CA: Civil — Civil — Partnership — Declaration that partnership existed — dates of beginning and end of partnership — Accounts. Appeal allowed in part. Declaration of partnership upheld but dates of beginning and end varied. Action remitted to Registrar for accounts to be taken and for enquiry as to profit. Dennis J dissents in parts. Majority decision. Cases referred to (see p 30 - end)

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 58 & 59/91

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	LYLE BARNES	DEFENDANT/APPELLANT
A N D	JOYCELYN BENNETT	
A N D	DALTON BARNES	PLAINTIFFS/RESPONDENTS
A N D	MICHAEL BARNES	

R.N.A. Henriques, Q.C., Allan Wood & Richard Williams for appellant

Dennis Goffe, Q.C. Miss Minette Palmer for respondents

13th, 14th, 15th, 16th, 17th July & 15th March, 1993

CAREY, J.A.

The parties in this case are brothers and a sister. The question which arises for decision is whether a partnership existed among them. There are two separate and distinct actions which were consolidated. In the first action, Lyle Barnes sued Joycelyn Bennett, Dalton and Michael Barnes to recover $295,488.15 which he claimed he had paid on their behalf pursuant to an agreement which involved all the parties purchasing a property situate at 76 Constant Spring Road in St. Andrew. The second action concerned a claim made by Joycelyn Bennett, Dalton and Michael Barnes against Lyle Barnes in which the following relief was claimed:

> "(i) a declaration that a partnership existed between themselves and the Defendant.
>
> (ii) a declaration as to when the partnership started.
>
> (iii) a declaration as to when the partnership ended.
>
> (iv) an order that the Defendant shall render an account for the period of the partnership.

"(v) an order that the Defendant delivers up to the Plaintiffs the various pieces of equipment found to be contributed to the business by them.

(vi) alternatively an order for payment to the Plaintiffs of the true value of the equipment contributed to the business by them.

(vii) an order for the Defendant to repay to the Plaintiffs all monies found to be contributed to the business by them.

(viii) an order severing the joint tenancy and for the Defendant to pay to the Plaintiffs their respective shares in the real property owned jointly by them or alternatively for the sale of the said property and the division of the proceeds equally between all the owners.

(ix) damages for loss of profits from the respective investment by the Plaintiffs in the business."

After the evidence was all in and in the course of the closing address by Mr. Goffe, Q.C., the judge granted amendments to the reliefs sought in respect of paragraphs (iv) to ix) as under:

"(iv) An order declaring the joint tenancy severed.

(v) A declaration as to the respective beneficial interests of the owners.

(vi) An Order for sale of the land and that the net proceeds of sale be distributed in accordance with the declaration as to the respective beneficial interests of the owners.

(vii) An Order that the Plaintiffs and the Defendant are to be at liberty to bid for and become the purchaser or purchasers at such sale of the said land.

(viii) An Order that in respect of the period from December 1986 until the sale of the said land, the Defendant do pay to the Plaintiff three quarters of such sum as represents a fair rent which would be the amount assessed under the Rent Restriction Act without regard to any other provisions of the said Act and if such sum be not agreed between the parties an Order that an enquiry be conducted by the Registrar of the Supreme Court into the rent

" payable on that basis.

(ix) Damages for loss of profits from the respective investments by the Plaintiffs in the business."

By a judgment dated 26th July, 1991, Chester Orr, J., ordered as follows:

"A. (a) that in Suit C.L. 3084/87 Judgment be entered for DALTON BARNES.

(b) that in Suit C.L. 129/87 Judgment be entered for the plaintiffs, whereby it was adjudged:

(I) a declaration that a partnership existed between Joscelyn Bennett, Darlton Barnes, Michael Barnes and Lyle Barnes.

(II) A declaration that the partnership started in October 1983.

(III) A declaration that the partnership ended on 18th February, 1987.

(IV) An order declaring the joint tenancy severed.

(V) A declaration that the equitable estate is held by the owners as tenants in common.

(VI) An order for sale of the land 76 Constant Spring Road and that the net proceeds of sale be distributed in equal shares.

(VII) An order that all parties are at liberty to bid for and become the purchaser or purchasers at such sale of the said land.

(IX) Damages for loss of profits assessed at $3,221,985.00 to be paid by Lyle Barnes. Cost to be taxed or agreed."

Lyle Barnes questions that determination in his appeal to this Court.

There is in this country, no Partnership Act or legislation similar to the United Kingdom Partnership Act 1890. Partnerships are governed by common law principles to be ascertained by reference to decisions of the courts in England prior to the passing of that Act. Decisions on those provisions of the Act which have not altered the common law remain valid and helpful. Our Partnership (Limited) Act

is, as its title implies, limited in scope and creates a special statutory partnership subject to terms and conditions prescribed by the Act. That statute has no bearing whatever on what we are called upon to determine in this appeal.

The question whether a partnership existed is a question of mixed law and fact. Parties cannot by their mere say so, create a partnership nor is the fact that they assert that they are not determinative of the matter. See **Weiner v. Harris** [1910] 1 K.B. 285. In **Stekel v. Ellice** [1973] 1 W.L.R. 191 at p. 199 Megarry, J., helpfully suggested a test. He said this:

> "... What must be done, I think, is to look at the substance of the relationship between the parties; and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is, and not on any mere label attached to that relationship. A relationship that is plainly not a partnership is no more made into a partnership by calling it one than a relationship which is plainly a partnership is prevented from being one by a clause negativing partnership:"

In Lindley on the Law of Partnership (14th edition) p. 126, the learned editors state as follows:

> "As between the alleged partners themselves the evidence relied on, where no written agreement is forthcoming, is their conduct, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people. This can be shown by books of accounts, by the testimony of clerks, agents, other persons, by letters and admissions"...

