COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2016/CLE/gen/01225

BETWEEN

BARBRO ANNA PILCH

Plaintiff

AND

DANIEL EDWARD FANCHER

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Ashley Williams for the Plaintiff**

Defendant pro se

3 November 2021 and 2 December 2021

JUDGMENT

WINDER, J

This is the claim of the Plaintiff (Pilch) seeking to sue upon the judgment made in the District Court, Pitkin County, Colorado against the Defendant (Fancher) on 13 August 2014.

[1.] On 24 February 2021 the Court ordered that unless the Defendant complied with the case management directions (given since 6 February 2020) by 31 March 2021, the Defence would be struck out. The Defendant failed to comply with the directions as ordered resulting in the Defence being stuck out.

[2.] The matter came on for trial following the striking out of the Defence of Fancher who was represented by Alexander Maillis at the time.

[3.] Pilch's claim is set out in her Amended Statement of Claim, which provided, in part as follows:

> 3. On or about the 1st June 2007, the Plaintiff and the Defendant orally agreed to form a general Partnership ('the Partnership') for the purposes of purchasing, owning, improving, and maintaining, using, renting, and/or re-selling for a profit real property located at Lot No. 20, Dorris Cove, Elbow Cay, Abaco, Commonwealth of the Bahamas ('the subject property').
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> 4. At the time of the information of the Partnership, the Plaintiff and Defendant were involved in a romantic relationship.
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> 5. Pursuant to the Partnership, the Plaintiff agreed to provide all of the money necessary to acquire the subject property and to construct a manufactured residence. To date, the Plaintiff has paid for the subject property, the carrying costs associated with it, and the costs to prepare the same for construction including the costs of construction materials, shipping, duties, customs taxes, costs of labour, the purchase of appliances, and other costs associated with the development of the subject property. It was a term of the verbal Partnership agreement concluded between the parties that all amounts paid by the Plaintiff were to be credited to her capital account.

6. Pursuant to the Partnership, the Defendant agreed to render all services reasonably necessary to provide for the construction of the manufactured residence to be placed on the subject property. These services included the selection and oversight of the subcontractors required to complete the work the Defendant could not perform such as pouring a concrete foundation, electrical and plumbing work. The parties orally agreed that the Defendant's services would be credited towards his capital account at a rate of US$65.00 per hour.

7. Further, it was a term of the Partnership that the parties would split the net profits of the sale of the subject property in proportion to their capital contribution. The parties did not address in their verbal Partnership agreement how net losses would be proportioned in the event that the subject property did not sell at a price sufficient to result in a net profit.

8. The subject property was purchased by the parties in or around the 6th September 2006. The Conveyance illustrating the purchase of the same was duly recorded in the Registry of Records of the aforesaid Commonwealth in Volume 9962 at pages 397 to 404.

9. After the subject property was purchased, the parties hereto proceeded with construction of a residence. The parties contracted with Topsider Homes, a company incorporated under the laws of the United States of America, for the purchase of a pre-fabricated home. Rather than paying Topsider Homes an additional US$45,000.00 to erect the home on the subject property, the Defendant, as part of his agreed contribution to the Partnership was to perform the work. The Defendant determined that construction of the residence would take approximately three months. The works to be performed by the Defendant in the three month period was to include erecting the pre-fab home, completing the interior and exterior finish work, concrete work, and the installation of a septic system.

10. In breach of the said Partnership, the Defendant failed and/or refused to complete the construction of the home.

11. After two years, Mr. Fancher had completed only minimal work on the residence despite repeated requests made to him by the Plaintiff to do so.

12. Due to the Defendant's breach of the Partnership, the Plaintiff was forced to hire an experienced contractor, Mr. Marty Cash ('Mr. Cash'), to complete the construction project. At the time, Mr. Cash was hired by the Plaintiff, he had determined that the value of the services rendered by the Defendant at the time of him being contracted for the construction of the residence did not exceed the amount of US$30,000.00.

13. Further, Mr. Cash determined that the home was approximately only 25% complete at the time he was hired to complete the said construction. ...

