

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No 5 of 2001

Between

David Walcott

Plaintiff

And

Trinbago Unified Calypsonians'
Association

Defendant

Appearances:

Mr. David Walcott appears in person

Ms. Gizzelle Russell for the Defendant

Before The Honourable Mr. Justice Devindra Rampersad

DELIVERED ON: Friday October 30, 2009

JUDGMENT

The plaintiff commenced this action on 30 January 2001 against the defendant claiming damages for breach of contract, damages for detinue, consequential losses, interest and costs. He claims to have entered into an agreement with the defendant to jointly produce a calypso magazine on a quarterly basis called "Stage Lights" from which he would benefit financially via a percentage arrangement. He also claims that he agreed with the defendant to be provided certain facilities by the defendant for the production of a souvenir calypso magazine. He says that the defendant's servants/agents were fully aware of these two projects and that he was wrongfully suspended from his elected position of secretary to the north zone of the defendant's organization and it placed a public disclaimer in the Newsday newspapers. He says that this disclaimer caused him much distress and financial losses and was in breach of the two commercial agreements made between both parties. He also claims that the defendant, its servants/agents detained two photo albums - each containing about 100 color photos, one Minolta camera 700 body and one BWIA traveling bag being his property.

The defendant filed its defence in this matter on 26 November 2002 after judgment was taken up in default and an order to set aside that judgment was made on 29 October 2002. The pleadings were regularized by the order of Master Doyle dated 15 June 2004 and a reply was filed by the plaintiff on 25 February 2005. The matter then came up the pretrial review before Ibrahim J. on 6 June 2006 and on 28 June 2006, Ibrahim J. gave directions for witness statements, disclosure, and specific disclosure of certain documents by the defendant to the plaintiff on or before 13 July 2006. The matter finally came up for trial on 16 January 2007 when it was **dismissed from non-appearance of the plaintiff**. That order was **set aside** on 17 April 2007 and the trial was then fixed for 19 September 2007. On 19 September 2007 the trial was adjourned upon the request of the plaintiff to retain an attorney at law and it was subsequently **dismissed for a second time** on 13th October 2008 again due to the non-appearance of the plaintiff. I **reinstated** this matter for a second time on the 17th of February 2009 and, after several pre-trial reviews, the trial began and was completed on 23 April 2009.

Despite having filed witness statements for himself, one Morel Peters and Winston Peters, only the plaintiff himself gave evidence at the trial. No witness statements were filed on behalf of the defendant and no evidence was led by them. The Plaintiff represented himself at the trial.

The issues:-

The onus was on the plaintiff, therefore, to prove that there were two contracts between himself and the defendant and that the defendant had breached those contracts. He also had to prove that he was the owner of one photo album containing 100 color photos (the original claim for two albums was amended on 27 March 2009 with leave given by this court), one Minolta camera 700 body and one BWIA traveling bag and that these things were wrongfully detained by the defendant or its servants/agents.

The Plaintiff's evidence:-

In his witness statement, the plaintiff described himself to be a photojournalist by profession. He sought to create a picture of being wrongfully suspended and evicted from the defendant's office because of assistance he rendered to one Venessa Roberts in relation to certain matters which led to her alleged wrongful dismissal. Venessa Roberts never gave evidence in this matter and, in those circumstances, these allegations made had to have been based on first-hand hearsay and were not admissible as the plaintiff failed to establish any grounds for its admission as per the Rules of the Supreme Court [RSC]. In those circumstances, that evidence was disregarded by me.

He went on to allege a joint venture to produce the calypso magazine called "Stage Lights" between his company -- Option Publications -- and the defendant. He annexed to his statement and relied upon copies of two proposals and an unsigned agreement:-

1. The 1st proposal – Exhibit B - which was undated, was a proposal that the defendant, Option Publications, and the said Venessa Roberts establish a working alliance. **The proposal is unsigned.**

2. The 2nd proposal -- exhibit C -- was stated to be between Option Publication and the defendant and sought to set up the areas of interest to be covered by the magazine, the frequency of publication, the profit-sharing arrangement, and the manner in which the joint venture would be operated. In that proposal, it was specifically stated that Option Publication comprised 7 persons. **This proposal was also unsigned.**

