

Doc# 532

3.11.95

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. C 160/94

CAUSE NO. 233/94



C 160/94  
BETWEEN:

CHRISTOPHER MCNAMEE  
WINSTON MCNAMEE

PLAINTIFFS

AND:

MARION PEYNADO

DEFENDANT

C 233/94  
BETWEEN:

CONCORDE GIFT SHOPPE, A FIRM

PLAINTIFF

AND:

JEWELLERY TRADERS LTD. (1)  
CHRISTOPHER MCNAMEE (2)

DEFENDANTS

For the plaintiff: Mr. M. Parkinson  
For the defendants: Mr. S. McField

BEFORE HARRE CJ

JUDGMENT

These two cases were consolidated. It is convenient throughout to refer to the parties so designated in Cause No. 233/94 as plaintiff and defendants respectively.

The plaintiff took possession of a retail shop unit at the Owen Roberts Airport, George Town when the airport was opened around 1985. She initially took a periodic tenancy from the Civil Aviation

Authority at a monthly rent and eventually obtained a lease running from December 1987. In mid -1987 she entered into an arrangement the terms and legal effects of which give rise to the issues in this case. The plaintiff firm claims that it is entitled to possession of the premises and that the written agreement which was made on the 3rd June 1987 was a grant of a license to occupy the premises for the better management of the store known as the Concorde Gift Shoppe at the premises and that it was an express term of the agreement that the license could be determined by either party giving to the other three months notice. Mrs. Peynado, who claims ownership of the firm says that on 19th January 1994 she gave notice to the defendants terminating the license but the defendants or either of them have remained in occupation at the premises as trespassers.

The defendants on the other hand say that they were not given a license but that they purchased the business, stock in trade and furnishings from the plaintiff outright. They say that there was a collateral oral agreement to the effect that the plaintiff would transfer its lease when obtained.

I will look first at the documentary evidence. The first point to note is that the first formal lease, dated 1st December 1987 contains a clause which provides that the lessee, described as Concorde Gift Shoppe P.O. Box 1199, George Town shall not assign underlet or part with the possession or the right to possession or control of the leased premises or any part thereof without the written consent of the lessor. The lease was for three years at a monthly rental of \$312.50

and Mrs. Peynado gave evidence that the box number -- No. 1199 -- shown on the lease was her own personal box number.

There are two documents dated respectively 27th May and 3rd June 1987. They are so important that I refer to them in full.

The first is a draft which was never signed -

"27th May, 1987

Marion Peynado  
P.O. Box 1199  
George Town  
Grand Cayman

Dear Ms. Peynado,

This letter is to confirm that Jewellery Traders Ltd., of Grand Cayman will acquire the management and merchandise of Concorde Gift Shoppe at the Airport from you under the following conditions:

- (a) A sum of CI\$4,000.00 to be paid, for all fixtures on the premises.
- (b) A sum of CI\$700.00 per month, to be paid to you for rent and utilities of the premises.
- (c) All stock on the premises to be acquired at cost price.

If the above is stated correctly, and the take-over date of July 1st, 1987 is comfortable with you, please sign the bottom of this letter and return it to us, keeping a copy of it yourself.

Sincerely yours,  
  
Jewellery Traders Ltd.  
  
Christopher McNamee

Signed:.....  
Dated:....."

That letter was not acceptable to Mrs. Peynado. She produced the following alternative version -

"June 3 1987

Mr. Chris McNamee  
Jewellery Traders Ltd.  
P.O. Box 1866  
Grand Cayman

Dear Mr. McNamee,

This letter is to confirm that Jewellery Traders Ltd., of Grand Cayman will acquire the management and merchandise of Concorde Gift Shoppe at the Airport under the following conditions:

- (a) A sum of CI\$4,000.00 to be paid, for all the fixtures on the premises.
- (b) A sum of CI\$700.00 per month, to be paid to me for the use and utilities of the premises. First and last month due upon occupying space on June 8, 1987.
- (c) In the event of non-payment of CI\$700.00 per month after a period of two months you will be required to immediately vacate the shop with stock and fixtures to be removed. I will be under no obligation to purchase these.
- (d) All stock on the premises to be acquired at cost price.
- (e) This agreement can be terminated on three months notice from either party.

