JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 50/93

COR: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE GORDON, J.A

BETWEEN	**DAVID McKENZIE**	**APPELLANT**
AND	**ROBERT JOSEPH**	**RESPONDENT**

David Henry for Appellant instructed by Christopher Cheddar of Nunes, Scholefield, Deleon & Company

Leighton Pusey with Cory Mills for the Respondent instructed by Grant Stewart, Phillips & Company

28th January and 1st May, 1998

RATTRAY, P.

I have read in draft the judgment of Forte J.A., which follows, and I agree and have nothing to add.

FORTE, J.A.

This appeal has its origin in an agreement entered into between the appellant and the respondent, concerning the rehabilitation of a restaurant previously owned and operated by the appellant and which at the time of the agreement had not been successful. In fact the agreement arose out of the appellant's desire to utilize the expertise of the respondent, who at the time was the Food and Beverage Manager at the Seawind Beach Hotel in Montego Bay. In order to accomplish this, he offered the respondent a partnership in the business. Having initially refused the offer, the

respondent subsequently agreed to the partnership, his investment therein being that he would provide food and beverage expertise, re-organise and redo the control systems and manage the restaurant. The appellant in return would put up all the money necessary for equipment, food etc. In the beginning there was some dispute as to the percentage share of the profits that each should enjoy, but the respondent contended as was accepted by the learned judge that there was in the final analysis an agreement for 65% and 35% for the appellant and the respondent respectively. In the meantime the respondent in accordance with the general basis of the oral agreement, which the appellant promised to reduce to writing, had embarked upon his tasks of improving the quality of the restaurant, and of course its share of business. The terms of the oral agreement having been settled by October, 1986, except for the percentage share, and the appellant having failed to produce a similar agreement, the respondent in December, 1986 demanded that it be done or else he would "pull out".

It is arising out of that demand that the agreement as to the 65% and 35% shares was reached. The appellant then reassured the respondent that the written agreement would be forthcoming. It was not until April, 1987, when the respondent was summoned to the offices of the appellant's Attorney-at-law that a written document was produced. The appellant however, refused to sign the agreement as he was opposed to the 65% and 35% split which in his opinion, was unreasonable. It was at that time that the respondent, severed his connection with the restaurant, and with the appellant, and thereafter brought this action, in which he prayed for and was granted the following orders:-

> 1) That the defendant do pay to the plaintiff the sum of One Hundred and Fifty Thousand Dollars ($150,000) for services rendered by the plaintiff pursuant to the informal contract of partnership with interest thereon at the rate of 10% per annum from he 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 of receipts and payments and make an enquiry as to gains and profits of and respecting the "Hungry Mack Restaurant" for the period from 26th December, 1986 down to the 30th April, 1987.

3) That an enquiry be made by the Registrar of the Supreme Court 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 (3) above be paid to the Plaintiff by the Defendarit together with interest at 10 percent per annum from the 30th April, 1987 to the date of payment.

The award of $150,000 for services rendered, was in respect of the following claim in the respondent's statement of claim:

"Para 4: In accordance with the terms of the aforesaid agreement the plaintiff retained the services of an architect and did renovate the restaurant. Additionally, the plaintiff hired and trained staff, developed an efficient kitchen area, implemented management control systems, planned and costed the menu and produced potential profit and loss statements all at a cost to the plaintiff of approximately One Hundred and Sixty Five Thousand Dollars ($165,000).

Para 8: Further and or in the alternative, the plaintiff states that the defendant is justly and truly indebted to him for services and materials provided to the defendant at the defendant's request valued at One Hundred and Sixty Five Thousand Dollars ($165,000)."

