IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA 1370 of 2002

BETWEEN

JIM MAILLARD

PLAINTIFF

AND

JULIET BROWN-ATTONG as Legal Personal Representative Of the Estate of Anthony Attong, Deceased

OCCUPATIONAL FIRE AND SAFETY SERVICES LTD.

JULIET BROWN-ATTONG

RAYMOND BROWN

DEFENDANTS

BEFORE THE HONOURABLE MADAME JUSTICE TIWARY-REDDY

JUDGMENT

Appearances:

Mr. Henley Wooding and Mr. T. Malcolm Milne for the Plaintiff

Mr. Louis Noel for the Defendants

INTRODUCTION

1. The Plaintiff Jim Maillard brings this action against the Defendants for breach of two agreements:

(1) A partnership arrangement entered into between himself and Anthony Attong (deceased) whereby they agreed to form and equally own a company to perform fire and safety training at AMOCO Trinidad Oil Company Ltd.; and

(2) An agreement made between himself and the Third and Fourth Defendants to carry on the business of the Second Defendant and to have an equal share in the shares and profits of the Second Defendant.

The Plaintiff also claims moneys had and received by the First and Second Defendants to the use of the Plaintiff which the Second and Third Defendants failed to pay.

THE PLAINTIFF'S CASE

The First Agreement

2. The Plaintiff was employed at AMOCO as a Fire and Safety Security Supervisor. AMOCO's Fire and Safety training was done by Fire Chief Safety Consultants Ltd. After the death of it managing director Harry Legall, Fire Chief Safety Consultants Ltd. ceased providing services to AMOCO. The Plaintiff's boss, Dave Blevis suggested to him that since the Plaintiff was due to retire in about two years, he take it upon himself to provide training services to AMOCO as a safety training contractor.

3. The Plaintiff approached his long standing friend and professional colleague, Anthony Attong (the deceased) and suggested to him that together they provide the safety training services at AMOCO. To this end, the parties agreed to form a company for this purpose. The company so formed was to be owned by both parties in equal shares, and further, that the net profits of the company were to be split between them equally, that is to say 50/50. It was also agreed between the parties, that as the Plaintiff was still employed at AMOCO, the deceased would hold the Plaintiff's shares in the company on trust for the

Plaintiff until he (the Plaintiff) retired from AMOCO. The deceased would also provide the Plaintiff with a monthly statement of the income and expenditure of the Second Defendant.

4. Pursuant to this arrangement, the deceased incorporated the Second Defendant with himself registered as the sole director and the Second Defendant commenced trading in 1997. The deceased functioned as the person in control of all the business affairs and assets of the Second Defendant. Through the joint efforts of the Plaintiff and the deceased, the Second Defendant performed as agreed and earned substantial revenues. The deceased died suddenly in June 1998. The Plaintiff maintained that at the date of the deceased's death, the Second Defendant had earned revenues totalling $1,092,094.05. It is the Plaintiff's case that the deceased never fulfilled his duties under the agreement to (1) transfer 50% of the shares to the Plaintiff; and (2) to pay 50% of the profits of the Second Defendant to the Plaintiff.

Terms of the First Agreement

5. The terms of the First Agreement set out in paragraph 4 of the Statement of Claim, identified the following obligations of the parties to the First Agreement:

    a) The Plaintiff undertook:

        i) At his own cost and expense to procure the incorporation of the Second Defendant.

        ii) To use his best efforts to develop the business of the Second Defendant together with the deceased.

    b) The deceased undertook:

i) To hold the Plaintiff's 50% shareholding in the Second Defendant in trust for the Plaintiff until the Plaintiff retired.

ii) To be the sole Executive Director of the Second Defendant.

iii) To use his best endeavours together with the Plaintiff to develop, the business of the Second Defendant.

iv) Every month to provide the Plaintiff with a statement of the monthy income and expenses of the Second Defendant and to pay the Plaintiff one-half of the net profit every month.

v) Upon the Plaintiff's retirement to cause to be vested in the Plaintiff his one-half of the issued shares of the Second Defendant.

