirming that the 1st claimant was aware of the present and future development plans, the defendant asserted that the 1st claimant upon his visits to the premises, praised him (defendant) for all the work he had done and was doing. He mentioned the 1st claimant said to him: "Phanso you know bout the bar business, do you thing. I have my equipment at bauxite to deal with." This, the defendant declared, led him to believe that the 1st claimant's contribution to

the business was the land, while his was to "put in the development to make the business a joint venture between both of (them)."

18. Furthermore, he stated that the 1st claimant had migrated around 2001 and upon his visit to the premises in 2003, only a bar was in operation. On the 1st claimant's subsequent visit in 2004, a restaurant was added to the business, and it was in full operation, the defendant asserted. The defendant stated that the business was now earning a stable income and prior to the 1st claimant's departure from Jamaica in 2004, he had said that he was desirous of having his share of money on a monthly basis, "but since it might be difficult for me (defendant) to find the money yearly he would accept his share so as to make it easier for me."

19. The business operated under the trade name Rolling Waves Beach, the defendant disclosed. It was the defendant's evidence that after the 1st claimant's departure from the island in 2004 he was approached by Jean Grant who advised him that the 1st claimant had sent her for the money that "Donald Rose Silvera and I spoke about." He testified that Beulah Baugh had given Joan Grant $6000 on the first occasion and the following month, she gave her $5,000. Thereafter, Miss Baugh gave Miss Grant $4000 monthly and after that, $6000.

20. The defendant stated that in or around 2005, he requested receipts for the money that Jean Grant was collecting and started issuing receipts for same. Those receipts, the defendant said, he had never seen and formed the view that they were - "merely to ensure that Jean Grant collected the money as discussed between Donald Rose Silvera and I."

21. He added that there had never been an agreement with the 1st claimant for him to pay rent for the premises and he was unaware that the receipts issued by Miss Grant to Miss Baugh had any mention of rent on them. According to the defendant, he had been under the impression that the receipts were merely to

signal that Miss Grant had collected the sums on a monthly basis, as part of the joint venture profit which was due to Mr. Silvera.

22. As such, the defendant asserted that he had never intended - "at any time, to be a tenant of Donald Rose Silvera, neither was the monies given to Jean Grant intended to be treated as rent, but to be treated as Donald Rose Silvera share of profit from the joint venture." He indicated that he had held no discussion with Miss Baugh pertaining to the details of the arrangements between himself and the 1st claimant regarding the sums collected by Miss Grant. Miss Grant had stopped collecting from Miss Baugh although, according to the defendant, he had given no instructions to the said Miss Baugh to discontinue those payments.

23. Antagonistic behaviour of the 1st claimant signalled that the two could no longer work together as business partners, the defendant asserted. Nevertheless, he said that the business was in its full operational mode at the time and he was now expecting to be compensated for all the time spent on the business over the years. He also had "expectation of future financial returns from the business; returns which would now benefit Donald Rose Silvera."

24. The defendant pointed out that during the 25 years of operating the business, he had ploughed back all profits in the said business to make it always a going concern and a suitable place to attract customers. Notably, inconsistencies were unveiled in the defendant's evidence upon cross-examination. For instance, he said between 1991 to 2004, he was not doing business on the property because he "just gwaan building cause is rough thing." He also stated that in 2003, he had finished building a bar and "put some things inside there."

25. This statement contradicted his earlier affirmation that in 2003, he was operating a bar on the premises. The defendant was asked whether he had started paying Mr. Silvera the 1st claimant a monthly sum for occupation of the premises. He responded that payment was commenced when the Silvera's sister died in November 2003. When confronted with the question as to whether he had

begun paying the money before the building of the place had started, the defendant departed from his earlier stance and said that he had paid no money at all. As regards the accounts for the business, the defendant stated that was never done due to the absence of funds.

26. This countered his testimony in chief that in 2004 when the 1st claimant visited the premises, the restaurant had been added and the business was realizing a stable income. It was at that time, he said, the 1st claimant's request for his share of the profit came to the fore. Despite the defendant's declaration of his unawareness that the receipts issued for money received on the 1st claimant's behalf, did not have 'rent' written on them, he reluctantly abandoned that position when one of the receipts and several stubs [Exhibit 1] were shown to him.

27. In his evidence-in-chief, the defendant affirmed that he has spent 22 years operating the business on the 1st claimant's premises. He said he started building in 1991 and the operation of the bar commenced in 2003 with the restaurant added in 2004. He also posited that in 2010 he secured partnership with the 1st claimant. Whether the defendant's start in business was from 1991 to 2010 or 2003 to 2010, the number of his years in operation of that business would fall short of 22 years.

