JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 11/2000

BEFORE: THE HON MR. JUSTICE HARRISON, J.A
THE HON MR. JUSTICE WALKER, J.A.
THE HON MR. JUSTICE PANTON, J.A.

BETWEEN:	**RAYMOND HUGH**	**APPELLANT**
AND	**CLIFTON YAP**	**RESPONDENT**

Dr Lloyd Barnett and Andre Earle instructed by Rattray, Patterson & Rattray for appellant

Ransford Braham and Ms Daniella Gentles instructed by Livingston, Alexander & Levy for respondent

December 17, 18, 2001 and March 13, 2003

HARRISON, J.A:

This is an appeal from the judgment of W. James, J. on December 10 1999, entering judgment for the respondent for professional architectural services rendered in the sum of $4,230,191.93 with interest at the rate of 20% from December 14, 1994, to December 10, 1999, and costs to be agreed or taxed.

The relevant facts are that the appellant, intending to construct a discotheque nightclub at Sovereign Centre, Liguanea, in about

October, 1990, engaged the services of the respondent, a registered architect, to provide his professional architectural services to the project. It was agreed that the respondent would be paid fees calculated at 13.5% of the total construction costs of the building project.

In confirmation of this agreement the respondent wrote the appellant by letter dated October 25, 1990, (exhibit 1), detailing the architectural services to be provided, the said fee of 13.5% of construction costs, and continued:

> "~~The construction cost shall be the~~ total cost or estimated cost of all work designed, specified and/or supervised by the architect/interior designer. The cost of air conditioning equipment, kitchen equipment. Standby generator, and audio/visual equipment will not be included in the assessment of fees, unless they are an integral part of the construction work.
>
> Labour or materials furnished by the client for the project shall be included in the construction cost.
>
> The selection of furnishings and accessories will not be included unless specifically requested by the client."

The letter further referred to the schedule of payment, stated which expenses were reimbursable and ending said:

> "I trust that the foregoing meets with your approval, and in acknowledgment of this, please sign and return the letter copy enclosed along with a retainer fee of $16,000.00."

The respondent received a cheque for $16,000.00 from the appellant and the respondent commenced working on the project. The primary contract of employment of the respondent to provide professional architectural services probably commenced in October 1990.

A company called Mirage Entertainment Ltd. was incorporated by the appellant on February 27, 1991. The certificate of incorporation, exhibit 2, is dated February 27, 1991. The appellant in examination-in-chief, at page 34 of the Record, with reference to the date of February 27, 1991, said:

> "At that time the plaintiff was already doing the preliminary drawings for the Club."

This confirms that the said contract with the respondent probably commenced in 1990. During the construction there were changes to the project. The appellant provided material and labour.

In 1991, according to the appellant, or in 1992 according to the respondent, the appellant invited the respondent to acquire shares in the company in lieu of payment of his fees for the said professional architectural services. The respondent agreed.

Consequently, by letter dated September 27, 1993, exhibit 3, the respondent wrote to the appellant, stating inter alia:

> "As previously discussed and agreed, it is my intention to use accrued fees on this project to

> purchase equity in the disco, however, I would like out of pocket expenses to be paid separately."

The tone and content of this letter suggests that the discussion in relation to the acquisition of shares probably took place in 1992, as the respondent suggests.

The construction project was completed in 1994, and the discotheque was opened on June 29, 1994, under the name of Mirage Disco and Club.

By letter dated October 10, 1994, exhibit 4, the respondent wrote to the appellant ~~seeking to complete the~~ negotiations. It read:

> "Dear Raymond:
>
> I would like to meet you as soon as possible to finalize the following:
>
> 1) Architectural/Interior design fees.
> 2) Overall project costs.
> 3) Share equity value of fees and timetable for issuing of shares.
> 4) Shareholders rights and access to financial information.
> 5) Cash flow projections to estimate payback of investments, etc.
>
> While I realize that you have been busy, it is important that we meet and I would appreciate it if you would call to set this up during this week."

The appellant did not respond to this letter, exhibit 4, nor was any meeting held.

The respondent by letter dated December 14, 1994, exhibit 5A, wrote to the appellant, expressing his dissatisfaction. It read:

> "Over two years ago when you offered me shares in Mirage, I agreed in principle to leave my accrued fees as equity in the project.
>
> I had agreed to this because I was an integral part of it's creation and I looked forward with pride to being involved in a meaningful way as a shareholder/director of the Company.
>
> As it has turned out, although the club has now been opened for nearly six months, and I wrote you on the matter in my letter dated October 10, 1994, you have not responded with any ~~information~~ requested, regarding the ~~issuing of~~ shares to me.
>
> Further, my involvement as a shareholder/ director is non-existent as I have never been invited to attend any meetings, nor have I been asked my opinion about any matters concerning its operations.
>
> I have therefore decided that it is in our mutual interest that I resign as a director of Mirage Entertainment Ltd. (assuming that I was formally appointed), and that, I be paid for my architectural and interior design services, as the matter of share equity has not been quantified or formalized.
>
> Enclosed herewith is an estimated invoice of accrued fees, and I look forward to your settling of this matter in the shortest possible time."