Performance by the Plaintiff and Attong under the First Agreement

6. a) The Plaintiff maintained that he:

i) Caused the Second Defendant to be incorporated on the 31.10.97 at the Plaintiff's own cost and expense; and

ii) Developed the business of the Second Defendant jointly with the Deceased.

b) The Plaintiff also maintained limited performance by the Deceased as follows:

i) The deceased developed the business of the Second Defendant through joint efforts with the Plaintiff.

ii) The deceased caused himself to be registered as the sole director and functioned as the person in control of all of the business affairs and assets of the Second Defendant until his death on 10.6.98.

7. The Plaintiff alleged that the Deceased "failed and/or neglected and/or refused to pay any moneys due to the Plaintiff notwithstanding his repeated requests to do so." The Plaintiff maintained further that the Deceased "departed this life on the 10.06.98 without having allotted any shares in the Second Defendant to the Plaintiff ."

The Second Agreement

8. At paragraph 6 of his Witness Statement the Plaintiff stated that he met with the Third and Fourth Defendants sometime after the death and burial of the deceased. At this meeting the Plaintiff and the Third and Fourth Defendants discussed the future of the Second Defendant. Both the Third and Fourth Defendants were ignorant of the business of the Second Defendant, so much so that the Third Defendant was not even aware of the name of the Second Defendant.

9. The Plaintiff explained to the Third and Fourth Defendants that the Second Defendant was his and that the deceased merely ran it for him. He also explained to the Third and Fourth Defendants, the arrangement between the deceased and himself. The Third and Fourth Defendants attempted to negotiate with the Plaintiff who saw no need to take advantage or make any changes to the 50/50 partnership agreement which he had had with the deceased.

10. The Plaintiff stated further that it was agreed among them that he, and the Third and Fourth Defendants would together carry on the business of the Second Defendant exactly as he had done with the deceased. It was also agreed that the Third and Fourth

Defendants would become registered as secretary and director respectively of the Second Defendant.

11. The Plaintiff alleged that after having performed the said services as agreed according to the terms of the Second Agreement, the Third and Fourth Defendants failed to pay or procure the Second Defendant to pay to the Plaintiff 50% of the profits, as agreed between them, under the Second Agreement.

Terms of the Second Agreement

12. a) The Plaintiff's obligations were:

i) To carry on the business of the Second Defendant together with the Third and Fourth Defendants.

ii) To maintain oversight of the Second Defendant's operations and where necessary, to initiate remedial action through the Third and Fourth Defendants, in order to maintain, develop and continue the business of the Second Defendant.

b) The obligations of the Third and Fourth Defendants were:

i) To carry on the business of the Second Defendant together with the Plaintiff.

ii) To be registered as Secretary and Director respectively of the Second Defendant.

iii) To split the profits of the Second Defendant equally, that is to say, 50% percent to the Plaintiff and 50% to the Third and Fourth Defendants.

Performance of the Parties under the Second Agreement

13. i) The Plaintiff procured the services of one Lionel Whiteman to function as Manager of the Second Defendant as a replacement Manager for the Deceased in order to restore the operations of the Second Defendant.

ii) The Plaintiff also negotiated the terms and conditions of service of the said Whiteman and advised the Third and Fourth Defendant thereof.

iii) The Plaintiff terminated the services of K. Maraj, lecturer in the Safety Training Programme operated by the Second Defendant.

14. Despite having performed the services in the manner required under the terms of the Second Agreement, the Third and Fourth Defendants have failed to pay or procure the Second Defendant to pay to the Plaintiff 50% of the profits as agreed between them under the Second Agreement.

The Defence

15. The Defendants denied the existence of either agreement as pleaded by the Plaintiff as well as the allegations that the Defendants had or had received any money to the use of the Plaintiff. The Third Defendant, alleged that she is a retired business-woman, with 21 years of experience as a manageress at de Lumas Company Ltd. According to her evidence, the deceased was well versed in the business of fire safety training. He was

therefore, quite capable and competent to establish and run the business of the Second Defendant by himself. In her witness statement, she stated that she advanced the deceased in excess of $20,000.00 to cover the incorporation and start up costs of the Second Defendant. She maintained that she typed the documents for the incorporation of the Second Defendant.