14. ...Previously, the Defendant warranted to the Plaintiff that he had spent 2500 hours on the construction of the residence located on the subject property. Pursuant to the parties' Partnership agreement this would equate to a total of US$162,500.00 for the Defendant's services which was to be applied to his capital account. Notwithstanding the same, the Defendant by an email to the Defendant valued his services as US$100,000.00 or 1538 hours of work.

15. To date the Plaintiff has incurred costs in connection with the subject property totaling US$826,803.00; which should be credited to the Plaintiff's capital account pursuant to the terms of the Partnership. ...the Partnership has a negative value."

16. The parties subsequently ended their romantic relationship and the Defendant has become increasingly hostile towards the Plaintiff. As such, the parties can no longer be in a Partnership.

17. Further, during the course of the romantic relationship between the parties, the Plaintiff advanced the sum of US$231,231.00 to the Defendant for the payment of his personal expenses pursuant to an oral agreement concluded between them. It was a term of this verbal agreement that the Defendant would reimburse the Plaintiff all of the advanced sums.

18. Since the advancement of the sum of US$231,231.00 to the Defendant, he has only repaid the Plaintiff the sum of US$33,997.00, in breach of their verbal agreement. The Defendant has been unjustly enriched due to the breach of the said verbal agreement.

19. The amount which remains outstanding and owing to the Plaintiff under the verbal agreement relating to the payment of the Defendant's personal expenses is

US$168,498.00. The said figure is calculated utilizing an equitable set-of of the following amounts:

(1) The amount of US$28,736.00 which the Plaintiff owes the Defendant for his interest in the Partnership; and

(2) The amount of US$33,997.00 which was paid to the Plaintiff by the Defendant in part payment of the debt incurred by reason of the verbal agreement concluded between the parties as it related to the payment of the Defendant's personal expenses.

20. By Complaint filed by the Plaintiff on the 19th September 2012, before the District Court of Pitkin County, Colorado, USA, the Plaintiff made application before the District Court of Colorado to have the Partnership dissolved and for reimbursement from the Defendant on an unjust enrichment claim pursuant to the verbal agreement concluded between them for the payment of the Defendant's personal expenses.

21. The hearing of the Complaint before the District Court of Pitkin County, Colorado, USA occurred on the 13th April 2014 and the following Orders were made:

(1) The Partnership is hereby judicially dissolved and a Judicial Decree dissolving the Partnership is hereby entered.

(2) A constructive trust on Mr. Fancher's interest in the subject property is hereby imposed in favor of Ms. Pilch.

(3) Mr. Fancher shall sign and return a deed transferring his ownership interest in the subject property within 10 days of delivery of the form of the deed to Mr. Fancher.

(4) Ms. Pilch may deliver the form of the deed to Mr. Fancher by email at billfish45@msn.com which is the only address for delivery that Mr. Fancher had provided the Court and Ms. Pilch.

(5) Pursuant to C.R.C.P. 70, if Mr. Fancher fails to sign and/or return the deed to Ms. Pilch within 10 days of delivery of the deed to him, Clerk of the District Court may sign the deed required to effectuate this Order without further notice to Mr. Fancher. Any deed executed by

the Clerk of this Court shall carry the same force, effect and validity as if Mr. Fancher had specifically executed said document as called for by this Order.

(6) Ms. Pilch is awarded damages against Mr. Fancher, after set-off, in the amount of US$168,498.00. Judgment hereby enters in favor of Plaintiff Barbro Pilch and against Defendant Daniel Fancher in the amount of US$168,498.00.

(7) Mr. Fancher shall pay to Ms. Pilch post-judgment interest at the legal rate of 8% plus costs in the amount of $331.00 for this proceedings.

(8) As this resolves all pending claims between the parties this shall constitute a final order in this matter.

22. The Defendant has failed and/or refused to abide by the Order(s) of the District Court of Pitkin County, Colorado, USA.