28. To buttress his case, the defendant invited three (3) persons to give evidence. They were Miss Beula Baugh and the expert witnesses Miss Charmaine Madden and Mr. David Thwaites.

Evidence of Beula Baugh

29. Miss Baugh's witness statement was accepted as her evidence-in-chief. She testified that she was Mr. Curtis' spouse and the manager of 'Rolling Waves Beach.' In her concise evidence-in-chief, Miss Baugh stated that in or around 2004, she had been instructed by Mr. Curtis to give Miss Jean Grant certain sums of money whenever she visited the premises. She said that was based on an arrangement which the defendant said he had with Mr. Silvera. Miss Baugh

indicated that Miss Grant had given her receipts whenever she made payments, but she (Baugh) never "scrutinized the detail of the receipts" except to verify that sums she gave Miss Grant were correctly reflected on the receipts.

30. Upon close examination of these receipts in or around 2010, Miss Baugh stated that she noticed that they were written "for rent collected." She went on to say that she did not know the arrangement between Mr. Alphanso Curtis and Mr. Donald Rose Silvera for payments to Jean Grant. However, Mr. Curtis had told her that the business was owned by both himself and Mr. Silvera. On the first occasion, Miss Baugh said she gave Miss Grant $6000; the following month, $5000; then $4000 monthly, and thereafter $6000. In cross examination, Miss Baugh said she was in charge of the administrative affairs of the business and she had first given sums of money to Miss Grant in 2004. She indicated that she and Mr. Curtis were always doing the business together. Miss Baugh testified that after the land was cleared, they (Mr Curtis and Miss Baugh) built a little cookshop made out of wood. This was in 2004 or 2005.

31. She also stated that whenever she made payments to Miss Grant, she would be issued with receipts. This she said was between 2006 and 2010. Yet she had never looked at those receipts. Although the business was not registered, Miss Baugh indicated they filed income tax returns. They were never registered to pay GCT, she added. She said Miss Madden was the business' first accountant and she was hired in either 2001 or 2004. Whenever Mr. Silvera came to the location, Miss Baugh said he would "eat and drink" without paying and no payment was requested of him because "Curtis said they were in joint venture. They were partners."

32. Miss Baugh agreed that defendant had managed to remove all "his stuff" from the property upon his eviction. Among the things removed were fixtures and posts that were in the valuation and electrical wires, utensils and benches that were not in the valuation.

33. Stating that the bailiff did not prevent the defendant from taking down the gazebos, Miss Baugh explained that he (Curtis) did not take down the gazebos just the posts that were there because "there wasn't any covering." She also said the defendant took only one gazebo because they were not "valued". She denied any knowledge that the 1st claimant had registered an increase in rent in 2000. The business she stated, is now being operated at a new location under a different name.

Evidence of David Thwaites

34. The valuation report of Mr David Thwaites, a valuation surveyor, was admitted as his evidence-in-chief. He stated that Mr. Alphanso Curtis had given instructions for an appraisal to estimate the market value of built improvements on the land for the purpose of establishing price of settlement arbitration. An inspection of the property was done on June 1, 2016 and included measurements of the buildings and full inspection of the exterior and partial inspection of the interior component. According to Mr. Thwaites, his company was specifically instructed to value the built improvement only "as is" without taking into consideration the value of the land. He indicated that the certificate of title for the subject property are recorded at Volumes 1002, 1211 and Folios 74 and 705. At the date of valuation, Mr. Thwaites said the value of the built improvements were in the order of $3,500,000 (3.5m).

35. Now, the salient aspects of his evidence on cross-examination, will be featured. He was unable to confirm which of the two titles referred to in his report, related to the property operated by the defendant. Furthermore, he admitted that none of those titles were attached to his report, and that the reference to the surveyor's report contained in his valuation report was bereft of volume and folio numbers.

36. Mr. Thwaites also admitted that of the two titles referenced, he omitted to state who the owners were for either of them. This witness stated that the value used

for the valuation was the depreciation cost approach, which he described as a method of valuation where the cost of the building upon built improvement is established and depreciated for age and conditions to arrive at a "value opinion." Hence, the older the building and the worse the condition, the greater the depreciation.

37. Upon inspection, Mr. Thwaites testified that the structures were seen to be in a fair condition, which was less than good. He explained that the statement fair meant that it was the "usual normal wear and tear that would require some maintenance and cosmetic repairs." He indicated that the he had observed holes in the roofs of the gazebos, the bar and restaurant. In accepting the suggestion that a building which is not structurally sound would have a negative impact on the value, Mr. Thwaites advanced that in assessing value, the cost to repair the building would have to be looked at.

> "My level of expertise would tell me that it cost more to build a concrete structure than a wooden structure. We look at condition and life span of each building and depreciate accordingly," he posited.

