

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C-154 OF 1986

BETWEEN	HERMAN CHIN LOY	PLAINTIFF
A N D	LLOYD CHIN LOY	FIRST DEFENDANT
A N D	DAPHNE CHIN LOY	SECOND DEFENDANT
A N D	AQUARIUS RECORDING CO. LTD.	THIRD DEFENDANT

Mr. Dennis Goffe and Mr. Peter Goldson instructed by Messrs. Myers, Fletcher & Gordon for Plaintiff.

Mrs. Angella Hudson-Phillips, Q.C. for first defendant.

Dr. Lloyd Barnett and Miss Hillary Phillips instructed by Messrs. Perkins, Grant, Stewart, Phillips & Company for second and third defendants.

TRIED: 1989: JUNE 14, 15, 16, 19, 20; OCTOBER 23-27
1990: JANUARY 29-31; FEBRUARY 1-2; NOVEMBER 15

PANTON, J.

The plaintiff is the brother of the first defendant who is the husband of the second defendant. The plaintiff's claim is for specific performance of a written agreement dated 14th March, 1983, and for damages for breach of contract. He called as a witness one Kenneth Barrington Whyte, a chartered accountant, who was projected as a mediator and the architect of the agreement.

According to Whyte, the agreement, though dated 14th March, 1983, was signed either on that day or "a day or two after". This signed agreement was never produced in evidence although copies were allegedly given to each party. According to the plaintiff, the first defendant borrowed his (the plaintiff's) copy and has not returned it. The plaintiff has, instead, produced a draft unsigned document (Exhibit 3) which Whyte stated that he (Whyte) had retained.

It is perhaps interesting to note at this stage that Whyte retained Exhibit 3, describing it as "the original", but he did not keep any of the signed copies, as he "had no further interest in the matter".

THE PLAINTIFF'S CASE

The plaintiff who spent most of his younger days in the care of the first and second defendants has been involved in the record industry since 1965. He is the managing director of Aquarius Limited which operates a record shop located at 9 Constant Spring Road in the heart of Half Way Tree, St. Andrew. On the way

to his present position, the plaintiff was on several occasions the beneficiary of the helping hands of the first and second defendants (particularly the first defendant). Help was extended to him in areas such as the liquidation of his gambling debts, the management of his business, and in his efforts to migrate to Canada and the United States of America.

In 1968, the plaintiff commenced business operations, in the form of the selling of records, in rented premises at 9 Constant Spring Road, St. Andrew. When these premises were put on the market for sale three years later, the plaintiff was unable to purchase them. The first and second defendants obliged by purchasing the property. It was after this acquisition that Aquarius Limited was incorporated with the plaintiff, first and second defendants and another relative as equal shareholders. Subsequently, the relative migrated and his shares were transferred to the plaintiff. The record selling business continued at 9 Constant Spring Road with the first defendant being in charge of administration.

As time passed, the plaintiff and the first defendant discussed expansion of their involvement in the record industry and this resulted in the incorporation of Aquarius Recording Company Limited with the plaintiff and first defendant as equal shareholders. This company decided to build a studio. The finance for this venture was sought from the Jamaica Development Bank which required the transfer of 9 Constant Spring Road to Aquarius Recording Company Limited as a pre-requisite to the disbursement of the loan. The transfer was effected in 1974; thereupon, the loan was disbursed to Aquarius Recording Company Limited.

Both Aquarius Limited and Aquarius Recording Company Limited eventually repaid the money borrowed from the Jamaica Development Bank.

The plaintiff and first defendant from as far back as 1973 have been in constant disputes. The first defendant, notwithstanding the rancour between them, financed the plaintiff's efforts to migrate to the United States of America. As a result, the plaintiff lived in the United States of America for a few years. During this period, the first defendant controlled the operations of the business.

The plaintiff, on his return to Jamaica, continued his participation in the operation of the business with his emphasis and interest being in Aquarius

Limited whereas the first defendant concentrated his emphasis in Aquarius Recording Company Limited.

The constant disputes between the plaintiff and first defendant prompted the making of a decision that they should separate their operations. Barrington Whyte was called in to help.

According to the plaintiff, they eventually agreed the following:

1. the first and second defendants to transfer their shares in Aquarius Limited to the plaintiff;
2. the plaintiff to transfer his shares in Aquarius Recording Company Limited to the first defendant;
3. the plaintiff and second defendant to form a new company in which they would hold equal shares; and
4. the parties to cause the third defendant to transfer 9 Constant Spring Road to the new company.

This agreement, the plaintiff stated, was recorded in a document dated 14th March, 1983, and signed by the plaintiff and the first and second defendants.

It is to be noted that it is alleged by the plaintiff that (2) above was varied by an oral agreement which was to the effect that instead of transferring his shares in the third defendant to the first named defendant, he would transfer them to the second defendant. This was done.

The plaintiff asserts that his claim of entitlement to part ownership of 9 Constant Spring Road rests on this agreement and his ownership of shares in Aquarius Recording Company Limited to which the property had been transferred at the request of the Jamaica Development Bank.