The Partnership Act [(1890) (U.K.)] defines partnership as the relation which subsists between persons carrying on business in common with a view of profit. This Act, it should be noted, is declaratory of the common law. One of the rules under the Act for determining whether a partnership exists is that the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business: Section 2 (2), Partnership Act. It is important to bear in mind as well that the

test of partnership is the carrying on of a business and not the agreement to carry it on. Partnership, properly so called, must also be distinguished from some loose agreement such as was held to be in the case of **Keith Spicer Ltd. v. Mansel** [1970] 1 W.L.R. 333. With that brief exegesis on the law which I think to be applicable to the facts in this case, I can now turn to consider the evidence adduced at the trial.

It was argued, certainly on behalf of the appellant, that the case was starved of evidence relating to the first issue of whether or not a partnership existed. The onus in this regard was wholly on the plaintiffs in the second action (the respondents in this appeal). Mr. Henriques argued most forcefully that they had not. He pointed out that the particulars of their pleadings, which alleged three agreements, were never supported by evidence, nor were the specific agreements put to the appellant in cross-examination. On the question of profits, he contended that no evidence in that respect was adduced. To illustrate his first point, he referred to paragraph 3 of the statement of claim which averred as follows:

> "3. In or about the year 1982 the second and third Plaintiffs and the Defendant agreed to set up a family partnership to operate a muffler specialist manufacturing, installing and repairing business and the business was duly set up and operated at 5 Red Hills Road in the Parish of St. Andrew."

The plaintiffs condescended to particulars of this agreement in paragraph 4 of the statement of claim as follows:

> "4. The agreement was that the second and third Plaintiffs would purchase a welding machine pipe bender machine additional sets of oxy-acetylene torches and hoses, and that each of the partners would own one-third of the business and earn one-third of the profits, that the Defendant would run the operation and be paid by the Partnership for his work in addition to his share of the business and profits."

The averment of a second agreement is to be found in paragraph 7:

> "7. The first Plaintiff found a place at 76 Constant Spring Road, Kingston 10 in the Parish of St. Andrew, registered at Volume 1199 Folio 367 and bought it and it was agreed -
>
> (a) to buy it in the names of the three Plaintiffs and the Defendant, for the price of $367,500.00
>
> (b) and to operate the business there on condition that the
>
> (i) partnership would be expanded to four to include the 1st Plaintiff and that the business would be owned by all four in equal shares.
>
> (ii) the Defandant would continue to manage and operate the business and to be paid by the business paid for by the business.
>
> (iii) the place would be for his work as before
>
> (iv) the profits would be distributed equally among the partners."

A third agreement is pleaded in paragraph 11 thus:

> "11. The Plaintiffs and the Defendant agreed to convert the partnership into a limited liability Company, in which the said four partners would be members, and to that end on or about the 12th day of November, 1986 they went to an Attorneys at law to implement the agreement; but at that stage the Defendant backed out and refused to form a Company, and repudiated the partnership, and claimed the business as his own."

Consistent with his argument as to the lack of proof in the case, Mr. Henriques, Q.C. pointed to paragraph 12 of the statement of claim which averred that the defendant has refused to keep proper books and went on to urge that the plaintiffs never gave any evidence that they enquired either about profits or the books or generally showed any concern about the business.

Mr. Goffe's, Q.C. riposte to these submissions was that it was not an essential element in a partnership to show that enquiries had been made about the keeping of books or that the defendants in this case exercised any control over the business, provided it was shown that the parties were involved in a common venture with a view to profit. He contended that the evidence showed that the parties were engaged in a common enterprise which was in two phases. He referred to them as an original partnership and an expanded partnership. The original partnership began in 1983 and the expanded partnership when the sister, Joycelyn Bennett, joined the brothers in the purchase of the land.

The learned judge gave a considered judgment which was not delivered until some 19 months after it was reserved. For myself, I regret to say that I did not find it at all helpful. The evidence was set out but not analysed in any way. The findings were set out but uninformed by any discernible legal principle. The basis of the judgment was an acceptance of the evidence of the plaintiffs in the second action and a rejection of the evidence of the appellant. A delay of 19 months is hardly conducive to any serious recollection of demeanour. But as has already been made clear, the determination of the existence of a partnership is a mixed question of law and fact. That determination cannot, it is plain, depend merely on an acceptance by the judge of the label the plaintiffs placed on their relationship with the defendant.

All this means that this Court is required itself to consider the evidence and to draw the proper inferences from the evidence which the judge below accepted. On that basis, I propose to examine the evidence which the plaintiffs adduced. Some background facts should first be stated. It is clear from the evidence that while the plaintiffs migrated overseas, first to Canada and eventually to the United States of America, Lyle Barnes remained in this country. Unfortunately he had polio. But he learned welding and worked with a firm of muffler manufacturers, viz Ryans. In 1982, Lyle Barnes and his brother Dalton, who was on a visit here, discussed the idea

of starting a muffler business. It must be emphasized that this account related by Dalton Barnes was the evidence accepted by the judge. I continue the narrative. Dalton and Michael discussed the idea and agreed to supply the necessary equipment. Michael Barnes said he contributed to the equipment. Three letters, two of which were undoubtedly written by Lyle Barnes were tendered in evidence to prove an agreement to enter into a partnership. The other letter, it was accepted on all sides, was not written by him nor was it proved that it was written on his behalf. Obviously it was inadmissible.

