The Republic of Trinidad and Tobago

In the High Court of Justice

Claim No. CV 2007-04441

Between

Phyllis Crawford

Plaintiff

And

Frankie Ramkalawan Defendant

Before The Honourable Mr. Justice Devindra Rampersad

Appearances:

Mr. Gerard Raphael for the Plaintiff

Mr. Eduardo Martinez instructed by Ms. Kavita Rampersad for the Defendant

Delivered on the 25th day of March 2010

JUDGMENT

1. Henry Ramkalawan (hereinafter called "the testator"), is the father of both the Claimant and Defendant. He died on 23 May 2003, leaving his last will and testament dated 12 November 2000. In it, certain devises were made with respect to property situate at No. 27 Southern Main Road, Curepe. For the sake of clarity and perspective, it is to be stated that said property includes as part of its physical makeup, a "beer garden" business- which is the subject matter of this claim.

2. Twenty three (23) years prior to his death – since 1980 - the testator gave over possession of the business to the Defendant to run the same under his own name and with the wine retailer's license in the Defendant's name.

3. More than twelve (12) years prior to his death – on the 23rd March 1991 – the testator entered into an agreement with the Defendant in which they were referred to as "the Father" and "the Son") respectively. In the agreement, the following recital and agreement was set out:

"*WHEREAS*
The Father is the Owner of a "Beer Garden" diyusyrf sy (sic) 27, Southern Main Road, Curepe.

AND WHEREAS because of the Father's failing health and age and the Son's financial difficulties it is agreed between the parties as follows:

(a) The Father has temporarily agreed to and has transferred the business known as "THE BEER GARDEN" to the Son and the Son has AGREED with the Father to accept a transfer of the said Beer Garden until such time as the Father deems fit to have the said business re-conveyed to him."

4. In his will, the testator appointed the Claimant (who was his daughter and who isthe Defendant's sister) and his granddaughter, Sherene Gowrie as the executrices of his estate. It was not in issue that probate of the said will was granted to the

executrices on the 23 January 2004[1]. A copy of the grant of probate was not provided for the court, however. After the payment of all his just debts, funeral and testamentary expenses, the testator gave, devised and bequeathed his property known as number 27 Southern Main Rd., Curepe to:

4.1. his daughter Phyllis Crawford [the Claimant],

4.2. his wife Sylvia Ramkalawan [who the parties agreed had predeceased him by reason of which there was lapse of the gift to her although no death certificate was provided];

4.3. his son Frankie Ramkalawan [the Defendant];

4.4. his daughter Joycelyn Dean.

5. The testator went on to declare in his said Will that he was the owner of "*a 'Beer Garden" business situated at the aforementioned premises*"[2] and, in the Will, he gave, devised and bequeathed this business to his daughter -- the Claimant -- for her use and benefit.

6. On 5th February 2007, the executrices assigned and assented the property at 27 Southern Main Rd., Curepe [which is leasehold property] to the Claimant, the Defendant and the said Joycelyn Dean as tenants in common for all the unexpired residue of 999 years commencing from the 6th day of December 1927. No mention is made therein of the business.

7. On 21 June 2007, the Claimant wrote a letter to the Defendant which basically called upon the Defendant to try to settle the issue of the transfer of the business to her under the will. The Defendant responded by letter 19 July 2007 in which he said that he had no intention of handing over the operation of the business to the Claimant. In response, the Claimant sent a "without prejudice" letter dated 30 July 2007 to the Defendant in which she offered to allow the Defendant to continue to operate the business upon payment of a reasonable monthly rent to her. This letter was not admitted by the Defendant as he alleged that he never

[1] See exhibit "P.C.3" to the witness statement of the Claimant dated 15 May 2009 -- the deed of assent at paragraph 2 of the recitals on pages 2 & 3.
[2] Being No. 27 Southern Main Road, Curepe.

received same. Notwithstanding the "without prejudice" reservation in the said letter, the Claimant annexed same to her witness statement as evidence, thereby waiving any privilege that may have attached thereto.

8. The Claimant brought this action on 23 November 2007. The action was brought by Claim Form by the Claimant **in her personal capacity** asking for the following reliefs:

   8.1. a declaration that the Claimant is entitled to possession of the beer garden

   8.2. an order by the Claimant to recover possession of the beer garden from the Defendant

   8.3. an order that the Defendant transfer the beer garden to the Claimant.