THE DEFENCE

The defendants are at one in asserting that the plaintiff has been for a substantial portion of his life dependent on them at home and at the workplace. They say that he was quite irresponsible at the workplace, and that in general he gambled that which he had as well as had not.

In relation to 9 Constant Spring Road, the defendants are agreed that it was the plaintiff who suggested the purchase of it; that the first defendant was unable to buy it; whereupon the second defendant, who had some independent

means, changed certain plans that she had, and acquired the property. The name of the first defendant was placed on the title at the request of the mortgagee but in effect he (the first defendant) made no contribution to the purchase price.

The defendants are agreed that the second defendant was pressured relentlessly by the plaintiff and the first defendant in order to get the second defendant to agree to permit the use of her land (9 Constant Spring Road) in a million-dollar dream scheme that the plaintiff and the first defendant had - that is, to borrow money from the Jamaica Development Bank and to equip a recording studio.

The defendants deny the existence of any written agreement signed by them and the plaintiff in the presence of Whyte. They agree that there were discussions to deal with the share ownership in relation to the two companies but disagree with the plaintiff that there was any agreement to transfer the second defendant's land to another company with a view to the plaintiff becoming half owner of the land.

According to them, the second defendant merely obliged the plaintiff and the first defendant to assist in the realization of their dream scheme by agreeing to the use of her land to secure the loan from the Jamaica Development Bank; and the understanding was that once the loan was repaid, the land would be reconveyed as at no time was there any intention on the part of the second defendant to part permanently with any portion of her interest in the land.

So far as her signature on documents incorporating the new company Melody Investments is concerned, the second defendant said that she signed the documents not to indicate her intention to transfer the land to the company, but rather to ease the pressure that the plaintiff and Whyte were putting on her to sign the necessary documents.

ASSESSMENT AND FINDINGS

In my judgment, there is one major factual matter for the Court's determination. It is this:

Was there a written agreement dated 14th March, 1983, and signed by the parties on either the 14th, 15th or 16th March, 1983?

In order to be able to answer this question, a careful evaluation of the testimony of the witnesses and of their demeanour is necessary. In short, their credibility is at stake.

Before evaluating the testimony or giving any impression as to their credibility, it is perhaps necessary to observe that there is no dispute that -

1. the land at 9 Constant Spring Road was transferred to the third defendant in order for the Jamaica Development Bank to disburse the loan;
2. the second defendant received nothing in the form of payment for the land which the plaintiff now seeks to acquire an interest in by his request for an order of specific performance; and
3. the second defendant was absent from most of the meetings attended by Whyte, the plaintiff and the first defendant.

I have considered all the evidence that has been given and I have taken into consideration the demeanour of all the witnesses as they gave their evidence. So far as positive impressions are concerned, I will give them first. The second defendant and the witness Trevor Clarke impressed me greatly. In relation to the second defendant, particularly, her evidence was given in a forthright manner. She faced all probing questions squarely, never flinching. In my view, her honesty was clear. She has convinced me that she was speaking the truth, and I accept her evidence without any reservation.

On the negative side, I must now go on to say that I found the plaintiff to be untruthful in some areas of his testimony; in other areas, he was, at least, unreliable. His witness Whyte was unconvincing, and the witness Claire Fernandez was unhelpful so far as the issue to be decided is concerned.

Was there a signing?

The plaintiff had this to say about the signing of the agreement: "the document was signed in Lloyd's office. Could have been in the evening, in the morning. In the evening. Don't recall when it was signed. Don't recall exactly what time it was. Don't remember who signed first or last - but I know that it was signed". These statements were made while the plaintiff was being cross-examined by Mrs. Hudson-Phillips. While he was being cross-examined by Dr. Barnett,

he had this to say: "All I remember signing on that day was Exhibit 3. No share or land transfer document signed on that day. Don't remember time meeting held - whether during or after business hours".

These answers by the plaintiff did not encourage me to place any serious reliance on his testimony. Here is a situation in which he has not produced the document signed, and he is unable to give any reliable evidence as to the circumstances surrounding the signing.

The unreliable nature of the plaintiff is perhaps heightened when one considers that his testimony revealed that he could not even recall who gave him the airline ticket which he used when he migrated to the United States of America. It is incredible that he could not remember such an important matter. Of course, it was the first defendant who had made that gift.

His lack of truthfulness was evident in his testimony as to the production of records and albums. During his evidence in chief, he gave himself credit for the production of some named albums. During cross-examination by Mrs. Hudson-Phillips, when he was confronted with the very albums, he admitted that he had not produced any of them and that his brother (the first defendant) was on the "jacket" as the producer of some of them. He was unable to explain this serious contradiction.

He testified that the first defendant borrowed his copy of the signed document. In his evidence under cross-examination by Mrs. Hudson-Phillips, he said, "Lloyd (first defendant) and I have not been on speaking terms from I was in New York up to now. My wife has tried, but no success". That means that he has not been on speaking terms with the first defendant since the 1970s. His evidence (and indeed there is other evidence to that effect in the case), indicates that there has been much turbulence for many years between him and the first defendant. They even found it necessary to bring in a mediator.