PARTICULARS OF INDEBTEDNESS

Designed and prepared plan for renovation	$30,000.00
Architect's Consultant fees to oversee construction from start to finish	$10,000.00
To plan menu and portion control	$15,000.00
To cost and achieve selling price on menu	$20,000.00
Prepared for Bank:-	
a) Daily potential sales	$ 5,000.00

b) Monthly potential sales report	$ 5,000.00
c) Daily potential Profit & Loss Statements	$ 5,000.00
d) Monthly potential Profit & Loss Statements	$ 5,000.00
e) Artwork, logo and theme	$ 5,000.00
f) Designed, fabricated and or sourced, walk-in cooler, cooking range, soda machines and dispensers - Equipment and starting stock order	$15,000,00
g) Employed and trained personnel	$10,000.00
h) Consultant and Management fee for 10 months of operation	$40,000.00
TOTAL	$165,000.00

It is sufficient only to refer to the finding of the learned judge in respect of that claim. He stated thus:-

"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"

In respect of this finding the appellant filed and argued the following grounds of appeal, which adequately identify the issues for determination:

> "1). The learned judge erred, in law, in finding that 'the plaintiff's evidence has substantiated the ... claim', and in ruling that 'bearing in mind that the number of hours

> given are approximations, a reasonable award would be $150,000', in circumstances where the said claim being special damages and therefore exceptional in their character were not strictly proved and the said claims were predicated exclusively on the discredited self-serving evidence of the plaintiff.
>
> 2) The learned trial judge erred, in law, by finding that the claims for preparing the plan for renovation and architect's consultant fee were substantiated and for making an award for these claims, in light of the evidence.
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> 3) The learned trial judge erred, in law, in awarding the plaintiff the costs of his services to the business in circumstances where he had found that there was a partnership and had awarded the plaintiff 35% of such profits made during the life of the partnership".

Ground 1

In pursuance of the first ground, Mr. David Henry for the appellant contended that the claim for $165,000 was by way of special damages, and was not strictly proved as it ought to have been. He relied on certain dicta of Hercules, JA (ag) (as he then was) in delivering the judgment of this Court in ***Robinson & Co v Lawrence*** [1969] 11JLR 450 at p. 453:

> "There is no doubt that the respondent can be entitled to damages for loss of earnings he had suffered by reason of his injury up to the date of trial as part of his special damages. But those damages must be pleaded and strictly proved.
>
> In ***Hayward v Pullinger & Partners, Ltd*** **(5),** Lord Devlin in dealing with special damage stated ([1950]1 All E.R. at p.582):
>
> > 'I think the true position is that, unless they are contained in the statement of claim, evidence leading to damage in respect of which damages are claimed cannot technically be relied on at the trial'.

> Then in the case of ***Bonham-Carter v Hyde Park Hotel, Ltd*** (6), Lord Goddard, C.J., declared ([1948], 64 T.L.R, at p.178):
>
> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages, it is for them to_prove their damages; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying:
>
> > 'This is what I have lost; I ask you to give me these damages.'
>
> They have to prove It".

This case establishes:-

i) that a claim for special damages must be pleaded; and
ii) it must be specifically proved

There was no contest that the items of special damages claimed were in fact pleaded by the respondent in the statement of claim. That leaves the question whether the special damages pleaded were specifically proved. The learned judge in his judgment determined that the claim for specific performance was substantiated by the evidence, and accordingly granted the special damage claimed, but reducing it by Fifteen Thousand Dollars ($15,000) to give effect to the variations which could occur, given the approximation of the times spent by the respondent in performing functions for which the amount is claimed. With the exception of the claim for Forty Thousand Dollars ($40,000.00) connected with the services of an architect the amounts claimed all related to the work done by the respondent, who assessed the value of his work and arrived at figures which would be his fees, had he been at the, time seeking remuneration in the market for similar work. This amount therefore represented his

personal charge for the work that he had done. In my view, that was evidence which if accepted, would go to prove the claim for special damages. All that remained, would be the credibility of that evidence i.e. did he actually do the work and if so, were the fees claimed, reasonable in the circumstances, given the type of fees which such service could command in the market? Mr. Henry attempted, during the course of his argument to establish some overlapping in the fees charged, but on closer examination, no real challenge could be so made. The learned judge examined carefully the fees in relation to the hours worked and the rate per hour for the specific type of work and in the end accepted the evidence of the respondent in that regard and came to his conclusion.

