

JERSEY / JUDGMENT

Bennett v Lincoln [2005]

JRC 029A (16 March 2005)

[2005] JRC 029A

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judgment

bailiff: 1. Counsel for the defendant described this case in his closing address as a 'nasty, horrible case'. We agree, and would only add that it is also a sad case in that strong mutual feelings of antipathy seem to have clouded all sense of judgment. The costs incurred in arguing this relatively trivial claim have exceeded by far the amount at stake. The outcome is likely to give satisfaction to neither party. History 2. The history can be shortly put although much time was spent on it during the trial. The plaintiff is a salesman with a particular interest and expertise in menswear. The defendant is a successful businesswoman who has conducted her own business for 34 years. In 1995 the plaintiff went into business with the defendant's son, Wayne Lincoln ("Wayne"). They rented a shop at 8 La Motte Street from the defendant. The plaintiff described his relationship with Wayne as a partnership, but in fact they both owned 50% of the shares in Scapolo Limited which conducted the business. 3. The business was not a success and ran into debt. Wayne left the Island in 1999 leaving the plaintiff with all the responsibilities of Scapolo. To his credit he worked diligently to reduce the debts, with great assistance from the defendant who clearly felt some moral duty to help. Notwithstanding the efforts of both parties however Scapolo Limited was declared en désastre . The defendant then assumed her son's liability for 50% of the overdraft at the bank. 4. The plaintiff and the defendant had met in 1985 and their shared experience in relation to Scapolo drew them closer together. They became friends, and socialised regularly. The defendant would dine with the plaintiff and his then girlfriend, Dionne, and when they married in 2002 the defendant was a guest at their wedding. 5. In the aftermath of the collapse of Scapolo the defendant was left with the lease of 8 La Motte Street. The property contains a small shop and a small storeroom. The precise way in which the next venture was launched is in dispute, and is far from clear. Indeed it seems to us extraordinary that an experienced businesswoman such as the defendant should have allowed a business relationship with the plaintiff to come into existence on such a sloppy and ill-defined basis. We will need to examine the relationship in more detail below. For the present however it is sufficient to state that a new business called 'Blue Collar' was formed. It was another menswear enterprise, concentrating on men's suiting. The undisputed elements of the relationship are that the plaintiff would receive a wage of £250 per week and the defendant would receive £100 per week. The plaintiff would be concerned with the sales, and the defendant would be concerned with the

paperwork and the accounts. It was agreed between the parties that the "liquid profits" would be split 50/50 between them at appropriate intervals. No part of this agreement was reduced to writing. The Court was not addressed on the meaning of "liquid profits"; if this is a term of art in the retail trade, no evidence has been adduced as to what it means. It is clear that the plaintiff was under the impression that he was in partnership with the defendant. It is equally clear that, so far as the defendant was concerned, the plaintiff was her employee with a right nonetheless to participate in the profits of the enterprise by way of incentive. 6. In September 2003 there was a major rift. According to the defendant it arose because she chastised the plaintiff over an order relating to ties; she thought that the shop was over-stocked. According to the plaintiff, he was deeply hurt by the defendant's lack of interest in his wife's welfare - she had recently suffered a miscarriage. 7. The plaintiff walked out of the shop. His wife sent a note to the defendant telling her that the plaintiff had been signed off work by his doctor as a result of stress, but would return as quickly as possible. Both parties however consulted lawyers. The defendant consulted Mr Philip Syvret. The plaintiff was advised by Advocate Costa and others in the firm of Crill Canavan. Efforts were made to achieve a compromise. According to the plaintiff there was a compromise agreement which the defendant has subsequently breached. According to the defendant there was no concluded agreement. 8. Whether or not there was a compromise agreement, the plaintiff did return to the shop and the business was wound down. It closed on 31st January 2004. Both parties have subsequently begun new enterprises on their own account. The remaining stock was listed by an independent stocktaker. Its value, and who is entitled to it, are in dispute. The plaintiff issued an Order of Justice on 23rd March 2004. The claim 9. First, the plaintiff asserts that he and the defendant were 50% partners in Blue Collar. Each of them was entitled and bound to share in the profits and liabilities of the enterprise. The plaintiff claims that he did not take his holiday entitlement, nor require any increase in his basic wage. He asserts that it was a further term of the partnership agreement that his wife would guarantee 50% of the overdraft facility of £25,000 at the bank. The Order of Justice asserts that this guarantee was communicated verbally to the defendant in the presence of the plaintiff in or about April or May 2000; we think the plaintiff means 'orally', that is by word of mouth. 10. Secondly, the plaintiff claims in the alternative that the defendant is estopped from denying the existence of the partnership agreement. It is asserted that the defendant made numerous statements to the plaintiff and to his wife about the existence of the partnership, and that she held him out to be a partner. In reliance upon those representations, the plaintiff is said to have acted to his detriment. 11. Thirdly, the plaintiff asserts that between 19th September 2003 and 21st October 2003 a compromise agreement was reached between the parties. That agreement was set out in five letters passing between the respective legal advisers of the parties. 12. Fourthly, the plaintiff claims that the defendant is now estopped from denying the existence of the compromise agreement on which the plaintiff is said to have relied to his detriment. We turn to consider each of these elements of the claim in turn. Was there a partnership agreement? 13. As we stated at paragraph 5 above, there is no doubt that the plaintiff thought he was in partnership with the defendant. Whether he understood the true nature of a partnership is another matter. 'Partner' is a word with a variety of meanings, both etymologically and colloquially. Counsel for the plaintiff drew our attention to the evidence of the plaintiff, of Mrs Bennett, and of others that the defendant referred to the