AND THE PLAINTIFF CLAIMS:

(1) A Declaration that the Partnership and/or verbal contract concluded between the parties has come to an end;

(2) A declaration that a constructive trust in relation to the subject property exists between the parties for the benefit of the Plaintiff;

(3) An Order that the freehold property being all that piece parcel or lot of land being Lot Number Twenty (20) of the Dorros Cove Subdivision situate on the Southern end of Little Guana Cay (also known as Elbow Cay) one of the Abaco chain of Cays in the Commonwealth of The Bahamas do vest in the Plaintiff, Barbro Anna Pilch, for all the estate and interest which immediately prior to the dissolution of the Partnership were vested in the Defendant, Daniel Edward Fancher.

(4) An Order setting-off any amounts owed by the Plaintiff to the Defendant under the Partnership against the amounts owed to the Plaintiff by the Defendant under the verbal contract for the payment of his personal expenses;

(5) An Order that the Defendant do pay the Plaintiff the sum of US$168,829.00, with interest thereon being applied at the rate of 8% per annum from the 13th August 2014;

(6) Costs; and

(7) Such further relief as the Court deems just.

[4.] The only witness at trial was Pilch. Pilch's examination in chief was given by her witness statement filed on 4 March 2021. She was subject to cross examination. Pilch's witness statement was settled in the following terms:

1. That I am the Plaintiff in this action.
2. That I met the Defendant in or around October 2005 and for the period 2006 through 2009, the Defendant and I, were engaged in a romantic relationship.
3. As with any romantic relationship, I assisted the Defendant in a multiplicity of ways. One such way was financially. Through the period 2006-2010, my expenditure on the Defendant totaled US$231,231.48. That the expenditure described above by me on the Defendant could not be described as a gift as at all material times the Defendant promised to repay me and also made part payment on the debt. In one instance, the Defendant also provided to me the original title to one of his vehicles, as collateral for the aforesaid debt.
4. That the Defendant at all material times was a furniture builder and finish carpenter or at the very least he represented himself to have this expertise.
5. That when we and the Defendant first started dating in or around 2006, we vacationed to The Bahamas and fell in love with the Abacos, and determined that it would be good to invest in real estate, develop projects, and build a vacation home. The Defendant agreed and we established a business Partnership for this purpose. As part of this Partnership, the Defendant and I agreed that I was going to put up the capital and he was going to provide the necessary labour and skill in relation to constructing the home. Afterall, the Defendant during the course of our relationship represented that he was a contractor/carpenter and had significant experience with building homes.

6. Further, we spoke to a number of prefab companies, whom advised that the cost per hour for constructing a prefab home of the style, shape and character akin to what we were constructing in Abaco, would be US$65.00 per hour. The Defendant and I agreed, for each hour of work US$65.00 would be allocated to his capital account. We also agreed, that any losses as between us, would be rationed based on the overall percentage contributed to the Partnership.
7. That in or around August or September 2006, I advanced the purchase money for the property in The Bahamas, and the Conveyance was placed in the names of both myself and the Defendant.
8. That during the course of the purchase, the Defendant and I, informed our conveyancing Attorney of our Partnership Agreement, and was advised that the Defendant would not be able to engage in gainful occupation in The Bahamas as such he would not be able to construct the home. The situation would be different, however; if he was constructing his own home on his own land. Due to this, I agreed to allow the Defendant's name to be placed on the Conveyance for the purposes of avoiding certain regulatory requirements in The Bahamas. In hindsight, I wish I never agreed to place his name on the Conveyance, until such time that he had substantially completed the construction work.
9. That I purchased a Prefab home from Topsider Homes at a cost of about US$160,000.00, to be constructed on the lot located Elbow Cay, in the Abacos. Customs and shipping of the home to the Bahamas cost about US$61,000.00 and excavation of the building site was an additional of US$35,000.00. Prior to purchasing, the Defendant assured me on several occasions that he had the expertise to buildout the house and to hire subcontractors as necessary. The project was estimated to be completed within three months.
10. The Defendant, however; failed to live up to his side of the Partnership Agreement and failed to complete the house within the allotted three-month time frame.

