

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2006

CLAIM NO. AXAHCV/2004/0009

BETWEEN:

MITCHELL CONNOR

1st Claimant

GUSTAF COMPANY LIMITED

2nd Claimant

AND

WHENTWORTH CONNOR
(alias WRENFORD CONNOR)

Defendant

APPEARANCES:

Ms. Eustella Fontaine instructed by Caribbean Associated Attorneys for the 1st and 2nd Claimants
Mr. Clyde Williams instructed by Caribbean Juris Chambers for the Defendant .

Date: 2006 17th 18th July,
26th September

JUDGMENT

- [1] **GEORGE-CREQUE, J.:** This case concerns a partnership between the 1st Claimant and the Defendant, the business of which was the operation at various points in time of two ferry boats namely, the MV Cheers I and the MV Cheers II for profit. The parties are at least ad idem that a partnership existed and that same came to an end sometime on or about 20th May, 2002, when the Defendant ceased working on the said ferry boats. The

nub of the dispute when stripped to its barest, boils down to the basic determination of a single central issue namely, (1) the nature of the partnership - that is to say whether the Defendant was a salaried partner as contended by the 1st Claimant or whether the Defendant was a full partner in the venture as contended by the Defendant and if the Defendant was a full partner then as a corollary to the central issue (2) the extent of his share or interest therein. These two issues both call for findings of fact.

- [2] The partnership arrangement which came about can at best be described as an informal arrangement and not surprisingly so, given the relationship between the 1st Claimant and the Defendant. The 1st Claimant ("MC") is the uncle of the Defendant ("WC") who was raised from childhood in the same household as MC by MC's mother. They operated and conducted their affairs from positions, for the most part, of mutual trust, until the relationship soured. The 2nd Claimant is a corporate entity incorporated on the 21st January 2002 wholly owned by MC and to which MV Cheers II was transferred by way of a Bill of Sale sometime thereafter.

The Background

- [3] In order to place the proceedings in perspective, a summary of the history giving rise to the dispute is useful. In providing this summary, I draw the same based on the evidence given at the trial which I accept and is to be treated as findings of fact.
- (1) MC was and is a businessman and WC is a boat captain by occupation.
 - (2) MV Cheers I, a gasoline operated boat, was purchased from one Craig Wilson of St. Maarten on 6th April 1989. The purchase price quoted was initially US\$85,000.00 and was finally agreed at \$80,000.00. The purchase monies were provided by the Caribbean Commercial Bank ("CCB") by way of a loan from CCB. This loan was fully secured by a cash sum belonging either to MC or one Yvette Richardson, a relative of his.
 - (3) The loan note for \$85,000.00, the original of which was produced by Mr. Preston Bryan, General Manager of CCB, showed a joint loan made to MC and WC in respect of this as joint applicants. MC has challenged the signature of WC thereon but acknowledges his own on the said note.

- (4) Cheers I went into operation as a ferry boat plying the waters mainly between Anguilla and St. Maarten with WC as the Captain. Two crew members namely Andy Connor, a son of MC, and one Charles Maynard (aka Mike) also sailed with WC. The crew would be paid from the revenues earned in passenger fares by WC before the money bag was turned over. MC accepted that WC worked hard and did everything in respect of the Cheers I. WC would be in charge of the money bag which eventually would be turned over to MC who dealt with the banking aspect of the business in respect of repayment of the loan, payment of bills, and deposit of funds. MC was assisted in these administrative tasks by his wife Marjorie Connor who also said that WC did all that was necessary for maintaining and sailing the boat.
- (5) The ferry boat venture was making good returns as in 1992 a second loan was raised for the purchase of a second ferry boat eventually named Cheers II, a diesel operated boat. This loan was also granted by CCB in the total sum of \$95,000.00 and the loan note also carried the signatures of MC and WC as joint borrowers. The first loan was fully paid off to CCB prior to its 1996 maturity date-approximately three years of its grant.
- (6) Accounts were at first kept in respect of the ferry boat operations up to the passage of Hurricane Luis in 1995, which caused their destruction. Thereafter, MC failed to maintain any records or books of account. The bank passbook No. 7502750 called the "Cheers Account" appear to be the only record now in existence shedding some light in terms of revenues earned by the ferry boat operations. This account was in the name of "Cheers" c/o MC and/or M. Connor. Sometime in December, 1994, the name of the said account showed M. Connor, and or MC or WC. WC's name appeared on CD's in respect of Cheers.
- (7) A third loan in the sum of \$51,000.00 was taken out in respect of the Cheers ferry boats. The loan note in respect of this loan similarly shows the signature of MC and WC as the joint borrowers.
- (8) During the boat operations, expenses were also incurred on the Cheers boats in respect of maintenance and repairs. Cheers II, once placed into operation, made runs between Anguilla and St. Maarten whilst Cheers I engaged mainly in a