3. The agreement -- exhibit D -- **was undated and unsigned** and bears the month "January" and the year "1996" at the top of it. It purports to be an agreement between Option Publications of the one part and the defendant of the other part to jointly pursue the production of an entertainment magazine entitled "Stage Lights". The last paragraph of this unsigned agreement specifically states the following -- "*THIS AGREEMENT BECOMES BINDING UPON THE SIGNING OF THIS DOCUMENT BY A REPRESENTATIVE OF BOTH PARTIES.*" The rest of the agreement was designated as follows:

<p><i>“SIGNED</i></p> <p><i>WINSTON PETERS</i></p> <p>.....</p> <p><i>PRESIDENT OF TUCO</i></p>	<p><i>SIGNED</i></p> <p><i>DAVID WALCOTT</i></p> <p>.....</p> <p><i>PUBLISHER, OPTION PUBLICATIONS”</i></p>
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He went on to say in his witness statement that he also entered into an agreement with the defendant’s North Zone Executive for the defendant to be a facilitator for the production of one edition only of a calypso souvenir magazine called "A Nation’s Pride" which was supposed to be have been done in conjunction with one David John-Williams.

He said that it was mutually agreed that he would, via his company Option Publications, benefit from a certain percentage of the profits derived from the production of "Stage Lights" magazine. He said that it was also agreed that he would pay the defendant a percentage of the profits to be derived from the production of "A Nation's Pride" souvenir magazine. In return, the defendant would provide office accommodation, typing

telephone services and mailing address to accommodate the day-to-day activities with potential advertisers. In support of this contention, he relied upon:

1. A letter dated 13 February 1996 from BWIA addressed to Winston Peters, Trinbago Unified Calypsonians Organization -- exhibit E. -- declining Mr. Peters' offer of request for BWIA to advertise in his monthly magazine "Stage Lights";
2. A letter dated 3 April 1998 on the defendant's letterhead -- exhibit F. -- signed by a person on behalf of one Dennis Cox and addressed to no one in particular indicating that the defendant, in collaboration with Option Publication, embarked upon the publication of an entertainment magazine called "Stage Lights" in April 1996 and inviting advertisement in the magazine.
3. Purported minutes which are **undated and unsigned** -- exhibit G. -- which referred to certain statements made by one Morel Peters about matters which are not related to this case and to the "Stagelights" (sic) document in relation to which a new proposal was presented by Options Publications - the Defendant's proposed partner in that publication - and in which it was revealed that Options Publications was comprised as follows:
 - a. David Walcott;
 - b. Dianne St. Rose;
 - c. Mansa Musa;
 - d. Lystra St. John;
 - e. Alana Clarke;
 - f. Oba Katime.

He claims that both projects were embarked upon while he was acting not just in his professional capacity as a publisher but as an agent of the defendant. He says that he functioned in the elected position of Education and Research Officer during the production of "Stage Lights", in the national executive before he resigned and secretary of the north zone before he was wrongfully suspended by the zone's executive.

He went on to say that both agreements were rendered ineffective as a result of a disclaimer placed in the Newsday newspapers on the 8th of April 1999 informing the public that he was no longer authorized to transact business on behalf of the defendant as a result of which he was forced to abort both projects after having secured \$2,550.00 in confirmed advertisement and over \$3,000.00 in prospective sales plus investment of financial and human resources. The disclaimer was produced in evidence.

In his witness statement, he claims that the Defendant's agents wrongfully detained property belonging to him inclusive of a Minolta 700 camera body which formed part of his professional tools as a photographer and that as a result of the detention of the said camera body his income generating capacity was severely affected. He did not say when this was done, who did it and the circumstances relating to the alleged detention nor did he say how his income generating capacity was affected.

He went on to rely upon alleged correspondence dated :-

1. 25th of February 1999 - written to the president of the defendant purportedly by one Mr. Felix Celestine [but which letter was **unsigned** in the copy put into evidence] in which he says that he acted for “Mr. David Walcott duly elected secretary of TUCO -- North zone since November 1998” and in respect of which he claims to have been wrongfully ejected on 22 February 1999 from the office pursuant to a letter of suspension and was prevented from entering the building and was unable to retrieve many of his personal belongings. The personal belongings were not specified. The letter requested the intervention of the president to facilitate the retrieval of the personal belongings of the plaintiff.
2. 9th of April 1999 - written to the general secretary of the defendant complaining about the wrongful suspension of the plaintiff who was the duly elected secretary of the North zone. This letter seems to have been missing a page and again was also **unsigned**.