11. After about two years of the Defendant fiddling with the construction project in The Bahamas, I had enough. The expenses relating to it were growing and yet there was nothing to show for it. In or around June 2009, I had essentially run out of money for the project and the Defendant ceased working on the home.
12. Subsequent to the Defendant ceasing to work on the home our relationship ended and as earlier mentioned I hired Mr. Marty Cash, a contractor from Hope Town, Abaco, The Bahamas to finish the construction of the home. Mr. Cash was hired in or around the year 2012. The project sat idle for about three years prior to Mr. Cash's hiring.
13. That the Defendant previously asserted that he valued his contribution to the Partnership at US$100,000.00. This in my opinion cannot be when one considers the tremendous losses which the Partnership incurred because he misrepresented his abilities as a contractor and carpenter.
14. That I brought court proceedings against the Defendant in the District Court of Colorado, U.S.A. and on the 13th August 2014, it was ordered that the Partnership between the Defendant and I, was dissolved, a constructive trust on the Defendant's interest in the Property called and known as Lot 20 Dorros Cove, Elbow Cay, Abaco, the Bahamas exists in my favour, and that a Clerk of the Court may execute a deed in my favour over the Defendant's interest if he failed to do so in ten days of delivery of the Judgment.
15. That the Supreme Court of the Bahamas should have judicial notice of the Colorado proceedings and its determinations as the Agreement in question between the Defendant and I, was made in that jurisdiction notwithstanding that the property in question was located in The Bahamas.
16. That the Defendant agreed to provide "sweat equity" as part of determining his overall contribution to the Partnership. However, he failed to maintain his part of the agreement and by his actions actually made the project less valuable. Due to this, it is unconscionable for the Defendant to have any interest in the property.

Analysis and disposition:

[5.] This is essentially a suit by Pilch, upon the judgment given in her favor in the Court in Colorado in the USA. The judgment of the Colorado Court provided at paragraphs 32-39 as follows:

> 32. The Court also would note that whether there was a Partnership with regard to the Property, the same result would be reached by the application of unjust enrichment principles to the Property. Clearly, Ms. Pilch advanced the money for the purchase and construction with the expectation that Mr. Fancher would perform the services necessary to fully construct the home. Mr. Fancher failed to do so despite ample time to do so and repeated requests by Ms. Pilch to do so. It would be inequitable for Mr. Fancher to retain an interest in the Property under these circumstances.
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> 33. "The right of setoff allows entities [or persons] that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A." *In re Myers*, 362 F.3d 667, 672 (10th Cir. 2004). "It is for the trial court to determine the amounts and reasonableness of the set-offs." *Flanders Elect. Motor Service, Inc., v. Duvall Controls & Engineering,* 831 P.2d 492, 496 (Colo. App. 1992). Here, it is proper for the amount Ms. Pilch owes Mr. Fancher for his interest in the Partnership (or Property) of $28,736 to be set-off by the amount Mr. Fancher still owes Ms. Pilch for the Fancher Personal Expenses in the amount of $197,234.
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> ORDERS
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> 34. The Partnership is hereby judicially dissolved and a Judicial Decree dissolving the Partnership is hereby entered.
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> 35. A constructive trust on Mr. Fancher's interest in the Property known as Lot 20, Dorros Cove, Elbow Cay, Abaco, Commonwealth of the Bahamas (the "Property") is hereby imposed in favor of Ms. Pilch;
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> 36. Mr. Fancher shall sign and return a deed transferring his ownership interest in the Property to Ms. Pilch within 10 days of delivery of the form of the deed to Mr. Fancher.
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> 37. Ms. Pilch may deliver the form of the deed to Mr. Fancher by e-mail at billfish45@msn.com which is the only address for delivery that Mr. Fancher has provided the Court and Ms. Pilch.
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> 38. Pursuant to C.R.C.P. 70, if Mr. Fancher fails to sign and/or return the deed to Ms. Pilch within 10 days of delivery of the deed to him, Clerk of the District Court may sign the deed required to effectuate this Order without further notice to Mr. Fancher. Any deed executed by the Clerk of this Court shall carry the same force, effect and validity as if Mr. Fancher had specifically executed said document as called for by this Order.