The enclosed "estimated invoice of accrued fees" claimed a sum due of $5,203,462.50.

Prior to the opening of the discotheque in June 1994, the appellant told the respondent that he had made him, the respondent, a director of the company. Consequently, the respondent received a business card with his name thereon as a director of the company.

However, the articles of association of the company did not include the name of the respondent as a director, there was no register of directors, no formal meetings of the company were held nor was any resolution passed appointing the respondent as a director. The appellant agreed in cross-examination that he never in fact appointed the respondent as a ~~director nor treated him~~ as a director.

In response to the respondent's letter of December 14, 1994, Judy Hugh, the acting managing director of Mirage Entertainment Ltd. and sister of the appellant, replied by letter dated December 20, 1994. It reads, inter alia:

> "We received your letter dated December 14, 1994, regarding your desire to resign as a shareholder of Mirage. It is with sincere regret that such a decision has been reached, but we understand the events that transpired that induced this decision. Therefore, as Managing Director of Mirage Entertainment Limited (I) am to blame and would like to explain a few details of the operations of the club to you and allow you to ponder carefully about this decision. This way it allows you to get a better understanding of what we at Mirage are up against."

The letter referred to staff changes and continued:

> "Over the past month, Mirage's management team has undergone a lot of changes. We have had several management personnel turnover (four persons to be exact) because they were not able to fulfill their job requirements. Just recently, a couple weeks ago, our main accountant has resigned because of not being able to meet these criteria and not being able to organize herself thus the pressures of work made her resigned.
>
> Over the past months, we had spoken briefly about the reconciliation of the total expenditure of Mirage investment. The total amount is still not reconciled due to the fact of our accountant has not been able to work this matter. It is stressful and tedious on my part to constantly remind the accountant to work on ~~this matter.~~ We ~~have~~ ~~hired~~ another accountant who will not be able to start work till January 3, 1995. Thus we are at a standstill temporary. Until the total expense has been reconciled, we cannot give an accurate number of shares. It would not be fair for any of the shareholders, if we decide to give you an X amount of share because we think that is what we spent on the club. Therefore we ask for your patience and bear with us for a little while longer."
>
> (Emphasis added)

Further construction problems were detailed, attributing some blame to the respondent, and the letter, in the concluding paragraph reads:

> "If after you read this letter and would like to discuss this matter with me further, I would be more than happy to meet with you on a person to person basis. Again, my apologies for not informing you of matters at hand. Please arrange to meet early next year to discuss this matter."

By letter dated January 13, 1995, the respondent rebutted the allegations of Miss Judy Hugh, and repeated his request for the settlement of the payment of his fees.

A statement undated, exhibit 8, at page 56 of the record, was sent to the respondent showing details of the "Total Expense" of the "Mirage" construction, and in particular, in conclusion reads:

> "Clifton Yap Architect's service includes items 6, 8, 12, 14, 18, 19 * 13% Service Fee $3,053,914.44.
>
> Therefor, Clifton Yap's Directors percentage shares at Mirage = Service Fee/ Total 4.81%."

The respondent maintained that the statement, exhibit 8, had omitted items 9 and 10 from the computation and repeated that his fees were 13½% of construction costs. He claimed accepting, to an extent, the figures of the appellant, a revised total fee due of $4,230,191.93.

The respondent filed suit on October 03, 1995, and obtained the said judgment in his favour on December 10, 1999. As a consequence the instant appeal was filed.

The grounds of appeal are:

> "1. The learned trial judge erred in fact and law in the judgment entered for the plaintiff as the findings of fact and the legal reasoning were against the weight of the evidence and the relevant principles of the law of contract, company law, estoppel and agency.

2. The learned judge erred in not:

(a) properly distinguishing in law between terms of agreements which are conditions precedent and conditions subsequent and their legal effect having regard to the evidence;

(b) finding having regard to both the correspondence and the conduct of the parties that there was an enforceable agreement for shares in lieu of fees between the plaintiff/respondent and the second defendant/appellant; determining that the plaintiff/respondent was estopped from unilaterally rescinding the said agreement which was properly terminable only with the consent of the second defendant/appellant or by reasonable notice.

3. The learned trial judge misdirected himself on the facts and failed to properly consider and adopt the modern approach to implied terms in the law of contract as formulated in Halsbury's Laws of England (4th Ed.) Vol. 16 paragraph. 957."

