LAHM *v.* LAHM

SUPREME COURT (Browne-Marke, J.): February 19th, 1970
(Civil Case No. 355/68)

[1] **Family Law—property—matrimonial home—substantial financial contribution to purchase price by party to customary marriage creates joint tenancy:** Where the parties to a customary marriage buy a house in Freetown in their joint names intending it to be a continuing provision for their joint lives, and each makes a substantial financial contribution to the purchase price and they run the household by their joint efforts, the property belongs to them jointly and each will be entitled to a share of the proceeds of its sale (page 30, lines 27–29; page 31, lines 25–33).

[2] **Land Law—joint tenancy—matrimonial home—substantial financial contribution by party to customary marriage creates joint tenancy:** See [1] above.

The plaintiff sought a declaration that certain property belonged to him in fee simple absolute in possession, and the defendant counterclaimed that she was the lawful owner of half of the property.

The parties were married according to native law and custom and lived together for 14 years. During this time the plaintiff bought a house with the help of a loan from the defendant's father. According to the plaintiff he paid the balance himself, and later repaid the loan, but the defendant claimed that she contributed a substantial amount to the purchase price. The conveyance was executed in their joint names, but the plaintiff claimed that this was only because he was pleased with his wife for bearing him five children, and he further claimed that since buying the house he had spent money from his personal savings on improving it.

The marriage finally broke up and the defendant left the matrimonial home with the children and started a business of her own. The plaintiff did not pay any maintenance for the children, and she assumed the entire responsibility for supporting them. When she finally took out a summons against him for maintenance the plaintiff commenced the present action in the Supreme Court seeking a declaration that the matrimonial home belonged to him in fee simple absolute, and asking for the defendant's name to be deleted from the conveyance.

The defendant counterclaimed that she was entitled to half the property since it was bought and owned jointly by the plaintiff and herself. She maintained that she had made a substantial contribution

stands alone and solitary on its own platform, without companionship of any kind. Fattallah had come to the journey's end and he ought to have waited to complete the transaction at hand. If for the reason he gave, he thought it wise to take the money out again in the car, I think from that moment it cannot be said in fact and in law that the money was in transit when it was found missing on his second visit to the Bank of Sierra Leone. To construe the policy as permitting the appellant, having reached the destination where the money should be deposited, not to so deposit it when the Bank was open and holding itself ready and willing to transact business with its customers, and then to drive out with the money in the car in order to transact some other business wholly unconnected with such a deposit, would be to add a new condition to the policy which could not be done. See *Pearson* v. *Commercial Union Assur. Co.* (3).

It is, therefore, not without some feelings of sympathy for the appellant, that I have come to the conclusion that the money was not in transit at the moment it was discovered missing when the boot of the car was opened after the car's second excursion to the Bank of Sierra Leone. It naturally follows from this that the appeal cannot succeed.

But even if the learned judge was right in his finding that the money was in transit, this court would have to be satisfied that its loss was not due to the negligence of the appellant and that the theft was accompanied by simultaneous flight of the thief while having such money in his possession. The learned judge found against the appellant on these two issues and I think he was right. Condition (1) of the policy reads: "The insured shall take all due and proper precaution for the safety of the money in transit." Quite a lot of argument was adduced as to whether or not the appellant had devised a reasonable system to ensure maximum security of the money whilst in transit. I think that on the balance of probabilities the system was reasonably safe. It had proved sufficiently safe and reliable on past occasions when Fattallah and this same driver had transported huge sums of money from the appellant's bank to the Bank of Sierra Leone. However, I consider that condition (1) ought to be construed as meaning that, even allowing for the existence of a reasonably safe system, the person in charge of the money (Fattallah) ought to keep a vigilant eye on the minute-to-minute operation of the system. In other words there was a continuous duty cast upon him, metaphorically speaking, to keep the money in his sight from one moment to the next until its final deposit at the Bank of Sierra Leone. He did not do so. He

to the purchase price, and although the plaintiff had repaid the amount borrowed from her father, she had spent the money on building materials to repair her mother's house which the plaintiff had subsequently appropriated.

