IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. J-088 OF 1989

BETWEEN	ROBERT JOSEPH	PLAINTIFF
A N D	DAVID MCKENZIE	DEFENDANT

Miss Carol Davis for Plaintiff and with her MIss Sharon Service

Mr. David Henry for the Defendant and with him Mrs. Heather Dawn Brown.

HEARD: 1ST, 2ND, 3RD, 4TH, 5TH FEBRUARY, 1993 AND 21ST JUNE, 1993

SMITH J.

This case raises the somewhat unfamiliar question as to whether or not there was a partnership between the parties. In 1986 the defendant David McKenzie, a Businessman, purchased the Dutch Pot Restaurant at 45 St. James Street, Montego Bay. The return from the business did not meet his expectation. According to McKenzie the business needed a "face lift." He approached the General Manager of Sea Wind Beach Resort seeking assistance and was referred to the Plaintiff Robert Joseph the Food and Beverage Manager at the aforementioned hotel.

McKenzie went and spoke with Joseph in September, 1986. He invited Joseph to come into the business with him as a partner. Joseph was at first somewhat reluctant. As to what happened thereafter the parties are at variance in certain material areas.

According to Joseph, the plaintiff, he told McKenzie that he was going on leave and could only give him some pointers. He went on two weeks vacation and on his return McKenzie again approached him.

Joseph was taken to the restaurant, he made observations and told McKenzie that the restaurant had potentials. He offered to give McKenzie pointers but McKenzie would not settle for that: "I want a partner not pointers, I want you to be totally involved," McKenzie insisted. After several discussions they agreed on a few points. One such point being that McKenzie would put up all the money and Joseph, who had no money would provide food and beverage expertise, would reorganise and redo the central systems and would manage the restaurant. Joseph said they spoke of a 60-40% split of the business for McKenzie and himself respectively. "In principle we had now come to some agreement" he said. Joseph spoke with his fiance Miss Nicholas whom he had already told of McKenzie's proposal.

About the beginning of October, 1986 McKenzie invited Joseph and Miss Nicholas to dinner. At the dinner, according to Joseph they spoke about "the disagreement, the important one was the 60-40% split which McKenzie said he thought was too much and should be 70-30." Miss Nicholas insisted on 60-40. Joseph sought a compromise of 65-35. "There was no agreement at that stage" the Plaintiff, Joseph, said. However, "in principle the other points were agreed on, the only problem was the percentage."

After this dinner the plaintiff became "totally involved in the reorganisation of the restaurant." There was at least an understanding between the parties that they would enter into a partnership. The restaurant, renamed "Hungry Mack," was opened on the 22nd December,1986 and was immediately a success.

The plaintiff said in December he went to the defendant, demanded a written document embodying the partnership agreement and threatened to pull out if he was not given "something concrete in black and white." He testified that they came to an agreement in December, 1986 that "it would be 65-35" and that the defendant assured him that the document would be forthcoming. The document was received several months later. It was exhibited in court.

Soemtime in April, 1987 the parties went to the plaintiff's lawyer Miss Pauline Simpson to sign the document. There the defendant refused to sign saying that he thought 65-35 split was unreasonable. The plaintiff left promising the defendant that he would hear from his lawyer. The plaintiff effectively pulled out of the business as of the date of the meeting in Miss Simpson's office.

On the other hand the defendant is saying that when he invited Joseph in September, 1986 to become a partner in the business Joseph said he did not have any money at the time but would assist him "to fix up the restaurant." There was no discussion concerning payment for his services "Joseph said he would help me but I would owe him one, I took it to mean I would owe him a favour," the defendant testified.

He denied that Joseph, Miss Nicholas and he discussed matters concerning the partnership at the dinner at his house in October, 1986. The purpose of the dinner he claimed, was to test the cook. No business was discussed at all, he insisted. Let me pause here to say that I find it hard to believe that the parties said nothing at all about the proposed partnership or the restaurant. According

to the defendant the only time something about the partnership came up after he spoke to Joseph in SEptember was in April, 1987. It was Miss Nicholas, he said who in April approached him and asserted "Bully has to get 40% of the business." To this demand he replied "no way, because he did not put even a dime in the business." He claimed that Miss Nicholas returned to him a few weeks later and threatened that Bully would pull out if he did not get 40%. Joseph and Miss Nicholas "kept on nagging" him about the partnership, he said, and during the same month Joseph pulled out of the business.