The two relevant letters, I think should be set out seeing that the plaintiffs relied so heavily on them. [Exhibits 8 & 9]:

"

Lyle Barnes
16 College Crescent
Kingston 20

Hi Michel

How is every thing, I hope you are fine as for me things is not so good. When Dalton was down here last time, I and him talk about setting up a muffler company down here but from he left I only hear from him one time and I write him three times and don't get any answer from him. He even send me a pair of welding-gauge but Michel from that time I don't hear anything from him. Michel find out from him what is happening for the place where I was working closed down and I am not working now the money I saved some of it buy tools please tell him not to buy the pipe cutters and the pipe-vice and jack because I buy those as for the welding plant what I was using at the work place my boss offer to sell me it so Michel please tell Dalton if he could send me Three Thousand dollars I could almost get Nine Thousand for it and that could buy the welding plant a build the ramp Michel please tell him send and tell me what he think about it and Michel please try and help him because it in the interest of all of us. Michel please tell him if he is sending money he must send it in U.S. money. Please try and help him for me. Nothing more to say and till I hear from you. Your brother Lyle. Send me your phone number."

4. 6. 1983
16 College Crescent
Kingston 20

Hello Michel

How keeping I hope your fine. I tried to phone you and I did not get you I want to know when Dalton is coming down please send and tell me Michel I all most complete the two ramp now and I am waiting for Dalton to come down I don't have any more money now I spend the Six Thousand Dollars I have to make the two ramp so send and tell me when he is coming please tell him to try and get things them for me because they are very important to me.

Michel if he don't come by the 11 of June I will call you and the 18 of June at about 9 o'clock to 10 o'clock and Saturday night.

Well noting more to say and till I here from you your Brother Lyle."

Some time in 1983 Dalton and Michael Barnes purchased a welding machine which was consigned to Dalton who came to Jamaica and cleared it through customs. This brother also provided gauges, a torch and hose. In December 1984 Dalton Barnes said that Joycelyn had telephoned him regarding a conversation she had had with Lyle about business but she expressed disinterest. In January 1985 Dalton Barnes with the assistance of Michael purchased a pipe-bending machine. Michael confirmed the purchase. This evidence according to Mr. Goffe, Q.C., constituted the original partnership.

The oral evidence thus far adduced and which was accepted by the judge was capable of showing that the two brothers Dalton and Michael contributed equipment to Lyle Barnes, being equipment for manufacturing mufflers. No details of how this business was to be operated can be deduced from that evidence. The three brothers, it is plain, never ever met together in any sort of discussion. Evidence was given by Dalton that he had a discussion in 1982 with Lyle about starting a muffler business. That was the full extent of it. When the letters are analysed, they are, in my view, "begging letters."

Michael is being entreated to assist in any way he can. Far from showing any commitment on the part of the "partners" to meet specific objectives, it is all very uncertain. In my opinion, the documentary evidence falls far short of even showing a loose agreement. The phrase - "he even send me a pair of welding gauge" hardly shows compliance with or adherence to any agreed plan. If these letters are capable of proving anything, they do show that the overseas male members of the family were minded to help their struggling brother in Jamaica.

It was argued that the statement "because it is in the interest of all of us" was clear proof that a partnership existed. I have little doubt it could be interpreted to mean that three brothers were in "something" together for their joint benefit. That statement, it should be noted, appears in a sentence where Lyle Barnes is importuning Michael to help Dalton so that he Lyle would be enabled to construct a ramp in the muffler business in which he was engaged. But that is not the same thing as proving that the parties contemplated that they were in a business venture, or were carrying on a business for profit.

In my view, the evidence such as it was, did not support the pleadings. The facts were incapable of establishing any relationship of a partnership. There was no evidence of a venture for the sharing of profits among the brothers. Contribution there was, but no evidence of their carrying on a business <u>in common.</u>

I pass then to the expanded agreement if I may borrow Mr. Goffe's language. It was expanded, he said, to include Joycelyn the sister of the Barnes brothers. According to her, in the latter part of 1984 Lyle called her in Toronto seeking her help to purchase land to give the muffler business a home. She was loath to become involved as she did not wish to own land in Jamaica. Responding to her mother's importuning she changed her mind. She contributed $34,000 U.S. in total to the deposit on the property at 76 Constant Spring Road in St. Andrew. The arrangement was that Dalton and

Michael would assist her to repay the money she had borrowed in America to assist Lyle. All four would have equal shares in the land and in the business, the profits of which would be used to make the mortgage payments.

The judge found that Lyle Barnes contributed from the business to the deposit. He said nothing of the mortgage payments, but it is plain these were made by Lyle Barnes. In 1985 all three overseas members came to Jamaica and executed the mortgage documents. In 1986 they returned to have the agreement for a partnership formalized but that came to nothing. It would seem that the reason why they all came home for this purpose was that they had learnt that Lyle had purchased a motor car for $66,000 and further that he was paying the school fees for his girlfriend to enable her to qualify herself for a position in the business. Dalton blocked the ramp at 76 Constant Spring Road and retrieved the equipment he had earlier contributed.

This evidence, in my view, converted what I would categorize as the assistance package of the brothers into an agreement for a parthership. The land was being purchased to house the business which was to be operated with a view to profit. The mortgage would be paid from the profits so derived. It mattered not whether anyone asked about accounts or books or the general health of the business or even wondered about the true extent of the profits. Indeed it is fair to suggest that none of the plaintiffs envisaged that the business generated or could have generated any significant profits. Because of that belief, they left Lyle to his own devices. But the discovery that he had purchased a car and was sending his girlfriend to school shattered their mistaken belief. Mr. Goffe, in my view, is right that the so-called expanded partnership was a partnership but he is, with respect, in error as to the original arrangement.