I would conclude, that in relation to the services performed by the respondent the special damages as found by the learned judge was so determined on the basis of evidence presented in this regard by the respondent, and accordingly this complaint cannot succeed.

Ground 2

I turn now to the claim made in respect of the architectural drawings and consultancy in respect of which the appellants made the same complaint.

A good starting point is the finding of the learned judge. Here is what he said:

> "Mr. Henry submitted that these amounts are not recoverable. He contended that the plaintiff could not properly give evidence as to the 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 had paid or is under a legal obligation to pay to Mr. Hepburn. in respect of work done pursuant to the partnership agreement".

The appellant contends that this finding by the learned judge is unsupported by the evidence, not only in relation to the sums allegedly charged by Mr. Hepburn, but also in respect to whether "the engagement of the services of Mr. Hepburn was to the certain knowledge of the appellant".

Evidence of Mr. Hepburn's charges

During the course of his testimony, the respondent stated that Mr. Hepburn did the architectural changes, and visited the site as a consultant, for which he charged the respondent Thirty Thousand Dollars ($30,000.00) and Ten Thousand Dollars ($10,000.00) respectively. However, when an attempt was made to introduce invoices allegedly received from Mr. Hepburn by the respondent, an objection was made to their admissibility in the absence of Mr. Hepburn, and the learned judge on ruling that as "a general rule the author of the document ought to be here", refused acceptance of the documents into evidence, but allowed them to be marked for identity. On this ruling counsel for the appellant moved that the evidence as to sums charged by Mr. Hepburn be removed from the record. Despite objections of counsel for the respondent the learned judge ruled:

> " a Judge can expunge evidence from records and even if he had ruled he can reverse. Don't see how I can avoid expunging it, at least for the time being, evidence expunged".

It is on the basis of the above, that the appellant contends that there was no evidence upon which the learned judge could make this finding, the evidence having been ordered to be expunged from the record. In making that order, it must be that the learned judge was indicating that - that evidence being inadmissible could not be

considered in determining the issues in the case. However, it appears that inspite of that ruling, he nevertheless considered the evidence in coming to the conclusion on the issue of the charges relating to Mr. Hepburn's work. Of importance, is the statement of the learned judge in making the ruling that the evidence was expunged at least for the time being, thus indicating that he was maintaining the right to reconsider its admissibility at another time. Significantly he entertained submissions from counsel for the respondent in his final address, as to its admissibility. In his conclusions, therefore, he had the opportunity of giving further consideration to the question of the admissibility in respect of the charges of Mr. Hepburn, and having done so considered that that was evidence which could form a part of his deliberations on this issue. In our view his later ruling was correct as the evidence related to an indebtedness which the respondent had incurred in fulfilling one of his obligations under the partnership agreement.

Engagement of Mr. Hepburn - was it to the certain knowledge of the Appellant ?

The appellant contends that there was no evidence to support this finding, and argues that it is contrary to the evidence. In support of this he referred to two bits of the evidence from the appellant which reads:

> "An architect was not retained with respect to the work. I was introduced to Mr. Hepburn as an architect but no drawing was done if he did I didn't see one and;
>
> I met Mr. Hepburn about 2 times at Mr. Joseph's place at Seawind. Mr. Hepburn did not attend the construction frequently, he did not".
>
> Sugg: Mr. Hepburn prepared plans.
>
> Ans: Never saw the plans, never.
>
> Sugg: He attended to ensure that the work was being done according to the plan.

Ans: Not true, I had no dealing with Mr. Hepburn
he has done nothing on the building."

