

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 391 OF 1994

BETWEEN	LISA WONG	1 ST PLAINTIFF
	JOANNE BLACKBERRY	2 ND PLAINTIFF
	JODIE WONG	3 RD PLAINTIFF
	CHRISTINE WONG	4 TH PLAINTIFF
	RICHARD CHONG	5 TH PLAINTIFF
	DONOVAN WONG	6 TH PLAINTIFF
AND	PHILLIP SAMMS	DEFENDANT

Mr. Michael Hylton, Q.C. and Mrs. Michelle
 Champagne instructed by Myers, Fletcher &
 Gordon for Plaintiffs
 Mr. Leon Green and Kayann Anderson for the Defendants

ENQUIRY PURSUANT TO CONSENT ORDER

In Chambers

17th, 18th October 2000 and 30th November, 2001

CAMPBELL, J

The inquiry undertaken by this Court was pursuant to a Consent Order before Mr. Justice Theobalds, on the 15th May, 1996, whereby it was ordered.

- (1) There be an enquiry by an expert to be agreed by the parties and failing agreement within 7 days by the Registrar or a Judge of the Supreme Court as to:
- (a) What are the assets of Medi-Centre Ltd and what is their value;
 - (b) What is the contribution made by the Defendant to Medi-Centre Ltd. between June 1978 and the present;
 - (c) What income or other benefits has the Defendant received from Medi-Centre between June 1978 and the present;
 - (d) What compensation if any is due to the Defendant.

In addition to these issues, arising out of a claim by Medi-Centre Ltd. for compensation for the use and occupation of that property by the Defendant, the parties, agreed that the issue as to the quantum owed by the Defendant be dealt with at this Enquiry. This to be reflected in a paragraph (e).

Paragraph (e) was formulated as follows:

What sum is due to Medi-Centre Ltd. from the Defendant and/or companies contracted by him for their use and occupation of part of the company property on Old Hope Road, from and after October 1, 1996?

BACKGROUND

Dr. Walter Wong, a Medical Doctor started Medi-Centre Ltd., sometime in the late 1960's and property was acquired at 34-38 Old Hope Road. In 1976, Dr. Wong migrated to Canada. The Defendant managed Medi-Centre, from that date until 1996.

In 1994 Dr. Wong made one of his regular trips to Jamaica. He arrived here on the 31st March, 1994. On this trip he fell ill and returned to Canada. On the 10th April he underwent surgery and died on the 3rd May, 1994. The day following the death of Dr. Wong, May 4, 1994 five cheques in the sum of Can \$100,000.00 each were negotiated.

The Defendant claimed that these cheques were a gift from Dr. Wong just prior to his final return to Canada. The Defendant also claimed 19,999 shares in Medi-Centre Ltd.

The Plaintiffs by Originating Summons dated 26th September, 1994, sought Declarations and Orders, in relation to the (two items of property) cheques and the shares in Medi-Centre. It was during the course of this hearing that the Consent Orders were made, which provided, inter alia, for the holding of this Enquiry in lieu of the Defendant abandoning his claim for the shares in Medi-Centre Ltd.

In respect of the other item, the Can \$500,000.00 the Court Theobalds J, presiding ordered:

- (1) That the Defendant transfer the sum of Can \$500,00.00 plus interest at 10% from May 4, 1994.
- (2) That the Defendant furnish all assets of the estate which have come into his hands since May 3, 1994 and assets of Dr. Wong which he had any control over and or access to prior to that date.

The Defendant's appeal from Mr. Justice Theobalds' order was dismissed. The Court of Appeal being as of the view, that the evidence was clearly inconsistent with the appellant's assertion that the sum of Can \$500,000.00 was an outright gift to him.

On the Plaintiffs case in this Enquiry, there is no dispute that the Defendant managed Medi-Centre Ltd for the period 1978-1996. He exercised control over the income of Medi-Centre. The Plaintiffs position is that the Defendant needs to prove his claim and in doing so he must account for how the income of Medi-Centre Ltd was spent over the period 1978-1996.