The appellant did not rely on ground 2(a).

Dr Barnett for the appellant argued that an agreement was formed that the respondent would take shares in the company in lieu of his professional fees of 13.5% of construction costs, and it was not void for uncertainty because the parties had agreed on all the important terms. There was an agreed formula in existence for the quantification of the contribution of the parties in the equity of the company. The court should imply from the express terms, that the

parties had agreed that they would examine the accounts and arrive at the computation; that they operated on the basis that the respondent's fees would purchase an equity in the company and no fundamental matter was otherwise left to be determined. A court will not lightly hold that there is no binding agreement in a commercial transaction on the ground of uncertainty, where parties have acted on a common understanding. The learned trial judge was in error to find that there was no agreement.

Mr. Braham for the respondent submitted that there was a concluded agreement for the provision of architectural services and for a fee of 13.5% of construction costs payable. There was in addition an agreement to take an equity in the club, in exchange for cash, but there was no agreement nor formula as to how one would equate the respondent's fees to the shareholding. That latter was an issue still to be discussed. There was no formula, nor mechanism to determine and settle the value of the equity in the club and in particular, the number of shares to which the respondent would be entitled. The learned trial judge was correct to find that there was no enforceable agreement.

One of the basic requirements that govern the constitution of an enforceable contract is that all its essential terms must have been agreed on by the parties. If any essential term is still left to be

negotiated by them or is to be determined by a third party there is up to then no concluded contract.

In ***Courtney and Fairbairn Ltd. v Tolaini Brothers (Hotels) Ltd*** [1975] 1 All E.R. 716, the respondents, having obtained financing for the appellants to develop a building site, wrote to the appellants expressing their desire to be employed as the building contractors on the project. The appellants, by letter, agreed and instructed their quantity surveyor to negotiate the price of the building works with the respondents. The negotiations broke down and no price was agreed on. The appellants employed other contractors. The respondents sued for loss of the profits they would have earned. The Court of Appeal held that there was no concluded contract, because the ascertainment of the price which was fundamental to the contract was never agreed on. Lord Denning, in delivering the judgment at page 719, said:

> "In the ordinary course of things the architects and the quantity surveyors get out the specification and the bills of quantities. They are submitted to the contractors. They work out the figures and tender for the work at a named price; and there is a specified means of altering it up or down for extras or omissions and so forth, usually by means of an architect's certificate. In the absence of some such machinery, the only contract which you might find is a contract to do the work for a reasonable sum or for a sum to be fixed by a third party. But here there is no such contract

> at all. There is no machinery for ascertaining the price except by negotiation."

and at page 720:

> "I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract. So I would hold that there was not any enforceable agreement in the letters between the plaintiff and the defendants."

The courts will strive to construe a contract to be subsisting if it can be so ascertained from the past dealings of the parties or any practice in a particular trade. This approach of the court is especially evident in dealing with commercial contracts. Accordingly, in ***Hillas & Co. Ltd. v Arcos Ltd*** (1932) All E.R. Rep. 494, the House of Lords held that the purchase of timber of "22,000 standard of softwood goods of fair specifications ..." was sufficiently particularized to indicate the intention of the parties to be bound, when it was interpreted in the light of previous dealings between the parties. Lord Tomlin, at page 29, said:

> ""The problem for a court of construction must always be so to balance matters that, without the violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."

The terms of a contract must be precise and the intention of the parties clear. If a contractual term is uncertain or unclear, it will not

necessarily vitiate the contract, if its meaning can be ascertained or the contract itself provides the method of supplying the meaning or deficiency. ***In F. & G. Sykes (Wessex), Ltd v Fine Fare Ltd*** (1967) 1 Lloyd's List Law Reports 53, a contract between the plaintiffs contained a clause that any differences arising between the parties "shall be referred to arbitration by a single arbitrator." The defendants repudiated the contract. A clause of the contract provided for a specific number of broiler fowls to be provided for the first year, and continued:

> "... and thereafter such other figures as may be agreed between the parties hereto."

In answer to the plaintiff's suit for breach of contract, the defendants argued that the latter clause was void for uncertainty in that it was too indefinite and uncertain to create legal relations and so no contract existed after the first year. The Court, in finding for the plaintiffs, held that the arbitration clause provided a sufficient means whereby the arbitrator was given jurisdiction to decide the differences arising between the parties. Danckwerts, L.J., agreeing with Lord Denning, M.R., at page 60, said:

> "... it seems to me this is not a case where there is an ineffective attempt at an agreement but that there is a form of binding agreement by which the parties were bound."

