Judgment No. HB 52/2004
Case No. HC 3204/96
X-Ref HC 1295/98

BERYL BRIAN SHER

Versus

PLAZA HOTEL (SUCCESSOR) (PVT) LTD

And

BRUNO CAROSELLA

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWYO 22 OCTOBER 2002 & 25 MARCH 2004

G S Wernberg for the plaintiff
J Sibanda for the defendants

Judgement

CHIWESHE J: In this matter the stated case is as follows:

"1. That certain two pieces of land situate in the District of Bulawayo being subdivision A of stand 1378 Bulawayo Township measuring 307 square metres and the remainder of stand 1378 Bulawayo Township measuring 248 square metres ("the properties) were prior to 1 August 1986 owned by the late Charles Sher father of the plaintiff and the plaintiff's late brother Hillel Harry She.

2. That there are certain improvements upon the said properties consisting of an hotel known as the Plaza Hotel.

3. That at all material times hereto the second defendant Bruno Carosella was the managing director and principal shareholder of the first defendant Plaza Hotel (Successor) (Private) Limited.

4. That on 26 April and 12 May 1986 respectively, the late Charles Sher concluded an agreement of lease with the first defendant under which Charles Sher let to the first defendant the properties as evidenced by documents numbers 1 to 11 inclusive of the plaintiff's bundle of documents.

5. That on 1 August 1986 the late Charles Sher donated *inter viros* and duly transferred the said properties in undivided half shares to the plaintiff and his late brother Hillel Harry Sher as evidence from the Deed of Transfer, a copy of which appears at pages 12 to 16 of the plaintiff's bundle of documents.

6. That sometime thereafter an agreement of lease was concluded between Beryl Brian Sher and Hillel Harry Sher as lessors and Bruno Carosella as lessee in respect of the properties, the parties no longer being in possession of a copy thereof if the same was in writing.

7. That on 13 January 1993 and 13 January 1994 respectively the late Hillel Harry Sher sold to the second defendant Bruno Carosella his undivided half share of the properties as evidenced by the agreement of sale a copy of which appears at pages 17 to 19 of the plaintiff's bundle of documents.

8. That on 14 March 1994 the said undivided half share was transferred to the first defendant Plaza Hotel (Successor) (Private) Limited as evidenced by the Deed of Transfer appearing at pages 20 to 23 of the plaintiff's bundle of documents.

9. That the sale referred to in the preceding paragraph were effected without the knowledge, consent or desire of the plaintiff who was however unable as a matter of law to preclude such sale and subsequent transfer.

10. That although no new agreement of lease was ever concluded between the plaintiff as lessor and either the first and or second defendants as lessees in respect of the property the first defendant has continued to pay rentals to the plaintiff in the sum of $2 890,00 per month by way of stop order on the plaintiff's account. The defendants continued to pay rental in terms of the lease concluded between the Sher brothers and the defendant prior to the sale and transfer of Hillel Sher's share of the property to the first defendant as though the same was still valid after such sale and transfer.

11. That between 17 March 1994 and 15 April 1995 the plaintiff via then legal practitioners. Messrs Webb Low & Barry and the defendant entered into certain correspondence with a view to the purchase by the first and or second defendants of the plaintiff's undivided half share of the properties but that the parties were unable to reach agreement as to the purchase price in respect of such half share, as evidenced by the documents appearing at pages 24 to 29 of the plaintiff's bundle of documents.

12. That on 13 February 1996 the plaintiff as applicant brought an application in this honourable court under case reference HC 428/96 in which he sought an order compelling the first and second defendant to grant access to the plaintiff or his duly authorised agent for the purpose of valuing the properties.

13. That for reasons not material hereto, the application in HC 428/96 was overtaken by events and was not persisted with and is not material to the present dispute between the parties.

14. That o 5 November 1996 the plaintiff instituted action against the first and second defendants under case reference HC 3204/96 in which it sought, in effect, as against the first defendant as co-owner of the said properties and as against the second defendant as being in control of the hotel business conducted at the properties by the first respondent, debatement of account of the income derived from such business from 1 April 1994 and payment to the applicant of his share of such income.

15. That on 31 March 1998 the plaintiff instituted in case reference HC 1295/98 an action against the first defendant pursuant to the *actio*

communt dividundo in which he sought an order that the co-owenrship of the properties be terminated:

a. against payment by the first defendant to the plaintiff of the value of the half shares held by the latter; or
b. on the basis that the properties be sold and the net proceeds be distributed equally between the parties; or
c. on such basis as is held to be just and equitable by this honourable court.