16. After the death of the deceased, the Plaintiff contacted her and requested a meeting with her. This meeting took place at her home and in the presence of her son, Raymond Brown the Fourth Defendant, whom she had requested to be present. At this meeting the Plaintiff informed the Third and Fourth Defendants that the Second Defendant belonged to him, and further, that he was entitled to 50 % of the profits of the Second Defendant.

17. The Third Defendant denied ever contacting the Plaintiff, or requesting to meet with the Plaintiff because she needed his aid in relation to the Second Defendant. She maintained that the Plaintiff was relevant to the Second Defendant's operations, only in so far as the Plaintiff could terminate the Second Defendant's contract with AMOCO. The Third Defendant said that the Plaintiff boasted that he was responsible for letting Fire Chief Safety Consultants Ltd. lose its contract with AMOCO and that he could do the same to the Second Defendant if the Third and Fourth Defendants did not comply with his wishes. Therefore, since she did not want to lose the contract with AMOCO, as it was a lucrative one, she directed the Fourth Defendant to pay to the Plaintiff the sums he requested.

Counterclaim

18. The Defendants counterclaimed that the Plaintiff acted unfairly and improperly in that by the use of threats and representations he induced the Defendants by his undue influence to pay to him or to someone at his direction, the total sum of $468,996.59. The Defendants also pleaded in the alternative, that the Plaintiff had fraudulently represented

that he and the deceased had an agreement whereby the Plaintiff was entitled to 50% of the profits of the Second Defendant and further that this representation was made by the Plaintiff to induce the Defendants to pay to the Plaintiff certain sums of money, totalling $468,996.59, which the Defendants did pay.

Reply and Defence to Counterclaim

19. The Plaintiff admitted to being employed as a Safety Supervisor in the Environmental Health and Safety Department of the operations of Amoco Trinidad Oil Company Ltd. and/or a retiree of the said Company. But the Plaintiff denied that the sums alleged to have been paid to him by the Defendants were ever paid to him.

20. The Plaintiff also denied every allegation of illegality or impropriety by the Defendants as contained in paragraphs 4 to 12 of the Defence and Counterclaim. The Plaintiff further pleaded in the alternative that if the said sum of $468,996.59 were paid, as claimed by the Defendants, then it was paid pursuant to the terms of the First and/or Second Agreement, as pleaded in the Statement of Claim.

The Issues

21. The principal issues for determination by this Court are:

    i) Whether there was a partnership between the Plaintiff and the Second Defendant(the First Agreement);

    ii) Whether there was a valid contract entered into between the Plaintiff and the Third and Fourth Defendants on the *11.6.1998* (the Second Agreement);

    iii) What were the terms of the Second Agreement?;

iv) Whether there were breaches of the First and Second Agreements respectively.

The Plaintiff's Evidence

22. The Plaintiff contended that he provided the monies needed to incorporate the Second Defendant. However he produced no evidence of same. The Plaintiff also maintained that he and the deceased paid the salaries of ten lecturers out of their own pockets. Once again the Plaintiff provided no proof of this. In his response to the Defendants' request for further and better particulars, the Plaintiff stated that the only expense he incurred was the sum of $4,000.00 paid by him to incorporate the Second Defendant. This is a clear contradiction to his evidence in his Witness Statement that he and the deceased incurred the expense of paying the lecturers.

23. Further, during cross-examination the Plaintiff said that the deceased approached an Attorney-at-Law to incorporate the Second Defendant. The Plaintiff then admitted that he did not directly incorporate the Second Defendant. The extent of his involvement in the incorporation of the Second Defendant was to pay for the incorporation of the Second Defendant which said receipt is not in the Plaintiff's name.

24. In his Witness Statement the Plaintiff also said that he and the deceased worked hard and combined their efforts from early February or March, 1998 in managing the coursework, including the screening of new lecturers, and generally ensuring that the courses were properly carried out. The Plaintiff was not cross-examined on this issue.

25. The Plaintiff also pleaded that he and the deceased agreed to hold an equal number of shares in the Second Defendant. He also stated that the deceased was to hold his (the Plaintiff's) 50% portion of the shares on trust for him until his retirement from AMOCO. However, he later stated that no shares were to be issued by the company.