If the parties to the agreement have not agreed on some essential term of the contract or provided an effective machinery to ascertain certain requirements of a contract a court will be reluctant to provide it. However, the court will, in some circumstances hold that the machinery, though defective, is operable. The House of Lords did so in ***Gudbrook Trading Estate Ltd. v Eggleton*** [1983] 1 A.C. 444, where parties to a lease were each obliged to appoint a valuer both of whom would value the property on the exercise of an option to purchase. On the refusal of the lessor to appoint a valuer and his argument that the option was thereby void for uncertainty, it was held, by a majority, that the provision that the valuers should fix the price was a decisive indication that the price was to be a reasonable price because the valuers were professionals who would provide professional standards. The option agreement was not void for uncertainty, having its own built-in machinery capable of making a final determination of the reasonable price.

The court will also imply terms in a contract which are necessary, reasonable and obvious to give business efficacy to the contract: (***The Moorcock*** (1889) 14 P.D. 64). In that case it was held that the defendants were liable for damage to the plaintiff's vehicle from grounding because the premises could not have been used without the vessel grounding, and therefore the defendants "must be

deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel." Bowen, L.J., at page 68, stated the principle in these terms:

> "The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men."

The principle enunciated in **The *Moorcock*** (supra), was followed and explained in ***Reigate v Union Manufacturing Co. (Ramsbottom) Limited et al*** [1918] 1K.B. 592, in which the defendant denied liability for breach of contract arguing that there was a term implied that they could discontinue their business at any time, terminating the seven year contract of employment of the plaintiff as their agent. The defendant company was voluntarily wound-up. The court refused to imply such a term. Scrutton, L.J., at page 605, said:

> "These, principles, however, have been clearly established. The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

Accordingly, if the parties have clearly expressed their intentions and they are governed by an agreement the courts will not imply a term or read words into a contract. This is moreso if a term is vague or uncertain. Neither will a court seek to supplement aspects of an agreement in circumstances where contracting parties have failed to address their minds to them. The Judicial Committee of the Privy Council so held in ***Douglas v Baynes*** [1908] A.C. 477, the headnote to which reads:

> "Held, that specific performance could not be decreed of a contract between the plaintiff and defendant by which the latter agreed to transfer to the former a farm in the Transvaal on which deposits of tin ore had been found in consideration of 3700 shares of 5l. each in a syndicate to be formed for the "purpose of developing" the same as a mining property,

> the 3700 shares to represent the appellant's holding in a syndicate of 12,000 shares.
>
> The price to be paid by the plaintiff was wholly uncertain. It was to consist of shares in a syndicate whose purpose of development there was no evidence to define, either as to the nature and extent of the operations contemplated or as to what the parties meant by it, the value of the shares depending upon the adequacy of working capital which was neither ascertained nor ascertainable."

A similar approach was adopted by the House of Lords in ***Way v Latilla*** [1937] 3 All E.R. 759, in which the appellant claimed damages, based on an alleged agreement that he would obtain and send information to the respondent in relation to gold mines and concessions in West Africa. In return for this information the respondent on acquisition would give to the appellant a share in such mines and concessions and pay to the appellant a reasonable sum for the information and reports. The appellant claimed, in the alternative, to be paid on a quantum meruit basis, entitling the court to fix a sum which the parties themselves considered reasonable and usual, taking into consideration a profit of £1,000,000.00 made by the respondent on the sale. Their Lordships held that there was no concluded contract between the parties as to the amount of the share or interest the appellant was to receive and it was impossible for the court to complete the contract for them. There was a contract of employment

and the appellant was entitled to a reasonable remuneration. Lord Atkin, at page 763, said:

> "There certainly was no concluded contract between the parties as to the amount of the share or interest that Mr. Way was to receive, and it appears to me impossible for the court to complete the contract for them. If the parties had proceeded on the terms of a written contract, with a material clause that the remuneration was to be a percentage of the gross returns, but with the figure left blank, the court could not supply the figure. The judge relied upon the decision of this House In ***Hillas & Co. Ltd. v Arcos, Ltd.*** (1932), 147 L.T. 503; Digest Supp. But in that case this House was able to find, in the contract to give an option for the purchase of timber in a future year, an intention to be bound contractually, and all the elements necessary to form a concluded contract. There is no material in the present case upon which any court would decide what was the share which the parties must be taken to have agreed."

In the instant case the respondent's letter of September 27, 1993, exhibit 3, stating:

> "As previously discussed and agreed, it is my intention to use accrued fees on this project to purchase equity in the Disco ..."

ranks as,

(a) an agreement to purchase shares in the company Mirage Entertainment Ltd., utilizing his fees of 13.5% of the construction costs, as soon as such amount was quantified; or

(b) an agreement that he is deemed to have purchased such shares on some date to be agreed by the parties when the amount was quantified.