9. In her Statement of Case, the Claimant said that the testator was the owner of the property situate at 27 Southern Main Rd. which comprised a dwelling house and a "Beer Garden" in its southern downstairs portion - the latter operated by the Defendant. The Statement of Case goes on to recite the agreement and the will and refers to the devises in the will mentioned above. It also sets out the deed of assent registered as number DE 200701013892 by which the property was assigned to the beneficiaries as tenants in common. The letters referred to above were also set out and, departing from the claim form, the Claimant made a claim for possession and the transfer of the beer garden leaving out the relief for the declaration set out in the claim form. No documents whatsoever were attached to the statement of case.

10. In the defence, the Defendant says that the testator only operated the beer garden for about one year from 1979 to 1980 but that, thereafter, from 1980 to present, the Defendant has been operating the said beer garden and has been the registered holder of the wine retailers' license in respect thereof. He also went on to say that he has been solely responsible for the payment of all business operating expenses as well as all maintenance and repair costs related to that part of the building from which the said business is operated. The Defendant further avers that during the lifetime of the testator, he, the testator, never requested a re-conveyance of the beer garden from the Defendant, and that, as such, at the date of the death of the

testator, the Defendant was still the owner of the said business. As a result, he says that the devise of the business in the will amounts only to the expression of a wish by the deceased but cannot operate as an effectual transfer of the business. In any event, the Defendant continues, it would be inequitable for the business to now be conveyed to the Claimant since, for approximately the last 30 years, he has operated the beer garden and has borne all of the expenses and problems inherent in running and operating the same. Consequently, he is solely responsible for the goodwill that has been built up over these many years.

11. Copies of the Defendant's wine retailers' licenses from 1979 to 2007 were annexed to the defense. No other documents were annexed.

12. No reply was filed.

The issues:

13. The parties did not file a Statement of Issues as mandated by the order of the Honourable Mr. Justice Smith of the 27th January 2009.

14. As I see it, the following issues arise for determination, with attendant questions to be considered:

    14.1. Does the Claimant have the sufficient locus standi to bring this action? In this regard, I ask myself the following questions:

        14.1.1. Can a beneficiary under a will bring an action as a beneficiary in her personal right against a Defendant in relation to an estate asset in which no formal document assigning title to her has been prepared and executed in her favour by the executrices?

        14.1.2. Should this action have been brought by the executrices of the will instead -- possibly on an application for the construction of the will for the determination of the issue of whether the business was capable of being devised under the will and was so devised -- in light of the fact that no document assigning title has ever been prepared?

14.2. What was the business transferred to the Defendant in 1980 or 1993 under the agreement? What were its assets and what was its value?

14.3. Was any request made for the re-conveyance of the business to the testator during his lifetime?

14.4. Was it the intention of the parties at the time that the agreement was signed that the agreement would survive the death of the testator? Was it intended for the benefit of the testator's estate?

14.5. What is the effect, if any, of the devise of the business in the will? For the purposes of certainty and finality in litigation, what was the business which existed at the date of the testator's death? What were its assets and its value?

14.6. What is the proper cause of action in this matter?

The Law:

15. It is trite law that a deceased's assets vest in the executor of the estate [in the event of testacy[3]] and in the administrator general [in the event of intestacy[4]] upon death – see the discussion by Hamel Smith J (as he then was) in **Walcott v Alleyne** HCT 92 of 1985 Those assets must be divested by the executors/administrators to the beneficiaries out of the estate by some manner. In the case of real property, those assets are distributed by a deed or other instrument of assent. In the case of chattel and choses in action such as apply in this case to the business which is the subject of these proceedings – a beer garden - and which would necessarily comprise inventory, appliances and tables and other chattel along with the goodwill of the business, then a deed of assignment of these things ought to be done to vest title in the beneficiary.

[3] Williams, Mortimer and Sunnucks on Executors, Administrators and Probate. 18th ed. 2000. para. 8-02.

[4] Ibid. para. 8-10.