26. During cross-examination the Plaintiff produced a handwritten document ("JM6") allegedly written by the deceased on 7.3.98. In this document the deceased had scribbled that 40% of the shares were to go to the Plaintiff's nominee and 60% to "*the Attongs*". This evidence supplied by the Plaintiff is in contradiction to what he stated in his Witness Statement, that is, that the agreement between the deceased and himself was that the shares and the profits would be split between them 50/50.

27. When challenged in cross-examination, the Plaintiff said that he had told the deceased that the earnings and the shares should be split 50/50 and further, that the relationship between himself and the deceased was based on trust. In the Court's opinion the document tendered and marked "JM6" is the only documentary evidence, and the strongest evidence the Plaintiff has in his favour. If this date (7.3.98) is correct, then this document was drawn up after the incorporation of the Second Defendant in October, 1997.

28. The contents of "JM6" contemplate that the Second Defendant was to be incorporated. The Defendants denied that the deceased prepared this document and further stated that they did not recognise the handwriting as being that of the deceased. What is surprising in this case is that neither party called a handwriting expert to testify in this matter. This certainly would have put to rest the question of whether the document marked "JM6" was indeed prepared by the deceased or by someone else. Such expert evidence surely would have aided the Plaintiff's case that some sort of agreement existed between himself and the deceased.

29. This Court does not agree with the proposition put forward by Counsel for the Plaintiff that the document "JM6" was prepared at different intervals, and this accounted for the questionable date recorded on the document, as well as the fact that the document alluded to a name search being carried out after the company had been formed. The fact that the

Plaintiff had this document in his possession all along, but never attempted to tender it into evidence, does not assist the Plaintiff. It is to be noted, this document was only produced by the Plaintiff in the course of cross-examination.

30. In his Witness Statement the Plaintiff said that he met with the Third Defendant at the funeral of the deceased but that they were then unable to discuss matters pertaining the shares of the Second Defendant. Further, in response to the Third Defendant's urgent message left for him, he met with the Third and Fourth Defendants at the Third Defendant's home about a week after the deceased's funeral and together they discussed the future operation of the Second Defendant.

31. In cross-examination at first, the Plaintiff said that he did not meet the Third Defendant on the day of the funeral but then said he did not remember exactly if they had met at the funeral nor could he recall if they had met the day before the funeral. He said that "*a week or two*" after the deceased died he made an agreement with the Third and Fourth Defendants. He said that the discussions with the Third Defendant relating to the Second Agreement started "*three or four days after to the best of his knowledge*" and that the Third Defendant contacted him about the Second Agreement. He said that there were two meetings and that the Third Defendant knew nothing about the Second Defendant, asked him for an update, and he then told her the name of the Second Defendant.

32. The question then arises is: if the Third Defendant were unfamiliar with the Second Defendant to the extent that she knew nothing about the Second Defendant, not even its name or to whom the Second Defendant 'belonged', or that the Plaintiff was the owner or part owner of the Second Defendant, then how could she call the Plaintiff to meet with them to discuss the Second Agreement or seek his approval to appoint the Third Defendant as a Director of the Second Defendant?

33. In his Witness Statement the Plaintiff insisted that, despite his frequent requests, the Third and Fourth Defendants repeatedly refused to issue to him shares in the Second Defendant as agreed, either with the Deceased or with them. The Plaintiff added that when he retired on 31.3.99, the Third and Fourth Defendants refused to pay him any money at all and when he requested the Fourth Defendant to pay the money due to him, the Fourth Defendant said that he would get nothing and that there was nothing that he could do about it.

The Defendants' Evidence

34. The Defendants asserted that all the income of the Second Defendant went towards the Second Defendant's operational expenses. However, the Fourth Defendant admitted that he had purchased a vehicle for himself from the revenues generated by the Second Defendant. The Third Defendant admitted also that she considered the contract with AMOCO to be a lucrative one and she did not want to lose it. It is to be noted that neither the Third nor Fourth Defendant had any training or knowledge in the fire safety training business.