This uncertainty is further emphasized by the respondent's letter of December 14, 1994, exhibit 5(B), which reads:

> "Over two years ago, when you offered me shares in Mirage, I agreed in principle to leave my accrued fees as equity in the project."

If the agreement was in terms of the former, that is, an agreement to enter into a contract to purchase shares, it would amount to a contract to ~~enter~~ into a contract of purchase which could be enforced on the ascertainment of the quantification of the architectural fees of 13.5 % of construction costs. This in itself would be in- complete, because its value in the equity of the company, as it related to the number of shares was still left to be determined.

On the alternative hypothesis, if the respondent was deemed to have purchased shares, the number of which were ascertainable after his fees were quantified, again, the number of shares, as the fees related to the equity in the company, would still be left to be determined.

Exhibit 8, headed "total expense Mirage", received from the appellant about June 1995, recited that;

> " Yap's directors percentage shares at Mirage = Service Fee/Total 4.81 %."

The appellant said, in examination-in-chief:

> "In 1991 we had discussion as to how fees would be converted with shares ... We did not come to any definite percentage at that time ...
>
> The only agreement we had was that plaintiff would use his fees to buy shares in Mirage."

At no time was there any agreement as to the date from which the purchase of shares would be effected in order that the value of each share to the respondent could be calculated from that date. That represented a fundamental omission.

The respondent's letter dated October 10, 1994, exhibit 4, specifically requested a meeting "to finalize", inter alia:

> "Share equity value of fees and timetable for issuing of shares." (emphasis added.)

The appellant did not respond to this letter. The negotiations on that issue were therefore incomplete. The appellant did say, in examination-in-chief, at page 35 of the record:

> "In 1991 we had discussion as to how fees would be converted into shares.
>
> Total project cost $100 - plaintiff's fee 13½% would be $13.50 of agreed.
>
> We did not come to any definite percentage at that time. What we discussed was that plaintiff would use his service fees to purchase shares in Company.

> I received Ex. 4 in October 1994. At that time the total contribution (sic) costs had not been determined."

On February 27, 1991, when the company was incorporated, it consisted of 1,000 shares valued at $1.00 each. The appellant and his brother, Antonio Hugh, held one share each. The equity value of the company would determine the value of each share during the ongoing life of the company.

When construction was complete and the club Mirage was to be opened in June 1994, the value of each share in the company could then have been ~~determined. That value would~~ change, for example, as soon as the "start up" working capital was injected. This would also vary in value, depending on whether or not the capital represented a loan to the company or an infusion of capital by the appellant himself.

The appellant himself, in evidence said:

> "Mirage was O.K. up to October to December, 1994. We had problems at other businesses."

confirming that the company was then operating at a satisfactory level.

Because the value of the shares would vary depending on the state of the operation of the business of the company, the timing of the investment of the respondent's fees of 13.5% of the construction costs was fundamental to the value of the appellant's share in the equity of the company.

The declaration of the appellant in exhibit 8, that the respondent was entitled to 4.81% in the equity of the company based on "13%(sic) ... service fee $3,053,912.44 ..." meant that sometime in 1995 probably between the months of January to June, the respondent would have been entitled to 48.1 shares of the 1000 shares in the company. This is an assumption that the number of shares in the company remained at 1000.

The appellant's rejection of the respondent's request on October 10, 1994, exhibit 4, for a meeting to discuss the "... timetable for issuing of shares ..." is a critical factor in the determination of whether or not there was a completed contract or one that was void for uncertainty. The question which arises is, what was the agreed date of the quantification of the shareholding? That date would be determinate of the value to the respondent of his shareholding, itself dependent on the value of each share on that date. Was the relevant date:

(a) the date of the discussions in 1992, retroactively;

(b) the date of September 27, 1993, exhibit 3;

(c) the date of completion of the project in 1994;

(d) the date of opening of the club Mirage in June 1994;

(e) the date of ascertainment of the value of the appellant's professional fee in 1995 or;

(f) some other date when the appellant would have sent an accurate revised final statement of the respondent's fees due?

Certainly, if, for example, one accepts that the relevant date is the date in 1995 when the professional fees of 13.5% were ascertained, the respondent would have lost a possible benefit of profits if any, previously, and in particular in 1994, between October to December when the club was operating satisfactorily. The company would have been utilizing for its own benefit the said retained fees of the respondent. That would have been unfair and detrimental to the respondent.

The learned trial judge found that:

> "... there was no contract between either the plaintiff and the ... defendant ... because the fundamental terms/conditions of a contract were never negotiated nor agreed ... there was no agreement as to the method to be used in determining the value of the shares in the ... (company's) or the percentage such shares would bear in the ... (company's) equity."