16. The Claimant claims the business known as the "Beer Garden." An understanding of the term "business" is relevant. "Business" is a wider term than "trade", and not synonymous with it, and means almost anything which is an occupation as distinguished from a pleasure. However the term must be construed according to its context: **47 Halsbury's Laws**: 4th Ed [2001 Edition] para 6. In **Rolls v Miller** [1884] 27 Ch D 71, Lindley LJ elaborated upon the preceding definition, and stated that *"anything which is an occupation or duty which requires attention is a business."*

17. In **Town Investments v Department of the Environment** [1977] 1 All ER 813 at 819, [1978] AC 359 at 383 Lord Diplock said the word 'business' is an etymological chameleon which suits its meaning to the context in which it found. In **American Leaf Blending Co Sdn Bhd v Director General of Inland Revenue** [1978] STC 561, [1979] AC 676, the issue was whether income was 'gains or profits from a business'. It was Lord Diplock who gave the opinion of the Privy Council and indicated that there was no special meaning of 'business' in that context. He said ([1978] STC 561 at 565, [1979] AC 676 at 684):*'In the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business*.'

    Whereas, he said, in the case of a company incorporated to make a profit, it might raise such a presumption. Later he continued:

    > *'The carrying on of "business", no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between.*'

18. It is to be noted that in the instant proceedings, the beer garden business was not registered in accordance with the **Registration of Business Names Act Chap. 82:85**, as it ought to have been. The long title to the Act reads, *"An Act to provide for the registration of firms and persons carrying on business under business names and for purposes connected therewith."*

It is noteworthy that, having failed to properly register the business, questions relating to equity may have been relevant but do not arise in these proceedings so I do not intend to deal with them at this point.

Resolution of the Issues:

ISSUE 1:

Does the Claimant have the locus standi to bring this action? Can a beneficiary under a will bring an action as a beneficiary in her personal right against a Defendant in relation to an estate asset in which no formal document assigning title to her has been prepared? Should this action have been brought by the executors of the will instead -- possibly on an application for the construction of the will -- in light of the fact that no document assigning title has been prepared and registered?

19. The Claimant is a party to this action in the personal capacity of a beneficiary under the Will of the testator, yet this Court has been furnished with no such proof of title. Whereas the grant of probate seems not to be in issue, I would have expected that a copy of the same would have been provided for the court. The Deed of Assent in respect of the subject property does refer to the grant of probate in favour of the executrices so, for now, I would accept that there was in fact a grant of probate. Having regard to the fact that no document vesting the business in the Claimant has been produced, I believe it safe to assume that no such documents exist and, as a result, I am not prepared to accept that the Claimant has any title or locus to bring this claim. It seems to me that the testator's interest, if any, in the business remains in his estate unadministered at present.

20. Even if all that existed at the death of the testator was the right to request the reconveyance, this right would be a chose in action which still is required to be assigned from the estate to the beneficiary -- the Claimant herein.

21. The classic definition of a chose in action is that of Channel J in **Torkington v Magee** [1902] 2 KB 427, 71 LJKB 712, [1900-3] All ER Rep 991: it is a personal right of property which can only be claimed or enforced by action, and not by taking physical possession. It is a necessary condition of the existence of a chose in action that there is a remedy for its enforcement; and it is usually the case that a chose in action is something that is capable of being turned into money: **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98, [1998] 1 BCLC 493, [1998] 1 WLR 896, 915.

22. It seems that an effective transfer of a chose can be done by way of

    22.1. Assignment

    22.2. Trust

    22.3. Promises to assign or create a trust. [5]:

23. In order to effect an assignment of a chose in action[6];

    23.1. *The assignee must have manifested an intention to transfer the chose.* Fundamental to any transfer of property is the manifestation of "final and settled" intention on the part of the assignor to make an immediate and irrevocable transfer of the chose to the assignee. See: Re Williams [1917] 1 ChD, CA) at 8 per Warrington LJ.

    23.2. *The thing being assigned must be a chose in action, in present existence, certain or capable of being ascertained.* For an assignment to be effective, the subject matter of the assignment must be (i) a chose in action (ii) in present existence (iii) identified or identifiable with reasonable certainty as the subject-matter assigned.

---

[5] **The Law of Assignment: The Creation and Transfer of Choses in Action**, Marcus Smith, 2007 at page 142 (Part 11: The Transfer of Choses in Action).

[6] Ibid: see Chapter 7: Assignment of Choses in Action. **Para.7:02**.

23.3. *The identity of the assignee must be clear.* For a successful assignment to be effected, the identity of the assignee- the person to whom the chose is transferred- must be clearly stated.