Mr. Thwaites defined market value as the price that a willing buyer will pay a willing seller and stated that his valuation did not set out the market value of the subject property. Additionally, he pointed out that he was unable to estimate the market value of the items stated; for example, the bar/restaurant, gazebos, as they would require time to develop an entirely different report.

38. He further indicated that he had relied on the depreciated cost method of valuation as that was the appropriate method under the circumstances. He noted that the structures on the property had no independent market value. In continuing his oral evidence, this witness stated that although he had outlined each structure on the property under the heading "facilities," he had omitted to speak to the condition of those facilities. Instead, he made a general statement in the report. He acknowledged that he did not state the 'useful life' of the gazebos and other structures because 'useful life' generally speaks to those

structures that can be moved. All the buildings including the gazebos, he said, could be easily dismantled.

39. According to this witness, the quality of the construction of the concrete structures "were not the best." This he explained, meant that the concrete framing and blocks were not of the best workmanship and so they were priced accordingly. The site value was not factored in the assessment of the build improvements because that valuation was "as is" and never represented market value, Mr. Thwaites offered.

Evidence of Charmaine Madden

40. An expert witness, Miss Charmaine Madden's Accounting Report – excluding the document submitted by Lanselot Henry – was allowed to stand as her evidence-in-chief. Miss Madden is a chartered accountant who stated that she had prepared financial statements for Alphanso Curtis t/a Rolling Waves Beach, Bar and Restaurant for the years 2010 to 2013. This report, according to her, had served to ascertain the profits for the years aforementioned, as well as to provide a valuation for the business operated by the defendant.

41. Miss Madden indicated that the reports were done in accordance with accounting standards. She asserted that records were incomplete and so bills and receipts submitted by the business operator were used to compute the profits based on expected results using ratios. And now, only the main features of Miss Madden's evidence in cross-examination will be highlighted. She mentioned that due to the insufficiency of information, an audited report was not done. Instead, a financial statement which was "less in scope" was prepared. She also went on to say that an unaudited report was less reliable that the audited version.

42. Throughout her oral testimony, Miss Madden referred to the defendant's operation as a business and even defined it as a "sole trader with Alphanso Curtis." She admitted that she had erred in using the term partner's drawings in

her report as that term was not applicable to a sole partnership. Miss Madden disclosed the net profits of the business from 2010 to 2013 and agreed that during those years, the profits were constantly depreciating. The constantly declining profits would decrease the goodwill, she noted, adding that the purpose of goodwill was to ascertain the value of the business in relation to expected future income. This witness acknowledged that in her preparations, she had looked at income tax returns but did not include those in the report submitted. In order to obtain an independent verification of the income of the business, Miss Madden said she had used the receipts of all the years as well as some of the bank statements. Nonetheless, those receipts were not exhibited in her report.

43. For the years 2010 to 2013, the business made an income in excess of 3 million dollars, Miss Madden revealed, and as such, was liable to pay GCT. She added that the GCT returns were among the most reliable of the methods employed to verify income. Miss Madden also stated that the business had employed other accountants prior to her engagement with them in 2014. She disclosed that she had seen accountants' reports for the years 2010 and 2014 and admitted that she had used assumptions, estimates and explanations forwarded by the proprietors to prepare the Financial Statement for the business.

44. She further indicated that the Financial Statement she presented needed various amendments. For instance, the leasehold improvement had been omitted from the actual financial statements. Also, the rate of depreciation that had been used for fixtures and furniture in 2010 was 20%, yet it was reflected in the financial statement as 10%. Neither did she mention the depreciation of the motor vehicle in the 2011 Financial Statement. Notwithstanding her admissions regarding the omissions, Miss Madden concluded in re-examination, that the amendments were immaterial.

The 1st Claimant's Case

45. I now turn to, the 1st claimant's case starting with the evidence of Mr. Donald Rose Silvera, the said 1st claimant. He too sought to rely on three witnesses to support his stance, namely - Miss Jean Grant and the expert witnesses Mr. George Langford, Mr. Andrew Jackson and Miss Donna-Marie Thompson.

1st Claimant's Evidence

46. The 1st claimant's witness statement stood as his evidence in chief. He stated that the subject property, owned by himself and his sister is registered at Volume 1002 Folio 74 in the Register Book of Titles. This property he advanced is about 650 acres and about half (½) an acre to an acre and had been occupied by the defendant as a result of a rental agreement in 1996. At the time of the agreement, the 1st claimant said the defendant had indicated the desire to sell fish and liquor on the property. He said the defendant told him that he would have had to put up buildings for his operation and had requested time to do that as well as to recover his costs. To that end, the defendant was given a "grace period" of two years, the 1st claimant stated.