In so far as finding that there was no proper agreed basis nor machinery to determine the precise shareholding to which the respondent was entitled, the learned trial judge cannot be faulted.

A court cannot supply to a contract a fundamental term, the details of which the parties failed to address their minds. Nor could a court imply such a term nor do so in the instant case.

It is my view that the said agreement is uncertain and deficient, in that a fundamental term was not agreed, cannot be implied and therefore is unenforceable.

The respondent is entitled to his architectural fee of 13.5% of the construction costs, in accordance with the contract with the appellant in 1990, as contained in exhibit 1.

This Court in ***British Caribbean Company v Perrier*** SCCA No.114/94 delivered on 20th May 1996, decided that in commercial cases the acceptable interest was the loan rate of interest. The learned trial judge had before him, exhibit 9, the statistical digest of March 1998, issued by the Bank of Jamaica, containing both the deposit and loan rate of interest. The learned trial judge in his discretion awarded a rate of interest, the deposit rate of 20% per annum. This award was not challenged.

In all the circumstances, I would dismiss the appeal with costs.

WALKER, J.A.:

The question in this appeal is whether the appellant, Raymond Hugh and the respondent, Clifton Yap entered into a concluded contract in October, 1990 for the provision of architectural services by Mr. Yap in payment for which the parties agreed that Mr. Yap would be allotted shares in a company, Mirage Entertainment Limited (the "company") equivalent to, and in lieu of, the professional fees due to Mr. Yap, such fees to be computed on a basis of 13 ½% of the total construction cost ~~of the project~~ being undertaken. That project was the construction of a club ~~and discotheque~~ at a location known as Sovereign Centre.

Mr. Yap and Mr. Hugh first met in October,1990 and at that time discussed Mr. Hugh's plans to construct and operate the club and discotheque. Subsequently the project was undertaken and completed with the utilization of architectural services rendered as agreed by Mr. Yap. The club named "Mirage" became a reality and was opened on June 30, 1994. It was operated by the company which was incorporated on February 27, 1991.

The evidence discloses that following their initial meeting and discussions in October, Mr. Yap wrote to Mr. Hugh on October 25, 1990 as follows:

"Mr. Raymond Hugh
c/o Rayton Manufacturers
20 Red Hills Road
Kingston 10

Re: Proposed Interior Design Work Discotheque/Club Sovereign Centre

Dear Sirs,

Further to our previous discussions regarding the above, the following is a breakdown of the Interior Design Services that we propose to offer at a fee of 13 ½% of the construction cost:

(a) Space Planning;
(b) ~~Design~~, ~~Detailing~~ and Specifications of Interior Finishes ~~including~~ ~~Cabinetry~~, Walls Floors, Ceilings etc.;
(c) Coordination with Electrical/Mechanical Engineers;
(d) Coordination with Lighting Consultants (if required);
(e) Construction and Installation Inspections.

The construction cost shall be the total cost or estimated cost of all work designed, specified and/or supervised by the Architect/Interior Designer. The cost of Air Conditioning Equipment, Kitchen Equipment, Standby Generator and Audio/Visual Equipment will not be included in assessment of fees, unless they are an integral part of the construction work.

Labour or materials furnished by the Client for the project shall be included in the construction cost.

The selection of furnishings and accessories will not be included unless specifically requested by the Client.

The following is our schedule of payment:

(a) Space Planning and Schematic Design- 15% of fee

(b) Design Development and Presentation of materials colour board -25% of fee

(c) Working Drawings and Specifications – 35% of fee

(d) Interior Construction Inspections – 25% of fee

Out of pocket expenses such as travel, long distance and overseas telephone calls, blueprints and photocopies etc. are reimbursable.

I trust that the foregoing meets with your approval, and in acknowledgement of this, please sign and return the letter copy enclosed along with the retainer fee of $16,000.00.

Yours truly,
CLIFTON M. YAP M.J.I.A.

It is not disputed that the retainer fee of $16,000.00 mentioned in that letter was subsequently paid.

On September 27, 1993, Mr. Yap addressed the following letter to Mr. Hugh:

"Dear Mr. Hugh:

Re: Mirage Private Club

As previously discussed and agreed, it is my intention to use accrued fees on this project to purchase equity in the Disco, however, I would like out of pocket expenses to be paid separately.

In this regard, I am enclosing a summary of reimbursable expenses from commencement of the project to the end of August, 1993.

Your prompt attention on this matter would be greatly appreciated and should you have any questions, please do not hesitate to call me.

Yours truly,
CLIFTON YAP ARCHITECTS

Clifton Yap RA. J.I.A."