35. The Third Defendant was a retired business-woman and the Fourth Defendant, a teacher and building contractor. The Fourth Defendant only participated in the running of the Second Defendant after the deceased died. He agreed that prior to this, he had never worked in the oil and safety business. The Fourth Defendant was clearly unable to account for monies received and disbursed by the Second Defendant. He was inconsistent throughout his cross-examination and he was completely inconsistent regarding the employment of Lionel Whiteman to function as Manager of the Second Defendant.

36. The Defendants' defence was a mere denial of the Plaintiff's allegations. The Defendants never sought to provide particulars of the fraud or misrepresentation, or deceit they

alleged. Further, since neither the Third nor Fourth Defendants had any knowledge of fire and safety training, it would have been very difficult if not impossible, for these Defendants to carry on the business of the Second Defendant to the requisite standards, without the direction and assistance of the Plaintiff.

37. Thus, this Court prefers the Plaintiff's evidence that the Fourth Defendant requested a meeting with him at her home to discuss the future of the Second Defendant. This Court accepts that the Plaintiff and the Third and Fourth Defendants entered into some agreement regarding the AMOCO contracts where the parties were to split the profits of the Second Defendant 50% to the Plaintiff and 50% to the Defendants.

38. This Court also accepts, that pursuant to this agreement, the Third and Fourth Defendants paid monies to the Plaintiff, or to his nominees. This agreement was not evidenced in writing because the Plaintiff was still employed at AMOCO at that time. The Defendants accepted such an arrangement because the contract with AMOCO was, as the Third Defendant claimed, "*a lucrative one*" and she did not want to lose it.

Conclusion

The First Agreement

39. This Court has concluded that in or about 1997 – 1998, the Plaintiff approached the deceased and suggested that together they would provide the fire and safety training needed at AMOCO and that the deceased agreed to this proposal. The Court accepts the Plaintiff's evidence that the Second Defendant was incorporated pursuant to this agreement. However, the Court does not accept that the Plaintiff and Attong agreed to split the shares and profits in the Second Defendant 50/50 as Court Exhibit "JM6" suggested otherwise. According to Court Exhibit "JM6" the Plaintiff would own 40 percent of the shares in the Second Defendant, while the "Attongs" would own 60

percent. This Court has also noted that the Plaintiff had this document in his possession, but failed to produce it to further his pleaded case. The Court is of the opinion that the Plaintiff's failure to produce the document earlier was an attempt to persuade the Court into believing that he was entitled to 50 per cent of the shares and not 40 per cent as contained in the document "JM6".

40. The Plaintiff stated that the deceased failed to pay to him his due portion of the profits of the Second Defendant. However, in his Witness Statement, he said at paragraph 5 that the deceased paid him in cash and by cheques issued to his daughter Stacy Davis. The Plaintiff provided no particulars of what sums where actually paid to him.

The Second Agreement

41. This Court accepts that after the death of the deceased, the Plaintiff and the Third and Fourth Defendants entered into an arrangement whereby the parties would together run the affairs of the Second Defendant, and further split the profits of the Second Defendant 50/50. It is clear from the evidence that the Third and Fourth Defendants knew nothing of fire safety training in the oil industry, and could not have carried on the business, as they claimed, by themselves. This Court also accepts that it was not until the death of the deceased that the Fourth Defendant became interested in the business of the Second Defendant. Therefore, this Court prefers the evidence of the Plaintiff that after the death of the deceased, the Third Defendant contacted him to discuss how to carry on the business of the Second Defendant. This Court accepts that it was to this end, that the Third and Fourth Defendants made the initial payments to the Plaintiff.

Submissions of the Parties

42. Plaintiff's Submissions

The Plaintiff submits that circumstances demonstrate the existence of a partnership. Counsel for the Plaintiff adopted the following definitions of 'partnership'.

Section 3(1) Partnership Act Chap 81:02 states:

"(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."