Case referred to:

(1) *Gissing* v. *Gissing*, [1969] 2 Ch. 85; [1969] 1 All E.R. 1043; *on appeal*, [1971] A.C. 886; [1970] 2 All E.R. 780, applied.

McCormack for the plaintiff;
Mrs. Harding for the defendant.

BROWNE-MARKE, J.:

The plaintiff's claim against the defendant is for a declaration that the land and premises known as No. 44 Soldier Street, Freetown belongs to him in fee simple absolute in possession and for all necessary and proper consequential orders and directions.

In the particulars the plaintiff described the land in dispute and stated that the defendant was his wife according to native law. He further alleged that the whole of the purchase price for the property was paid by him and that the defendant contributed nothing. The plaintiff further requested the court to alter the deed of conveyance for the property by deleting the name of the defendant therefrom.

The defendant denied that the plaintiff paid the whole of the purchase price for the property and alleged that it was bought and owned jointly by both parties. By way of counterclaim the defendant claimed a half share of the said property on the ground that it was bought and owned jointly by the plaintiff and herself.

In the reply to the counterclaim the plaintiff admitted that he borrowed money from the defendant's father but said that he had fully repaid the loan and that if the defendant had spent money at all on the said property it was his money.

At the hearing the plaintiff and two witnesses gave evidence on his behalf. The plaintiff said that he married the defendant according to native law and custom in 1949 and that they lived together from 1949 to December, 1963 when the defendant left the house. The plaintiff, who was a merchant seaman, said that he and the defendant had five children together. He had a second wife in the house and as a result of a quarrel between himself and the latter, the defendant left the house.

The plaintiff continued that he bought the house at Soldier Street

on November 12th, 1953 from a Mr. Spaine, an auctioneer, for £450 or Le900 and that he deposited £200 or Le400 the same day. The owner of the house was one Coleridge Jones who he said gave him a receipt for £200 in the presence of Mr. Spaine. The receipt, Exhibit A, was made out in favour of the plaintiff and after he had paid the balance the conveyance was executed. This is Exhibit B, in which both parties were recorded as purchasers of the property. The plaintiff explained that he allowed the defendant's name to be included because he was pleased that the defendant had had children by him. He maintained that the defendant did not contribute towards the purchase price, and that in 1957 when he returned from sea and was paid up he improved the property. He withdrew from his savings £40 or Le80 which he gave to the defendant and told her that they should demolish the kitchen which was made of corrugated iron sheets and erect a better building. The work was not complete when he returned from sea and he requested a Mr. Metzgar to prepare a plan for the improvement of the building. He bought all the building materials and paid the workmen, and after the defendant had left the house he installed a private water supply and electricity.

The plaintiff agreed that he borrowed £160 from the defendant's father in 1953 towards the purchase of the property but said that on his return from sea the defendant informed him that her father was unwell and suggested that he should give her father some money. He said that he gave her £60 to hand over to her father on the understanding that it was against the debt. He gave her a further £4 towards medical expenses for her father. He said that he spent about £1,900 on the improvement of the house, workmanship not included, and that he paid the workmen weekly. He built the house in sections as and when convenient and he started to build in January 1963 and completed in 1967. The defendant was in the house when he commenced building the basement but she had left before he completed the top floor. He said that he gave the balance of £100 of the loan to the defendant after the death of her father in the presence of a witness and that he gave the defendant £20 to start a trade but that when he returned from sea she told him that the money had been stolen from her. He tendered 27 receipts and invoices of amounts expended by him on the building of the house up to 1963 when the defendant was still in the house and said that he had incurred further expenditure after the defendant had left the house.

The plaintiff agreed in cross-examination that he had commenced the action after the defendant had taken out a summons against him

for maintenance, and that he did not support the children because they did not visit him, and further that the defendant traded in fish and palm oil.

[The learned judge reviewed the evidence of the witnesses for the plaintiff, and then the defendant's evidence, in which she alleged that £500 was needed to buy the house and of this sum the plaintiff had contributed £160, £160 was borrowed from her father, and she had contributed £180 herself. She had been in business since she left the plaintiff and had been solely responsible for the maintenance of the children. The learned judge continued:]

I observe that at least 19 of the receipts tendered by the plaintiff were dated between January and March 1963. Some were made out in the plaintiff's name and the others were mostly bills of sale but they would not be considered as conclusive evidence that the amounts were advanced by the plaintiff from his own savings or that he was the owner of the property.