plaintiff as 'her partner' or 'her business partner', and to evidence that the plaintiff made similar references in relation to the defendant. In his wedding speech the plaintiff apparently referred to the defendant as 'his partner'. We do not doubt any of this evidence. What is in question however is whether there was in law a partnership. The frequency with which a person may say 'the sky is pink' is not sufficient to alter its colour if the sky is in fact blue. The plaintiff considered that he was in partnership with Wayne Lincoln. In law he was not in partnership with Wayne. Both owned 50% of the shares in Scapolo Limited. They had an equal beneficial interest in the company. 14. What then are the characteristics of a partnership in law? In *Cooley v Wood* [1993 JLR 24] Le Cras, Lieutenant Bailiff, stated at page 28 - There was no local authority put to the court; the precedents relied upon by the parties, so far as relevant, are very old. In those circumstances, the Court finds that the law is not settled and adopts the approach set out by ... the English Partnership Act 1890." 15. Since that decision the legislature has however adopted the Limited Partnerships (Jersey) Law 1994 and the Limited Liability Partnerships (Jersey) Law 1997. Both are of course particular legal animals, but some assistance as to the nature of the species can nonetheless be drawn from the statutes. Article 41 of the 1994 Law provides that "The rules of customary law applicable to partnerships ("contrats de société") shall apply to limited partnerships except in so far as they are inconsistent with the express provisions of this Law". Similarly, Article 49 of the 1997 Law provides that "The rules of customary law applicable to a partnership shall apply to a limited liability partnership except to the extent that they are inconsistent with the express provisions of this Law". These statutory provisions make it clear that the source of our law of partnership is to be found in the customary law. 16. Counsel for the defendant referred us to a number of authorities and to a useful article entitled Limited Liability Partnership - true partnership - by Jonathan Walker, a solicitor of the Royal Court, published in (1998) 2 Jersey Law Review 1. Counsel for the plaintiff did not suggest that the law was not correctly stated by the defendant. 17. Not much may turn however, certainly for the purposes of this case, on the genesis of the law of partnership. Indeed decisions of the English Court, interpreting the common law and even the 1890 Act may occasionally be helpful. When considering the nature of partnership in *Holme v Hammond*