16. That the first defendant in case number HC 1295/98 filed a claim-in-reconvention against the plaintiff wherein it seeks compensation in respect of improvements affected by the first defendant to the properties.

17. That at all material times hereto and in particular sine 1 April 1994 the first defendant under the control of the second defendant has enjoyed the sole use and benefit of the properties having operated thereon the said hotel business for the purposes of profit which is continues to do at the present time.

18. That the properties have been valued by various persons on divers occasions as follows:

a. by Knight Frank on 29 November 2001 at the instance of the plaintiff;
b. by Turner Townsend Africa on 24 July 2002 at the instance of the defendants, in respect of the "renovations and repeated maintenance works executed on Plaza Hotel from 1982 to date based on current construction costs".
c. By John Pocock & Company (Private) Limited on 31 August 2002 at the instance of the defendant; and
d. By George Edgar Grey on 8 October 2002.

As evidenced by the valuation reports which appear at pages 30 to 61 of the plaintiff's bundle of documents.

19. That the properties in question are not, for all practical purposes, capable of physical subdivision due to the fact that their common boundaries are straddled by various improvements thereon.

20. That the parties are in agreement that it is in their mutual interest for the co-ownership of the properties to be determined subject to the determination by this honourable court of the terms upon which such determination should take place.

21. That the parties shall not, by this agreement be precluded from leading additional evidence in this matter provided that such evidence does not conflict with the provisions of the stated case.

22. That the parties have further agreed that issues arising in both case references 3204/96 and 1295/98 being closely interrelated are for the purposes of the consolidated actions as follows:

a. What is the present market value of the properties?
b. Whether in the determination of the amount payable by the first defendant to the plaintiff in respect of the determination of the co-ownership by the parties of the properties being the value of the plaintiff's undivided half share of the properties, the first

defendant is entitled to set-off or be compensated in respect of the cost of improvements effected thereto and for which purpose:

i. the extent and nature of the improvement effected.

ii. By whom and when such improvements were effected?

c. Whether in the event that the first defendant is entitled to set-off or be compensated in respect of improvements effected to the properties. Whether such improvements should be valued at the actual cost price to the first defendant, the cost price of effecting the same or equivalent at current market prices or in such other manner as the court might determine to be just and equitable.

d. Whether the plaintiff is entitled to a debatement of accounts in respect of the operation by the first defendant under the control of the second defendant of the hotel business operated at the premises from 1 April 1994 and thereafter to payment of a share of the net profits of such business as representive his share of the fruits of the properties?"

I will deal with the issues as agreed upon by the parties in the order in which they are stated.

(a) What is the present market value of the properties?

The properties have been evaluated by various persons on diverse occasions the last of which valuation was in August 2002. Given inflation those valuations are obviously no longer relevant in 2004. I am inclined to the view that in order to determine the properties' current market value, the properties be evaluated by an estate agent agreed upon by the parties or failing which the properties be valued by two evaluators one appointed by the plaintiff the other by the second defendant, the average figure between the two valuations being taken as the true market value of the properties. Should the first option be taken, the costs of evaluation will be jointly met in equal shares by the plaintiff and the second defendant. Should the parties opt for the latter

arrangement then each party shall meet the costs of the evaluation carried out by its respective appointee.

(b) Whether in the determination of the amount payable by the first defendant to the plaintiff in respect of the termination of the co-ownership by the parties of the properties, being the value of the plaintiff's undivided half share of the properties, the first defendant is entitled to set off or be compensated in respect of the cost of improvements effected thereto and, for which purpose;

(i) the extent and nature of the improvements effected;

(ii) by whom and when such improvements were effected?

It is settled law that a possessor or occupier who effects improvements to the property of another is entitled to compensation to the value of such improvements. In the event that the improvements made were necessary for the preservation of the property then compensation may be awarded in the full amount of the expenditure incurred.

The second defendant says he made improvements to the property in 1984, 1985 and 1986. But the plans that were put in as evidence of these improvements relate to proposed alterations and renovations of existing buildings. The 1984 plans relate to the construction of additional toilets and a cold room. The question to be asked is whether these were necessary improvements. From an objective point of view such improvements to the property were not necessary. If they were necessary they must have been necessary for the furtherance of the 1st defendant's business objective and not for the maintenance and improvement of the property itself per se.

They were intended to benefit the business of the 1st defendant in which the plaintiff did not anticipate or reap the fruits thereof. I do not believe it just and equitable that plaintiff be asked to pay for such improvements. In any event the defendant has in my view failed to quantify in monetary terms the extent of these improvements.