23.4. *The appropriate forms and formalities must have been satisfied.* This requirement encompasses the following heads:

23.4.1. Whether a particular form of words is needed in order to effect an assignment,

23.4.2. Whether an assignment needs to be in particular form- in writing, witnessed etc. In particular, this involves consideration of the rule that the assignor must have done everything according to the nature of the chose in question to transfer title to the assignee,

23.4.3. Whether, in order to be valid, an assignment needs to be notified to anyone,

23.4.4. Whether consideration for the assignment is required in order to render it enforceable.

24. As a result, I am of the view that the claim should have been brought by the executors as the legal personal representatives of the testator on behalf of the estate for a determination of whether the business formed a part of the testator's estate to then allow the executors to administer the estate fully. The chose never having been assigned to the Claimant, she cannot now seek to enforce any right she may have to it.

25. Very interestingly, the Claimant did not rely upon the **doctrine of election** as it applies to the facts of this case and, as a result, the Defendant did not consider that doctrine in the presentation of his case. Had that been considered by the executors, there may have been serious questions to be asked and answered on both sides. However, that is not before me.

26. Consequently, I find that the Claimant has no locus standi to bring this action.

27. The Claimant has submitted that the Defendant has not made any issue of this lack of capacity and has never objected to her right to bring the action. While this

may be so, it hardly stands to reason that this can, or ought, to vitiate the live question as to locus standi in this matter. The burden is on the Claimant to bring and substantiate a claim in law and the issue of locus standi is an issue of law which, to my mind, cannot be waived by the Defendant in failing to raise it as an objection. That is an issue which ought to have been dealt with earlier and could therefore impact upon the costs which would be ordered in this matter. But, in law, this Claimant cannot substantiate a right or entitlement to judgment in her favor. As a result, I am of the view that the Claimant's claim should fail on this ground alone.

28. If, however, I am wrong on this point, I will continue to consider the other aspects of the questions I have mentioned above.

ISSUE 2:

What was the business transferred to the Defendant in 1980 or in 1993 under the agreement? What were its assets and what was its value?

29. I have no evidence whatsoever of what was transferred to the Defendant when the business was given to him -- whether in 1980 as he alleged or, as set out in the agreement in 1993. The latter date is the one he agreed to as being the effective one in the agreement with the testator. As a result, in the absence of any evidence that the business comprised assets of the testator to which the Claimant is entitled as of right, I have no inclination whatsoever to make a declaration or to make an order in relation to the entitlement of the Claimant to possession of a business which occupies a portion of a property to which the Defendant himself is entitled as a tenant in common.

30. A declaration is an equitable remedy and the court would not make a declaration lightly. In all of the circumstances, I do not know what exactly the testator gave up which must now be returned to the Claimant as his beneficiary. Saying that it is the "business" as a going concern which must be returned is not enough for the

court's purposes. I am afraid that without a proper understanding of the testator's entitlement when the "business" was transferred, I cannot just make a declaration *in vacuo* without a true appreciation of what the testator would have wanted returned to him. Even if it was the business *in toto*, I cannot see how that could be in light of the extended period of time which has elapsed without a proper determination of the extent of the business and who was entitled to what..

31. As such, I cannot see how I could make the declaration requested by the Claimant on her Claim Form (even though that declaration was not pursued in the Statement of Case). I therefore refuse that declaration sought.

ISSUE 3:

Was any request made for the re-conveyance of the business to the testator during his lifetime?

32. There is obviously no evidence of any request made for the re-conveyance of the business to the testator during his lifetime.

ISSUE 4:

Was it the intention of the parties at the time that the agreement was signed that the said agreement would survive the death of the testator? Was this agreement intended for the benefit of the testator's estate?

33. The agreement speaks for itself as to the intention of the parties. There were 2 considerations mentioned in the recitals which prompted the parties to come to this agreement. Those considerations were:

    33.1. The testator's failing health and age; and

    33.2. The Defendant's financial difficulties.

34. It therefore seems to me that this was an agreement between a father and a son to provide an opportunity for the latter to get out of his financial difficulties using the business as a vehicle especially in consideration of the father's failing health

and advancing age. The testator obviously was not envisioning himself to be in a position to run the business and he obviously decided to give it over to someone who would better be able to take advantage of the opportunity of running the business at a time when his son was in need. He had already done it for the 13 years from 1980 to 1993. There is no provision in the agreement which specifically preserves the benefit and obligations of the contract to extend to the parties' heirs and successors. Could it therefore have been the intention of the parties for the agreement to survive the death of the testator?