47. According to the 1st claimant, when the parties initially spoke, there was no price fixed for rent as they had agreed that the defendant would build temporary structures on the portion of the land rented to him. After two years had elapsed, the defendant would commence payment of rent, and the amount would be set at that time. Whereas the parties settled on a monthly tenancy, the 1st claimant stated that the period of the tenancy was not fixed when the parties spoke in the beginning.

48. Mr. Silvera, the 1st Claimant indicated that the payment of rent then commenced in the year 2000 at the rate of $3000 monthly, notwithstanding the moratorium period. After 6 months, the rental payments were interrupted by a storm which damaged the property. Therefore the 1st claimant suspended the rental payments for 6 months to allow the defendant to recover from the "storm

damage." The 1st claimant went on to say that the defendant had paid the monthly sum of $3000 for a few years, then it was increased to $4000 and later to $6,000. He maintained that the defendant was told and had agreed that no permanent structures were to be constructed on the property. At the end of his tenancy, the defendant was entitled to remove the structures he had put on the land, the 1st claimant affirmed. He added that there was no agreement for him (the 1st claimant) to take possession of the defendant's structures or to pay for them.

49. The 1st claimant stated that he had no joint venture with the defendant and neither did he (defendant) advised him of his income nor showed him his books. Under cross-examination, the 1st claimant stated that he knew the defendant, though not very well. He denied putting the defendant in occupation of his land in 1991 but said that was done in 1993 or 1994. At that time, the 1st claimant said the rental sum was $2000 per month and payment began in 1996, after the 2 year moratorium had expired.

50. In relation to the structures on the property, the 1st claimant said upon his visit to the island in 1999 and 2000, there "wasn't anything out of order." Yet when he returned in 2001, the defendant had constructed "two pieces of building with block and steel." These were a portion of the bar and other two rooms by the river. Those two buildings, he asserted, were constructed "behind my back, between 2000 and 2001." Upon seeing them, the 1st claimant said he reminded the defendant that that was not the agreement. However, the defendant replied that the 1st claimant should not worry about it and that he needed something more secure because the bamboo structure had been broken into.

Evidence of Jean Grant

51. Jean Grant's witness statement was accepted as her evidence-in-chief. She stated that, acting upon the instruction of the 1st claimant, she would have collected the rent for the property from either the defendant or Miss Baugh. Miss Grant added that in the year 2000 she received the rent from the defendant. In

the majority of cases, Miss Grant stated that she had carried the receipt book and had written the receipt on spot. The defendant, she said, always told her to keep the receipts, as he did not need them. Then in 2005/2006, Miss Grant stated that the defendant came to retrieve the receipts and indicated that they were needed for tax purposes. Hence, she delivered those that she had found from the year 2000. "From 2005/2006 I would always give a receipt at the same time I collected rent. If I never took the receipt book, I would give him about a week after. Sometimes when I went, they (Curtis and Baugh] would not have the money to pay the rent so I would go away and they would call me when they had it for me to come and collect it," Miss Grant disclosed. There were times, she stated, when she gave the receipts directly to the defendant, and the last collection of rent was in August 2010.

52. In cross-examination, Miss Grant said that she had started to collect the rent in 2000 and that had been her first visit to the property. Occasionally, according to Miss Grant, the defendant did not pay any rent and "begged for time to recover due to flood rains which damaged the place." Commenting on the structures on the property, Miss Grant testified that when she visited in 2000 she saw "some stick things like when you make a hut." These, she said, have remained unchanged from then until now.

53. In accounting for the missing receipts for the period 2000 to 2005, Miss Grant said that those were lost in the flood waters. She also testified that she was not the only collector of rent since said responsibility was shared by Mr. Vincent Edwards.

Evidence of Andrew Jackson

54. Mr. Andrew Jackson, a civil engineer, prepared a report for the subject property titled "Civil/Structural Engineering Inspection Report for Fanso Beach, Restaurant and Bar." This stood as his evidence-in-chief. Mr. Jackson posited what he

described as principal issues relating to the structures on the property. I will condense them as follows:

1. The building structure was in breach of the National Building Code of Jamaica.

2. The floor slabs of the circular gazebos were constructed in breach of the International Building Code (2009).

3. The timber used throughout the property as structural members was also in breach of the National Building Code of Jamaica.

4. Many of the metal roof sheeting on site exhibited advanced corrosion and as such lost significant strength. Many of them also had holes in some areas.

5. The fastener screws and nails for the timber members and the sheeting and cladding had advanced corrosion and therefore lost the inherent strengths of the fastener and the connection.