The appeal is taken also on the question of the award of damages for loss of profits and the dates between which assessment should be made. A declaration was sought as to when the partnership began and when it ended. The learned judge declared that "the partnership started in October 1983" and that the partnership ended on 18th February, 1987. Insofar as the commencement of the partnership went, in the light of what I have said, that date cannot be right. I would hold that the partnership commenced when the land was purchased some time in 1985. Mr. Goffe, Q.C. conceded that the partnership ended when Lyle Barnes called the police to eject his partners in November 1986. The learned judge was plainly wrong because he declared the partnership came to an end when Lyle filed suit. That suit, the first action, had nothing whatever to do with the partnership; it concerned a claim for moneys allegedly advanced by Lyle Barnes on behalf of his brothers and sister for the purchase of 76 Constant Spring Road.

It was also conceded by the respondents in agreement with the appellant, that the learned judge firstly assessed damages for a period beyond the date he had determined that the partnership ended. It was further conceded that there was absolutely no evidence adduced to provide the basis for damages for loss of profits. It was accepted also that where damages for loss of profits are sought, the plaintiff must prove some wrong-doing on the part of the other partner or partners. See **Grant v. Creelman et al** 3 Nova Scotia Reports 37. It was held there that:

> " Where three partners enter into a contract to perform a certain work as partners, and two of them, after the work has been commenced exclude the third from all participation in it, the partner so excluded may sustain an action against them for such exclusion, while the work is still in progress.
>
> The measure of the damages in such case will be the profits that might reasonably be expected to result from the undertaking."

An odd feature of the case was that Lyle Barnes was recalled at the end of the case to be cross-examined by Mr. Goffe to prove damages. For reasons which I am quite unable to fathom, counsel who appeared on behalf of Lyle Barnes did not object. However that may be, the respondents themselves demonstrably induced the trial judge into this error of considering and assessing damages. They chose to amend the relief claimed originally, from an enquiry into profits to damages for loss of profits. At the end of the submissions before us, Mr. Goffe applied to restore the status quo ante if, in the event it became necessary.

For all these reasons, I would affirm the judge's first declaration that a partnership existed between the parties, vary the date stated in his second declaration to read "in June 1985," vary the date stated in the third declaration to read "November 1986," and finally I would set aside entirely the award for loss of profits. As a consequence, I would remit the action to the Registrar of the Supreme Court for an account to be taken and for an enquiry as to profits. To put the matter beyond dispute, I must add that in any distribution of profits, the fact that the appellant's capital injection was greater than the other parties' must be taken into account. In the result, I would allow the appeal in part. The appellant has succeeded substantially, I would allow him his costs of appeal. So far as the first trial costs are concerned, he should have half the costs in that Court.

WRIGHT, J.A.

The judgment of Carey, J.A., which I have read in draft, deals so admirably with the essentials of this appeal that apart from registering my concurrence with his reasoning, conclusion and the proposed order I need do no more than make a brief comment.

To my mind it is clear that despite the massive effort to exact considerable damages for the years of the partnership's continuance, the life of the partnership extended only from June 1985 to November 1986 - roughly seventeen months - and that the partnership was terminated when Lyle ousted his partners with the help of the police. It is patent that the claim for damages was misconceived and, bereft as the respondents' case was of any evidence to found a claim for damages, they should not have been allowed the last-ditch effort to put some semblance of respectability on their case by seeking to extract evidence out of the mouth of the appellant. But even that evidence did not serve the intended purpose. That evidence provided no proof of the amount of profit made by the business and it is worthy of note that in his endeavour to assess the profits, the trial judge overlooked the fact that he had no evidence of the cost of materials. The result was, unfortunately, that the figure used as profits included the cost of the material used. It may well be said that the case was largely thrown into the lap of the judge and that his task was aggravated by the failure to apply the appropriate legal principle.

What is also clear is that the lion's share in 76 Constant Spring Road belongs to Lyle. A phenomenon of this transaction is that Dalton and Michael acquired an "equal share" in this property without making any financial contribution whatsoever because they reneged on repaying Joycelyn Bennett the portion of the deposit which would have been credited to them out of the payment made by Joycelyn Bennett and they have made no contribution to the mortgage payments.

It is, indeed, regrettable that the obviously correct course of having an account taken by the Registrar of the Supreme Court was not adopted in order to bring this family adventure to a happier ending.

DOWNER, J.A.:

In a consolidated hearing before Chester Orr, J, that learned judge made declarations and orders in favour of Joycelyn Bennett and her brothers Dalton and Michael Barnes, the respondents on appeal. The substance of those orders were that Champion Mufflers was a partnership consisting of the other brother, the appellant Lyle Barnes and the respondents, and that the real estate in dispute was held as a tenancy in common between these parties. On the other hand the claim of Lyle Barnes against Dalton Barnes for $295,488.13, was dismissed and as there was no appeal against that decision, there was one appeal before this court. The first issue to be resolved therefore was whether there was an initial partnership with the three brothers in Champion Mufflers as the respondents have contended.

Was there a partnership between the brothers as found?

As Chester Orr, J. found a partnership existed, it is pertinent to set out the three orders he made in this regard. They are:

> "(i) A declaration that a partnership existed between Joscelyn Bennett, Dalton Barnes, Michael Barnes and Lyle Barnes.
>
> (ii) A declaration that the partnership started in October 1983.
>
> (iii) A declaration that the partnership ended on 18th February 1987."