On the face of this evidence it would appear that the learned judge was incorrect when he concluded that the engagement of the architect was to the "certain knowledge" of the appellant. However, the evidence ought not to be taken out of context. The appellant in his evidence admitted that the restaurant was closed for refurbishing and that he obtained a contractor because the respondent wanted to meet with the contractor to see what was to be done. He also testified that he and the respondent met with the contractor. There was therefore no dispute as to the fact that some construction work was done to the restaurant. In his testimony, the respondent maintained that he hired Mark Hepburn to do architectural drawings for the renovation of the building and that he (Mr. Hepburn) supervised the project from October to December, 1996. The learned judge was faced with the denial of knowledge by the appellant, and the assertion by the respondent, that the architect was hired and worked in circumstances, where the inference must be drawn that the appellant would have seen him and would have known what he was doing at the site from time to time. In those circumstances, it was open to the learned judge to reject the testimony of the appellant in that regard and accept that of the respondent in coming to the conclusion that the appellant must have known about the services of the architect. In the event I cannot agree that there was not sufficient evidence upon which the learned judge could have come to the conclusion which he did, and accordingly this complaint is without merit, and I would hold that the learned judge's finding in this regard cannot be faulted.

Ground 3

The appellant contends that the learned judge erred in law in awarding the respondent the cost of his services, and in addition a share of 35% of the profits of the partnership. There has been no challenge in the appeal to the findings of the learned judge that a partnership agreement existed between the parties. In coming to his conclusion, the learned judge stated:

> "The plaintiff's evidence which I accept was that they agreed that the defendant would provide the money and that the plaintiff would supply 'food and beverage expertise, would re-organize 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...
>
> I am firmly of the view that from the conduct of the parties a valid partnership can be inferred."

This finding indicates that the respondent's investment in the partnership, would be his expertise in reorganizing etc. This would amount to his equity in the business and would form part of the capital assets of the business. As Mr. Pusey for the respondent maintained this represented capital which could not be withdrawn, and should be distinguished from profits which could result from the gains earned from the investment. On the termination of the partnership, the respondent would not only be entitled to share in the capital but also in the profits. The circumstances of this case, however, demanded that such a division of capital need not take place. As an

explanation, I would adopt and approve the words of the learned judge in his determination of this issue. He stated:

> "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 this particular case' see ***Syers v Syers*** (1875 -76) 1 AC 174. In the circumstances of this case, where all the capital was contributed by the defendant, it would not in my view be desirable to have a sale."

Considered in that light, the complaint made in this ground is plainly without merit. The respondent, in lieu of the order of dissolution of the partnership and sale of the assets, ought to be rewarded with a sum equal in amount, to the value of his contribution to the partnership, but not to the detriment of his right to share in the profits to the extent agreed and for the period which he remained in the partnership. This ground also fails.

One other matter requires attention, this concerns the complaint in ground 4 which reads:

> "Having found the existence of a partnership and assessing the percentage entitlement of the parties it follows that the parties must share in the bitter and sweet of the arrangement. The learned trial judge therefore erred in granting the plaintiff an entitlement to profits without ordering a corresponding liability to share in the losses of the business during the lifetime of the partnership".

During the course of his argument before us, Mr. Pusey for the respondent conceded correctly in my opinion the merits of this ground. Orders two to four of the Court below must therefore be varied accordingly as follows:

> 2) That the Registrar of the Supreme Court do take accounts of receipts and payments and make an enquiry

> of receipts and payments and make an enquiry as to gains and profits or losses of and respecting the "Hungry Mack Restaurant" for the period from 26th December, 1986 down to the 30th April, 1987.
>
> 3) That an enquiry be made by the Registrar of the Supreme Court as to what sum would on the 30th April, 1987 represent the Plaintiff's 35% share in the profits or losses of the said business.
>
> 4) That such sum as ascertained at (3) above be paid to the Plaintiff by the Defendant or to the Defendant by the Plaintiff as the case may be together with interest at 10 percent per annum from the 30th April, 1987 to the date of payment.

The appellant should pay the costs of the appeal, which should be taxed if not agreed.

GORDON J.A.

I agree.