Jessel MR in **Pooley v Driver [1876] 5 Ch. D458,** 472-473 said:

"*… I take it that the ordinary meaning of the word 'partnership' is that no doubt as a rule, each partner does contribute something, either in the shape of property or skill. But it is not a universal rule and therefore the definition of Chancellor Kent which is given in the same page is not quite correct.*

"He says: 'Partnership is a contract of two or more competent persons to place their money, effects, labour, and skill or some or all of them in lawful commerce or business …"

And at page 474:

"*… If we find an association of two or more persons formed for the purpose of carrying on in the first instance, or of continuing to carry on business, and we find that those persons share between them generally the profits of that business, as I understand the law of the case as laid down by the highest authority, those persons are to be treated as*

partners in that business unless there are surrounding circumstances to show (sic) that they are not really partners..."

43. It must be noted that Jessel MR was wary of defining 'partnership' and confined himself only to "… *what sort of evidence I must rely on to prove the partnership,*" and held that it was necessary that as a general rule there existed a commercial business with a view to profit and division of profits. It was not essential that both parties contributed because one party may be a dormant partner.

44. In **Khan v Miah [2000] 1 WLR 2123 (Khan)** at pages 2128-9, the House of Lords held that there was no rule of law that parties to a joint venture did not become partners until actual trading commenced. Per Lord Millet:

"*The question is not whether the parties "had so far advanced towards the establishment of a restaurant as properly to be described as having entered upon the trade of running a restaurant," for it does not matter how the enterprise should properly be described. The question is whether they had actually embarked upon the venture on which they had agreed. The mutual rights and obligations of the parties do not depend on whether their relationship broke up the day before or the day after they opened the restaurant, but on whether it broke up before or after they actually transacted any business of the joint venture. The question is not whether the restaurant had commenced trading, but whether the parties had done enough to be found to have commenced the joint enterprise in which they had agreed to engage. Once the judge found that the assets had been acquired, the liabilities incurred and the expenditure laid out in the course of the joint venture and with the authority of all parties, the conclusion inevitably followed.* "

45. Where the parties deny the existence of a partnership, this may be disproved on the circumstances of the case. In **Moore v Davis 11 Ch. D 261, 266** VC Hall stated at page 266:

> "*… although the parties said that there was not to be a partnership between them, yet the agreement must be construed as constituting one; and if that is not a proper construction of the language, still I hold that it was an agreement which in itself involved a partnership in law notwithstanding the words used.*"

Calculation of Plaintiff's Damages

46. The Plaintiff submitted that under the heading '*further or/other relief*' the Court is entitled to award the Plaintiff, damages in the sum of $1.5 million dollars. The Court possesses a wide jurisdiction to assess damages according to **Serrao v Noel 15 QBD 549**.

Defendant's Submissions in Reply

47. According to the Defendants the cases relied on by the Plaintiff to demonstrate the existence of a partnership, namely **Pooley v Driver; Khan v Miah** and **Re K/9 Meat Supplies (Guilford) Ltd.** can all be distinguished from the present case. On the question of damages, the case of **Serrao** can be distinguished. The Plaintiff is statute barred from claiming damages due to him prior to 20.4.02.

48. There was no agreement between the Plaintiff and the Deceased. The First Agreement was never reduced into writing. If the First Agreement was made, the only parties to the First Agreement were the Plaintiff and the Deceased. The Second Defendant could not be a party to the First Agreement because it is a separate legal entity.

49. If the First Agreement was made there was no obligation upon any other person under any of the terms of the First Agreement, to issue shares of the Second Defendant. Since the Second Defendant was not a party to the First Agreement, the terms of the said agreement cannot be enforced against it or against the estate of the deceased. The Second Defendant as a duly incorporated company has no obligation to its incorporators, once formed, and cannot be bound by any oral agreement made by its incorporators before coming into existence.

50. Finally, the Defendants submitted that the Second Agreement was not made between the Plaintiff and the Defendants. If the Second Agreement was made, the Second Defendant could not have been a party to this agreement and the terms of the Second Agreement are unenforceable against the Second Defendant. There was no valid consideration for the shares claimed by the Plaintiff under the First Agreement. The Plaintiff engaged in unfair and improper conduct and exercised undue influence on the Defendants. The Plaintiff is guilty of fraudulent misrepresentation regarding his ownership of the Second Defendant.