Exhibit B is a document which speaks for itself. In it both the plaintiff and the defendant were described as purchasers and that can only carry the meaning that they are joint owners of the property. No other document was tendered to replace that exhibit. The plaintiff's explanation was that the conveyance was prepared in both their names because he was pleased that she had children for him. It is therefore clear according to his own evidence that there was no mistake or misrepresentation. Despite this fact I must say that I believe the defendant when she says that the purchase price was made up of the plaintiff's contribution, her own contribution and the loan obtained from the defendant's father. The proper test to be applied is: Has the defendant made a substantial contribution towards the purchase of the property? Although the plaintiff says that he repaid the loan obtained from the defendant's father, he admitted that he got the money when he required it.

The plaintiff's witness, Massaquoi, said that he was present when the plaintiff returned £100 to the defendant through Mammy Fangeh. The defendant did not deny that the plaintiff returned this amount after the death of her father but said that she used the amount to purchase materials to repair her mother's house at Lungi. Some of the materials she said the plaintiff took in her absence and when asked to return them he promised to do so, but failed to fulfil this promise. Mosemeh Sujoh, the defendant's witness, said that the plaintiff took the materials from him in the absence of the defendant and promised to return them. This witness said that he did some work for the

defendant at Soldier Street for which she paid him £60 and purchased all the materials. He said that he repaired the house of the defendant's mother at Lungi.

Another witness for the plaintiff, one Sulaiman Zokar said that he first built a lavatory for the plaintiff and the second floor of the main house in 1965 for which he was paid £150 for work and materials. That was after the defendant had left the house.

The plaintiff and the defendant were married according to native law and custom from 1949 to December 1963, a period of 14 years, during which they had five children. It seems somewhat natural for the wife to expect some security in the form of a house owned by them to provide some financial help for the children, if need be, in future years. The plaintiff did not deny that since the defendant left the home in 1963 he had not contributed towards the maintenance of the children. This is when the question of the defendant engaging in business seems relevant because she was responsible for the school bills although the plaintiff drew rents from a portion of the property.

The judgment of the Court of Appeal in *Gissing* v. *Gissing* (1) went much further than the facts in the present case. It was held that a wife who worked most of her married life and paid for her own and her sons' clothing and for some of the furniture and equipment and house-keeping, but did not contribute directly to the purchase of a house conveyed to her husband or to the mortgage instalments was nevertheless entitled to a half share interest in the house and to half the proceeds of the sale after the marriage broke up. Where a couple by this joint effort bought a property intending it to be a continuing provision for them for their joint lives, the *prima facie* inference from this conduct was that the property was a family asset in which each was entitled to an equal share. It mattered not in whose name it stood or who paid for what or who went to work or who stayed at home, if both contributed to it by their joint efforts and each had made substantial financial contribution. The *prima facie* inference was that it belonged to them both equally.

In the present case the conveyance was made in the joint name of the plaintiff and the defendant and this has not been contradicted.

Taking the evidence as a whole I hold that the plaintiff failed to prove his claim and it is therefore dismissed.

As regards the counterclaim I hold that plaintiff and defendant owned jointly the property at 44 Soldier Street, Freetown and that defendant is entitled to a half share of the said property.

Suit dismissed; counterclaim allowed.

AGIP (SIERRA LEONE) LIMITED *v.* SAO

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones, JJ. A.): February 27th, 1970
(Civil App. No. 31/69)

[1] **Civil Procedure—counterclaim—contents of claim—governed by same rules of pleading as statement of claim—issues of fact raised by claim and counterclaim tried together:** Though they differ in some respects, a counterclaim resembles a cross-action inasmuch as claim and counterclaim must as a rule be tried together and the counterclaim is governed by the same rules of pleading as a statement of claim; and thus, since the burden of proof lies upon the party who substantially asserts the affirmative of the issue, if the plaintiff abandons his claim the burden of proving the counterclaim is cast on the defendant and the plaintiff is under no duty of disproving it (page 34, lines 31–41).

