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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 56 of 1982

Between:

RAM LATCHAN also known as K. R. Latchan — Appellant

and

LESLIE REDVERS MARTIN — Respondent

S. M. Koya and G. P. Shankar for the Appellant.
E. D. Lloyd Q.C. and T. J. Ginnane for the Respondent.

Dates of Hearing: 7, 8 & 9 March, 1983.

Delivery of Judgment: 23rd March, 1983.

JUDGMENT OF THE COURT

Quilliam J.A.

This is an appeal and cross-appeal from the decision of the Supreme Court in proceedings arising out of the business relationships of the parties.

The facts are set out in detail in the judgment appealed from, but it is necessary for present purposes to give a summary of them and of the background to the proceedings.

To avoid confusion it is convenient to refer to the parties as the plaintiff and the defendant.

The defendant is a retired accountant although never licensed as such. He was formerly employed by the firm of Pearce & Company which firm he later acquired. Over a long period from 1946 there developed a business relationship between, on the one hand, the defendant and on the other hand the plaintiff's father and mother and eventually the plaintiff himself. The plaintiff's father had been a farmer. His mother started a transport business. In about 1962 for the purposes of that business the practice developed of all income being paid to the defendant who would bank it in his personal account and pay all outgoings from the same account.

The plaintiff managed his mother's transport business and also operated businesses of his own. The practice continued in respect of all his business dealings of the defendant acting as his banker. The defendant rendered annual accounts to the plaintiff in respect of the money received and expended by him.

In 1970 the plaintiff decided to import buses from the English firm of Seddon Motors Limited for his firm which was registered under the name of K. R. Latchan Bus Service. He required two buses for his own business and he decided also to seek the sole selling agency for the English firm in Fiji, Samoa and Tonga. Following correspondence between the plaintiff (supported by the defendant) and Seddon Motors Limited an arrangement was made for the supplying of the two buses and also for the sole agency. The arrangement could not at once be put into effect because the plaintiff had to find a source of finance. The outcome of this was that the defendant agreed to finance him and must have been regarded by Seddon Motors Limited as the plaintiff's backer. An agreement, known as a Distributors Agreement, was entered into between an agent for Seddon Motors Limited and Brunswick Motors (described in the agreement as also trading as K. R. Latchan Bus Service).

This agreement is dated the 1st November, 1972. The importing of buses started earlier than that. The first order of two buses was placed in February, 1971. These were for use by the K. R. Latchan Bus Service itself. They were financed by the defendant. Six more arrived in October, 1971 and that marked the start of the business of Brunswick Motors. What was imported was the chassis and the bodies were built on them by the plaintiff. Both the cost of the chassis and the body-building was financed by the defendant. Upon the sale of completed buses they were either sold for cash or the defendant would finance the purchasers on the security of bills of sale. Over the years the defendant advanced substantial sums to Brunswick Motors. The account fluctuated from time to time as receipts from the business were paid in.

The business of importing chassis and selling buses flourished and between 1st January, 1973 and 31st December, 1977 74 bus chassis were imported.

On 17th December 1971, the plaintiff applied for registration of the business name Brunswick Motors and gave the date of commencement of that business as the 2nd February, 1971. On the 28th December, 1972 the plaintiff and the defendant joined in an application under the Registration of Business Names Act recording a change of particulars. This was for the purpose of recording a partnership between them. That partnership was shown as having commenced on the 17th February, 1971. The learned Judge found as a fact that it commenced on the 2nd February, 1971, which was the date shown as that on which the business of Brunswick Motors commenced.

The relationship between the parties deteriorated and on the 2nd October, 1978, the plaintiff wrote to the defendant giving notice of dissolution of the partnership as from the 30th September, 1978, and inviting the defendant to draw up the partnership accounts as at that date.

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In January, 1979, the plaintiff issued an Originating Summons seeking a number of declaratory orders, and then followed it in July 1980 by a Statement of Claim. It will be necessary for us to refer to the facts in more detail in respect of particular aspects of the appeal as we deal with each of them. We now summarise the nature and scope of the proceedings.

The Originating Summons sought declarations:

1. That the plaintiff formed the firm of Brunswick Motors and was at all times the sole proprietor of it.

2. That by reason of a confidential relationship existing between the plaintiff and the defendant and of a false representation made by the defendant the plaintiff was induced to accept the defendant as a partner.

3. That the defendant exercised undue influence over the plaintiff in order to obtain a one-half interest in the firm.

4. That the partnership was dissolved on 30th September, 1978, and that accounts should be settled.

5. That in the settlement of accounts certain items should be debited against the defendant.

6. That the defendant had used for his own purposes money deposited with him by the plaintiff on behalf of the firm.

The plaintiff accordingly sought orders that the partnership be set aside and that the defendant account to the plaintiff, and also that the defendant pay damages or compensation for his use of the firm's money.

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The Statement of Claim in its finally amended form sets out the allegations in considerable detail. The relief sought is in substance the same as that set out in the Originating Summons although there are additional prayers for relief as well. There was a Counterclaim by the defendant in which he in his turn sought relief. That relief may be summarised as follows:

1. A declaration that a partnership had existed from 17th February, 1971 until 30th September, 1978, and had been dissolved on the latter date.