6. There is the appearance of significant cracking in the beam of the storage area which demonstrated that the structure was securely stressed. The cracks however have been rendered out.

55. Mr. Jackson explained in cross-examination that advanced age of corrosion meant that the reinforcement steel is heavily rusted and rotten and had loss a significant amount of its inherent strength. He also asserted that if the building was below minimum specification of the building code, the building would be deemed in breach and hence not structurally sound. In concluding, Mr. Jackson advanced that based on his inspection, the structures all exhibited structural deficiencies which would make them likely to undergo severe damage in the event of a moderate significant act of nature such as earthquake and hurricanes.

Evidence of Gordon Langford

56. A chartered valuation surveyor, Mr. Gordon Langford's valuation report stood as his evidence-in-chief. Only the significant aspects of his report will be mentioned. He described the structures on the land as the type which could be dismantled and removed except the concrete plinths/foundations and concrete buildings.

Therefore, he posited that the main method to arrive at a value of those structures was to examine the current replacement cost, and depreciate this cost to a level to reflect the utility value of the structure.

57. He continued to explain that the value to be assessed was the amount that another party would pay if they were to take over the operation of the beach facility. This he said, took into account the use value of the buildings, which was the market value of the buildings. Mr. Langford gave the market value of the buildings on the property as $430,000. He further advanced that cost to rebuild all of the structures, (that is the replacement cost) would have amounted to $2,672,000.00.

58. Under cross-examination, Mr. Langford said that the replacement cost that he submitted, did not take into account the value of the land or site improvement because he did not observe any site improvement on the land. He also said the sum of $2,672,000.00 represented the replacement cost of those items that were left on the premises. It was suggested to Mr. Langford that he had erred in his report when he omitted to include a figure for site improvement. He responded that there was negative improvement and "when I inspected, the place was a mess."

Evidence of Donna-Marie Thompson

59. The report of Donna Marie Thompson, a chartered accountant was allowed to stand as her evidence in chief. Among other things, she found that there were discrepancies between the sales reported by the accounting firm Aelous F Madden and Company (AFM) in their financial statements prepared by Charmaine Madden, and that reflected in the defendant's records. She stated that the defendant's record showed that he had earned in excess of $3,000,000.00 and should have been registered under GCT Laws of 1991 (Section 27 (1) of GCT Act) and made his monthly returns. The defendant, she said, did not keep records of stock figure and tended to buy according to sales, yet the accounts from AFM showed figures for stock.

60. The defendant claimed that he did not operate a payroll, however AFM listed wages in Profit and Loss Statement which were paid to gardener and groundsman. Miss Thompson disclosed AFM's failure to conduct an audit and contended that; "reliable records would constitute financial statements that were audited... - another item would be historic records. The absence of historic records gave rise to many estimates being used, hence the non-existence of reliability."

The issues

61. Based on the evidence unveiled, the court is now left to resolve the following issues:

1) Whether the agreement between the 1st claimant and the defendant was a joint venture, a partnership or tenancy.
2) Whether the defendant is entitled to compensation for the cost of the infrastructural works and buildings which were constructed on the 1st claimants land.
3) Whether the defendant is to be compensated by the 1st claimant for loss of income and profit.

62. **The Law and Analysis**

It is imperative to this discourse, to commence by explaining the elements of joint venture as this is what has given birth to the instant case. The concept of partnership will also be visited.

63. **The Encyclopaedia of Terms and Precedents 5th Edition, Volume 19,** in the Preliminary note posits that:

> **"A joint venture may be defined ... as any arrangement whereby two or more parties cooperate in order to run a business or to achieve a commercial objective."**

At paragraph 31, it states that in a joint venture it is important to establish the nature of the business or the project which the parties have in mind, including the type of activity, its geographical scope, and the extent to which any party is committed to it to the exclusion of other similar activities.

> Paragraph 3.2 states –
>
> "It will have to be decided in what proportions the parties will share profits and losses..."
>
> Paragraph 3.3. posits:
>
> Provisions must be made for the joint venture to be adequately financed both at the initial stage and in the future...".
>
> In relation to partnership, the Partnership Act of 1890 S1 defines it thus:
>
> "The relationship which subsists between persons carrying on a business in common with a view of profit."

The esteemed authors of Company Law, 3rd Edition, John Lowry and Alan Dignam at page 4 posit that:

> "A partnership can come about by oral agreement, it can be inferred by conduct or it can be formal written agreement specifying the terms and conditions of the partnership. There is no formal process of becoming partners – if you believe as partners the law will deem you are partners, even if you have no idea what a partnership is."

Based on the foregoing it would present a struggle to ignore the similarities between a partnership and a joint venture.