[2] **Civil Procedure—pleading—counterclaim—governed by same rules of pleading as statement of claim—issues of fact raised by claim and counterclaim tried together:** See [1] above.

[3] **Contract—damages——aggravation—no aggravation of breach of contract—misconduct of defendant or plaintiff's disappointment not factors to be considered in assessing damages:** In assessing damages for breach of contract, as a general rule neither the motives and conduct of the defendant nor the disappointment or wounded feelings of the plaintiff are to be taken into account, and in an action for wrongful dismissal the manner of dismissal, the employee's injured feelings, and the difficulty he may have in finding further employment are not factors which can be compensated for by damages (page 35, lines 18–28).

[4] **Contract—damages—measure of damages—compensatory not punitive —aggrieved party to be put in same position as if contract performed:** In an action for breach of contract damages are compensatory and not punitive, so that an aggrieved party should be put, as far as money can do so, in the same position as if the contract had been performed and no more (page 36, lines 10–38).

[5] **Employment—termination—wrongful dismissal—measure of damages —no damages for manner of dismissal, injured feelings or difficulty of re-employment after dismissal:** See [3] above.

[6] **Evidence—burden of proof—counterclaim—burden on party making counterclaim:** See [1] above.

The appellants brought an action in the Supreme Court to recover money owed to them by the respondent, and the respondent counter-

claimed for the value of stock wrongfully seized, loss of profits and commission and damages for breach of contract.

The respondent was the manager of one of the appellant oil company's filling stations, selling petrol and allied products on a commission basis. A dispute arose and the appellants summarily took possession of the filling station in breach of the agreement between them which required two months' notice of termination of the employment. The appellants issued a writ in the Supreme Court claiming a sum which they alleged was owed to them by the respondent for petroleum stock sold and delivered to him, and which he had paid for by post-dated cheques which were now dishonoured on presentation for payment. The respondent, denying that the cheques were dishonoured, maintained that they had been replaced by bank drafts. He counterclaimed for the value of the stock taken over by the appellants when they seized possession in breach of the agreement, loss of profits and commission, and damages for breach of contract.

The appellants were forced to abandon their claim for lack of evidence, and the trial proceeded on the respondent's counterclaim. The trial judge gave judgment for the respondent and awarded damages which included the value of petrol stocks taken over by the appellants, loss of profits during the two month period for which notice should have been given under the agreement, and compensation for the manner in which the filling station was taken over.

The appellants appealed to the Court of Appeal on the grounds (a) that the trial judge was wrong in finding that the respondent had proved his claim to the value of petrol stocks and loss of profits, and that since in an action for breach of contract damages are compensatory and not punitive, the amount awarded was excessive, and (b) that he was wrong in holding that the burden of disproving the respondent's counterclaim lay on the appellants.

Cases referred to:

(1) *Addis* v. *Gramophone Co. Ltd.*, [1909] A.C. 488; [1908–10] All E.R. Rep. 1, *dicta* of Lord Atkinson applied.

(2) *Maw* v. *Jones* (1890), 25 Q.B.D. 107; 63 L.T. 347, not followed.

Barlatt for the appellants;
Smith for the respondent.

MARCUS-JONES, J.A., delivering the judgment of the court: The appellants are an oil company carrying on business in Sierra

Leone and the respondent was in charge of one of their filling stations selling petroleum and allied products on a commission basis. The appellants, having summarily taken over the filling station, issued out a writ in the Supreme Court claiming the sum of Le2,518.00 as the amount due and owing by the respondent to the appellants for petrol and petroleum products sold and delivered to the respondent, for which the respondent paid by post-dated cheques which were dishonoured on presentation for payment. The appellants enumerated the alleged dishonoured cheques drawn on the Standard Bank of West Africa Ltd. The respondent denied that the cheques were dishonoured and alleged that instead they were replaced by bank drafts. The respondent counter-claimed the sum of Le4,341.75 being petroleum stocks alleged to have been taken over by the appellants when they abruptly took over the station in breach of their agreement, which required them to give to the respondent two months' notice in termination of the agreement. The respondent also claimed loss of profits, special commission and damages for breach of contract. Owing to the unsatisfactory accounting system of the appellants it turned out that the allegation regarding non-payment of the debt was unfounded and they had to abandon their claim so that the trial then proceeded on the respondent's counterclaim.