On October 10, 1994 Mr. Yap again wrote to Mr. Hugh as follows:

"Dear Ramond

I would like to meet you as soon as possible to finalize the following:

(1) Architectural/Interior Design Fees
(2) Overall project cost
(3) Share ~~equity value of fees and~~ timetable for issuing of shares.
(4) Shareholders rights and access to financial information.
(5) Cash flow projections to estimate payback of investments, etc.

While I realize that you have been busy, it is important that we meet and I would appreciate it if you would call to set this up during this week.

Yours truly,
CLIFTON YAP ARCHITECTS

Clifton Yap RA. J.I.A"

Yet again on December 14, 1994, Mr. Yap wrote to Mr. Hugh in the following terms:

"Dear Ramond:

Re: Mirage Club & Disco

Over two years ago when you offered me shares in Mirage, I agreed in principle to leave my accrued fees as equity in the project.

I had agreed to this because I was an integral part of it's creation and I looked forward with pride to being involved in a meaningful way as a shareholder/director of the company.

As it has turned out, although the club has now been opened for nearly six months, and I wrote you on the matter in my letter dated October 10, 1994, you have not responded with any information requested, regarding the issuing of shares to me.

Further, my involvement as a shareholder/ director is non existent as I have never been invited to attend any meetings, nor have I been asked my opinion about any matters concerning it's operations.

I have therefore decided that it is in our mutual interest that I resign as a director of Mirage Entertainment Ltd. (assuming that I was formally appointed), and that, I be paid for my Architectural and Interior Design Services, as the matter of share equity has not been quantified or formalized.

Enclosed herewith is an estimated invoice of accrued fees, and I look forward to your settling of this matter in the shortest possible time.

Wishing you continued success in your operations.

Yours truly,
CLIFTON YAP ARCHITECTS.

Clifton Yap RA, J.I.A"

The invoice enclosed with this letter estimated accrued fees for work done at $5,203,462.50.

Following upon receipt of Mr. Yap's letter of December 14, 1994, by letter dated December 20, 1994, Judy Hugh, Acting Managing Director of the second appellant company replied to Mr. Yap inter alia as follows:

> "Over the past couple of months, we had spoken briefly about the reconciliation of the total expenditure of Mirage investment. The total amount is still not reconciled due to the fact of our accountant has not been able to work this matter. It is stressful and tedious on my part to constantly remind the accountant to work on this matter. We have hired another accountant who will not be able to start work till January 3, 1995. Thus we are at a standstill temporarily. Until the total expense has been reconciled, we ~~cannot give you an accurate~~ number of shares. It would not be fair for any of the shareholders if we decide to give you an X amount of share because we think that is what we spent on the club. Therefor we ask for your patience and bear with us for a little while longer.
>
> As you are probably aware, the club was opened on June 30, 1994. I underlined opened because that is exactly what transpired. We had to open because a date was set and we had to fulfill certain obligations but the fact is that the Club was not complete. There were a lot of construction items not completed. The metal work was incomplete, doors were not fully hung, electrical work was still being done, the sound and light system was still being installed, the kitchen storage area was not even 50% ready, the Cafe counter was incomplete, customers were getting hurt because a portion of the counter was not constructed and the list goes on and on.
>
> You being the Architect and a Director knew that the club was not complete, but to other people, we had to give that image. Anyone who was involved with the construction knew that the Club was not operating at full capacity. Paul Scott had wiped his hands clean of

> the club on June 29, 1994 and it was left to me to finish the construction work and run the club at the same time. In all true honesty the Club was not completed till the beginning of October which was right after our first concert, Musical Rhapsody, Even now, there are still outstanding details not completed and we seek your assistance in this. The finish detail on top of the columns is still not in place because the cladding is no longer circular. Please advise us on this. Why was there not a final walk through after the Club was opened? We did not feel that we were getting preferential treatment.
>
> This brings me to another point regarding the architectural coordination and design for Mirage. During our final month, we discovered a lot of details were missing, but we at the jobsite made executive decisions to compensate for details taking a long time to reach us. The acoustic wall co-ordination should have been coordinated by you, the architect but Paul Scot did the brunt of the work. How are we to calculate this in our shares or fees disbursement for this work that you were to provide?"

By letter dated January 13, 1995 Mr. Yap replied to this correspondence from Judy Hugh concluding as follows:

> " I would greatly appreciate a settling of the fee situation as soon as possible so that we can disentangle our business problems and get back to a more cordial social relationship".