The Defendant claim is based upon a settled intention on the part of Dr. Walter Wong to compensate the Plaintiff for his years of hard work and

prudent management. The Defendant contends that his death prevented this from happening and so the Court is being asked to step into Dr. Wong's shoes and make that assessment. The evidence of the Defendant has put the net value of his investment in the Company over the period, at \$27,001.166.00 and the Court is being asked to agree that this in fact his due entitlement.

Pursuant to notice of intention to cross examine, the Plaintiffs cross-examined the Defendant Phillip Samms and Dr. Franklyn Johnston., whose affidavit dated 30/12/1985 was read into evidence. The Defendant cross-examined Maurice Russell, who had sworn to an affidavit in support of the Plaintiffs.

The cross-examination provided the Enquiry with the advantage of seeing and hearing the deponents and observing their demeanour, as they reacted to cross-examination. Even before dealing with the cross-examination, there were certain aspects of applicant's evidence which were worthy of note, and which to our mind, were of importance in the analysis of the evidence, some of these were noted in the affidavit of Debbie Fraser, sworn to on 6th October, 2000 in which, she describes herself as a partner in the firm Myers, Fletcher & Gordon at paragraph 18 and paragraph 19.

Paragraph 18:

I beg to refer to paragraph 15 of the Samms Affidavit. In paragraph 15 of the Defendant's explanation for not being paid for his "management services" and for not being "reimbursed for any money spent by [him] maintaining the assets" despite his expectation at all times that he would be reimbursed is that both the deceased [Dr. Wong] and I were looking forward to the deceased's return to Jamaica to reside permanently, at which time I expected that together we would reach an agreement whereby I would be compensated. His untimely death prevented that from happening.

Paragraph 19:

The reasons why he was not paid as set out in paragraph 15 of the Samms Affidavit are in contrast to what the Defendant had said in his affidavits sworn to on November 9, 1994 and March 17, 1995. He said that Dr. Wong "handed me the keys for the building and told me that if I could save the company it would be mine" (paragraph 7 of the 1994 affidavit). "That acting under the honest understanding and belief that I owned at the very least a substantial interest in Medi-Centre Limited, I invested large amounts of my own money firstly, in paying off

debts hereinbefore referred to, secondly, in up-keep and maintenance of the buildings and thirdly, in capital improvement including the construction of a factory and warehouse on lands owned by Medi-Centre Limited (paragraph 11 of the 1994 affidavit). Exhibited hereto and marked "DAF10" for identification are copies of the said affidavits.

The Defendant's evidence contained in paragraph 15, of his affidavit dated 30/12/98 contemplates a situation, where no agreement had yet been arrived at for the compensation of the Defendant for his services to Medi-Centre. This bit of evidence also pre-supposes that the Defendant, would maintain sound accounting principles of his expenditures in salvaging the business, in maintaining the facility, and settling the debts of Dr. Wong, as the Defendant claimed he did. How else in the absence of such records could a figure for compensation be obtained. On the other hand, Samms depones at paragraph 5: of his affidavit dated 9/11/94 **inter alia**

"Junior (Dr. Wong) lived in our home for many months, during which time he and I became each other confidantes, which relationship grew stronger throughout the years indeed, we became, as it were, closer than brothers".

And at paragraph 10:

“Because of the casual manner in which Junior and I have been accustomed to conducting business between us no steps were taken to formalise this agreement (i.e.) the transfer of his shares in Medi-Centre’.

This informality may well explain, the casual conduct of business between Dr. Wong and the Defendant. It leaves unexplained, the lack of proper accounting records such as one would expect from a person providing professional management services to a company such as Medi-Centre Ltd.

In the course of the cross-examination of the Defendant, he varied his affidavit evidence in several material areas.

Paragraph 15 of his affidavit dated 30th October, 2000, was referred to and it was suggested that although he had deponed that, ‘I was never paid for my services’, he had been paid between 1978 and 1982. The following exchange between examining counsel and the Defendant, is recorded.

Samms: No payment was received at any time during that period for my management services.

Counsel: It is suggested that the Company paid your salary, motor vehicle expenses, personal rental and personal travel expenses.

Judge: Did you receive a salary during that period?

Samms: Yes.

Judge: I don't understand.

Counsel: What was the salary for?