(1872) 7 EX 218 at 234, Cleasby B described Pothier as "a very accurate writer" and, referring to a translation of Pothier in an English textbook, stated "that, in my opinion, explains the general nature of partnership". The customary law principles laid down by Pothier have much in common with the English common law. Indeed the definition of a partnership in section 1 of the Partnership Act 1890 is not dissimilar to Pothier's definition of a 'contrat de société'. 18. Pothier defines a 'contrat de société' as follows - "Le Contrat de Société est un contrat, par lequel deux ou plusieurs personnes mettent ou s'obligent de mettre en commun quelque chose, pour faire en commun un profit honnête, dont ils s'obligent réciproquement de se rendre compte". 19. In our judgment a partnership in Jersey law is a contractual relationship by which two or more persons oblige themselves to carry on business or to hold something in common with a view to an honest profit which they commit to share amongst themselves. In the article in the Jersey Law Review to which we have referred above, Mr Walker summarises the four characteristics which Pothier states

are essential to a 'contrat de société' or partnership as follows - (i) that each of the parties brings or obliges itself to bring something to the arrangement; (ii) that the arrangement is established for the common benefit of each of the parties; (iii) that the parties propose, by the arrangement, to make a gain or profit in which each of the contracting parties can hope to have a share of what it has brought to the arrangement; and (iv) that the business which is the object of the arrangement and for which the contracting parties entered into the arrangement should be something lawful and that the profit which they propose to withdraw should be an honest profit. We think that it is an accurate summation of the ingredients of a partnership. 20. It must be remembered however that a partnership is a contract and, like all contracts, there must be a meeting of minds between the parties. The first pre-requisite of a valid contract is consent; have the parties agreed to create this contractual relationship? That is an issue of fact for the Jurats. 21. What then is the evidence, leaving aside the stated intentions of the parties? The application to register the business name 'Blue Collar' was made by the defendant on 3rd April 2000. No mention was made of the plaintiff. The Certificate of Registration was issued to the defendant on 5th April 2000. A bank account was opened at the Royal Bank of Scotland International Limited by the defendant in her own name. The bank had no record of any participation by the plaintiff nor of any guarantee by the plaintiff's wife. The manpower survey submitted by the defendant to the Regulation of Undertakings and Development Office during 2002 recorded that the business had one full-time employee. The survey returned for the first half of 2003 showed one full-time employee (the plaintiff) and one part-time employee (the defendant). The Survey returned for the second half of 2003 showed two full-time employees (by that time the defendant was engaged in the business for more than 25 hours per week). Most significantly, perhaps, the Contribution Schedules submitted to the Employment & Social Security Department from 2001 onwards showed the plaintiff to be an employee and the defendant to be the employer. Social Security contributions were paid on that basis. 22. Evidence was adduced of a letter sent by the plaintiff's wife to the defendant on 10th March 2001. The letter stated - Hi Val As discussed with you, Neil and I have completed his tax return marking him as the Manager of the shop and as advised by you we have marked down his salary only. Here is a copy for you as you wanted which I have sent in. During our conversation, you said you would take care of the tax return for the business partnership for you and Neil. The defendant denied receiving this letter. The Income Tax returns submitted by the plaintiff recorded only his weekly wage of £250. Other evidence was adduced showing that many, if not most, of the suppliers to the Blue Collar business dealt with the plaintiff rather than the defendant. The plaintiff asserted, and we accept his evidence in this respect, that the business was in effect managed by him. He had, certainly in the early stages, the primary responsibility for the ordering of the stock. The defendant asserts that the plaintiff's activities were subject to her strict control, but no evidence of such control has been placed before us. On the contrary, our assessment is that the plaintiff had, at any rate during 2001 and 2002, a fairly free hand. 23. The conclusive evidence as to the nature of the business relationship between the plaintiff and the defendant is however, in our judgment, to be found in the accounts. Only one set

of completed accounts was produced during the currency of Blue Collar. Those accounts were produced by Mr Paul Lewis, a chartered accountant, for the period ended 31st March 2001. Those accounts were not partnership accounts; they were produced on the basis that the defendant was a sole trader. Indeed Mr Lewis never understood the relationship between the parties to be that of partners. The accounts contained a paragraph headed "Proprietor's approval of accounts". That was signed by the defendant on 12th January 2003 and the accounts were sent to the Comptroller of Income Tax. The plaintiff agreed that he had seen these accounts and had never protested that they misrepresented the business relationship between him and the defendant. 24. We do not doubt that the plaintiff considered himself to be a partner of the defendant. We have no hesitation in concluding however that in law there was no partnership. There was no consent, no meeting of minds, as to the nature of the parties' business relationship. One of the essential ingredients of a contract of partnership is therefore missing. Is the defendant estopped from denying the existence of a partnership? 25. Counsel for the plaintiff drew our attention to a definition of estoppel by representation in *Maclaine v Gatty*