2. A declaration that after dissolution the plaintiff wrongfully used the partnership assets to derive profits for himself.

3. Orders for the taking of accounts and for the final settling of accounts by the Court at the hearing of the action.

4. An order for payment by the plaintiff to the defendant of the latter's share.

5. An order for payment by the plaintiff of the defendant's share of any profit made after dissolution, or alternatively for payment of interest.

It is unnecessary to give any greater detail of the pleadings at this stage, although reference will have to be made later to certain particular aspects.

After a lengthy hearing the learned Judge delivered a reserved judgment. The effect of that judgment was to disallow the whole of the relief claimed by the plaintiff with two relatively minor exceptions. Those were in respect of accountancy fees and commission charged by the defendant to the partnership each of which was ordered to be deleted as not

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being properly chargeable in the partnership accounts. On the counterclaim the learned Judge made the declarations sought as to the existence and dissolution of the partnership and as to the wrongful use by the plaintiff of the partnership assets after the dissolution. He then decided that he should settle and pass the accounts and did so, and he made an order for the sale by the defendant to the plaintiff of a one-half share in the partnership, and for the payment by the plaintiff of the purchase price which, together with interest, he fixed at $257,387.73.

The plaintiff appealed against the disallowance of all those items of relief upon which he had failed and also against the declarations and orders made against him in the counterclaim. The defendant in turn cross-appealed against the exclusion from the partnership accounts of the two items of accountancy fees and commission, and against the disallowance of costs.

Before considering any of the particular grounds of appeal it is necessary to say something in a general way about the course which events took between the parties.

The arrangement whereby the plaintiff (and, before him, his mother and father) had paid money to the defendant who had simply deposited it to his personal account was, to say the least, an unusual one. There can be little doubt that many of the difficulties which arose in the course of the proceedings must be attributed to this practice and in particular to the fact that the defendant made no attempt to maintain any separate set of accounts for the partnership as distinct from the numerous other people with whom he was dealing. We will refer later to some of the repercussions of this.

Nevertheless a close business relationship became established between the plaintiff and the defendant and there seems little reason to doubt that for a period of about six years that was both a profitable and an amicable relationship.

There came a time, however, when this changed. Some time in 1977 the plaintiff decided to get rid of the defendant whom he regarded as a nuisance. In about October, 1977, the partnership was in credit with the defendant to the extent of over $121,000. The plaintiff stopped making payments into the defendant's account and indeed drew on the account by the end of January 1978 to a total of about $187,000, so that the partnership's account was then in debit by about $75,000. When the defendant realized that payments to his account had stopped he refused to provide any further finance for the partnership.

Although the plaintiff had decided to get rid of the defendant he does not appear to have done anything about it until May 1978 when he consulted his solicitors. On 2nd May 1978 the solicitors wrote to the defendant saying that an audited statement of the plaintiff's interest in Brunswick Motors was needed to enable him to satisfy his bank in respect of an application for credit. The defendant was asked to make his records available for inspection. Concern was expressed that there had been no separate bank account kept for the partnership. This letter was followed by a visit to defendant's office by the plaintiff and Mr. Mills, an accountant, but the defendant became upset and refused to let them see his accounts. Notwithstanding the deterioration in their relationship it was not until the 2nd October, 1978, that the plaintiff wrote to the defendant with notice of dissolution of the partnership as at the 30th September, 1978, and a request that accounts be prepared to that date. On the 16th January, 1979, the plaintiff issued his Originating Summons and since then the parties have been involved in the present proceedings.

A substantial number of matters are in issue between the parties, but inevitably some are of more significance than others. There are two main matters:

1. Whether there was a valid partnership created between the parties.

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2. If there was, whether the learned Judge was in error in declining to appoint a referee and order the taking of accounts and in ordering a sale by one party to the other.

We deal with these in turn and will then consider the ancillary matters.

1. Partnership

It was common ground that the parties went through the process of establishing themselves as partners in the business known as Brunswick Motors. A relatively minor matter arose as to the date of commencement of that partnership, and we will deal with this among the ancillary matters. The real issue concerned the plaintiff's allegation that there should be an order setting aside the partnership on the ground that it was wrongfully and unlawfully procured by the defendant and so was never to be regarded as a valid partnership. This allegation was made upon two grounds:

(a) That the defendant acted as the plaintiff's sole business adviser, accountant and financier and was accordingly in a confidential and fiduciary relationship to the plaintiff so as to have been able to acquire a knowledge of the plaintiff's business secrets and methods. In this way, and by reason also of a false representation made by the defendant, he had induced the plaintiff to accept him as an equal partner.

(b) That by the exercise of undue influence over the plaintiff the defendant had obtained for himself a half share in the partnership business.

The learned Judge rejected both these allegations.

(a) Fiduciary relationship and false representation

There is no doubt that the defendant was fully aware of the plaintiff's affairs. He had advised the members of the family for years and helped the plaintiff with advice and finance. He knew of the plaintiff's desire to make an arrangement for the importing of buses and took part in the negotiations to achieve that. It is no doubt true to say that he was in a fiduciary relationship to the plaintiff in the sense that he was receiving the plaintiff's money into his personal bank account and so was under a duty to account to the plaintiff for that money. There is, however, no suggestion that the defendant failed to account for any of that money and there seems to be no connection between the fiduciary relationship and the creation of the partnership.