3. 9th of April 1999 - written to the president of the defendant purportedly by one Mr. Felix Celestine [but which letter was **unsigned** in the copy put into evidence] in which he says that he was instructed to return the following items belonging to his client which was left at the North zone office :-
 - a. Two (2) Albums of photos:
 - i. Young King's visit to President House
 - ii. NACC honoring of Mighty Duke, Superblue and Earl Rodney
 - b. One (1) Minolta camera, 70” camera body
 - c. One (1) BWIA bag.

The plaintiff went on to claim that sometime during the 1st quarter of 1998, the defendant advanced to him the sum of \$5,000.00 as part of a proposed \$15,000 advance payment towards the cost of a \$24,000 budget for the production of the publication with the balance to be paid on completion of the said project and with the profits to be divided between the plaintiff and the defendant on the basis of prior arrangement. He relied upon a memo in support of this -- exhibit N. -- which was a memo addressed to "Treasurer" purportedly from Dennis Cox, dated 13 January 1998 and captioned "Advance with respect to the publication of Stage Light." It stated as follows: "Reference is made to prior arrangements with respect to the captioned and to advice [sic] an initial sum of fifteen thousand (\$15 000.00) be advanced to Options Publication as per details below: Editorial, Typesetting, Color Separations, Bromides/ Scanning, Photography.". The plaintiff also relied on another memo addressed to the president of TUCO dated 12 January 1998 from Mr. Dennis Cox [again **unsigned**] which was a record of Mr. Cox' comments on a draft proposal for the publication of the Stage Light quarterly magazine. The memo states that TUCO should adopt the proposal with certain provisos including distribution of profits among the 3 parties to the joint ventures [with no direct reference to whom the 3 parties were] and that "*the agreement be finalized and settled by a legal personnel to be signed by all parties and witnessed accordingly*".

The plaintiff then alleged that there was an abundance of documentary evidence before the court to support the fact that a commercial arrangement existed between the defendant, himself and Mrs. Venessa Roberts for the production of “Stage Lights” magazine and also refers to evidence of the defendant's involvement in the production of “A Nation's Pride” magazine. The evidence which he provided included invoices on a "Caribbean Option" letterhead for advertisements for various clients which were signed by him, a First Citizens Bank Limited deposit slip in the name of the defendant paid in by Venessa Roberts and a letter from the defendant's North Zone dated 2 December 1998 stating that: "*The North Zone arm of the Trinbago Unified Calypsonians Organization (TUCO) is producing a commemorative magazine "A Nation's Pride"*" with no mention of the plaintiff or Option Publication.

The analysis of the evidence and the resolution:

None of the Plaintiff's documentary evidence was signed and the agreement in particular envisaged validity only upon its execution as mentioned above. Notwithstanding the fact that all of the documents before this court were unsigned, I have no hesitation in finding that there was some sort of commercial arrangement between the defendant and Option Publication, of which the Plaintiff was a member, for the production of "Stage Lights" magazine. Exhibits C and G (albeit unsigned) disclose that Options Publications comprised 6 members and lists their names respectively, and on the Plaintiff's own admission, this body contracted with the defendant with a view to benefitting from a percentage of the profits derived from the production of “Stage Lights” magazine. There is no doubt that Options Publications was a partnership of 6 persons (including the Plaintiff) carrying on a business in common with a view to profit. From the evidence, it is clear that Option Publication was a partnership within the meaning of **section 3 (1)** of the **Partnership Act Chap. 81:02** which defines a partnership “*as the relation which subsists between persons carrying on a business in common with a view to profit.*” In fact, the plaintiff admitted in cross-examination that there was an intention to have Option Publication incorporated but it was never done and the association of the six members was never registered under the **Registration of Business Names Act.**

What perplexed this Court however, was why the instant proceedings was brought not in the name of Option Publication (with which the defendant contracted), but in the name of the Plaintiff solely?

Lindley and Banks on Partnership, 18th ed. 2002 states at para. 14-69: “*Any partner may, without the consent of his co-partners, commence proceedings in his and their names or (which amounts to the same thing) in the firm name.*” [Emphasis mine]

A partner has the implied authority of his fellow partners to bring legal proceedings in the names of all the partners or in the partnership name. As Bayley B. observed in **Whitehead v. Hughes (1834)** 2 Cr. & M. 318 “*one of several partners has a clear right to use the names of the other partners.*”