What is the evidence which was relied upon by the respondents to establish a partnership? The evidence discloses that Lyle Barnes the appellant operated Champion Mufflers a business from 1979 for the repair and installation of mufflers. It was located successively at Marverly, Red Hills Road, Dunrobin Avenue and finally at 76 Constant Spring Road. In order to expand the business his family who were abroad assisted in the purchase of equipment. This was understandable as he was partly disabled as a result of being a victim of polio during his childhood. Moreover, he was adept at repairing and installing mufflers

and was so employed at Ryan's Mufflers Company which he left in 1979.

The crucial date on the evidence of Dalton Barnes who happened to be a mechanic was 1982. It runs thus:

> "I was in Jamaica in 1982. In 1982 Lyle and self had discussion. He had an idea to start a muffler business and he discussed it with me. He said he got $6,000.00 and he was going to get two ramps and if Michael and I would supply equipment necessary for the business we would have a three way partnership, sharing equally in everything. I told him it was a good idea. When I returned to Canada I discussed it with Michael - he almost agreed right away - he did agree. Michael and I put Can. $3,000.00 together and I purchased a C.02 Welding Machine in Canada and took it to Llocksley's house in Canada."

This evidence was accepted and at its highest it shows co-ownership of the equipment used in the business. If there was a dispute it may have resulted in a claim by the two brothers on Lyle for rental, but this evidence does not indicate there was an agreement to share profits. His next contribution to the business was in 1985. This is how he recalled it:

> "I spoke to Michael - we put together about Can. $13,000.00. I went to Miami exchanged it at the Airport for about U.S.$9,000.00 and purchased a Ben Pearson bending machine with the dies. I shipped it by Delta Freight Forwarders. This was in January 1985. This is shipping document from Delta Freight Forwarders 13 for identity. Now tendered as Ex. 13(a) by Consent. Dated Feb. 1, 1985 (U.S. 2.1.85). This document is Bill of Sale from Company where I bought bending machine - dated 25.1.85. It is notarised. I gave original to Lyle. I got a true copy."

Then in 1986 he began to think like a man of business in addition to being a generous member of a family. Here is how it was recorded by the court:

> "About the middle of 1986 Joyce called me and gave me information. As a result I came to Jamaica. Michael, Joyce and myself came. All 4 of us went to Attorney Ramsay to put in writing our agreement for Partnership. No agreement was reached. During discussion with Attorney, Lyle got up and left. We were

"getting advise from Attorney how best to put agreement. This was September or October 1986 - not sure. Up to then Lyle had not told me his expenses or income."

Such arrangements and contributions are commonplace among families but it is difficult to discover the elements of a partnership for profit on this account. If Dalton was in a business relationship with Lyle with a view to profit, how is it that during the period 1982 to 1986 he never sought to share in the profit of Champion Mufflers? It is on this aspect of the matter that the respondents' case founders.

It is now necessary to turn to the evidence of Michael Barnes the other brother who is a member of the nursing profession. Since the respondents relied on two letters from Lyle to Michael to prove the formation of a partnership in 1982 and its continuance thereafter they must be examined. The first appears to be written in 1982 or 1983. It reads as follows:

"

Lyle Barnes
16 College Crescent
Kingston 10.

Hi Michael,

How is everything. I hope you are fine as for me things is not so good. When Darlton was down here last time I and him talk about setting up a muffler company down here but from he left I only hear from him one time and I write him three times and don't get any answer from him. He even send me a pair of welding gauge but Michael from that time I don't hear anything from him. Michael fine out from him what is happening for the place where I was working closed down and I am not working now. The money I saved some of it by tools. Please tell him not to buy the pipe cutter and the pipe vice and jack because I buy those as for the welding plant what I was using at the work place my boss offer to sell me it so Michael please tell Dalton if he could send me Three Thousand Dollars I could almost get a **nine** thousand for it and that could buy the welding plant a build the ramp - Michael please tell him send and tell me what he think about it and Michael please try and help him because it in the interest of all of us. Michael please tell him if he is sending money he must send it in U.S. money.

"Please try and help him for me. Nothing more to say until I hear from you, your brother Lyle.

Send me your phone number."

There is no acknowledgement here by Lyle that he had agreed to start and carry on a business for profit with Dalton and Michael. These letters are familiar pleas from the third world to the first for remittances. The other letter runs thus:

"

4.6.1983
16 College Crescent
Kingston 20.

Hello Michael,

How keeping. I hope you are fine. I tried to phone you and I did not get you I want to know when Dalton is coming down please send and tell me. Michael I almost complete the two ramp now and I am waiting for Dalton to come down. I don't have any more money now I spend the six thousand dollars. I have to make the two ramp so send and tell me when he is coming please tell him to try and get things them for me because they are important to me.

Michael if he don't come by the 11 of June I will call you on the 18 of June at about 9 o'clock to 10 o'clock on Saturday night.

Well nothing more to say until hear from you, your brother Lyle."

Is the oral evidence from Michael of any help to determine on balance of probabilities that there was a partnership between the three brothers? It must always be borne in mind that merely to label a discussion with the word partnership does not create a partnership at law. However, to turn to further evidence adduced by Michael. His initial statement on that occasion runs thus:

"Dalton in Jamaica on holiday - forget month. Came up back and spoke to me. He and I had discussion about buying equipment for the business. I think this was late 1982. Discussing buying welding machine and pipe bending machine. Machines to be shipped to Lyle. I contributed money to Dalton to buy machines. About one week after Dalton came Lyle called me and said if Dalton and I buy the equipment we go three ways in the partnership. I thought good idea and I agreed with it right away."

Here is his account of contribution:

> "I gave Dalton Can. $7,000.00 cash as my contribution to cost of machine - 1984 - early 1985. Dalton went to Miami. I saw machine when I came to Jamaica in 1985 at corner Dunrobin and Constant Spring Road also at 76 Constant Spring Road. It was being used at corner of Dunrobin and Constant Spring Road."