[1921] 1 AC 376 in the following terms - "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time". Counsel's submission was that the defendant had often referred to the plaintiff as "her partner" or "her business partner", and could not now be permitted to deny the existence of that contractual relationship. The plaintiff had acted to his detriment by pouring his heart and soul into the business on the assumption that he was a partner; he had worked long hours, and not taken all his holiday entitlement on that assumption. Counsel submitted that he did not demand his share of the profits because he wanted to build up the stock levels. 26. There seem to us to be two flaws in these

submissions.

First, on the assumption that "liquid profits" are to be equated to "net profits", there was no detriment for the plaintiff by using cash to build up the stock. Net profit is calculated by deducting from gross profit the expenses of running the business. Gross profit is calculated by deducting from the turnover during a given period the cost of acquiring the goods sold, or stock. The cash available to the business may be affected by a build-up of stock, but the net profit is not affected. Secondly, whatever the precise ambit of the English doctrine of estoppel as a matter of Jersey law, it is clear that estoppel by representation does not constitute in itself a cause of action. Estoppel cannot be used to create an agreement where none exists. We have found that there was no consent, or meeting of minds, in relation to the alleged establishment of a partnership. No estoppel by representation can replace that want of consent. Was there a compromise agreement? 27. The plaintiff contended that, during the course of negotiations which began shortly after the plaintiff left the shop in September 2003, an agreement compromising the differences between the parties was reached, and that agreement was binding on the defendant. In oral submission, counsel for the plaintiff contended that the agreement was made on 21st

October 2003. In his skeleton argument counsel submitted that the key elements of the compromise agreement were - (i) that Blue Collar would cease trading on 31st January 2004. (ii) that all remaining stock would be split or, alternatively, either party would buy out the other's share at a price to be agreed; (iii) that accounts would be drawn up and credit/liability divided equally between the parties; (iv) that the plaintiff would receive certain agreed fittings. 28. Counsel for the plaintiff submitted that the agreement was embodied in five letters or faxes, viz - Letter of 19th September 2003 Benest and Syvret to Crill Canavan Fax of 22nd September 2003 Crill Canavan to Benest and Syvret Letter of 7th October 2003 Benest and Syvret to Crill Canavan Fax of 15th October 2003 (dated in error 22nd September 2003) Crill Canavan to Benest & Syvret Letter of 21st October 2003 Benest & Syvret to Crill Canavan The first of those letters opens with a statement by Mr Syvret, then acting for the defendant, in these terms - "I write further to our meeting of the 19th September 2003. I was pleased that our without prejudice discussions led to agreement which I am now able [sic] record in open correspondence as follows:-". While the letter does record a significant measure of compromise, it does not, in our judgment, record anything like complete agreement on the points of dispute. The crucial element of the compromise, given the parties' continuing disagreement as to whether there was a partnership in law, was what was to happen with the stock. Paragraph 6 of Mr Syvret's letter stated - "Arrangements in relation to the disposal of any residual stock held by the company after the 31st January 2004 will need to be agreed by the parties once that residual stock has been identified. Essentially either the stock can be physically divided between the parties or one party can buy the other out at a price to be agreed". Advocate Costa responded to this paragraph by fax of 22nd September 2003 as follows - "This is a little vague. I think it should state that in the event of no agreement being reached on buying out, then a 50/50 split of stock should happen. The decision to buy out must be agreed by no later than the first week of February 2004. In the event that it is necessary to split the stock and in the event of a dispute, then perhaps the parties should consider appointing a third party, such as the accountant, to arbitrate on the split of the stock." 29. As counsel for the defendant rightly contended, on analysis this is no more than an agreement to agree. It is not possible to say that the first element of a binding contract, namely consent in the sense of a meeting of minds, was present. Subsequent correspondence serves only to confirm that this element of the alleged compromise agreement was absent. The parties never agreed how to split the stock nor how it was to be valued. We therefore dismiss this element of the claim. Is the defendant estopped from denying the existence of the compromise agreement? 30. Counsel for the plaintiff submitted that the plaintiff relied upon the existence of the alleged compromise agreement to his detriment. Evidence was given of an offer of employment by Mr Byron Khawaja of the Designer Sofa Shop at a salary of more than twice that earned by the plaintiff in Blue Collar. This offer was declined and the plaintiff returned to Blue Collar to wind up the business. We do not think that this submission holds water. It is true that such an offer was made, but the plaintiff did not decline it on account of the alleged compromise agreement. He declined it because he had decided to set up business on his own account. The company White Collar Limited, through which the plaintiff now conducts his own enterprise, was incorporated on 23rd October 2003. The plaintiff knew that Blue Collar was to cease trading at the end of January 2004. He must have known, at the time when he declined the offer of Mr Khawaja that