I trust the above will meet with your satisfaction; therefore please sign below.

(Signed)	(Signed)
Signed:.....	.....
Christopher McNamee	Marion Peynado
Dated:.....	.....
June 8, 1987	June 8, 1987"

The plaintiff's evidence about the events surrounding the two letters was this. Before either letter was produced she had consulted Christopher and Winston McNamee and discussed an arrangement whereby Christopher would manage the store for her. Following that the offer dated 27th May was made but Mrs. Peynado did not agree with the wording and redrafted the letter in the form dated 3rd June. It will be seen in particular that the expression "for rent and utilities" in the first letter has been changed to "for the use and utilities" in the second and that a provision was added that the agreement could be terminated on three months notice from either party.

The second letter was signed by Christopher McNamee and Mrs. Peynado.

She strenuously denies that she made any agreement to transfer any lease and that she had made it clear that she did not have one to sell. That was undoubtedly true at the time. However, the defendants' case is that the agreement was indeed for the sale of the business at the Airport and it was a term of the agreement that the defendant would transfer the lease to the plaintiffs when she got it; and it was then agreed between the parties that the McNamees should operate the business under a management agreement until the plaintiff was able to transfer the lease so that they could get through Airport security to operate the business. Mrs. Peynado acknowledges that she never showed the letter to the Civil Aviation Authority.

On 30th June 1993 some six years after these events, the Civil Aviation Authority wrote to Concorde Gift Shoppe at P.O. Box 1199 in

the following terms -

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"Concorde Gift Shoppe  
P.O. Box 1199  
George Town  
Grand Cayman

Dear Sirs,

Re: Lease Agreements

Enclosed are Lease Agreements covering space rented by Concorde Gift Shoppe on the first floor of the Airport Terminal Building. You will recall the problem we had regarding the transfer of lands from Government to the Authority. This had just recently been resolved and it was decided by the CAA Board to make leases effective from the 1st January, 1993 for a period of three (3) years.

Two signatures are required along with a Notary Public's on the front and back of the Registered Land Law, 1971 LEASE Forms and on the last page of the Lease Agreements. When this had been done, please return them to us for the signatures of the Chairman of the Authority after which they will be forwarded to the Registry Office. You will subsequently be informed of the Stamp Duty Fees and after these charges are paid, the leases will then be executed.

Yours sincerely,

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Secretary  
Civil Aviation"

An unexplained feature of this matter is although the letter to which I have just referred was addressed to Box 1199 the draft lease itself indicated the address of Concorde Gift Shoppe as being P.O. Box 1866 G which is the Box number of Jewellery Traders Ltd the first defendant. It suffices at this time to say that it was Mrs. Peynado who signed the new lease and gave three months notice to vacate the shop to both

the McNamees, and to Jewellery Traders Ltd.

There are a number of factors which favour one or other of the conflicting versions of the parties. One thing is certain. These kinds of homespun arrangements, without benefit of legal advice, are a recipe for litigation, and the courts have to do the best they can with them.

No explanation is forthcoming as to why it could have been necessary to enter into a devious arrangement by way of a written document which did not reflect what the parties had agreed. There is no evidence that the Civil Aviation Authority had the slightest objection to the McNamees taking over Mrs. Peynado's business or that any problem has arisen during the years when they have been operating it. If Mrs. Peynado had indeed agreed to relinquish all her interest in the business, why did they not put their cards on the table there and then with the CAA? Mr. Winston McNamee gave evidence of his business experience and in particular that he had helped to found Cayman National Bank, worked in banking for 20 years, left as Executive Vice President and now worked in real estate. He was no novice nor the unbusinesslike person which his version of events suggests.