Further explaining his understanding of the arrangement, he said:

> "Lyle telephoned me end of 1984 - told me he getting a few customers and losing customers. Customers could not wait by the time he went to Ryan's, that is why he needed bending machine. Said he losing money and had to pay $4.00 for each bend. Dalton and Lyle and I had agreement if we came up with machines we go three way split partnership."

It is clear that when Lyle bought a car, and it was assumed that he had sent his girlfriend to school to master the business side of Champion Mufflers, the tensions in the family could not be contained. Here is the language he used in court to describe the anger:

> "Joyce told me something and I felt that I had no control over my investment, neither money nor business, so I wanted something in writing."

If there was a partnership it is odd that he had no control over his investment, his money nor business. He had no conception of what the partnership he claimed, entailed. The missing link was carrying on a business in common with a view to profit.

Chester Orr J, found a partnership on the basis of the respondents' evidence outlined. In so finding the learned judge failed to give any weight to the documentary evidence preferred by the appellant Lyle of a certified application from Champion Mufflers to be registered on 12th June 1984 and the second Certificate of Registration 12th June 1987. Further, it does not seem that the legal effects of registration by Lyle as an individual pursuant to the Registration of Business Names Act was ever explored in the court below. Here it must be noted that the appellant tendered the then current certificate while the respondents tendered the original Statement of Particulars. (See section 18 of the Registration of Business Names Act.)

Of importance is the date registered for the commencement of Champion Mufflers. It is the 17th September 1983, and the application was on 12th June 1984 - the certificate exhibited is numbered 319/84 and the date on it is 12th June 1987. The expiry date is June 1990. There was unchallenged evidence that the initial Certificate which ran from 1984-87 was destroyed in a dispute with a younger Barnes brother. Other internal evidence that Champion Mufflers was an entity known to third parties were two cheques dated 1989 and a receipt from Tower Merchant Bank dated 1988 acknowledging a payment from Champion Mufflers on account of Lyle Barnes.

Even more important, no analysis of the law which pertains to the application and issuance of a certificate pursuant to the Act was made. That it was necessary to register Champion Mufflers may be discerned by referring to section 3 which stipulates the class of business which must be registered:

> "3. Subject to the provisions of this Act--
>
> (b) every individual having a place of business in Jamaica and carrying on business under a business name which does not consist of his true surname without any addition other than his true Christian names or the initials thereof;
>
> (c) every individual or firm having a place of business in Jamaica, who or a member of which has either before or after the commencement of this Act changed his name, except in the case of a woman in consequence of marriage."

Those doing business with Champion Mufflers were bound to take this fact into account. It is odd that those who claim to be partners in this venture make scant reference to it. Since the application for registration was made by the appellant Lyle, this was official documentary evidence refuting the existence of a partnership which the learned judge found commenced in October 1983 and was concluded February 1987. Further requirements of

the Act reinforce this position that a partnership was not in existence. It reads:

> "6. The statement required for the purpose of registration must be in the case of an individual be signed by him and in the case of a corporation by a director or secretary thereof, and in the case of a trader being a firm by all the individuals who are partners, and by a director or the secretary of all corporations which are partners and in the case of a firm not being a trader either by all the individuals who are partners and by a director or the secretary of some corporation which is a partner, or by some individual who is a partner, or a director or the secretary of some corporation which is a partner, and in either of the last two cases must be verified by statutory declaration made by the signatory."

If the respondents were serious about the claim of being partners in Champion Mufflers they would no doubt have prayed in aid the first proviso of section 6 which reads:

> "Provided that no such statutory declaration stating that any person other than the declarant is a partner, or omitting to state that any person other than as aforesaid is a partner, shall be evidence for or against any such other person in respect of his liability or non-liability as a partner, and that the Supreme Court or a Judge thereof may on application of any person alleged or claiming to be a partner, direct the rectification of the register and decide any question arising under this section."

It is necessary to examine also the cases cited to determine if on that basis a partnership existed. Further, it is common ground that Joycelyn Bennett, the first respondent, joined with her brothers when the land was acquired. She could not have joined a partnership if none existed before. A partnership could have been started then but there was no proof of that. Here reference must be made to 3(iv) of the Registration of Business Names Act as this provision is patterned on the common law as stated in section 2(i) of the Partnership Act, U.K. 1890. It states:

> "3(iv) a purchase or acquisition of property by two or more persons as joint tenants or tenants in common is not of itself to be deemed

> " carrying on a business whether or not the owners share any profits arising from the sale thereof."

So even if she is a co-owner of the land that does not necessarily make her a partner in Champion Mufflers. Be it noted however that the Certificate of Registration lists 76 Constant Spring Road, the land in issue, as the principal place of business of Champion Mufflers.