Samms: I assume you refer to my claim for management services. I
Agree I received a salary between 1975 and 1982.

Counsel: Did the company pay for the maintenance of your motorcar?

Samms: Yes.

Counsel: Did they pay rental for the property on your behalf?

Samms: Yes.

Counsel: Did the company pay your personal travel expenses i.e. non
Business?

Samms: No.

Later in cross-examination.

Counsel: On page 430 entertainment and travel, does it refer to you?

Samms: A part of it refer to me a part to Dr. Wong.

Counsel: Would you agree that travelling there is not business?

Samms: Yes.

Counsel: On all subsequent pages, when it refer to entertainment and
travel (non business travel) and business travel your answer
remains the same?

Samms: Yes.

The *viva voce* evidence of the Defendant Samms, not only conflicts with his sworn affidavit, but he contradicts himself in oral cross-examination. He admits that Rental Director, an entry in the balance sheet, recording the payment of rental on behalf of a Director, was a reference to himself. His testimony was that the company “always owned a motor car all along” however when showed the schedule of fixed assets, agreed that the company did not own a motor car, at that time. The witness testified however, that despite the fact Dr. Wong had left in 1975 that an entry for ‘motor vehicle expenses’, referred to Dr. Wong car, which would be taken out on 2 or 3 occasions to be serviced. It sat at his parents home where it was kept unused and serviced for his return. Similar reference to Directors salary, was for payment to Dr. Wong who resided in Canada whilst the Defendant, the only active Director, the person who was charged with the day to day administration of the company had no record of payment in the expenses and charges. In any event, this testimony conflicts with his earlier evidence. Mr. Samms admitted that on an examination of the company’s 1992 Balance Sheet, that there was a sum of \$212,000.00 owed by the company to a Director, either himself or Dr. Wong which sum was an increase of \$160,000.00 over the preceeding year. It was agreed that the

sum went down the following year by about \$85,000.00 and that by 1994 that debt was paid off. The significance of that is all outstanding debts against the company have been extinguished. The first time that a director borrowed money from the company, was in 1994. Dr. Wong died that year. Mr. Samms is saying that the debt owed could have been either that of himself or Dr. Wong. This debt went up after Wong's death.

It is noteworthy that at the time of his death Dr. Wong was able to forward \$1,000,000.00 Can., for relocation. I do not believe, he would have found it necessary to incur such a debt, moreover what is the explanation for the growth of this sum after the death of Dr. Wong clearly, this was a debt by the Defendant Samms.

I now turn to examine the evidence under the specific issues, pursuant to the Consent Order before Mr. Justice Theobalds.

1. What are the assets of Medi-Centre Ltd., and what is the value?

That Franklyn Johnston's affidavit states at paragraph 5:

I have been informed and verily believe that the assets of Medi-Centre Ltd., are:

- (a) Premises known as 34 Old Hope Road also in the parish
St. Andrew.

(b) Premises known as 38 Old Hope Road in the parish of
St. Andrew.

Opinions of D. C. Tavares - Finson Realty Ltd., in respect of 34 Old Hope Road, is that the market value for the property should be in the region of Thirty-Seven million Dollars to Forty-Two Million Dollars (J\$37-42 m). Property Consultants, whose opinion the plaintiffs sought, have assessed the open market value at \$67,000,000.00 and a forced sale value of \$56,000,000.00.

In respect of 38 Old Hope Road, the market value is stated, in the region of Six million Dollars to Seven Million Dollars Five Hundred Thousand (\$6,000,000.00-\$7,000,000.00). Property Consultants Ltd., valuers, whose opinion the Plaintiffs have sought, puts an open market value, of Five Million, Five Hundred Thousand Dollars. It is the opinion of Mr. David Russell, the valuation is consistent with that of D. C. Tavares - Finson

The parties are agreed that the assets of Medi-Centre Ltd., are 34 and 38 Old Hope Road and that their value is \$53 Million and \$6 Million respectively, and I so find.

What is the contribution made by Defendant to Medi-Centre Ltd., between June 1978 and May 15, 1996? The Defendant's claim rests on two limbs.

1. Firstly, that he single handedly managed the affairs of Medi-Centre Ltd., for the period.
2. Secondly, the Defendant claims for value of improvements/ construction to 38 Old Hope Road.