THE LAW

51. **Was there a Partnership?**

The onus is on the Plaintiff to prove that a partnership existed between himself and the deceased. The **Partnership Act Chapter 81:02** provide:

> *3 (1): "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."*
>
> *(2): "But the relation between members of any company or association which is –*

(a) Registered as a company under the companies ordinance or any other written law for the time being enforced and relating to the registration of companies …
Is not a partnership within the meaning of this Act.

4. In determining whether a partnership does or does not exist, regard shall be had to the following rules –

(b) The sharing of gross returns does not of itself create a partnership, whether the persons sharing the returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived;

(c) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular –

(ii) *A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such*;

52. This Court has examined the above provisions of the **Partnership Act**, as well as the aforementioned cases, submitted by the Plaintiff, to determine whether a partnership existed between the Plaintiff and the deceased and/or between the Plaintiff and the Third and Fourth Defendants. This Court accepts the Plaintiff's submissions that a partnership had existed between the Plaintiff and the deceased based on the learning in **Moore**, **Khan** and **Pooley (supra).**

53. The Plaintiff relied on the statement of Jessel MR in **Pooley**, at paragraph 42 hereinabove. In **Khan**, the House of Lords held that there was no rule of law that parties to a joint venture did not become partners until actual trading commenced. In **Khan** the three (3) parties entered into an agreement to form a partnership to open a restaurant. Before the opening of the restaurant the appellant provided most of the capital. However, the relationship between the parties broke down. The two (2) other partners continued to run the business of the restaurant without settling accounts with the appellant. The House of Lords found that a partnership had been formed even though trading as a restaurant had not yet commenced.

54. In **K9 Meat Supplies (supra)**, the application before the Court was a petition for the winding up of a company. Pennycuick J applied the "*Yenidje principle*" which states that where a company is carried on by individuals as a quasi-partnership, the court will so regard it on a winding up petition.

55. This Court agrees with Attorney for the Defendants that to rely on **K9 Meat Supplies** case to find that the parties entered into a partnership, which included the Second Defendant, is misleading. The "*Yenidje principle*" should be confined to winding up petitions and used as a guide by the Court in determining whether it is "*just and equitable*" that a company should be wound up. As Pennycuick J stated in **K9 Meat Supplies (supra)** at p. 1117:

> "*There is no doubt that where a company is carried on by individuals as a quasi-partnership the court will so regard it in relation to a winding up petition …*"

And later on in the judgment at p. 1118 Pennycuick J explained:

"…*So you may treat a company of this kind as if it were a partnership for the present purposes, but you must treat it as a partnership constituted upon the terms of the articles of association of the company.*"

56. Finally, the Plaintiff submitted that the Court is entitled to award him damages in the sum of $1.5 million under the heading "*further or other relief*". In **Serrao**, the Plaintiff, having suffered a loss on the sale of shares which were held for several days by the Defendant, despite an earlier consent order in another action over the said shares that they be handed over forthwith, brought an action against the Defendant for damages for detention, and that the said consent order had concluded with the usual prayer for "*such further and other relief as the nature of the case might require.*" On appeal, it was held that the Plaintiff was entitled to the full range of remedies open to him.

57. Counsel for the Defendants submitted that any claims for sums of monies based on a simple contract would be statute-barred after the expiry of four years from the date on which the cause of action accrued. Since the Plaintiff filed his writ on 19.4.02, he was statute-barred from claiming any damages due to him prior to 20.4.98. However, it is to be noted that the agreement entered into between the Plaintiff and the Third and Fourth Defendants occurred sometime in June 1998. The Plaintiff's entitlement, if any, to damages for breach of the Second Agreement, is therefore not statute-barred.

58. This Court accepts that since the Second Defendant was not a party to the First Agreement, then the First Agreement cannot be enforced against it.