charter service in and around Anguilla. New ferry boat regulations coming into effect in St. Marten required diesel operated ferry boats only. Lyle Connor, a son of MC, captained the Cheers I in respect of its charter operations, and WC captained Cheers II.

(9) From in and around 1989, and up to 2002 all bills and expenses of WC were paid for by MC. In 1995 a loan of \$27,000 was made by Barclays Bank to MC and WC as co- applicants, in respect of the purchase of a house for WC at Blowing Point in which WC still resides

(10) Sometime between 1995 and 1996 WC began paying himself out of the money bag a weekly sum of \$150.00. By 2002 all the loans in respect of the Cheers boats had been repaid.

(11) In January, 2002, WC discovered that MC had formed a company, the 2nd Claimant and had transferred by Bill of Sale Cheers II to the 2nd Claimant. He also discovered on checking the Cheers bank account that substantial withdrawals had been made which prompted him to seek explanations from MC and to request meetings with him.

(12) On 14th March, 2002, MC wrote to WC concerning the boat Cheers and said in part : *"I am now doing what is necessary to be done. Cheers is all paid for and is now under heavy repair. This is final including one house.*

One house at the cost of \$45,000.00

Plus cash received previously ... from me \$ 4,000.00

Sub total \$49,000.00

Plus enclosed cheque approximately EC\$15,000.00

When boat is completed with repairs, sometime after you will be receiving 30% in the company.

(13) This was not accepted by WC and a further letter dated 15th May, 2002, was sent by MC to WC wherein he stated in part: *"I even went as far as offering you 40% in an effort of making peace. I am giving you the chance to reconsider the matter.*

For the past six years your salary was at US\$1,200. per month 86,400

Plus \$700.00 per month for six years for the house 50,400

Extra papers taken from Bag at \$400.00 per week 20,800

Total 157,600

Added to this, the amount needed to move boat and continue

business

.....

Total

20,101

- (14) WC claimed that he was entitled to 90% and MC to 10%. No amicable resolution could be reached between the parties.
- (15) MC launched these proceedings in which he seeks inter alia, injunctive and declaratory relief, refund of monies and damages. WC has counterclaimed and also seeks inter alia, declaratory relief, damages and an order for accounts.

[4] **The Law**

The Partnership Act¹ of Anguilla defines a partnership as *"the relation that subsists between persons carrying on a business in common with a view to profit"*. In **Khan and Another –v- Miah and others**² this relationship was explained and it was held that actual trading need not have commenced in order for parties to a joint venture to become partners but rather *"the rule was that persons who agreed to carry on a business activity as a joint venture did not become partners until they actually embarked on the activity in question. It was therefore necessary to identify the venture in order to decide whether the parties had actually embarked upon it."*³

- [5] Counsel for the Claimants in support of their case that WC was no more than a salaried partner relies on the case of **Stekel –v- Ellice**⁴. The principle enunciated in this case is this: The term 'salaried partner' is not a term of art. Whether a person is a salaried partner or a true or full partner (i.e. a partner in the true sense) depends on what the substance is and not the name given to the relationship, on the facts of the particular case.