(a) improvements and Life Cycle replacements for 34-38 Old Hope Road.

Management Services

The Defendant attorney submitted that Samms management style is consistent with that of a manager/owner. That he received no compensation, save certain perquisites, that is personal rental, gasoline, entertainment and travelling. These perquisites, it was contended was not his salary, but ought to be deducted from any such salary found due to the Defendant.

The Plaintiffs submission is that Samms has already been duly compensated for his contribution, that he undoubtedly made.

Dr. Franklyn Johnson, in support of the Defendant's claim, states that he saw no evidence that the Defendant received a salary. An earlier report, penned by Johnston, describes a sum of \$229,088.00 as salary. His later

report, describes it as an expenditure on the Defendant's behalf "it is not salary". It is revealing that the earlier report contained a more detailed breakdown. This earlier report, entitled Summary of Directors Salary and Rental has headings for each of the years 1984-1995 and records a Director's salary range of \$5,511.19.00 in 1984 to \$229,088.00 in 1995, and particularises Strata Plan 59 the home of the Defendant, telephone, electricity, Proprietor Strata Plan #309, miscellaneous, Valuation Fee, P. Samms Director's salary.

Dr. Johnston has agreed that there is a figure for Rental Director in the accounts for the years 1984 to 1993 which is similar to the totals of the particularised items, in the detailed report. I find that the Rental Director in the accounts for the years 1984 to 1993 refers specifically to the Defendant Samms, and constitutes the totals of particulars for which he benefitted for each year of that period.

It was submitted on behalf of the Plaintiffs that the quantum or the level of remuneration is irrelevant. That the Court cannot repair a bad bargain. I cannot agree, with such an approach in the circumstances of this case. It is clear that Mr. Samms and Dr. Wong the deceased conducted their business at less than arms length. It is to that arrangement that this Enquiry attempts definition. It is obvious that when the agreement between Dr.

Wong and Samms was being arrived at, it would have been in the contemplation of the parties that Samms would have to be remunerated for his services to Medi-Centre. The Courts will imply terms into the agreement, between these friends to give “business efficacy” to their arrangements. In the case of the Moorcock (1889) 14 P.D. 64. Bower L.J said:

“I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at an event by both parties who are business menThe question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction.”

Despite the loss position of the company, it is uncontroverted that the company was brought from a state of near insolvency to one with an asset base in excess of Forty-Three million dollars. He did manage the business in all aspects – executive management, property management and marketing. The Plaintiff have raised no challenge to this area of evidence. The

methodology of deflating the amount of \$1,200,00.00 (the figure he would have earned in 1995) to 1975 and using the Consumer Price Index for Kingston Metropolitan area for the relevant years. I have accepted, Dr. Johnson's opinion that the CEO/GM of a small service company, such as Medi-Centre, would have a rate of remuneration of \$1,200,000.00 in 1995. The parties could not reasonably have expected any departure from this standard.

The Gross Salary for a period of twenty-one years is \$5,243,144.00. From this award for Gross Salary, the sum of \$229,088.00 constituting payments for perquisites should be deducted leaving a balance of \$5,014,056.

Vacation Leave/Pay

There is no evidence that the Defendant did not take a vacation, on the other hand there are indications to support that he did, e.g. expenditures on non-business travel, entertainment and gasoline. No award is made under this heading.

Redundancy Payments

Mr. Green had conceded that Samms would not be entitled to redundancy payments under the Act. No award.

Claim For Pay In Lieu Of Notice

The length of notice will be that expressly set out; or if none is expressly agreed, that implied by custom, or, otherwise the reasonable period ending the particular contract. The higher the status of the worker, the longer the period of notice that would be deemed reasonable. We make an award for a period of 2 months in lieu of notice - \$184,616.

Pension Benefits

Multi-Centre Ltd., did not operate a pension scheme for its workers, this claim therefore fails.

Claim For Salary For Property Management Services

This was been addressed in the Defendant's claim for business management services.

Equity

The Consent Order dated May 15, 1996 determined that the shares form part of the assets of the estate of Dr. Wong. The Defendant is estopped from pursuing this claim before this Enquiry.