Partnership law through the cases

Davis v. Davis (1894) 1 Ch. 393 reviews the principal authorities as regards the requirements to constitute a partnership. It was a case stated. The important fact in relation to issues in this case are set out at page 394 thus:

> "From the death of testator until the death of C.F. Davis the Plaintiff and C.F. Davis carried on the business for their own benefit under the style of Lloyd & Davis, and on the same premises, which was advantageous in keeping together the connection. 'No articles of partnership were ever executed, nor any agreement for a partnership come to, nor was a partnership ever mentioned between the Plaintiff and C.F. Davis. No accounts as between the Plaintiff and C.F. Davis were ever kept, nor was any balance-sheet or annual account as to the business prepared, but every week, and occasionally oftener, the Plaintiff and C.F. Davis each drew from the business and retained for his own use £3 or more, each one so drawing and retaining the same sum precisely as the other, and, save as aforesaid, no division of profits or other moneys was made.' "

It will be observed that the drawings of the partners was crucial. There was no such evidence in this case. The correct approach to the law was stated thus by North, J:

> "In Baddeley v. Consolidated Bank Ibid. 250 there are some observations in the judgment of Lord Justice Cotton which are directly in point. But I will read what Lord Justice Lindley said (38 Ch. D. 258): 'I take it that it is quite plain now, ever since Cox v. Hickman 8 H.L.C. 268, that what we have to get at is the real agreement between the parties. It is no longer right to infer either partnership or agency from the mere fact that one person shares the profits of another. It may be, and

" 'probably it is true, that if all that is known is that one person carries on a business and shares the profits of that business with another, prima facie those two are partners, or prima facie the person carrying on the business is carrying it on as the agent of the person with whom he shares his profits. That may be true, and I think it is true even now; but, when you have a great deal more to consider, it appears to me to be a fallacy to say that you are to proceed upon the idea that sharing profits prima facie creates a partnership or an agency, and that prima facie presumption has to be rebutted by something else. I cannot help thinking that Sir Montague Smith was quite correct when he dealt with that mode of reasoning in the case of Mollwo, March & Co. v. Court of Wards 38 Ch. D. 238. He says this: "It was contended at the Bar, that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances. It appears to their Lordships that the rule of construction involved in this contention is too artificial; for it takes one term only of the contract and at once raises a presumption upon it. Whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all." Now, it appears to me, having read the judgment of Mr. Justice Stirling with great attention, that he has inadvertently fallen into that erroneous method of reasoning. He has laid stress on the fact that Smith and Badeley participated in profits, and has treated that circumstance as prima facie evidence of partnership which had to be rebutted by other evidence, instead of taking the whole of the documents and the whole of the evidence and drawing such inferences as he thought right from the whole.' "

When all the facts and circumstances are considered against the law of partnership it is clear that Champion Mufflers was a business registered and run by Lyle Barnes. As it was not a partnership with Dalton and Michael the declaration awarded by Chester Orr J, must be set aside. It now remains to be considered whether there was a partnership with three brothers and Joycelyn Bennett which commenced at the time when 76 Constant Spring Road was acquired.

Was there a partnership in law between the parties to this action when 76 Constant Spring Road was purchased?

The starting point of this enquiry must be to take into account the proviso to section 3 of the Registration of Business Names Act. To reiterate, it reads as follows:

> "Provided that:
>
> (iv) a purchase or acquisition of property by two or more persons as joint tenants or tenants in common is not of itself to be deemed carrying on a business whether or not the owners share any profits arising from the sale thereof."

The logic of this proviso is that for the ownership of registered property one must examine the provisions of sections 65 and 74 of the Registration of Titles Act.

The appellant Lyle grasped this feature of the case when he said:

> "From 5 Red Hills Road I moved to Hagley Park Road - then to corner Dunrobin and Constant Spring Road, from there negotiations to purchase 76 Constant Spring Road. Moved there 1/11/85. November 1986 sister came said she wanted the Company to register as Limited and each of us must get 25% share free - because 4 of us names in title. I told her no because land and business 2 (two) separate things."

The other factor to note is that on or around June 1985 when the agreement for sale was signed and on 21st April 1986 when the Certificate of Title was issued Champion Mufflers was already registered from 12th June, 1984 in the name of Lyle Barnes as the sole operator of the business. The onus must have been on the respondents to prove that there was a partnership in Champion Mufflers which commenced when the deposit was put up to purchase the property. The intention of the parties must be inferred from their words and conduct and there was no proof of intention to form and carry on Champion Mufflers as a partnership at this stage.

Here is how Joycelyn Bennett made her first contribution:

> "Deposit on 76 Constant Spring Road was $55,500.00 - not quite sure. I contributed - first sent to Lyle U.S.$6,000.00 in cash. I spoke to him before I sent it, also spoke to Samuels. I sent it by Lady Delam Cohen. She was going to Harbour View. U.S.$6,000.00 was my own money. Sent it in 1985 not sure of month. I came to Jamaica about May 1985. Sent $6,000.00 before I came."

As for her concept of partnership, she puts it thus:

> "Agreement with Lyle was - Lyle was to operate business and pay mortgage on 76 Constant Spring Road. Money to pay mortgage was to come from business. Lyle's name was to go on title with others."

Lyle did operate Champion Mufflers - the earnings were his and his mortgage and other payments must go to his account in any subsequent reckoning. Then her initial statement under cross-examination runs thus:

> "Lyle said if I can come up with money to buy land for the three of them to do business, he will add my name to the business and make it four. Then the business would move unto the land and it wouldn't have to move again."

It is clear that she was using the label partnership without any concept of what a common venture with a view to profit entailed. Under further cross-examination the following excerpt makes this clear:

> "The plan was that business was to pay for mortgage in Jamaica and Michael and Dalton when they returned to Canada would help me to pay mortgage. Not so Lyle did not know of arrangement with myself, Michael and Dalton."

Her reasoning was related to how the payment for the property was to be effected. Lyle would pay from the earnings of his business and Dalton and Michael would pay her, then she revealed that:

> "In 1985 when I went to Ramsay and signed mortgage documents no talk about partnership. No discussion as to how partnership should be formed."

Her most cogent statement ran as follows:

> "There had already been oral agreement for partnership."