The allegation that there was a false representation which induced the plaintiff to agree to the partnership is contained in paragraph 11 of the Statement of Claim:

> "(a) That the defendant in the month of December, 1972, at Suva made representations to the plaintiff to the effect that the plaintiff's late father had asked the defendant to guide and assist the plaintiff in his business affairs after the death of the plaintiff's father.
>
> (b) That the defendant when making the representations aforesaid also made false representations to the plaintiff to the effect that the plaintiff was heavily indebted to the defendant."

Paragraph (a) would not appear to involve any representation at all, but the matter was clarified by Mr. Shankar on behalf of the plaintiff when he made it clear that he was relying upon the allegation that the defendant had falsely represented the plaintiff was heavily indebted to him. This in turn was further refined because it was common ground that the extent of the plaintiff's indebtedness at that time was $32,501.92.

The question therefore was whether, when that indebtedness was described by the defendant as heavy, that was a false statement. Mr. Shankar's argument was that the plaintiff had at that time assets valued at $107,000 and also an interest in 200 acres of freehold land, and as well had shown a profit for 1972 of $39,386.10. It was accordingly argued that in the light of such a financial position it could not be properly said that by owing some $32,500 the plaintiff was heavily indebted.

It should be observed that the value of the net assets was taken from the evidence of Mr. Vilash, the accountant called on the plaintiff's account. In that passage in his evidence Mr. Vilash was referring to the accounts of K. R. Latchan Brothers. The plaintiff was in partnership with his brother in a dairy business and it appears the accounts related to that partnership rather than to the plaintiff personally. Whether that is so or not, however, the learned Judge considered that owing a sum of $32,500 constituted heavy indebtedness and we cannot for a moment say he was not entitled to make that finding. The sum is a large one and the plaintiff's business at that time was a modest one.

It was further argued by Mr. Shankar that the extent of the plaintiff's indebtedness had been concealed from him by the defendant, and that if he had realized it was only some $32,500 he would not have felt under an obligation to admit the defendant to partnership. The learned Judge has, however, made it clear in his findings that the plaintiff was fully aware of his position, in general if not in precise detail, and we can see no basis upon which we ought to say that he could not properly have made that finding.

It has not been established that the learned Judge was in error in holding that the partnership did not arise from the breach of a fiduciary relationship or from any false representation.

(b) Undue influence

This allegation was based on the proposition that the defendant had taken an unfair advantage of the plaintiff.

The question of undue influence is one which requires to be considered upon the basis of whether a special relationship existed between the parties. If it did then there arises a presumption of undue influence which it is for a defendant to rebut (18 Halsbury 4th Edition p. 148, para. 330). What constitutes a special relationship for this purpose was considered in In re Craig (1971) Ch. 95. Ungoed-Thomas J. reviewed the authorities and summarised the position at p. 104 in this way:

> "What has to be proved to raise the presumption of undue influence is first a gift so substantial (or doubtless otherwise of such a nature) that it cannot prima facie be reasonably accounted for on the ground of the ordinary motives on which ordinary men act; and secondly, a relationship between donor and donee in which the donor has such confidence and trust in the donee as to place the donee in a position to exercise undue influence over the donor in making such a gift."

The emphasis is accordingly upon inequality of position and bargaining power. This emerges clearly from the cases in which a special relationship has been held to exist. In In re Craig it was the case of a man whose wife had died leaving him her estate and who then engaged a secretary-companion to whom he proceeded to make a series of gifts totalling over half his estate. In Zamet v Hyman (1961) 3 All E.R. 933 a 71 year old widow who proposed to marry a 79 year old widower was taken to the latter's solicitor and induced to sign a previously prepared deed relinquishing her rights to claim against his estate.

These cases are sufficient to indicate that the present case cannot be regarded as one of special relationship.

The parties were upon reasonably level terms and certainly the plaintiff was not in any specially vulnerable position. We will return to this shortly, but it is necessary first to refer to the general principle which is to be applied in considering the claim of undue influence. The rule is of long standing and provides that where a transaction is shown to have been so opposed to fair dealing that it ought not to be binding the Court will be prepared to interfere (Chesterfield v Janssen (1751) 2 Ves. Sen. 125 at p. 155; 28 E.R. 82 at p. 100).

The plaintiff's case was that the defendant had established himself in a position of authority over the plaintiff in so far as he had full control of all his finances and was his sole business adviser and accountant as well as having been the whole family's guide, philosopher and friend. It is true that the defendant had achieved very much that role. It is necessary, however, to look also at the position of the plaintiff. In December 1972 when the defendant was admitted as a partner the plaintiff was about 31 years of age and already well established in business. He had been in partnership with his mother and brother in a dairy business and, in 1962, had started his own bus service, namely K. R. Latchan Bus Service. It appears both these businesses had operated successfully. He had been sufficiently astute as to see the possibilities of importing buses for distribution, not only throughout Fiji but also in Samoa and Tonga. He required the assistance which the defendant was able to supply in order to conclude that arrangement, but it is clear from the correspondence that he had a full understanding of the business implications.