2. Claim For Value of Improvement Construction

The Defendant has admitted an evidential weakness in this claim. He

Has not produced one iota of documentary support for his claim. No receipts, invoice or bill has been submitted. It is impermissible to throw figures at the head of the Court, without more.

He however ask the Court to infer that the Defendant was the only person from whom these funds could have been forthcoming and he financed these improvements from his own resources. The difficulty is there is no evidence from which I could infer an income for the Defendant independent of Medi-Centre Ltd

I cannot draw such inferences when the Defendant's evidence before the Court is that Dr. Wong sent materials for refurbishment, moreover the Court had ruled that the Defendant was never the owner of Medi-Centre, his improving and repairing the building in the absence of the clearest authorisation from Dr. Wong, would be inconsistent with his position as Manager. These claims are in the nature of Special Damages claim for past pecuniary loss. Such a claim must be strictly proved.

In the case of **Hepburn Harris v. Carlton Walker** SCCA 40/90, which dealt with a claim for loss of earnings, Rowe, P at page 3 said:

“... If the Appellant was to be believed he kept no books of account, paid no income tax and could produce no financial record from which a reliable earning pattern could be inferred. Plaintiffs ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to

rely on logical argument to say that specific sums of money must have been earned.”

This manager in respect of his efforts of improvement had kept no books, could produce no financial record from which a reliable expenditure pattern could be inferred.

A court of law has never encouraged plaintiffs to throw figures at trial judges without an effort to substantiate them with documentary evidence . This claim fails, Mr. Samms is not entitled to the sum o f \$5,625,000,00 which is claimed.

Payment Due From The Defendant

The Plaintiffs by letter dated October 1, 1996 demanded immediate possession of the section of the Medi-Centre property occupied by the Defendant Yamaha Engines Ltd.

Mr. Maurice Russell give as his opinion in paragraph 25 of his affidavit dated 6/10/2000 that the benefit to Mr. Samms and or his companies in occupying 38 Old Hope Road for the period October 1996 to October 2000 would be \$1,995,075.00 . The benefit for occupation of 400 sq. feet of office space at 34 Old Hope Road for a similar period is \$508,738.00 and for the basement \$280,735.00.

It should be noted that the claims for rental form the basis of Suit No. C.L M 256/1997, in which the parties are Medi-Centre Ltd vs. Phillip

Samms first defendant and Yamaha Engines Ltd and Turbin Inc Ltd., as second defendant and third defendant respectively. Mr. Hylton, Q.C. letter dated 1st October, 1996, challenges the validity of the lease between Medi-Centre Ltd and Yamaha Engines Ltd. the plaintiffs did not develop that challenge before me.

In the lease agreement, dated 1st January, 1980 on which the Defendant relies, the Defendant, Phillip Samms signs on behalf of Medi-Centre Ltd., similarly in the letter dated 22nd August, 1992, extending concessionary terms to Yamaha Ltd, Phillip Samms, signs on behalf of Medi-Centre Ltd. He is clearly not a party to the Lease Agreement. My term of reference, is the benefit devised by Phillip Samms, Yamaha Ltd., is not a party to this Enquiry.

The Plaintiffs claim for rental from the Defendant, thereof fails. The Defendant has failed to properly account for the fixed assets totalling \$1,347,242.00 which was missing from the premises after he handed over control of the property to the Plaintiffs' representatives. That sum is therefore due from the Defendant to Medi-Centre Ltd.

The Enquiry finds as follows:

1. The assets of Medi-Centre Ltd., are:

(a) 34 Old Hope Road and 38 Old Hope Road and these

value is \$53 million and \$6 million respectively;

- (b) That the Defendant services to Medi-Centre when quantified amounts to:

Management Services	-	\$ 5,014,056
Pay in lieu of notice	-	184,616
Total		5,198,672

- (c) The Defendant has received from Medi-Centre amounts To \$1,347,242.00.
- (d) That as a result of (b) and (c) the outstanding Compensation to the Defendant from Medi-Centre Is \$3,851,430
- (e) There are no sums due to Medi-Centre Ltd., from the Defendant;
- (f) The parties should bear their own costs.