The account as to what happened next according to the defendant is as follows: He went to Miss Pauline Simpson, his attorney-at-law, and explained everything to her. He asked her to draw up an agreement between Joseph and himself. This was in either May or June. The agreement was drafted by his attorney. He gave Joseph a copy sometime in July or August, 1987.

In about August or September he invited Joseph to the lawyer's office to sign the agreement. At his lawyer's office he told his attorney-at-law he could not sign the contract because he did not think the 60-40 split was fair.

The defendant asserted that it was because of the harassment why he had decided to enter into a partnership. So we have from the mouth of the defendant the fact that he had decided to enter into a partnership with the plaintiff albeit that such decision was as a result of harassment by Miss Nicholas. The reason attributed to his making this decision is immaterial. In any event it is clear to me that the defendant's decision was not due to any harassment. On his own evidence the plaintiff and himself had actually begun to carry on the business long before the so called harassment. Such harassment, if there was any, was with a view to getting him to reduce the terms of the alleged partnership into writing. The plaintiff is in my view a credible witness. I prefer his evidence to that of the defendant and his witnesses.

The defendant is insisting that the document Ex. 2 was drafted and ready to be signed but that no agreement could be arrived at on its terms. The draft document provided that the defendant should receive 65% of the net profits and the plaintiff 35%. It was the defendant who instructed his attorney to draft the document. This document was handed to the plaintiff for his perusal. An appointment was made for them to meet at the lawyer's office with a view to signing the document.

In spite of all this the defendant would want us to believe that he and the plaintiff did not agree on the manner of the apportioning of the profits. I find it hard to believe that there was no consensus.

Was there a valid Partnership Agreement?

Partnership is the result of an agreement. It involves the carrying on of a business in common with a view to profit. There must be a community of profit or of loss. To determine whether or not a partnership exists the agreement must be construed as a whole and the mere fact that the parties describe themselves as partners is not conclusive. Thus the evidence of the defendant that he decided to enter into a partnership is not by itself conclusive.

Mr. Henry argued that there was only an agreement to contract which he submitted is not enforceable. This agreement, he said is too general to be valid and is dependent on the making of a formal contract. The condition to reduce everything into writing remains unfulfilled and is at best a contract to enter into a contract of partnership.

As I understand the law, there is merit in Miss Davis' contention that persons who agree to become partners although they contemplate signing a formal partnership deed and never sign it may in fact and in law be partners. In Branca v. Cobarro (1947) 2 All E.R. 101 an informal agreement stated to be "provisional until a fully legalised agreement is drawn up" was held to be "Immediately fully binding." In that case the use of the word "until" was pivotal in ascertaining the intention of the parties. This and other authorities clearly indicate that the legal effect of such prior informal agreement depends on the intention of the parties. See for example Lyle Barnes v. Joycelyn Bennett and others S.C.C.A. Nos. 58 and 59/91 delivered 22nd March, 1993. What was the intention of the parties? It seems to me that where the parties have actually begun to carry on business that that is strong evidence of their intention that such an informal agreement should be binding. In Lindley on Partnership (14th Edition) P. 16 it is stated:

> "It is not always easy to determine whether an agreement amounts to a contract of partnership or only to an agreement for future partnership. If the parties to the business have begun to carry on business, although prematurely they will be partners." (emphasis supplied)

In this case the only reasonable construction to be placed on the conduct of the parties is that they intended the informal agreement to be binding. The promise by the defendant to have a formal document drawn up did not constitute, in my view, a condition precedent to contract.

In light of the conduct of the parties there was no basis to conclude that the agreement reached in Dec. 1986 was "subject to contract." I find that the agreement by the parties that there should be a formal document is "a mere expression of the desire of the parties as to the manner in which the transaction already agreed to, will in fact go through."

Mr. Henry further submitted that the contract must be certain. If the terms are unsettled or indefinite there will be no contract, he urged. It was his contention that the terms of the proposed partnership were uncertain, it was not certain whether the percentage related to profit or business, the commencement and duration of the partnership were not stated and the responsibilities and liabilities of the parties were not settled. For support he referred to Halsbury Law of England Vol. 9 para. 262 (4th Edition).