[6] **The evidence**

MC in cross examination stated in relation to the ferry boat business that he and WC were doing things together; that WC worked hard and did everything in respect of the boat and

¹ RSA P15

² [2001] 1 ALL ER 20

³ Per Millet LJ

⁴ 1971 s No. 4334 Ch D

decided on the crew for the boat. In relation to the letters of March and May 2002 he said he had offered WC 30% and later 40% of the ferry boat business and that he had tabulated in the letter the benefits that WC had obtained from the business up to 2002. He said that he paid all of WC's bills from before 1989 up to 2002 or later. With regard to the letter of 14th March 2002 MC specifically accepted that the 15,000, being claimed in this action as a loan or advance to WC was one and the same as what he considered to be part of the benefits obtained by WC out of the ferry boat business and that the same is the case in respect of the sum of \$4,000.00 stated therein and yet claimed as a loan or advance in the action. Similarly, it is worthwhile to note that the sum of \$50,400 and 45,000 referable to the house purchased for WC and regarded as a benefit to WC from the ferry boat business is also claimed by MC as a loan or an advance made to WC. Also clear from MC's letter of 14th May, 2002, is that WC took no salary at least for the first six years of the Cheers ferry boat business. MC also said he took no money for personal use from the Cheers ferry boat operations.

- [7] In an action brought by MC against one Basil Gumbs in relation to repairs on the engine of Cheers II, WC was joined to the action as a co-claimant with MC in his capacity as a partner in the ferry boat business. It was also stated in a sworn affidavit by MC for this purpose that WC had an interest in the amount of any damages recovered against the said Basil Gumbs.
- [8] MC further said that WC did not co-sign the loans in respect of the Cheers ferry boats with him. This is contrary to the evidence of Mr. Preston Bryan, and the original of the loan notes produced, and the hand written notes of the meeting in respect of the second loan as recorded by Mr. Bryan whose evidence I accept. Further, MC stated that he didn't recall WC paying the crew men before the money bag was turned over to him. However, Lyle Connor, MC's son, stated that WC paid the crew from the money bag.
- [9] MC also stated that it was not WC's idea to purchase and operate a ferry boat. Interestingly, Lyle Connor says that WC approached his father MC and suggested that he purchase a boat which would be captained by WC. Lyle Connor also stated that WC was

always of the opinion that he should be entitled to share in the boat and knew that his father had offered WC 30% of the business.

- [10] Marjorie Connor, wife of MC said in essence that MC dealt with the administrative matters relating to the boat such as paying the bills and the bank loans and that bills would also be paid for WC as from 1989 onwards and WC worked the boat and that this in essence spelled out their relationship. She assisted her husband in the administrative aspects. She said the first loan was paid off after three years, and that monies collected from the ferry boat business were used mostly to pay for diesel, gas, pay staff, purchasing of parts and for servicing the loans.
- [11] Preston Bryan, General Manager of CCB, said he knows both MC and WC. They came to the bank for a loan. The first loan was to purchase a boat. He said WC's name was on the documents as he was advised that it was a joint venture between them and thus both names would have been documented. Repayment of the loans was to come from funds generated by operation of the boat.
- [12] It is not disputed that WC did not put up any security for the loans. Preston Bryan stated that a CD belonging to Yvette Richardson was used to furnish cash security for the first loan. The second loan was secured by real property over which MC had authority and cash deposits. The loans were all repaid.
- [13] WC worked as a captain for all his working life. He said on learning that the boat which became Cheers I was up for sale, he approached his uncle with the idea of purchasing the boat as he needed financing and MC was in charge of the family lands. The arrangement, as he described it, was that he would captain the boat and take care of the bills for maintenance and pay the crew and MC would deal with the banking aspect. He says he was present at the bank when the first, second and third loans were signed. I accept this evidence.

Findings

- [14] I do not consider MC to be a reliable witness and where his evidence conflicts with evidence of WC and Preston Bryan I accept their evidence. MC sought to impugn the joint nature of the loan notes without putting forward any credible basis for so doing. He seemed content to treat WC as an employee when the purpose suited him and as a partner when this was beneficial to him.
- [15] On a consideration of all the evidence and the conduct of the parties in relation to the operation of the ferry boats coupled with the manner of their acquisition, and applying the principles set out in the cases of **Khan** as well as in **Stekel**, I have no hesitation in finding that MC and WC entered into a joint venture which was the acquisition and operation for profit of ferry boats in circumstances of mutual trust where WC was to and did provide his skills and labour as a boat captain, and MC was to handle all the administrative and banking aspects of the operation.
- [16] I do not accept that at some unascertainable time WC became a salaried partner of MC merely because sometime around 1995 or 1996 he began paying himself weekly sums from the money bag. MC's letters of March and May, 2002 do not support this contention. The evidence in its totality simply does not support the relationship of WC being a salaried partner. Further, it begs the question as to why WC would have been working without pay for an initial period of about six years, and why would MC be paying all of WC's expenses if it was not accepted and understood that WC was to share in the income of the business or receive from the business the benefits which MC acknowledged WC had received. It was at no time sought to be asserted by MC that these benefits were in the nature of payments of salary due to WC. I am satisfied that the substance of the relationship between MC and WC in respect of the operation of the ferry boats Cheers I and Cheers II was as partners in the true sense. MC was fully cognisant of this fact and thus in his offer letters sought to do what was necessary in acknowledging their relationship.