The plaintiff was also, at least in general terms, aware of his own financial position. He had been receiving from the defendant annual statements of his account, and there is no suggestion that he was incapable of understanding them.

The extent of the plaintiff's intellectual capacity and general acumen is demonstrated by the fact that a few years later, in 1977, he was elected as a Member of Parliament. It is plain, therefore, that the plaintiff was well able to look after himself and was at no stage dealing with the defendant from a position of intellectual or emotional weakness.

Before any question of a partnership arose the plaintiff was indebted to the defendant. When the possibility of a new business of importing buses arose it must have been obvious to the defendant that he would be expected to provide the finance. He had provided finance for members of the family over a number of years and had done so without security. Indeed, even at a time when the indebtedness of the partnership to him reached $100,000 he still held no security. The protection which he sought for himself in respect of the new venture of Brunswick Motors was to say that he thought he should have a partnership. He pursued this request over a period of about two years, and it is apparent that for most of this time the plaintiff was able to resist these requests. The defendant eventually made it clear he was not prepared to continue financing the plaintiff unless he received a partnership. This was not a matter of pressure or unfair bargaining. It was a business negotiation. The plaintiff was at liberty to seek his finance elsewhere and terminate his association with the defendant. He chose not to do so, and the reason is obvious.

At no stage did the plaintiff attempt to find an alternative source of finance. It must have been plain to him that he could not possibly have obtained such liberal and satisfactory terms as he had received and could expect to receive from the defendant. He was required to find no security and he could expect to draw almost at will upon the defendant's account upon the basis of a daily rate. All receipts went at once to lower the account.

He was in truth receiving all the advantages of operating on a current overdraft account but with none of the disadvantages.

It has been argued that in agreeing to accept the defendant as a partner he was at a disadvantage because he received no independent legal advice. It is the case that he did not consult a solicitor as to this proposal, although it is plain he could well have done so had he wished. He had solicitors who had acted for him and there is no suggestion that he was dissuaded from consulting them. The absence of independent legal advice is one of the factors which may lead to the conclusion that there has been undue influence but it does not rest alone. This is to be seen from the leading case of Allcard v Skinner (1887) 36 Ch. D. 145. In the present case the absence of legal advice was in no sense a determinative factor because the plaintiff was fully aware of his position and able to make his own decision. Although we have expressed ourselves a little differently, we are in full agreement with the learned Judge that there was no undue influence exercised by the defendant to procure a partnership and the appeal against the finding as to this must fail.

We should perhaps add that, even if this had been a case in which there was a special relationship, the presumption of undue influence was, upon the evidence, rebutted for just such reasons as we have already set out.

2. Appointment of Referee and Taking of Accounts

Accepting that there was in existence a valid partnership which was in due course dissolved as at the 30th September, 1978, the next main issue concerns what consequences ought to have followed. The learned Judge decided to settle and pass the accounts in the form presented to him and ordered a sale of the defendant's half share to the plaintiff. This has been strongly challenged.

It requires consideration under two heads:

(a) As to the settlement of accounts

(b) As to the order for sale.

Some general observations of application to both those matters must first be made.

It was in 1977 that the plaintiff decided he wanted to get rid of the defendant. It was the defendant's case that the reason for this was the plaintiff's growing realization that the business of Brunswick Motors had flourished and that he wished to regain the defendant's interest for himself. This may well be true, but at least it must be borne in mind that the plaintiff was the partner who desired the dissolution.

He set about trying to obtain an accounting from the defendant and he met with resistance. Finally, he gave a notice of dissolution. He was entitled to do so and one might have expected that the normal consequences of dissolution would be put into effect. Those would have involved a taking of accounts, the resolution of differences by a referee, and then the division of proceeds in accordance with the entitlement of each partner. Had the plaintiff acted promptly to achieve that there seems no reason to believe there need have been any greater difficulty involved than the interpretation of the defendant's undoubtedly unusual accounting system. One might have expected, however, that a final winding-up could have been achieved in a fairly brief period.

That did not happen. Instead, after six or seven years during which the plaintiff accepted the existence of a partnership and the undoubted benefits which he had received from it he suddenly elected to try and repudiate the entire arrangement. In January, 1979, only four months after he had given his notice of dissolution, he issued his Originating Summons seeking a declaration that no valid partnership had ever existed.

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Not surprisingly this, and the action which followed, met with resolute resistence from the defendant. There followed, inevitably, long delays which were not finally resolved until the judgment of the Supreme Court was delivered in October, 1982. It has been said that some of the delay may have been due to the pressures on the Court itself, and that may be so. That was, however, a known likelihood and the moment the proceedings were issued it must have been obvious that the allegations which were made could not be resolved for a considerable period. It follows that the plaintiff, who initiated the entire matter by dissolving the partnership and then asserting it had never existed, had prevented the normal sequence of events from being pursued. The position which confronted the learned Judge must be considered in the light of that situation. He was required to make an order which was capable, four years after the event, of having some sort of practical application.