As a partner in Options Publications, the Plaintiff would have been vested with that presumed authority to initiate this matter in the name of the partnership, or alternatively, in the name of **all** partners in the firm. Even if, at the highest, it may be said that the other partners did not wish to pursue this action, it was nonetheless incumbent on the Plaintiff, if he desired to establish liability, to bring this action in the firm’s name or all the partners’ names. As Sir Nicholls VC explained in **Sutherland and Ors. v. Gustar (1994)** 3 WLR 735, 310:

“But partners do not always have the same interest in challenging an assessment. What is important to one partner may not matter to another. Similar divergences of interest, and differences of view about what is the best course for the partnership, can and do arise regarding other aspects of partnership business. Here, as elsewhere in the law, the courts evolved practical solutions. In the context of litigation, the courts devised procedures which protect a would-be plaintiff partner by permitting him to go ahead with court proceedings but also protect the partners who do not wish to become embroiled in the proceedings. The traditional means used to achieve this end was for the minority partner to be permitted to bring the proceedings in the name of the partnership. Every partner

is an agent of the firm, a principle now enshrined in section 5 of the Partnership Act 1890 (53 & 54 Vict. c. 39)- [Our section 7].But the other partners had to be protected by an adequate indemnity. There are many instances of this procedure being followed. For example, in Whitehead v. Hughes (1834) 2 Cr. & M. 318 Bayley B. observed that "one of several partners has a clear right to use the names of the other partners." If the others object they may apply for an indemnity against the costs to which they might be subjected by the use of their names. This was approved by Sir Gorrell Barnes P. in Seal & Edgelow v. Kingston [1908] 2 K.B. 579, 582, and by Lord Finlay L.C. in Rodriguez v. Speyer Brothers [1919] A.C. 59, 69. Those were cases of claims brought by a partnership.

The other partners of Options Publications had certain legal recourses available to them if they did not wish to pursue a claim against the defendant. The possible undesirability of the partners to participate in these proceedings therefore ought not to have affected the intitlement of this action in the name of all the partners or the partnership. The law provides protective measures to a Plaintiff and his partners in circumstances such as these, yet this matter is before the court in the Plaintiff's name only. Given the strictures that govern the law of partnerships, this court can only conclude that the Plaintiff has brought these proceedings in his personal capacity, and not on behalf of Options Publications. And herein lies another issue that has confronted this Court- since a partner may only sue in his own name in the following circumstance as dictated by Lord Lindley at para. 14-28 of **Lindley and Banks on Partnership:**

"One partner may sue alone on a written contract made with himself if it does not appear from the contract itself that he is acting as agent of the firm; and one partner ought to sue alone on a contract entered into with himself, if such contract is in fact made with him as a principal, and not on behalf of himself and others."

The contract which is the subject matter of these proceedings was made between the defendant and Options Publications, not the Plaintiff; and as such, the above circumstance cannot apply to the instant facts.

That being the case, the Plaintiff is not the proper party before the Court, and the matter must end there. The following judgment of the Court in **Watson v. Imperial Financial Services Ltd. (1994)**, 111 D.L.R. (4th) 643 (B.C.C.A) explains why:

“Even if it could be said that each of the partners was owed a transmitted or transferred fiduciary duty by the respondent bank, I do not think it would be open to those partners to individually commence actions against the bank. That would expose the bank to any number of lawsuits within the limitation period. I do not think that can be right. In my opinion, any such claim by the partners would have to be in the firm name as permitted by the Rules of Court or in some form such that all the partners were before the court in one action such as a representative action. In my opinion, this emphasizes the point made by the respondent bank that this claim, in substance, is one of the partnership and not the individual partners. This, in my opinion, is no less so just because the partnership itself is not a legal entity. The fact is that partnerships can sue and be sued as long as the proper procedure is followed.”

In my opinion, the general principle that comes from Foss v. Harbottle applies to the claims of the 845 partners against the respondent bank. It is a claim of the partnership. I am satisfied that this is plain and obvious and that a claim by the individual partners other than in a form that shows it to be a claim of the partnership or a representative action where all the partners are before the court cannot succeed.” [emphasis added]

The plaintiff has carried on this case as if he was the sole contracting party without recognizing Option Publication’s *locus standi* and interest in this matter. It is a fundamental principle of contract law that for there to be a contract, there must be an offer by one party and acceptance by the other consummated by consideration. In this case, the plaintiff cannot show that he is the sole party with whom the defendant contracted and, in fact, the evidence is clear that, prior to formalizing the proposal discussion, the defendant required disclosure of the names of the persons involved in Option Publication. I am therefore satisfied that the defendant intended to create legal relations not with the plaintiff himself but with Option Publication hence the request for

clarification as to its membership. I have no evidence before me from any of the other five members of Option Publication as to the consent for the plaintiff to represent them and the association/firm/committee in these proceedings.