- [17] The question which now remains is their respective interests. MC asserts that the agreement as between him and WC was for WC to hold a one quarter share after all loans and expenses on the boats were paid. WC rejects this. MC's last offer to WC in 2002 was for 40%. I accordingly consider 40% to be an appropriate starting point. Counsel for the Claimant contends that MC having provided the security for the loans, paid the bank loans, insured the boats and paid the business licence, are all factors in favour of MC holding a greater share than WC. WC considered that he was entitled to 90%. There is no agreement as to their respective interest. Section 25 of the Partnership Act states, in essence, that in the absence of any agreement between the partners, the interests of the partners in the partnership property is equal. In the circumstances of this case there is no basis for departing from this rule. I accordingly hold that MC and WC are equal partners in the Cheers ferry boat venture.

The relief sought by the Claimants

- [18] With regard to the declaratory and injunctive relief sought by the Claimants, having regard to the findings I have already made, I consider that it would be inappropriate to grant the relief prayed for in paragraphs 1, 2 and 4 of the Claim Form. It is unnecessary, in my view, to make a declaration regarding the loan of 27,000. for the purchase of a house at Blowing Point by WC as this is acknowledged. It is similarly unnecessary to make a declaration in respect of the dissolution of the partnership since it is accepted by the parties that the relationship came to an end on or about 20th May, 2002, when WC ceased his captaincy of the boats.
- [19] With regard to the claims for \$64,844.22 as monies loaned or advanced to WC, suffice it to say that MC in his evidence acknowledged that these sums are benefits from the said ferry boat business flowing to WC from his involvement therein. Accordingly, they are not in the proper sense loans or 'advances' (assuming the term is used as being synonymous to the term 'loan'). Further, it has not been shown that such sums were paid from personal funds of MC as distinct from income flowing from the ferry boat operation. The claim for \$10,000.00 as monies appropriated by WC fails for the same reason and in any event has not been proved. The Claimant has similarly failed to prove the damage claimed in the sum

of \$63,080.15 said to have been caused by WC. Merely bald assertions have been made without any evidence being led in support. Accordingly, this claim also fails.

The relief sought by the Defendant

[20] WC has sought in his defence and counterclaims the following declarations:

- (i) That a partnership existed between MC and WC as from 6th April 1989;
- (ii) A declaration of the respective shares owned by the partners within the partnership;
- (iii) that the transfer of the boats to the 2nd Claimant was unlawful.

Based upon my findings as set out in the foregoing, I make the following declarations:

- (i) A partnership in the true sense existed between the 1st Claimant and the Defendant as from 6th April, 1989.
- (ii) The partners held equal shares in the partnership.
- (iii) The boats Cheers I and Cheers II are the property of the partnership.

[21] The Defendant also seeks an account of the partnership business, and evaluation of the partnership assets and damages for loss of his entitlement to profits. To my mind, these are all captured in an order directing MC to render an account of the partnership. This may turn out to be easier said than done given the admitted lack of accounts and information maintained by the 1st Claimant. There is, however, some information, though far from the best, from which as fair as possible an assessment may be derived in all the circumstances. I accordingly consider that it is proper to make such an order and I so do.

Conclusion

[22] The Claimants' claim is dismissed. I make the declarations in favour of the Defendant as set out in paragraph 20 above and I further order that the 1st Claimant renders a true account of the partnership business namely, the Cheers ferry boat business as from 6th April 1989.