(a) Settlement of accounts

It is observed by the author of Lindley on the Law of Partnership, 14th Ed., p.553: "The right of every partner to have an account from his co-partners of their dealings and transactions is too obvious to require comment."

The only question for decision in this case was how that accounting was to be achieved. It had been contended for the plaintiff that there should be reference to a referee in order to enable any differences to be resolved. In the present case this would have achieved nothing.

It must be remembered that, although the defendant had rendered Statements of Account of Brunswick Motors every year, his books and records were primitive in the extreme. He operated for all his personal and business activities only a single bank account. He had not attempted to separate out the numerous dealings through that account affecting a variety of different people.

We will deal later with some of the consequences which must follow from this. It is sufficient for the moment to say that the compiling of partnership accounts for Brunswick Motors for the purposes of dissolution was a formidable task.

The plaintiff engaged Mr. Vilash, a qualified chartered accountant to undertake this task. Mr. Vilash encountered certain difficulties, but in the end he was able to compile a set of re-structured accounts. For this purpose he made certain assumptions, not all of which turned out to be justified, and eventually conceded that some errors had been made by him. On behalf of the defendant another chartered accountant was engaged and he also examined the books of the plaintiff's businesses as well as the re-structured accounts of Mr. Vilash. He was in general agreement with those accounts, but he noted seven points of difference which he thought required to be made. Each of these was considered by the learned Judge in the course of his judgment and findings upon them were duly made. They form the subject of some of the ancillary matters of appeal to which we will refer later.

In the result the learned Judge was presented with a set of accounts upon which an experienced accountant from each side were agreed, with the exceptions referred to. Those exceptions were of a legal and not of an accounting nature. It is therefore apparent that any question of reference to a referee would have been superfluous.

There was a matter which remained unresolved by the re-structured accounts. It related to the allegation made by the plaintiff that the defendant had on occasions applied partnership money for his own personal use, and in particular for lending to other persons and upon which he derived interest. Although it was never suggested that there was any element of fraud in this, and indeed it was conceded by Mr. Koya on behalf of the plaintiff that no question of conversion arose; nevertheless it was said that the use of a single bank account and the confusion of money from various sources must have resulted in this kind of misuse of

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partnership funds. We were at one stage referred to extracts from exhibits which were said to show that, at a time when the partnership was in substantial credit with the defendant, his account was in debit to the bank. It was therefore said that on these occasions at least there must have been improper use of partnership funds. The difficulty was, however, that it had proved impossible for the two accountants to demonstrate that this really was the case. A statement of agreed facts had been submitted to the Supreme Court in an endeavour to show what had occurred in respect of the sales of imported buses. That statement recorded that certain receipts and payments formed part of or had come from a pool of money in the defendant's account but that it was not possible to identify whose money was paid out of that account. It is unnecessary to pursue this topic any further than to say that, because of the inability of the accountants to resolve these matters, there seems to have been no point in the learned Judge ordering reference to a referee. He declined to do so and we are satisfied he was justified in doing so. He accordingly settled the accounts on the basis of the re-structured accounts but allowing for the findings he made upon the matters of difference, and we agree that this was the proper course.

(b) The order for sale

The usual course where former partners are in disagreement as to the division of partnership assets is for the Court to order a sale, and this is the course which it is contended the learned Judge ought to have followed. Instead, he determined the values of the assets upon the basis of the balance sheet and directed that the plaintiff purchase the defendant's half share.

The course which ought to be followed in such cases is well recognized but is subject to a certain amount of flexibility. The matter is dealt with by Lindley on the Law of Partnership, 14th Ed., in this way:

p. 598: "It has been already seen that, in the absence of a special agreement to the contrary, the right of each partner on a dissolution is to have the partnership property converted into money by a sale: even although a sale may not be necessary for the payment of debts."

And at p.599: "The rule as to selling partnership property is merely adopted in order that justice may be done to all parties, when no other course has been or can be agreed upon. It is not an arbitrary rule, inflexibly applied in all cases whether it is necessary or not; and although, if one partner or his representatives insist on a sale, the Court may not be able to refuse to enforce that right, still the Court is always inclined to accede to any other mode of settlement which may be fair and just between the partners."

The question, then, was how the learned Judge in this case was to achieve in 1982 a fair distribution between the partners of the assets of a partnership which had been dissolved four years earlier. There is little doubt that if application had been made to the Court at that time an order for sale would have been appropriate and would have been made. But the position had greatly changed. At the time of dissolution the partnership had stocks on hand to a value of over $282,000. This alone is sufficient to indicate that a sale four years later could not possibly reflect the true position at dissolution, because what that value was would be a matter of speculation and uncertainty.

There remained the question of whether the values of assets shown in the balance sheet reflected reasonably the true values at that time. This could not have been the subject of any precise finding, but we have no doubt the learned Judge was entitled to adopt those values. They were contained in a balance sheet which had been compiled after making due allowance for depreciation (and accordingly may well have represented rather less than the true market value) and after the writing off of stock to the extent of $12,100.

The values of stock were taken from figures supplied by the plaintiff and ought to be accepted by him.