Judgment was eventually given in favour of the respondent's claim and this included an amount of Le3000.00 damages for the manner in which the filling station was taken over by the appellants. It is against this judgment that the appellants have appealed to this court. They allege first that the quantum of general damages awarded was excessive and could not have been assessed on correct legal principles; secondly, that the learned trial judge was wrong in holding that when the appellants abandoned their original claim, it became their duty to disprove the defendant's counterclaim.

I feel it my duty at this stage to correct a misapprehension as to the burden of proof in a counterclaim. A counterclaim is a cross-action and is governed by the same rules of pleading as a statement of claim. The appellants having conceded that their claim was unsustainable and having submitted to its dismissal, the issue that remained to be tried was the counterclaim. The burden of proof lies upon the party who substantially asserts the affirmative of the issue. The appellants having submitted to the dismissal of their action, the counterclaim was proceeded with; and although a counterclaim may in some respects differ from a cross-action, the issues of fact raised by claim and counterclaim must as a rule be tried together. The burden

require to get new employment—the difficulty he would have as a discharged apprentice in getting employment elsewhere—and it was on this precise ground the direction was upheld. I do not think that this case is any authority whatever for the general proposition that exemplary damages may be recovered for wrongful dismissal, still less, of course, for breach of contract generally; but, such as it is, it is the only authority in the shape of a decided case which can be found upon the first mentioned point.

I have always understood that damages for breach of contract were in the nature of compensation, not punishment, and that the general rule of law applicable to such cases was that in effect stated by Cockburn, C.J. in *Engel* v. *Fitch* in these words: 'By the law of England as a general rule a vendor who from whatever cause fails to perform his contract is bound, as was said by Lord Wensleydale in the case referred to, to place the purchaser, so far as money will do it, in the position he would have been in if the contract had been performed.' "

Continuing, Lord Atkinson said (*ibid.*, at 496–497; 5–6):

"In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action.

One of these consequences is, I think, this: that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.

I can conceive nothing more objectionable and embarrassing in litigation than trying in effect an action of libel or slander as a matter of aggravation in an action for illegal dismissal, the defendant being permitted, as he must in justice be permitted, to traverse the defamatory sense, rely on privilege, or raise every point which he could raise in an independent action brought for the alleged libel or slander itself.

In my opinion, exemplary damages ought not to be, and are not according to any true principle of law, recoverable in such an action as the present, and the sums awarded to the plaintiff

should therefore be decreased by the amount at which they have been estimated, and credit for that item should not be allowed in his account."

It follows therefore that the learned trial judge was wrong in awarding vindictive damages of Le3,000.00 in an action for damages for breach of contract. This amount is disallowed accordingly.

From the evidence it appears that the parties considered two months' notice as sufficient to enable the respondent to hand over and the appellants to repossess the filling station. The respondent's sales averaged 20,000 gallons of petrol monthly at a profit of two cents per gallon. This works out at Le400.00 per month and for the period of two months this amounts to Le800.00. The learned trial judge awarded him Le2,500.00 This is obviously a wrong calculation from the evidence. This head of loss would therefore be reduced by Le1,700.00.

In view of the unsatisfactory state of the appellants' accounts they were unable to contradict satisfactorily the respondent's claim of Le4,341.75 in respect of petrol stocks taken over. The learned trial judge found this claim proved and I see no reason for disturbing that finding in the absence of any cogent evidence to the contrary.

Having disallowed the damages of Le3000.00 under general damages in contract, the question arises whether the respondent is entitled to nominal damages. I feel that the damages which the respondent would be entitled to are such damages as were within the contemplation of the parties at the time they entered into the contract and this in my opinion is adequately met by the loss of profits for the period of two months which the parties regarded as adequate notice.

The amount of Le4,700 made up as follows is disallowed, that is to say: Le1,700.00 reduction on profits claimed and Le3,000.00 general damages allowed, and to this extent the judgment of the learned trial judge is varied accordingly.

Order accordingly.