(1) **Chitty on Contracts 25th edition, Volume 1, Chapter 18, p. 662, paragraph 1221**:

"*The doctrine of privity of contract may be stated as follows: a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it.*"

59. This Court accepts the Defendants submission that the Second Defendant, being a duly incorporated company, has no obligation to its incorporators once formed and it cannot be bound by any oral agreement made by its incorporators before coming into existence (even if it were made for or on behalf of the Plaintiff, which it was not). Support for this proposition is found in the following authorities:

(1) **Kelner v Baxter and Ors [1866] LR 2 CP 174** at 183, per Erle, CJ:

> "*When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights and obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made.*"

And at p. 185 per Byles J:

> "*It is said that the contract was ratified by the company after it came into existence. There could however, be no ratification … The ratification must be by an existing person, on whose behalf the contract might have been made at the time."*

(2) ***Re Empress Engineering Company [1880] Ch. D p. 125*** *CA* at p. 128, per Jessel, MR:

"*The contract between the promoters and the so-called agent for the company of course was not a contract binding on the company, for the company had then no existence, nor could it become binding on the company by ratification because it has been decided and, as it appears to me, well decided that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made because the ratifier was not then in existence.*"

(3) Harry Sutherland QC **Fraser & Stewart Company Law of Canada, 6th edition, 1993** pp 108 – 110 gives an explanation of the common-law on pre-incorporation contracts that are not in writing:

"*At common law, a contract [that is not in writing] made on behalf of a corporation before incorporation was not binding on the corporation and could not be ratified by it after incorporation.*"

(4) **Companies Act. Chap. 81:01, Section 20(2)**:

"20 (2) *Within a reasonable time after a company comes into existence, it may, by any action or conduct signifying the intention to be bound thereby, adopt a written contract made, in its name or on its behalf before it came into existence.*"

CONCLUSION

60. Having considered all the evidence this Court finds that on a balance of probabilities the evidence of the Plaintiff is to be preferred to that of the Defendants. Document "JM6" confirms that it was the intention of the parties to form and operate the Second Defendant. The Court therefore finds that a partnership arrangement existed between the Plaintiff and the deceased before he passed away. The Court accepts, as set out in "JM6",

that the Plaintiff is entitled to 40 per cent of the shares of the Second Defendant and further, that the Plaintiff is entitled to 40 per cent of the profits of the Second Defendant.

61. This Court also accepts on a balance of probabilities that the Plaintiff and the Third and Fourth Defendants did enter into an arrangement whereby the Plaintiff would in effect, develop and operate the business of the Second Defendant as formerly carried on by the deceased and that the Third and Fourth Defendants would be the name and face of the Second Defendant. However, the Court does not accept that the parties to the Second Agreement agreed to split the profits of the Second Defendant 50/50, that is, 50 percent of the profits to the Plaintiff and 50 percent of the profits to the Third and Fourth Defendants. The Court is of the opinion that the same arrangement as in the First Agreement continued between the parties, that is, to split the profits 40/60 with 40 per cent going to the Plaintiff and 60 per cent to the Third and Fourth Defendants.

62. On the question of damages, this Court finds that the Plaintiff is entitled to damages for breach of the Second Agreement made between himself and the Third and Fourth Defendants in June of 1998. However, the Plaintiff is not entitled to damages for breach of the First Agreement as such claim has now become statute barred.

63. This Court finds that the Second Defendant is not a proper party to this suit and therefore all the Plaintiff's claims against it are dismissed.

ORDERS

64. The Court therefore makes the following Orders and Declarations:

i) That the Plaintiff is the owner of and entitled to 40 percent of the shares of the Second Defendant;

ii) That the Third and Fourth Defendants do transfer 40 percent of the shares of the Second Defendant to the Plaintiff within 30 days hereof;

iii) That the Third and Fourth Defendants do pay to the Plaintiff, for breach of the Second Agreement, damages being 40 per cent of the profits of the Second Defendant for the period June 1998 to the filing of the action in April, 2002, to be assessed by a Master in Chambers on a date to be fixed by the Registrar of the Supreme Court;

iv) The Third and Fourth Defendants do pay interest at 6% per annum on the damages at (iii) above from April, 2002 to date of judgment.

v) An injunction restraining the Third and Fourth Defendants as the officers or agents of the Second Defendant, from transferring or in any way dealing with or disposing of or removing the Second Defendant's shares, cash, cash securities and other assets adverse to the interest of the Plaintiff; and

vi) That the Third and Fourth Defendants do pay the Plaintiff's costs of this action to be taxed in default of agreement.

Dated this 27th day of May, 2011

Amrika Tiwary-Reddy
Judge

.