35. The conditionality for the re-conveyance of the business was "*until such time as the Father deems fit to have the said business re-conveyed to him.*"

36. The question which arises, therefore, is whether the testator ever deemed it fit to have the business re-conveyed to him. Evidently, in 1993, the father would have been aware of his failing health and advancing age, hence the reason for the agreement. In the year 2000, he made his will declaring that he was the owner of the business when, quite clearly, he was not. At best, he had a right to request the re-conveyance of the business. The burden is on the Claimant to show the intention of the parties and it is quite obvious that the Claimant has not done so nor has she laid the foundation to establish how she could have known what the parties intended at the time. It seems to me at this point that the parties intended the right to be exercised only during the lifetime of the parties since the contract was executed at a time when the testator was unable to handle the affairs of the business. Twelve years down the line, the testator was in no position to devise to the Claimant something over which he had no knowledge or control and which he had voluntarily given over to the Defendant since 1980 – 13 years before the agreement was signed. It strikes me as being most inequitable to expect this Defendant to hand over to the Claimant -- or, for that matter, to the testator in the year 2000 when the Will was made -- a business over which he has tended for 20 years. What was it that the testator could possibly have requested in the year 2000 when he made the will? As I have said, it would not have been fair in light of the uncontroverted evidence from the Defendant that he ran the business since 1980 -- a period of 20 years as at the date of the will -- for him to give up the business

without some sort of consideration or compensation for the increase in goodwill, stocks, furniture, chattel and other input by the Defendant.

37. In any event, it could not have been that the testator intended to have the right to have the business re-conveyed to him extended in perpetuity. Any determination of the testator's true intention in this regard necessarily involves some consideration of the rule against perpetuities. Indeed, the Claimant's case is not based on any declaration of trust but, even if this were an action in trust, such a trust could not have been intended to exist in perpetuity thereby offending the established rule against perpetuities. As Farwell J. stated in **Re Canning's Will Trust** [1936] Ch.D. 305 at 312:

> *The first thing to be remembered in construing a will which raises questions as to the rule against perpetuities is, that the will must be construed in the first place without regard to the rule against perpetuities, that is to say, the Court is not entitled to construe the will so as to avoid the rule against perpetuities. Having construed the will and determined what is the effect of the dispositions in it, the Court then has to see whether those dispositions or any of them offend all or any of the rule against perpetuities.*

38. It would be most unusual for the testator's right to be capable of devolution from himself to beneficiaries under a will then to their respective beneficiaries and so on ad infinitum. If I were to have accepted the Claimant's submission, it would have meant that the Claimant could wait any amount of years to then make a claim for the re-conveyance of the business to her or her beneficiaries or even to further devise her right under her will to some beneficiary with that beneficiary further devising the right and so on and so on. As it stands at present, even in the circumstances of this case, the Claimant waited over 3 years after the grant of probate and over 4 years after the death of the testator to assert any claim in the business. She could just as easily have waited another 5 – 10 years, for example, as the Defendant continued to pour his sweat and effort in the business, to cream the profits and goodwill off a thriving business and call for the re-conveyance to her.

39. In these circumstances, I find that the right retained by the testator was a personal right which had to be exercised during his lifetime and which had to be addressed directly to the Defendant to have allowed him an opportunity to make representations on his own behalf for or against the re-conveyance. I cannot see how this devise of the business to the Claimant in the will without the knowledge of the Defendant can amount to an enforcement of the agreement by the testator.

40. Consequently, I hold that the parties could not have intended this right to be a right capable of surviving the demise of the parties. It was for their personal benefits derived from particular circumstances and, as such, the right remains personal until death or exercised *inter vivos*.

ISSUE 5:

What is the effect, if any, of the devise of the business in the will? For the purposes of certainty and finality in litigation, what was the business which was existing at the date of the testator's death? What were its assets and its value?

41. As a consequence of the Claimant's failure to identify any aspect of the business beyond the fact that it occupies a portion of the property at 27 Southern Main Rd., Curepe, I have no evidence of what the testator contemplated when he devised the business to her in his will. Was it just the name or was it all of the assets which had been accumulated over the years including the goodwill?