Moreover, neither he nor his son seem to have taken the slightest interest in the terms of the lease which they say it had been agreed that they would take over, even to the extent of ascertaining the rent. They paid over \$700 per month to Mrs. Peynado for the use of the premises and utilities until she suggested they pay the rent direct to

CAA from September 1991. Then, they say, they were disagreeably surprised to find that the rent charged by CAA was only \$312.50 per month. Mr. Winston McNamee did say, however, that he thought \$700 was cheap. That is a possible though not very convincing explanation. They continued paying the rent and, according to the evidence of a member of their staff, a Mrs. Greenwood, it was discovered in 1993 that Mrs. Peynado had began paying rent also in that year.

Mrs. Peynado's behaviour in relation to the payment of \$700 was also curious. She gave no better reason for foregoing the difference between \$312.50 and \$700 per month in 1991 than that the existing arrangement was a bother to her. That is only credible on the basis that she had completely lost interest in the business at that time and indeed she had taken no active part in it from the moment the defendants moved in. I am asked to infer that the resumption by her of the rental payments is a colourable attempt to justify her contention that she has never relinquished, and never agreed to relinquish any leases, and to get the new lease in her name. She says she discovered the rent was behind and only discovered later that it had been paid.

Mr. Winston McNamee's evidence is that he repeatedly asked Mrs. Peynado to transfer the lease. There is no documentary evidence of this at all over the whole material period.

Taken all in all, the oral evidence throughout is inconsistent on both sides. As to the law, I was rightly referred to a number of well known doctrines relating to the method the court should use to ascertain the

terms of an agreement, the requirement of writing containing in S. 37 (2) of the Registered Land Law and the proviso relating to the doctrine of the part performance.

Consideration of the doctrine of part performance seems to me to beg the very question of issue in this case - whether the defendants in taking possession and operating the business were wholly performing the terms of the written contract or partly performing the written contract as orally varied. Their activities are equally consistent with either proposition. Their payment of rent to the CAA is some support for their view that they thought of themselves as tenants from the time when they began to do so at least, but that is not in my view enough to displace the unequivocal terms of the termination clause of the written agreement. Mrs. Peynado could never have agreed to transfer any lease to them. That would have required the consent of the CAA. She could have done no more than say that she would use her best endeavours. True, she could have done nothing at all in the expectation that the defendant would be allowed to sign a lease in the name of that nebulous entity "The Concorde Gift Shoppe". One of the issues in this case is the proprietorship of that name, and the goodwill of the business. Did Mrs. Peynado dispose of it or did she not? The defendants's argument really amounts to this. Mrs. Peynado had sold her entire interest in the business, which did not include any lease, so she had nothing left. I think that that argument has two flaws. She did have an "interest in land" which she could dispose of by contract, as the defendants say she did; and she did not dispose of all that she had. She retained the right to terminate the agreement

and regain all that she had transferred on giving three months notice. It is that clause which seems to me to be fatal to the defendant's case.


I am constrained to adopt a simple and straightforward approach to this case. That the written agreement dated 3rd June 1987 meant exactly what it says. And that there was no inconsistent oral agreement. It was a management agreement revocable on 3 months notice. It may well be that the McNamees thought that on moving in they had seen the last of Mrs. Peynado and they were shocked to find that this was not so. It may also be that for years she lost interest and did indeed ultimately change his mind and decide to move back.

Those seem to me to be reasonable inferences from the evidence. Mr. McNamee's evidence that she admitted changing her mind (which she denies) could amount to no more than that. But that is not to say that she had abandoned her right to invoke the terms of the written contract.

The defendants are not the tenants of the CAA. The plaintiff in Cause No. 233/94 of which Mrs. Peynado is the sole proprietor is entitled to the reliefs which it seeks in the specially endorsed statement claim in Cause 233/94 and it follows that the claims of the plaintiff in Cause 160/94 fail.

Cost to follow the event.

Dated 3rd November 1995

  
G.E. Harre  
Chief Justice