We consider that the course followed by the learned Judge had the effect, as nearly as could be obtained, of equating the result of a sale if one had taken place in late 1978. That was the time when the plaintiff should have been seeking a sale and it was no fault of the defendant that the matter was not resolved then. We accordingly conclude that the learned Judge was entitled to make the order for sale that he did.

Ancillary Matters

Having dealt with the two principal issues involved, which encompass several of the grounds of appeal, we turn now to a number of ancillary matters which formed the subject of argument on appeal. We do not suggest that they are of a minor or trifling nature, but we have found it convenient to isolate first the matters of particular importance. We have not, therefore, dealt with the appeal in the same order as the grounds are set out in the notice of appeal. In any event the grounds as set out in that notice contain many duplications and repetitions and so need not be dealt with seriatim.

1. Commencement of Partnership

The first formal appearance of the defendant as a partner is to be found in a form signed by the parties on the 28th December, 1972 for the purposes of the Registration of Business Names Act. This was the record of the defendant's admission to the business of Brunswick Motors as a partner and it purports to show that the partnership commenced on the 17th February, 1971.

It was the plaintiff's case that, if there was a partnership at all, it did not commence until the 28th December, 1972, and that accordingly the plaintiff was entitled to any profit derived prior to that date.

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The learned Judge held that the date of commencement was 2nd February, 1971.

In the normal course a partnership will commence on the date of the agreement to form the partnership. The parties may, however, agree that their partnership shall operate retrospectively. (Lindley, p. 173). Where there is no written agreement it will no doubt require convincing evidence that the intention was that it should be retrospective.

It seems clear in this case that there was indeed agreement between the parties that there should be retrospective operation, although the precise date of commencement is rather less clear. The business of Brunswick Motors had commenced in about November, 1971. In his evidence the plaintiff in effect acknowledged that the partnership was to operate from some time prior to December 1972, although he resisted the suggestion that it went back as far as 2nd February, 1971. When his solicitors wrote to the defendant on the 2nd May, 1978, to ask for access to his records they specified that it was desired to see those records "from commencement of the partnership during November 1971 up to the date of audit." The first set of accounts for Brunswick Motors is for the period from November, 1971, to the 31st December, 1972. These accounts show the defendant as a partner and they were seen by the plaintiff who acknowledged his ability to understand them. There was, therefore, ample evidence upon which to find that the commencement date was to be retrospective.

It is, however, less easy to see that there was a sufficient basis for the finding that the commencement date was the 2nd February, 1971. This finding was really based upon that date having been shown in the document which evidenced the creation of the partnership. Both parties denied having written that date. The learned Judge held that it had been the plaintiff and he did so upon a comparison of the way in which the figures were written.

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It seems to us that this was a rather slender basis for the finding, but we need not pursue the matter further. It is clear that the business of the partnership did not commence at least until the arrival of an order of six chassis in October, 1971. Prior to that there had been two buses imported but they were for the use of the plaintiff's bus service and formed no part of the business of Brunswick Motors. To adopt a commencement date in November, 1971, rather than in February, 1971, does not, therefore affect the financial relationship between the parties.

We are not prepared to hold that the commencement date ought to have been December, 1972, but, for what it may be worth, we think the finding of the learned Judge should be varied to November, 1971, that is, to coincide with the opening of the partnership accounts.

2. Use of Assets after Dissolution

In his Counterclaim the defendant has included a prayer for relief in respect of the alleged wrongful use by the plaintiff of the partnership assets over a period of some four years after dissolution. He claimed to recover his share of the profits made during that period or alternatively interest. The learned Judge found that the plaintiff had used the assets wrongfully and made an award of interest which he quantified at $42,897.94.

There was evidence given at the hearing concerning the use by the plaintiff of the assets after dissolution and it was a matter canvassed in argument. The appeal in respect of this matter is based, however, upon a procedural objection.

At the time the hearing commenced the pleadings had reached the point where there was a Counterclaim which contained a single prayer for relief, namely for a declaration that the partnership be dissolved. On the first day of the hearing counsel for the defendant submitted to the Court a

document headed Proposed Prayer for Relief. It appears that this was, in effect, an application for amendment of the Counterclaim by the addition of several new grounds. The Proposed Prayer contained 7 paragraphs in which particular relief was sought. The record made by the learned Judge shows that Mr. Koya offered no objection to any of those paragraphs except paragraph 3. In respect of paragraph 3 he seems to have maintained his objection. The learned Judge is recorded as having said that, without reading paragraphs 1 to 26 of the Defence, he could not say whether the proposed paragraph 3 arose on the Counterclaim. He gave leave to amend the Counterclaim by including all 7 prayers for relief.

Paragraph 3 prayed:

> "A declaration that after the dissolution of the said partnership the Plaintiff wrongfully used the partnership's assets to derive profits therefrom without accounting therefor to the Defendant."

The objection which is now raised is that there was no pleading upon which that prayer could have been based and that it ought not to have been included as an amendment to the Counterclaim.

This submission is based upon Order 18 r. 8(1) of the Rules of the Supreme Court which provides:

> "8.(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality -
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading."