his future lay in the new business which he planned to establish. 31. Counsel for the plaintiff referred us to correspondence between legal advisers where reference was made to "the agreement", meaning "the compromise agreement". We think that a certain amount of loose phraseology was employed, but none of this can create a contract where there remained an absence of consent. As we stated at paragraph 25 above, an estoppel cannot in itself constitute or indeed create a cause of action. It is a shield and not a sword. 32. Counsel for the plaintiff referred us to a useful passage from the judgment of Lord Denning M R in *Amalgamated Property Co. v Texan Bank*

- [1981] 3 WLR 565 at 575 - The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them
- neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. Even if one accepts this dictum as being broadly representative of the law of Jersey, the estoppel upon which the plaintiff seeks to rely is not in our judgment applicable to the facts of this case. There was no underlying assumption upon which both parties conducted the dealings between them. There was no compromise agreement. There was no meeting of minds on the basis upon which the disputes between them were to be resolved. We accordingly reject the submission that the defendant is estopped from denying the existence of the compromise agreement.

Conclusion

33. It follows that the plaintiff's claims as set out in the Order of Justice must be dismissed. We have nonetheless considered whether the plaintiff is entitled to any damages on a quantum meruit basis having regard to the terms of the agreement to divide "liquid profits" on a 50/50 basis. We have assumed "liquid profits" to be equivalent to "net profits". We have therefore examined the management accounts prepared by Mr Lewis who was, as we have said, the accountant employed by the defendant for the Blue Collar business. 34. The revised figures given to the Court on 22nd February 2005 showed a net loss for the period to 31st March 2001 of £9,733, net profits of £19,497 and £9,025 for 2002 and 2003 respectively, and a net loss of £12,614 for the period ended 31st January 2004. Netting off those figures, there was a net profit for the business during the time of its existence of £6,175. It is clear, however,

notwithstanding the dispute between the parties as to the amount actually drawn down by the plaintiff on account of his entitlement to 50% of the liquid profits, that the plaintiff has received, in addition to his wages, in excess of £3,088. We therefore conclude that, even on a quantum meruit basis, the plaintiff is entitled to no further payment from the defendant. The Order of Justice is accordingly dismissed. *Authorities Cooley -v- Wood* [1993 JLR24]. *Limited Partnerships (Jersey) Law 1994. Limited Liability Partnerships (Jersey) Law 1997. Walker* : "Limited Liability Partnership

- true partnership.

(1998) 2 Jersey Law Review 1. *Holme -v- Holland*

(1872) 7 EX 218 at 234. *Partnership Act 1890: s1. Pothier: Coutume d'Orléans: Traité du Contrat de Société* (1827 Ed'n). *MacLaine -v- Gatty*

[1921] AC376. *Amalgamated Property Company - v - Texan Bank* [1981] 3 WLR 565. *Selby -v- Romeril* [1996 JLR 210]. *Ex parte Viscount Wimbourne* [1983] JJ17. *Davis -v- Davis*

[1894] 1 Ch 393 . *Le Cornu and Le Cornu -v- C. I. Heat Pump Bureau, Glover and Black* [1991 JLR197]. *Token Ltd -v- Planning & Environment Committee* [2001 JLR 698]. 4 Halsbury 16 (2): p.500. Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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