The Plaintiff provided no explanation why Mr. Winston Peters, who was the President of the Defendant at the material time and who gave a witness statement which was filed and read by the Court, was not called. In that regard, I am guided by the judgment of Moosai J in the case of H.C.A. No. S-184A of 2003; H.C.A. No. 409 of 2003 (P.O.S); CV 2006-00986 :- **Mahadeo Sookhai vs. The Attorney General of Trinidad And Tobago** at paragraphs 23 and 24 which gives authority for the proposition that I can make adverse inferences from the failure to call Mr. Peters as a witness despite him having signed a witness statement. As such, I am afraid that the plaintiff cannot sustain an action on his own without the due authority of the other members of Option Publication as he has failed to establish any agreement/contract between himself personally and the defendant in relation to the “Stage Lights” magazine. With respect to “A Nation’s Pride” there is not a scintilla of evidence to substantiate any agreement between himself and the defendant and, as such, I cannot grant any relief in respect of that venture either.

Even if the plaintiff had proven his case in respect of the liability of the defendant, he has still failed to provide figures, records or accounts at all in relation to the sales of the magazines or even in relation to any expenses to which he would have been entitled for reimbursement. The Rules of the Supreme Court provide for discovery and the Plaintiff would have been well advised to have sought his remedy under the appropriate provisions. He did not. In those circumstances, it is difficult to see how any court would award any damages for breach of contract under the established measure of putting the afflicted party in the position he would have been had the contract been performed or even on a quantum meruit basis. I have no records of sales, expenses, receivables, profit and loss, etc. so that it would have been impossible for me to assess what damages the plaintiff has suffered. The Plaintiff’s claim of an advance of \$15,000.00 is not an

indication of the actual sales or expenditure involved in the project and does not assist me in any way. This figure provided by the plaintiff did not assist me.

With respect to the items allegedly detained by the defendant, I am satisfied, on a balance of probabilities, that the plaintiff was excluded from the premises and, in particular, from the office which he was occupying and that this was done by the instruction of the defendant and I accept that he had the item referred to in his witness statement with him on the day when he was so excluded. A claim in detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is possession of the goods and who **on proper demand**, fails or refuses to deliver them up without lawful excuse. (See dictum of Donaldson J. in *Alicia Hosiery v Brown Shipley and Co. Ltd. [1969] 2 All E.R. 504 at 510*). The evidence before me of the demand for the items is woefully inadequate since the purported letter written by Mr. Felix Celestine does not carry sufficient weight in light of the fact that it is unsigned and unsubstantiated and is not corroborated by any evidence from Mr. Celestine himself. That was the only evidence provided by the plaintiff for the demand for the return of the items. But, even if I am wrong on that, I have noted that, although his claim was for several items, the plaintiff only referred to a Minolta 700 camera body in his witness statement so that this is the only detained item that I have evidence of from the plaintiff. Even though he mentioned that its detention severely affected his income generating capacity, I have no evidence as to how and in what manner and to what extent. He did not say, for example, that prior to the detention of the camera he earned \$ X and that he was not able to earn that sum again or that he was forced to purchase a new camera and that, until he purchased the new camera, he was not able to earn anything [bearing in mind his duty to mitigate this loss]. Further, I have no evidence of the value of a Minolta 700 camera body so that I am unable to quantify the extent of the damages payable to the plaintiff in this regard. In all of these those circumstances I am unable to award damages for detinue.

The Order:

In the circumstances, I am constrained to dismiss the Plaintiff's case. With respect to costs I note that an order for discovery was made by Ibrahim J and, in particular, for particular and specific discovery of certain documents. That was not complied with and the Plaintiff took no steps to enforce that order through contempt proceedings. Had he done so, he may have had evidence to provide to this court which may have been helpful to him and to his case. However, that was not the position and no reason was advanced whatsoever for the Defendant's flagrant disregard for orders of the court including for the filing of witness statements. The Defendant has shown total and utter disregard for this court by failing to send a representative on more than one occasion - even on the day of the trial. At the end of the day, costs are in my discretion and I would make no order as to costs as the defendant has not acted properly or with respect to this court in its conduct of this matter.

Devindra Rampersad
Judge (Ag.)