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It is perhaps unfortunate that there had not been any express allegations of fact directed to the use by the plaintiff of the partnership assets over the period following dissolution. We do not think, however, that the pleadings were so deficient as to justify us in holding that the award of interest which was made upon the basis of paragraph 3 in the prayer to the Counterclaim should fail upon a matter of procedure.

It was implicit in the prayer that there was an allegation of wrongful use of assets even though that may have appeared in the wrong place. It was also implicit in the fact that both parties sought the taking of accounts that those accounts should embrace the position between them for such period after the dissolution as may have been necessary to determine the full entitlement of each of them. What really happened was that the plaintiff engaged in an unofficial way in a winding-up of the partnership business. He carried on the business on a reduced scale, gradually sold many of the assets, and eventually lodged some of the proceeds in a bank. Any profit derived by him in doing that was something for which he was required to account. A taking of accounts could therefore be expected to include that period. We are not prepared to uphold the procedural objection raised.

The defendant sought either a share of profits made during the additional four years or alternatively interest. In the course of the hearing he elected to pursue only the claim for interest and this was the basis upon which judgment was given. What the learned Judge did was to allow interest at 5% per annum on the value of the defendant's share in the partnership as at the date of dissolution.

We are not prepared to say that was an approach which was not open to the learned Judge. The only alternative would have been to try and assess the actual profit which ought to have been made by the proper conduct of the business during that period.

The accounts in respect of the actual conduct of the business by the plaintiff are materially affected by the fact that he had sold some of the partnership stock to his own business of K. R. Latchan Brothers at cost. In these circumstances some attempt would need to have been made to reconstruct the accounts upon a proper basis of trading.

The learned Judge chose to make an award of interest which he considered to be less to the detriment of the plaintiff than a notional calculation of profit, and we can see no reason for interfering with that. This ground of appeal must fail.

3. Defendant's Capital Contribution

The opening accounts of the partnership show each partner to have introduced a capital of $10,000. It was found as a fact by the learned Judge that the defendant did indeed introduce such a sum and one of the grounds of appeal is that this finding was not supportable on the evidence.

The argument advanced was that at the time the partnership was agreed upon, namely 28th December, 1972, the defendant's account at the bank was in debit to the sum of $38,894 and so there could have been no question of his having contributed $10,000. It was, however, never the defendant's case that he had drawn this sum in cash. What he had done was to effect the capital contributions for each of them by journal entry. His evidence was that at that time the plaintiff's mother owed the plaintiff $13,000, and the plaintiff's capital contribution came, by means of journal entry, from that source. The defendant's own contribution is shown as having come from his own account. This was not a reference to his bank account, but to the account between himself and the plaintiff. The effect of these two entries was to reduce what would otherwise have been an indebtedness by the partnership to the defendant of $52,501.92 to an indebtedness of $32,501.92.

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That is the figure shown in the opening accounts. It was not necessary for the defendant to show he had made his contribution in cash so long as it was made for valuable consideration. Clearly it was and there was accordingly a proper basis for the learned Judge's finding.

4. Whether Money Repaid to Defendant was Recoverable

Throughout the period of the partnership, and indeed from long before that time, the defendant was advancing money as part of his business. The learned Judge held that he was a moneylender within the meaning of the Moneylenders Act, Cap. 234. This finding has not been challenged. It was alleged on behalf of the plaintiff that, as the defendant was never licensed as a moneylender any sums which had been lent by him to the partnership should be held to be irrecoverable. This was upon the basis of section 15 of the Moneylenders Act which provides:

> "15. No contract for the repayment of money lent after the commencement of this Act by an unlicensed moneylender shall be enforceable."

This argument was met by the decision of the High Court of Australia in Kilgariff v Morris (1955) 91 C.L.R. 524 in which it was held that the corresponding section of the Australian Moneylenders Act did not apply to the case of money contributed by a partner, who was a moneylender, to partnership funds for the purpose of the partnership beyond the amount of capital he had agreed to subscribe. We need not refer in any greater detail to Kilgariff v Morris because we did not understand Mr. Koya to challenge its authority. He contented himself with submitting that the amount advanced by the defendant would not have been recoverable until after the accounts had been finalised - i.e. after dissolution.

This would not seem to have any bearing on the present proceedings and we do not find it necessary to pursue this topic further.

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5. Interest Charged by Defendant

Throughout the period of this partnership the defendant debited the partnership regularly with interest on the amount from time to time owing to him. This was allowed by the learned Judge, but it is argued that there was no authority for the defendant to have charged interest.

Section 25 of the Partnership Act, Cap. 248, provides:

> "25. The interest of partners in the partnership property and their rights and duties in relation to the partnership shall be determined subject to any agreement, expressed or implied, between the partners by the following rules -
>
> ...
>
> (c) a partner making for the purpose of the partnership any actual payment or advance beyond the amount of capital which he has agreed to subscribe is entitled to interest at the rate of five per cent per annum from the date of the payment or advance."

There was no evidence as to the rate of interest charged by the defendant. The onus was, of course, upon the plaintiff to show that the rate was in excess of five per cent if that were thought to be the case. It was open to the defendant to charge interest unless there was an agreement to the contrary. There was no evidence of any such agreement. Indeed, there was evidence indicating that the plaintiff had acknowledged the defendant's right to charge interest. Each of the annual accounts showed the payment of interest and these were seen and understood by the plaintiff. He must be taken to have approved of it. This ground of appeal must fail.