64. Irrespective of whether the joint venture or partnership remained in the oral form, a discussion on profit sharing and loss would have had to take centre stage because in every business the primary goal is to make profit. The defendant in the case at bar insisted that there was a joint venture agreement between himself

and the 1st claimant. He sometimes, in his evidence, resorted to referring to the relationship as a partnership. Hence, the earlier review of both concepts.

65. Counsel for the defendant, Mr. Hines vigorously advanced his position (defendant's) and in his oral and written arguments, asserted that the arrangement between parties commenced as a joint venture and subsequently the 1st claimant transformed the nature of the agreement to a tenancy. Mounting a robust opposition to that view, the 1st claimant's counsel Mr. Hanson stated that the defendant's evidence was devoid of all the elements which constituted a joint venture. And neither did the defendant prove the existence of a partnership because the business was not registered as a required by law under the Registration of Business Names Act and the Annual Consumption Tax Act, Mr. Hanson contended.

66. Were those observed, Mr. Hanson posited, then the court would have been placed in a position to determine whether the agreement between the parties was a joint venture. Additionally, the intention of the parties could have been inferred. Notwithstanding the positions of each counsel, the evidence of the defendant and the 1st claimant provided sufficient insight as to what agreement was reached between them regarding their contractual relationship. Notably there was no discussion between the two in relation to how profits would be shared and how losses would be treated.

67. In fact, the defendant did not disclose at any juncture in his evidence that he had spoken with the 1st claimant about the profit which the business had enjoyed, albeit for that short period, between 2010 to 2012. Neither was the 1st claimant informed of the loss which plagued this business for most of its 'life,' based on the defendant's evidence and that of his manager and accountant. Undoubtedly, profit and loss information is a feature which is as pertinent to joint venture operations as it is to a partnership.

68. Another important element in any joint venture or partnership is that of management. Who will undertake the day-to-day operation of the business? It is evident in the instant case that this duty was being executed by Miss Baugh, who also described herself as a partner in the business. There is also absolute clarity in the defendant's evidence as well as Miss Baugh's that the 1st claimant had no input whatsoever in the decision making of the bar and restaurant; and those collectively were the business. Even the selection of Miss Baugh as administrator and partner, excluded the 1st claimant's participation. The overall tone in the defendant's case defeats any notion that the operation was either a partnership or a joint venture. Instead, the evidence does suggest the existence of a sole trader enterprise. This view was enlivened by the defendant's expert accountant Miss Madden who unequivocally described the business as "a sole trader with Alphanso Curtis."

The foregoing begs the question; what then was the relationship between the 1st Claimant and the Defendant?

69. Accordingly to the 1st claimant, it was landlord and tenant. To resist that position would be tantamount in my view, to scandalizing the evidence presented especially the physical evidence of receipts with the bold inscription "for one month rent." In the initial stages of the tenancy when the moratorium was granted, I will venture to say that the defendant was enjoying occupancy of the property as a tenant at will. This phenomenon was highlighted in '*Elements of Land Laws, 3rd Edition* by erudite authors Kevin Gray and Susan Francis Gray, where at pg 411 they say a tenancy at will –

> "...arises where with the consent of the owner, a person enjoys occupation of land for an indefinite period in circumstances where either party may at any time terminate the arrangement at will i.e. on demand...."

They want on to state at page. 412.

> "A tenancy at will normally confers merely some form of intermediate status, and is readily (although not always)

> converted into an estate in land by way of implied periodic tenancy..."

Based on the above stated, in the instant case, one can infer that the relationship between the parties evolved from a tenancy at will to a periodic tenancy.

70. I must now direct my attention to the issue as to whether the defendant is entitled to compensation for the infrastructural works and buildings on land. Before such a determination can be made though, it is prudent to examine whether the structures erected on the land can be classified as chattel or fixtures. The maxim *"quicquid planatur solo solo cedit*," which means whatever is attached to the land becomes part of it, is a principle which relates to fixtures.

> "Fixtures are those material things which are physically attached to land so that they become part of the realty and the property of the landowner."

So stated the esteemed author Gilbert Kodilihye in **Commonwealth Caribbean Property Law, 2nd Edition (pg. 6)**

71. He also posited that: "A chattel ... is a physical object which never becomes attached to the land even though placed in some close relation with it ... There are two tests for determining whether an object is a fixture or a chattel; (a). The degree of annexation; and (b) the purpose of annexation." Seeming to have scrutinized the distinction between a fixture and a chattel, Counsel Mr. Hanson proffered that all the buildings erected by the defendant would qualify as fixtures, as both the degree of annexation and the purpose of annexation would support that finding.