I find it absolutely incredible that, in this hostile atmosphere, the plaintiff would have even thought of lending the first defendant this very important document which it had taken so long to agree on, and to get the parties to sign. Why should the plaintiff lend the first defendant this document when the second defendant (first defendant's wife) was also the holder of a copy of this

document? I do not believe it. The fact, as I have found it, is that there was no such signed document.

I am conscious that Mr. Whyte testified in support of the plaintiff. However, his evidence did not satisfy me. I find it odd that he, having taken so much time to arrange the details of the agreement and to have the parties sign, should have failed to retain a signed copy - saying that he "had no further interest in the matter" - yet he kept an unsigned copy which he regarded as the "original". Considering the problems that were encountered in arriving at the agreement, and the animosity that existed, wouldn't he the mediator be keeping a signed copy instead of an unsigned one? I should have thought so. My conclusion is that there was no such signed document and Whyte knew. His evidence is false

So far as Ms. Fernandez is concerned, I have found that she was misled by the plaintiff to believe that she was seeing a genuinely signed document. She did not know the defendants' signatures. She was not present at the signing. Her evidence is therefore unhelpful save that it has left me with the impression that deception was practised on her.

When one contrasts the shortcomings and false indicators presented by the plaintiff and his witnesses with the positive statements of the first and second defendants that they signed nothing, I am satisfied that the evidence of the defendants is the evidence that is to be believed. The second defendant has said that she was engaged in representing Jamaica at golf during the period of the alleged signing. She left Jamaica on the 14th March. I believe her.

Two other issues were raised. First; the second defendant's intention in relation to the property. Second; part performance.

What was the second defendant's intention in relation to the property?

As I said earlier, I have accepted the evidence of the second defendant. Let us look at her evidence in regard to the property. She had plans to buy a house. Her husband (first defendant) and the plaintiff persuaded her to buy 9 Constant Spring Road instead. The second defendant, at the request of the mortgagee, placed the first defendant's name on the title to 9 Constant Spring Road. No money was contributed by the first defendant. There was no intention

to share the property with him.

The plaintiff and the first defendant decided to build and equip a recording studio at 9 Constant Spring Road. They persuaded the second defendant to permit the use of the property to secure the Jamaica Development Bank loan. The understanding, which I accept, was that the land would be transferred to Aquarius Recording Company and that after the loan had been repaid, the land would be re-transferred to the second defendant.

Mr. Goffe has scoffed at the evidence that Trevor Clarke had suggested, and the first and second defendants had accepted, the idea that the land could be "loaned" in this way. Although land cannot be "lent" like a book or money, one cannot overlook that this was a situation in which the parties were related, and that the first and second defendants had always received requests from the plaintiff to rescue or help him.

I find that the second defendant had no intention at any stage whatsoever to part with any portion of her interest in the property. She has received nothing in return for the transfer of the land. Her non-receipt of any compensation confirms the position I have found that she had no intention to part permanently with her property. This lack of intention on her part also shows that she did not, and would not have, signed any document in terms of Exhibit 3.

Had it not been for the persuasive efforts of the plaintiff, the first defendant and Trevor Clarke, the second defendant would never have allowed her land to have been used to ensure the disbursing of the loan by the Jamaica Development Bank. She would have stayed clear of the project as she has no serious interest in the record industry.

Equity looks at the substance rather than the form. In my view, the fact that a sale price or value was put on the property when it was transferred to the third defendant is merely a matter of form.

The Court cannot ignore the substance. That is, the second defendant was put under considerable pressure to transfer, without consideration, the land in question. The Court finds that she did so expecting that decency would have prevailed and that the land would, on repayment of the loan, be re-transferred. The plaintiff clearly is not entitled to that which he seeks. He gave the second

defendant nothing in return for the transfer.

Mr. Goffe raised the question of part performance. To me, this issue does not arise. However, I shall deal with it.

The plaintiff's claim is that there is a written agreement; that is what he seeks specific performance of. Part performance relates to a contract that is not in writing. I have noted carefully that the plaintiff is saying that there was an oral variation of the contract. Even if the principles relevant to part performance are applicable here, it seems to have been overlooked that the act or acts of part performance must have been done by the plaintiff; and that for any acts to suffice as part performance, they have to be seen as having been done by the plaintiff in reliance on a contract. There is no acceptable evidence of the plaintiff having done anything in reliance on any contract.

The share transfers, I find, were obviously necessary in order to regulate the business relationship between the parties in view of the hostility that exists particularly between the plaintiff and the first defendant.

I accept the second defendant's evidence that she signed the documents to incorporate Melody Investments Company in order to ease the pressure that was being applied to her by the plaintiff and Whyte.

In view of the findings of fact that I have made, I am unable to accede to the plaintiff's request. His action is dismissed. Judgment is hereby entered for the defendants with costs to them to be agreed or taxed.