Finally, not having been paid his fees, Mr. Yap filed suit against the appellant and the company. The action was heard by Wesley James J., who found that in or about October, 1990 Mr. Yap and Mr. Hugh entered into an agreement, but that there was "a fundamental disagreement/misunderstanding between the plaintiff and first defendant regarding the question of whether there was a binding

agreement between them in relation to the plaintiff's fees being used to acquire shares in the club." Accordingly, the trial judge gave a judgment for Mr. Yap against Mr. Hugh in the following terms:

> "1. There be Judgment for the Plaintiff against the First Defendant for the sum of $4,230,191.93 with interest at the rate of 20% per annum from the 14th day of December, 1994 to the 10th day of December, 1999;
>
> 2. Stay of execution of Judgment granted for six (6) weeks
>
> 3. Costs to the Plaintiff to be agreed or taxed."

On this appeal it was argued by Dr. Barnett for the appellant that the trial judge erred in finding that there was no concluded agreement between the parties whereby Mr. Yap agreed to accept shares in the company equivalent to, and in lieu of, the sum for professional fees due to him, and calculated on the basis of 13½ % of the total construction cost of the club and discotheque.

Now the discussions and correspondence between the parties make it clear that in October, 1990 the parties did, indeed, enter into an agreement but the critical question is whether that agreement was a concluded and enforceable contract viewed in the entirety of it. In considering this question I think the first point to note is that the precise extent of Mr. Yap's shareholding, which was an essential term of the contract, was never agreed between the parties. Beyond

saying that the shareholding was to be equivalent to the sum of the professional fees earned by Mr. Yap, and that those fees were to be paid on the basis of 13½ % of total construction cost, the agreement went no further. Indeed, the extent of Mr. Yap's shareholding (i.e. in terms of number of shares) could not have been ascertained at the time of the making of the contract as that depended on the total amount of the construction cost which in turn could only be finally and definitively determined at the end of the project. Nor was there in that agreement any mechanism prescribed for determining Mr. Yap's shareholding independently of the parties themselves. As it turned out Mr. Yap's shareholding was never determined since it depended upon the quantum of his professional fees which was never agreed and it remained in dispute between the parties, eventually leading to the institution of these proceedings. In this regard the decision in ***F & G Sykes (Wessex) Ltd. v Fine Fare Ltd.*** [1967] 1 Lloyd's List Law Reports 53 relied on by Dr. Barnett is to be distinguished. In ***Sykes*** the disputed contract included an arbitration clause which it was held was sufficient to resolve any uncertainties left by the parties to the agreement. In the present case there is no such clause, nor is there any other mechanism for resolving the fundamental uncertainties surrounding Mr. Yap's entitlement under the parties' agreement. The reality of the situation is that there is no concluded and enforceable

contract in the terms and on the basis contended for on behalf of the appellant. In such terms the contract is incomplete and it is now impossible for the court to complete that contract for the parties: see ***Way v Latilla*** [1937] 3 All ER 759; ***Courtney and Fairbairn Ltd. v Tolaini Brothers (Hotels) Ltd. and Another*** [1975] 1 All ER 716. But Dr. Barnett argued that the parties had formed what was in effect a shareholders' agreement as to future participation in the company. He contended that the parties had in fact embarked on a joint venture; that they had agreed to work together to further the project being undertaken to establish the club and discotheque and that, by so doing they had created mutually binding rights and obligations. In this regard Dr. Barnett relied on ***Khan and Another v Miah and Others*** [2000] 1 W.L.R. 2123. In ***Khan*** the question was whether in law the parties had carried on business in partnership together. It was held:

> "that there was no rule of law that parties to a joint venture did not become partners until actual trading commenced; that persons who agreed to carry on a business activity as a joint venture became partners when they actually embarked on the activity on which they had agreed and entered into transactions on behalf of the joint venture; that the parties had agreed to find suitable premises, fit them out as a restaurant and run the restaurant once they had set it up; and that accordingly, the acquisition, conversion and fitting out of the premises were all part of the joint venture undertaken with a view of ultimate profit and formed part of the business which the parties had been carrying on in partnership together."

Khan is to be distinguished from the present case, the fundamental difference being that in ***Khan*** the contractual relationship between the parties was not beset by uncertainty as is the situation in the present case. The issues in the two cases being different, I am of opinion that the decision in ***Khan*** cannot avail the present appellant.

However, notwithstanding that there was no concluded contract between Mr. Yap and Mr. Hugh in the terms contended for by the appellant, it is plain that there existed between the parties a contract of employment under which Mr. Yap did do work for Mr. Hugh which was not to be gratuitous but for which Mr. Yap expected to be paid, and should be paid. The finding of the trial judge was to such an effect and I agree with it.

Accordingly, I, too, would affirm the judgment below and dismiss this appeal with costs.

PANTON, J.A.

I am of the opinion that this appeal should be dismissed and the judgment of Wesley James, J. affirmed. I agree entirely with the reasons stated in the judgment of Harrison, J.A.

ORDER

HARRISON, J.A.

Appeal dismissed. Order of the court below affirmed. Costs to the respondent to be taxed if not agreed.