42. I find it difficult, if not impossible, to accept as fair and just any expectation that the Defendant who was given an opportunity in 1993 (or sooner) when he was in financial difficulty, and who utilized and made a success of that opportunity, ought now, upon a mere request for re-conveyance, be obliged to so comply, without equitable principles coming into play and questions of compensation being considered. I have no evidence of the success or failure of the business but it is reasonable to assume that if there is a fight or contention in respect of the business, the Claimant would not be so inclined if it was a losing concern.

43. Consequently, there must be certainty in respect of what the Claimant seeks in these proceedings. I have no evidence from the probate application in relation to the estate of the testator whether the business was included in the inventory or of the value placed on it for estate purposes. That, of course, presupposes that it fell into the estate. If, however, I am to construe the Claimant's letter of 21 June 2007 as being the request to re-convey the business as contemplated by the agreement -- a chose in action -- then I once again revert to the position that the Claimant cannot ask for something which has not been formally vested in law in her.

ISSUE 6:

What is the proper cause of action in this matter?

44. I move on now to consider the appropriateness of the Claimant's action before this court.

45. If, during the lifetime of the testator, he had made a request for the re-conveyance of the business to him and the Defendant refused, what would have been the testator's recourse? Obviously, he would have had to seek to enforce the agreement by bringing an application for specific performance of that agreement. In those circumstances, the Defendant would have had recourse to the principles of equity including unconscionability, delay and laches. Equitable doctrines such as "he who comes to equity must come with clean hands" and the like would have been apposite.

46. Regrettably for the Claimant, this is not an action for specific performance of the agreement. This is an action for a declaration of rights, possession and transfer in relation to the business. As such, not having established any title to the business I cannot see how the Claimant can expect to have possession of the same or to have it transferred to her. It may be that the more appropriate cause of action would have been one brought by the executors on behalf of the estate (or by the Claimant herself in her personal capacity after the assignment of the chose in action to her) for specific performance of the agreement.

47. In any event, the Claimant seeks possession of a portion of a property upon which the business is being carried out against a person who is a co-owner of the property. In such a case, partition of the subject premises, or a sale in lieu thereof may have been considered. However, in light of the fact that the Claimant has sought possession, she must meet the requirements of the law[7] to show that she has a more sustainable right of possession to the business and the area being occupied by the Defendant and in which he is carrying on the business.

48. If the business was being carried on under a tenancy, the right to possession would lie in the landlord. In this case, the Defendant himself is occupying the premises.

49. The Claimant's submission in this regard is that when the business was transferred to the Defendant, it included the goodwill of the business, the assets of the business [which were never identified] and that portion of the deceased's property where the business was carried on. Until the death of the testator in the year 2003, the Defendant was occupying the premises to run the business under a license from the testator who, up to that time, was the owner of the whole premises. By deed dated 5 February 2007 -- which predated the Claimant's letter of 21 June 2007 -- the Defendant no longer occupied the subject premises under a license, which had in any event terminated upon the death of the testator in 2003, but was occupying as a co-owner. In those circumstances, and bearing in mind that the parties to the deed of assent hold the same as tenants in common and not in equal shares as joint tenants, I cannot see how the Claimant can claim any better right to possession of the beer garden area of the property. What she may have wanted was a declaration that she was entitled to take over control of the business known as the "Beer Garden" by reason of the fact that she had exercised a valid right to have the same re-conveyed to her but that was not what she set out in the statement of case. In any event, she has not established that she is entitled to that right as mentioned above.

[7] See **Murray v Biggart** HCT 101 of 1998 per Smith J and the cases referred to therein

Conclusion and order:

50. The burden was on the Claimant to prove that the testator was entitled to exercise the right to have the re-conveyance of the business which survived his death **and** that she was entitled to it in law.

51. To achieve that, she had to prove that the testator had an interest in the business known as the "Beer Garden" by showing the following:

    51.1. What the business consisted of in 1980 when possession was given over to the Defendant or even in 1993 when the agreement was signed, that is, the goodwill and the assets and stock and chattel – this was **not pleaded or proven**:

    51.2. Whether the testator was still entitled to those things when he died – this was also **not pleaded or proven**.

52. In the circumstances, and in light of all that has been set out above, I am compelled to order that the Claimant's claim be dismissed which I now do. The Claimant is to pay the Defendant's costs assessed under the prescribed rate in the sum of $14,000.00.

Devindra Rampersad
Judge (Ag)