72. This being so, Mr. Hanson said the attention must be directed at how the said fixtures ought to be treated upon termination of the tenancy in relation to the claim for compensation. To advance his view, he relied on the cases ***Aston Lewis v Victor McLean (1982) 19 JLR 56; McCollin v Carter (1974) 26 WIR 1,***

and New Zealand Government Property Corporation v HH& A Ltd. [1982] QB 1145 at 1151.

73. Mr. Hanson argued that the defendant was not entitled to compensation for the cost of fixtures because he had obtained instructions not to build any permanent structures and neither did he receive "any promise of assurance of the land on the faith of which he erected the buildings." He also submitted that Section 25 (7) of the Rent Restriction Act was not applicable to the case at bar, as the order for compensation would have had to be made simultaneously with the order for possession as provided by the said section.

74. Conversely, Mr. Hines maintained that the buildings were erected with the knowledge and consent of the "claimant and should therefore attract compensation." He relied also on **McCollin and Carter (supra).** In a nutshell the plaintiff in that case alleged that the defendant was a tenant and that the tenancy was determined by a notice. The defendant's view however was that he was allowed to enter the plaintiff's premises by an oral agreement for sale. The defendant subsequently expended monies to improve the property with the knowledge and acquiescence of the plaintiff. One of the principles enunciated in that case is that:

> ***"Where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance of promise that that part of the land will be made over to the person so expending his money, a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation: and when, for example, for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended."***

75. In his submission, Mr. Hanson opined that that principle was not applicable to the instant case as there was never any promise made to the defendant regarding

the land except to build temporary structures to facilitate the operation of his business.

76. I find resonance with Mr. Hanson's view that the defendant had received no promise of assurance in relation to the land. However, on the issue of acquiescence, I must embrace Mr. Hines' position. Why do I say so? Despite the 1st claimant's assertion that he had told the defendant that he should confine his building to temporary structures, his reaction upon seeing the concrete structures was not grounded in strong objection. In fact, he resigned against taking any definitive action. For instance, when he visited the land in 2001 and saw the 2 concrete buildings, he only told the defendant that "that was not the agreement."

77. He stated that the defendant's response was that he needed something more secure and the 1st claimant should not worry about it. Consequent upon the foregoing, the 1st claimant seemed to have accepted the defendant's posture having not engaged him (defendant) in any further discussions on the matter. This, in my view, would be tantamount to acquiescence albeit after the fact.

78. Despite the 1st claimant's acquiescence, the question of compensation is still not settled. Augmenting his argument for compensation for the defendant, Mr. Hines described the property under review, as a "controlled promises" and placed reliance on Section 25(7) of the Rent Restriction Act. That provision states:

> "... for granting an order or giving judgment under this section for possession or ejectment in respect of building land, the court may require the landlord to pay to the tenant such sum as appears to the court to be sufficient as compensation for damage or loss sustained by the tenant, and effect shall not be given to such order or judgment until such sum is paid."

79. Mr. Hanson, on the other hand, dismissed this viewpoint that Section 25(1) of the Rent Restriction Act was applicable to the instant case. He contended that

the order for compensation would have had to be made simultaneously with the order for possession as the section stipulates. He pointed out that the order for possession was made on February 1, 2016 and the defendant was subsequently evicted. Furthermore there was no stay of the order for possession or ejectment until compensation was paid.

80. The 1st claimant's counsel went on to say that no contractual obligation had been proven and the terms of the tenancy made no provision for compensation by the 1st claimant.

81. Though the contractual agreement between the parties was oral in nature, neither of them advanced any evidence to suggest that there was ever any engagement in discussions as to how a breach of their agreement would be addressed should it arise. I follow up to say that the claimant, upon observing the concrete structures in 2001, should have seized the opportunity to address the issue of compensation or otherwise, should the contract become unfavourable to either himself or the defendant. Hence, the case of ***Aston Lewis v Victor McLean*** in my view is of great assistance. In that case, the landlord rented a square of land to the tenant (appellant) who stated it was for commercial purposes. With the permission of the landlord the tenant erected 4 buildings of concrete and lumber as well as an adjoining shed. There was no agreement between the landlord and tenant being required to vacate the premises. Upon entering an agreement for sale of the land, the tenant was served a month's notice and was ordered by the Court to deliver up possession within 3 months.

82. The appellate Court held:

    i. The right of a tenant to compensation from his landlord for any building erected by him on land rented by him is determined by the terms of the tenancy.

ii. There is no contractual obligation on the respondent to compensate the appellant for loss or damage occasioned by his being required to quit the premises.

iii. In the case of "building land "in" controlled premises, a tenant may in the absence of contractual agreement receive compensation for loss or damage under S. 25 of the Rent Restriction Act.

iv. A building will not be deemed to be commercial with the meaning of the Act unless it was being used as such previous to the letting or at the time of the letting.

v. There was no letting of any building in this case as there is no special statutory notice to determine tenancy of building land."