The plaintiff's evidence which I accept was that they agreed that the defendant would provide the money and that the plaintiff would supply the "food and beverage expertise," would reorganise the control systems and manage the restaurant. And in Dec. 1986 it was agreed after several discussions that the profit would be shared 65-35 in favour of the defendant. Thus there was no joint capital or stock. The defendant had the capital, the plaintiff had the skill. There was no arrangement whereby the plaintiff should be paid a salary. They agreed to combine capital and skill in the running of the restaurant and to share the profit. The whole agreement I think could only receive a reasonable construction by holding a partnership to exist in light of the fact that the plaintiff on the basis of this agreement expended considerable time and energy and skill in the reorganization and management of the restaurant.

The decision of the House of Lords in Morris Robert Syers v. Daniel Beckhouse Syers (1875-76) 1 A.C. 174 is instructive. The Appellant was the lessee of the "Oxford Music Hall and Tavern." Being short of ready cash he applied to his brother the respondent for an advance of £250. The respondent drew up a paper which was, in form, addressed to himself, and was duly signed by the Appellant. It was dated and was in the following terms:- "In consideration of the sum of £250 this day paid to me, I hereby undertake

to execute a deed of co-partnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern to be drawn up....." The money was advanced and the speculation became successful. The Respondent afterwards claimed to have a deed of partnership executed, and a deed was drawn up on his behalf, by the Appellant refused to execute it. The Respondent filed his bill against the Appellant claiming inter alia to be a partner with the Appellant in the undertaking.

Their Lordships were of the view that the paper (which contained no provision as to the date or duration of the partnership) constituted a partnership at will. I am firmly of the view that from the conduct of the parties a valid partnership can be inferred.

Termination of Partnership

The plaintiff's evidence is that sometime in April, 1987 on the invitation of the defendant he met the defendant in the office of the defendant's Attorney-at-law. They had gone there to sign a formal partnership deed. The plaintiff left the attorney's office threatening that the defendant would hear from his lawyer. He pulled out of the business then and was no longer engaged in its management.

The defendant's refusal to execute the partnership deed for the reason that the 65-35 apportioning of profits was unfair amounted to a repudiation of th existing informal contract of partnership. It is a clear intimation that he did not wish the existing contract to continue instead he wanted to renegotiate. By withdrawing his services the plaintiff by his conduct had accepted the repudiation. It follows therefore, in my view, that the partnership was terminated in April, 1987 when the plaintiff pulled out.

Even though no notice to dissolve was given, this being a partnership at will, a dissolution may be inferred from the circumstances. Miss Davis no doubt had this in mind when she told the court that the plaintiff would not be pursuing his claim for specific performance.

The Plaintiff's Claim

Normally where there is a dispute between the parties a court order would be sought for the dissolution of the partnership and the court would direct a sale of the assets and if necessary, a sale of the concern as a going concern and give liberty for proposals to be made by either party to purchase it. But "those provisions are moulded by the court to meet the circumstances of the particular case" see Syers v. Syers (above.) In the circumstances of this case, where all the capital was contributed by the defendant, it would not in my view be desireable to have a sale.

If a decree for dissolution was made in the first instance the court would have thought it just to authorise the defendant to lay proposals for the purchase of the concern before the Registrar - see Syers v. Syers.

It is in the light of the foregoing that one should consider the claim of the plaintiff as set out in paragraph 8 of the amended Statement of Claim which reads in part:-

> "the defendant is justly and truly indebted to him (the plaintiff) for services and materials provided to the defendant at the defendant's request valued at $165,000."

The plaintiff is in effect claiming the return of his contribution to the concern. This contribution he has valued at $165,000. I must now examine the evidence to ascertain whether or not this claim is substantiated. The plaintiff gave details of the preparatory work he did prior to the opening of the restaurant in December, 1986. He gave approximations of the number of hours spent on each aspect of such work. He testified that he spent about 75 hours on menu; 100 hours on costing to achieve selling price; 250 hours preparing and compiling daily and monthly potential sales report, daily and monthly potential Profit and Loss Statements, equipment and starting stock orders; conceptualising and supervising artwork, logo and theme; designing and fabricating walk-in-cooler, cooking range, soda machines and dispensers and interviewing and training personnel. For those services he claims $200 per hour. This he said was the going rate per specialist hour.