39. Ms. Pilch is awarded damages against Mr. Fancher, after set-off, in the amount of $168,498. Judgment hereby enters in favor of Plaintiff Barbro Pilch and against Defendant Daniel Fancher in the amount of $168,498.

[6.] The decision of ***Barnett CJ*** (as he then was) in ***KPMG Inc v Pogachar CLE/gen/00176 of 2010*** is instructive on how this Court ought to treat with the judgment of a foreign court. At paragraphs 15-17 of the decision, ***Barnet CJ*** stated:

15. In **Dicey and Morris**, the learned authors state the principle as follows:

> "...a foreign judgment for a debt or definite sum of money might be enforced by an action in personam on the part of the person in whose favour the judgment was given (generally the plaintiff in the foreign proceedings) for the sum due under the judgment. Enforcement was not dependent on the reciprocal treatment of English judgments in the foreign country, English policy being singularly generous in this regard. Nor was it necessary that the judgment should be given as the result of investigation of the merits of the case; if the court were one which in the view of English law had jurisdiction over the defendant, and he failed to defend, the court's judgment might be enforced in England as fully as if he had defended the case on the merits."

16. As recently as July 2012, the Court of Final Appeal of Hong Kong summarized the common law position in **First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd. [2012] HKEC 946**, it said:

> 44. At common law a judgment of a foreign court of competent jurisdiction which is final and conclusive and on the merits will be conclusive in Hong Kong proceedings if the parties are the same and the issue is identical: Carl Zeiss Stiftung v. Rayner & Keeler Ltd [1967] 1 AC 853. Lord Reid, at 918-919, said, however, that there were at least three reasons for being cautious in any particular case. First, it might not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or *obiter*. Secondly, it might be most unjust to hold that a litigant should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad with the result that the decision in that case went against him. Third, there could be no estoppel of this character unless the foreign judgment was a final judgment on the merits.

> 45. The questions in the *Carl Zeiss* case related to identity of parties and issues, and to whether the judgment was final and conclusive, but the meaning of "on the merits" arose in Sennar (No. 2) [1985] 1 WLR 490. In that case the bill of lading contained a clause providing that "all actions under this contract" were subject to the exclusive jurisdiction of the courts of Khartoum or Port Sudan. Dealers in Sudanese groundnut expellers claimed that the shipowners had wrongfully inserted a false date on the bill of lading. The Dutch court held that their only claim was for breach of contract, and the effect of the jurisdiction clause was to make any remedy enforceable only in the Sudanese courts. When the same claims were brought in England in tort, it was held that the plaintiffs were precluded by the Dutch decision from arguing that the exclusive jurisdiction clause did not apply. Lord Brandon said (at 499):
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> Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.

> 17. The fact that a Defendant may not have participated in the foreign proceedings does not prevent this Court from giving effect to the decision of that tribunal as a decision on the merits. If the foreign tribunal had jurisdiction over the Defendant (for example by the Defendant submitting to jurisdiction) this Court will give effect to the decision of that foreign tribunal as if the Defendant had fully defended the case on the merits.

[7.] Having observed Pilch as she gave her evidence I am satisfied that she was a truthful witness. I therefore accepted her evidence which supports her claim to the relief sought in the Amended Statement of Claim. It is supported by the judgment of the District Court, Pitkin County, Colorado made by Judge Nichols on 13 August 2014. The judgment is that of a competent court on the merits and the decision is final and conclusive. Whilst he may not have participated in the foreign proceedings, the Court had jurisdiction over Fancher in that he submitted to its jurisdiction. The parties here are the same as before the Court in Colorado.

[8.] In all the circumstances I must give judgement for Pilch as prayed in her Amended Statement of Claim. She shall have her reasonable costs to be taxed if not agreed.

Dated this 9th day of December 2021

Ian R. Winder

Justice