In 1997 the defendant says he made certain structural alterations which required that a new beam be placed in the roof. Again such alterations have not been shown to be a necessary improvement to the property itself, nor the preceding alterations. The only conclusion to be made is that the alterations were intended to benefit the hotel business run by the 1st defendant. Why should the plaintiff pay for them? In any event the defendant has not discharged the onus cast on him, that of proving in monetary terms the extent of such improvements.

I believe the plaintiff when he says that he was not consulted over all these improvements although he may have been aware of them. Consultation in the business sense means approaching the plaintiff with proposed plans and explaining to him the necessity for such proposed improvements, the costs therefor and how and by whom it is intended to fund such improvements. I am fortified in this belief by the averments made by the defendant to the effect that the plaintiff had almost nothing to do with the building. He was an owner in name only. He did not pay the rates which task was always the responsibility of the defendants. He had nothing to do with the daily maintenance and preservation of the property. The plaintiff was so aloof from the property that the second defendant literally did as he pleased with it. Anything he did to improve the property he did for the ultimate benefit of the 1st defendant. It is not surprising that the plaintiff wants out and only seeks his half share of the property in monetary terms. His interest in the property must have waned when

his late brother sold the other half share to the defendant behind his back. His disinterest is further examplified by his acceptance as rentals of the paltry figure of $2 890,00 per month for a property of that size being rented out to a business outfit such as the 1st defendant.

For these reasons I am inclined to the view that what the plaintiff lost out by way of reasonable rentals over the years may be considered sufficient compensation for what the defendants may have expended on improvements, rates and general maintenance. The facts of this matter are not such as would be amenable to a mathematical calculation as to which party is liable to compensate the other and to what degree. This is partly the reason why the parties themselves are unable to agree on a figure. The gap between them is so wide that the plaintiff believes he is entitled to 22.5 million dollars as representing his half share whilst the defendants insist that it is no more than 4 million dollars.

I do not therefore think that it would be equitable in the circumstances of this case that the defendant be allowed to set off any amount from the plaintiff's half share of the property on the basis of any improvements effected to the property be they necessary or cosmetic improvements.

Accordingly the third issue automatically falls away. This is the issue which had been stated thus:

> "(c) Whether in the event that the first defendant is entitled to set off or be compensated in respect of improvements effected to the properties, whether such improvements should be valued at the actual cost price thereof to the first defendant, the cost price of effecting the same or equivalent at current market prices or in such other manner as the court might determine to be just and equitable.

(d) Whether the plaintiff is entitled to a debatement of accounts in respect of the operation by the first defendant under the control of the second defendant of the hotel business operated at the premises from 1 April 1994 and thereafter to payment of a share of the net profits of such business as representing his share of the fruits of the properties?"

The relationship between the parties is very clear. The plaintiff and the second defendant are co-owners of the property in which the 1st defendant operates a hotel business. The 1st defendant is a persona separate and distinct from the plaintiff and the 2nd defendant. It is also distinct and separate from the property itself. Moreover while the 2nd defendant may have controlling shares in the 1st defendant, the plaintiff has no stake in the 1st defendant. The correct position is that the co-owners of the property (namely the plaintiff and the second defendant) have leased out to the 1st defendant their property. The best the co-owners can expect from the 1st defendant are rentals. From such rentals the plaintiff can claim a half share. The plaintiff has been receiving over the years a paltry figure as his share of the rentals. About this he never raised a finger. He has accepted this paltry figure over the years. He cannot now claim that he should have been paid a higher rental, merely because he now wants to terminate his co-ownership. He could have enforced his rights as co-owner. He did not and instead chose to let the second defendant run the property to his exclusion. He must have been content with that arrangement. He cannot expect the court to come to his aid at this late hour.

I hold therefore that there is not legal basis upon which the plaintiff can claim an abatement of the accounts of the 1st defendant and seek to share the net profits arising out of the business operated by the 1st defendant.

Both the plaintiff and the defendants have realised partial success in their claims and counter claims. In the circumstances I am included to order that each party meets its own costs.

Accordingly, it is finally ordered as follows:

1. That the property be evaluated by a property consultant agreed upon by the plaintiff and the second defendant and that the plaintiff be paid half the value of the property as representing his half share thereto. The costs of the evaluation shall be jointly met by the parties in equal shares. Alternatively in the event that the parties are unable to agree on the choice of a property consultant, then each party shall appoint its own evaluator at its own costs and the average figure as between the two evaluations shall be deemed to represent the market value of the property and the plaintiff shall be paid half such value as representing his half share of the property.
2. Each party shall bear its own costs of suit.

Ben Baron & Partners plaintiff's legal practitioners
Job Sibanda & Associates defendants' legal practitioners