83. I note with keen interest the penultimate and last paragraphs of this judgment and deem it pertinent to offer a definition of commercial building. Section 2 (1) of the Rent Restriction Act describes a commercial building as

> "... a building, or a part of a building separately let which at the material date was or is used mainly for the public service or for business trade or professional purposes, and includes land occupied therewith under the tenancy but does not include a building, part of a building or room when let with agricultural land."

Based on the above, would the premises under review be deemed a commercial business?

84. The evidence in the present case would suggest otherwise. For instance, the defendant's evidence is that he started to operate in 2001 with a "temporary drinking place on the premises," and the bar became operational in 2003 followed by the restaurant. Although there is conflict in the evidence as to when possession was granted (whether 1991 as the defendants said or 1994 for the 1st claimant) it remains undisputed that no business was being operated on the premises prior to the defendant's, and the buildings were erected after the commencement of the tenancy.

85. It has long been established that a tenant is entitled to remove his trade fixtures where his tenancy is terminated. This was highlighted at page 67 of **Commonwealth Caribbean Property Law**, by the distinguished author Gilbert Kodilinye who stated:

> "*A tenant is entitled to remove any trade, ornamental and domestic fixtures attached by him,; these are classified as tenant's fixtures.... the right to removal will continue where a periodic tenancy is terminated by the landlord, the tenant is allowed a reasonable time after the expiration of the notice to grant to remove his fixtures."*

86. According to Miss Baugh, the defendant had removed the fixtures and posts, "that were in the valuation and things weren't in the valuation." So having reviewed all the relevant factors regarding the issue of compensation for the structures on the premises, I declare with a hint of pessimism that I am unable to honour the defendant's claim in this regard.

87. I now consider the defendant's claim for compensation for loss of profit and earnings. Under this rubric, Mr. Hines extracted the principles posited at paragraph 22.170 of **Woodfall – Landlord and Tenant** which indicates that in certain cases a tenant whose tenancy has been terminated is entitled to recover compensation from the landlord. This includes compensation of disturbance, and loss of goodwill. Mr. Hinds contended that despite the decline in net profits from 2010 to 2013, the business was still considered a going concern and was viable. He placed great reliance on the Miss Madden's Financial Report. This attracted strong criticism from Mr. Hanson who regarded Miss Madden's evidence as unreliable.

88. I must agree that Miss Madden's evidence suffered major deficiencies and was dotted with errors and assumptions as she was made to garner information from a defendant who kept poor records and for some periods, none at all. For example, in cross examination Miss Madden admitted that the defendant's

business had no records for seven (7) years prior to her engagement there as an accountant.

89. As regards any account of his profits during the period of his operation, the defendant offered in cross-examination "it's hard to make a profit because you have to keep building back." The paucity of reliable evidence on the defendant's case, has not placed me in a position to determine the financial status of the defendant's business over the period of its operation. As such, I would be hard-pressed to make an award for loss of earning and profit.

90. The issue of goodwill has been abandoned by the defendant as there was no evidence led to support that claim.

91. It would be remiss of me, I believe, to conclude without addressing the quality of the evidence in support of the defendant's case as well as the 1st claimant's. I am mindful that it is the defendant on whose shoulder the burden of proof rests and this he must discharge on a balance of probability if he is to succeed. The defendant's case was marred with discrepancies, which were material. I will proceed to revisit a few.

92. He described his business as a joint venture operation yet all the information he forwarded to his accountant led her to conclude that the business was a sole partnership. While the defendant stated that he had not removed anything from the 1st claimant's property at the termination of the tenancy, his partner and business manager Miss Baugh said he had removed everything.

93. Miss Madden stated that there were other accountants before her appointment to that position and she had seen their reports for the 2010 and 2011. However, Miss Baugh asserted that the business never had an accountant before Miss Madden. "She was the first," Miss Baugh affirmed. The claimant's case on the other hand was devoid of material inconsistencies and the evidence of the expert witnesses, reliable.

Findings

94. Having assessed the evidence in total and the demeanour of each witness as he/she gave evidence, I find, on a balance of probabilities, that:

i) The relationship of landlord and tenant was established between Mr. Curtis and Mr. Silvera. In essence, a tenancy existed.

ii) There is insufficient evidence to ground a claim for compensation for loss of profit and earnings.

iii) The subject property does not qualify as commercial building within the meaning of Section 28(7) of the Rent Restriction Act. As such, no compensation can be awarded for the fixtures erected by the defendant.

95. Accordingly, I give no judgment for the defendant in the counterclaim. Costs to the claimant to be agreed or taxed.