Then immediately following, to demonstrate that there was no such agreement, she said:

> "Went to Ramsay to form the partnership. Waited one year after signing mortgage because Lyle told me business not doing so well. I was giving business time to pick up. To get it legal. I had no idea what should be written in Partnership document that is why I went to Attorney. I made no suggestion to Attorney about what should be put in agreement. Dalton did not nor did Michael. Lyle did not make any suggestion what should be put in document. My intention was that when business settled, business and land would be four way business, that is why I went to lawyer to have it legally on paper. No special person was spokesman for us."

In the light of this passage it is difficult to understand how on a balance of probabilities it could be said that Champion Mufflers was carried on as a partnership either before or after the acquisition of 76 Constant Spring Road. This was the gist of Mr. Henriques' submission and I think it was well founded. As for the other two brothers, Joycelyn said:

> "Dalton has not started to repay me nor has Michael."

Michael confirms this for he said:

> "I have not repaid Joyce. Problems started when we were to pay her."

As for Dalton, here is his evidence. He said generally:

> "In 1987 we went to Attorney to set up partnership. In 1985 - all of us came to Jamaica to sign mortgage. Can't remember if Michael went to Attorney before. Can't remember if Lyle went to sign mortgage. No discussion then about partnership. Lyle, Michael and I had discussed partnership before. We were to tell Joyce. We proposed to Joyce that she be included in partnership and she would buy land. We went to sign mortgage first. In 1987 all 4 of us went to Attorney to put on paper Agreement we had concerning partnership in business."

Specifically on the issue of contributing to the purchase price, he said:

> "I did not contribute to purchase of land at the start. Sister did. We told sister - that Michael and I when we went back to Canada would help her to pay mortgage on her house which she did to buy land."

He was equally emphatic under cross-examination:

> "I did not contribute to purchase of 76 Constant Spring Road."

These excerpts are sufficient to show that the purchase of 76 Constant Spring Road did not result in a partnership of Champion Mufflers. Champion Mufflers was an occupant. The land was not used to generate profit for the joint tenants as a business venture. The facts of this case are markedly different from that in Re: John's Assignment Trusts Niven v. Niven [1970] 2 All E.R. 210. The crucial facts were stated thus at pages 210-211:

> "By an assignment dated 19th April 1948 and made between Willie George Johns of the one part and the plaintiff and the defendant of the other part, Johns assigned to the plaintiff and the defendant his leasehold interest of 99 years in the premises together with certain fixtures, plant and machinery and the goodwill of the business then being carried on by him on the premises, the purchase price being £2,000. By such assignment the house and shop premises were conveyed in trust for the plaintiff and defendant as beneficial joint tenants. The premises were purchased out of the proceeds of sale of Rock View as to £1,847; and the remainder was borrowed from the bank on mortgage. The business was run almost entirely by the plaintiff in her own name. She used the proceeds for the common benefit of herself, the defendant and their son, and for household expense generally."

It is against that background that Goff, J. said at page 213:

> "As to the business, I see no escape from the conclusion that it was a partnership business, although the defendant never looked at the accounts or enquired into the disposal of the proceeds, and it was carried on in the plaintiff's name."

On the basis of the foregoing analysis I am prepared to set aside all the declarations on partnership and the

irrelevant orders concerning damages for loss of profit of $3,221,985 to be paid by the appellant Lyle. There remains the question of how 76 Constant Spring Road is to be treated. The starting point of this enquiry must be an examination of the learned judge's orders in this regard. They are as follows:

> "(iv) An order declaring the joint tenancy as served.
>
> (v) A declaration that the equitable estate is held by the owners as tenants in common.
>
> (vi) An order for sale of the land 76 Constant Spring Road and that the net proceeds of sale be distributed in equal shares."

The order at (vi) was unusual as in the court below the respondents requested the following order:

> "(vi) An order for sale of land and that the net proceeds of sale be distributed in accordance as to the respective beneficial interests of the owners."

So the learned judge awarded the respondents more than they prayed for in their Statement of Claim. There was no warrant for such an award either on authority or principle. The appellant recognised the anomaly and adverted to the issue both in their grounds of appeal and in their written submissions. The ground of appeal at 4(b) reads in part:

> "In which case the learned trial judge erred in not determining what sums of monies if any were contributed to the alleged partnership as distinct from what sums of monies were advanced by the respondents for the joint property."

As for the written submissions, the following passage makes it clear that matter of the real estate was recognised to be of prime importance. It runs thus:

> "The evidence clearly showed that in so far as the real estate was concerned the appellant made a larger capital injection than any of the respondents, which was unchallenged."

On the evidence there were two contributions to the purchase of the real estate. The legal joint tenancy between

the parties should therefore be severed and the Registrar ordered to take an account of the respective contribution of the parties and the beneficial interests in the tenancy in common must be apportioned according to contributions for purchase and payment of mortgage and other matters. Expedience would suggest that the sale to which all parties are at liberty to bid for and become purchasers should await the taking of accounts by the Registrar. See section 43(1) Trustee Act and Higgins v. Beale [1932] 2 Ch. 15 at 16.

Since Lyle has been in sole occupancy, an account must be taken of the rental which has accrued as a result of his tenancy, and any sums which he received as rental income.

To my mind, Lyle has succeeded on this appeal and should have his costs taxed or agreed both here and below.

Cases referred to:

1. Weiner v Harris (1910) 1 KB 285
2. Stekel v Ellice (1973) 1 WLR 191
3. Keith Spicer v Mansel (1970) 1 WLR 333
4. Grant v Creelman et al 3 Nova Scotia Reports 37
5. Davis v Davis (1894) 1 Ch 393
6. Re: John's Assignment Trusts Niven v Niven (1970) 2 All ER 210
7. Higgins v Beale (1932) 2 Ch 15