After the opening of the restaurant, the plaintiff said he spent around 4-4½ hours daily six days per week at the restaurant. Altogether he said he spent about 474 hours running and managing the business up to the time when he left, around the end of April, 1987. He is claiming $100 per hour for this period. This rate he said was the going rate for each non specialist hour.

The plaintiff also claims that he engaged the services of one Mr. Mark Hepburn to do architectural drawing for the renovation of the restaurant and to visit the site to ensure that "what was on paper was actually carried out." He testified that Mr. Hepburn charged $30,000 for the drawing and $10,000 for consultancy fees. Accordingly he is now indebted to Mr. Hepburn.

Mr. Henry submitted that these amounts are not recoverable. He contended that the plaintiff could not properly give evidence as to amounts charged by Mr. Hepburn.

I am inclined to think that there can be no real objection to the reception of evidence from the plaintiff as to his indebtedness to Mr. Hepburn for work done for

the benefit of the defendant.

The engagement of the services of Mr. Hepburn was to the certain knowledge of the defendant. He did not object to the employment of Mr. Hepburn. I hold that the plaintiff is entitled to recover any reasonable amount which he has paid or is under a legal obligation to pay to Mr. Hepburn in respect of work done pursuant to the partnership agreement.

I do not agree with Mr. Henry's further submission that if I so hold then there would be a risk of the defendant being called upon to pay the amount claimed twice since, he said, Mr. Hepburn could himself sue the defendant. Indeed the defendant would have a good defence to any such claim made by Mr. Hepburn.

The Plaintiff's evidence has substantiated the following claims:-

Preparing menu - 75 hours at $200 per hour	$15,000.00
Costing to achieve selling price - 100 hours at $200 per hour	20,000.00
Preparing daily and monthly potential sales reports etc... 250 hours at $200 per hour	50,000.00
Consultation and management fees 475 hours at $100 per hour - $47,500 - Amount claimed	40,000.00
Preparing plan for renovation	30,000.00
Architect's Consultant fee	10,000.00
	$165,000.00
Bearing in mind that the number of hours given are approximations, a reasonable award would be	$150,000.00

Share of Profits

Miss Davis submitted that the plaintiff was entitled to 35% of the profits of the business for the period of January - April, 1987 and for a reasonable period after termination of the partnership. On the other hand Mr. Henry submitted that there was no evidence to satisfy the court as to what the profits were.

The plaintiff is certainly entitled to 35% of such profits made during the life of the partnership. However as to his entitlement to such profits for a further period after termination, I can see no warrant for this. If the partnership was for a fixed period and was prematurely terminated it would not be difficult to understand a claim for damages for loss of profits for the period from the date of

dissolution to the date fixed for expiration of the partnership; but this is not the case here. The plaintiff cannot get damages for loss of profits in the circumstances of this case.

Let me now deal with the plaintiff's claim in respect of profits made up to the dissolution of the partnership. There is no sufficient evidence as to the profits made by the business. In this regard the plaintiff testified that the defendant told him that sales were in the region of $50,000 per week. Profit on sale of $50,000 would be about 25%, he stated. I agree with Mr. Henry that this is not good enough to prove the profits of the business. In the circumstances it is appropriate to make an order for an account to be taken.

Conclusion

Judgment for the plaintiff and it is directed:

1. That the defendant do pay to the plaintiff the sum of $150,000 for services rendered by the plaintiff pursuant to the informal contract of partnership with interest at 10% from the 30th day of April, 1987 to date of Judgment.

2. That the Registrar of the Supreme Court do take accounts of receipts and payments and make an enquiry as to gains and profits of and respecting the Hungry Mack Restaurant for the period from the 26th December, 1986 down to the 30th April, 1987.

3. That an enquiry be made by the Registrar as to what sum would on the 30th April, 1987 represent the plaintiff's 35% share in the profits of the said business.

4. That such sum as ascertained at head No. 3 be paid to the plaintiff by the defendant together with interest at 10% from the 30th April, 1987 to the date of Judgment.

4. That the defendant do pay the costs up to the hearing before me. The costs of accounts to be in the discretion of the Registrar.

Cases Referred To

(1) Branca v Cobarro (1947) 2 All ER 101

(2) Lyee Barnes v Jay ... Bennett ... S.C.C.A. 58 and 59/91 (2/3/93)

(3) Morris Robert Syers v Daniel Beckhouse Syers (1875-76) 1 A.C. 174.