6. Buses Imported in the name of K. R. Latchan Bus Service

Notwithstanding the formation of Brunswick Motors it was the plaintiff's case that between 1971 and 1974 a total of 38 chassis were imported by his own business known as

K. R. Latchan Bus Service and that these ought not to have been shown in the partnership accounts.

There was at all times a good deal of confusion with regard to the plaintiff's various business interests. This is demonstrated by the fact that in the Distributors Agreement with Seddon Motors Limited the Distributor is described as "Brunswick Motors also trading as K. R. Latchan Bus Service." It was for the plaintiff to prove that in respect of the 38 chassis in question they were intended to be the property of K. R. Latchan Bus Service and not of Brunswick Motors. The learned Judge held that this had not been established and we have no doubt that was a finding he was entitled to make.

Brunswick Motors was established for the express purpose of importing buses and chassis for distribution and sale. Apart from the first two buses which went directly to K. R. Latchan Bus Service for its own use, all the rest were re-sold. The probability at once arises therefore that this was done in accordance with the original intention. The use of the name K. R. Latchan Bus Service for the purposes of importation has no significance. That name and Brunswick Motors were used interchangeably on many occasions.

In particular, however, in each of the years 1971 to 1974 the importations were clearly reflected in the accounts of the partnership which were seen and accepted by the plaintiff.

7. Damages for Use of Confidential Information

The plaintiff sought an order for damages or compensation

> "for the use of confidential information, matters or methods of his business, or for use of Plaintiff's secrets."

We need devote little time to this claim which was clearly misconceived. On behalf of the plaintiff it was sought to rely on the case of Seagar v Copydex Ltd (1967) 2 All E.R. 415, but that was a case so far removed from the present one as to require no further mention. There was no suggestion that the defendant used any knowledge he may have gained of the plaintiff's affairs in order to compete with him or in some other way put that knowledge to profit otherwise than within the partnership. There is no merit at all in this ground of appeal.

9. Travelling Expenses Charged by Defendant

The defendant in each year charged travelling expenses against the partnership and objection was taken to the inclusion of these sums. There can be little doubt that any travelling expenses actually incurred on partnership business were properly to be debited against the business. The appeal on this topic was based on the submission that it was necessary for the defendant to show that the expenses had been bona fide incurred. Putting aside the fact that this seems to involve a reversal of the onus of proof, there was ample evidence on which the learned Judge was entitled to hold that the expenses had been incurred.

In the first place, they were all recorded in the accounts each year and were not the subject of any protest by the plaintiff. Moreover, they had been checked by Mr. Vilash in the compiling of his re-structured accounts, and the only real variation which seems to have been suggested by him was in the allocation of the expenses to particular years. In the end Mr. Vilash appears to have arrived at a total over the years which exceeds the amount claimed by the defendant. This ground of appeal has not been established.

10. Garage and Workshop

The garage and workshop used for the partnership

business were situated on land belonging either to the plaintiff or his family. They were shown throughout as assets in the partnership accounts. The plaintiff's case was that this was not correct and they should now be excluded. The learned Judge declined to do so and we can see no basis upon which we should differ from that view.

The garage and workshop were taken in to the opening accounts at a value of $5,575. During the period of the partnership there were additions made to a total value of $39,888 all of which was paid out of the partnership so that, at the time of dissolution, and allowing for annual depreciation, the value had risen to $37,582. It is not easy to see upon what basis this item should be excluded, and we note that there was no argument advanced in support of the appeal on this point.

11. Expenses Claimed by Plaintiff

The Plaintiff sought declarations that he was entitled to debit against the final partnership accounts $3,600 per annum by way of rent for the use of his garage and workshop, $2,400 per annum for the use of his car, and $6,000 per annum by way of remuneration for his services in managing the operations of the business. None of these was allowed by the learned Judge and we agree that they should not have been.

As a partner the plaintiff was entitled to no remuneration other than his share of profits (Partnership Act, Cap. 248, s. 25 (f)) and there was no evidence of any agreement between the parties for the charging of rent or car expenses. No doubt if the plaintiff did in fact incur car expenses on the partnership business and had charged them they may well have been paid, as was the case with the defendant's interest and travelling expenses. They appeared in the plaintiff's claim, however, as an afterthought and were unsupported by any evidence.

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12. Allowance on Spares and Chassis

In preparing his re-structured accounts Mr. Vilash added 10% to spares and 20% to chassis in respect of stock taken over by Brunswick Motors when it commenced business. It is not at all clear what this was intended to represent, and there is no pleading in the Statement of Claim which seems to refer to it. The argument advanced by Mr. Shankar on this ground of appeal was that the plaintiff was entitled to a reasonable profit for selling this stock to the partnership. Whether that may have been so or not, the fact is that there is no evidence of any agreement by the parties that this charge should be made. Indeed, the stock was taken in at valuation. We are satisfied the learned Judge correctly disallowed it.

13. Accountancy Investigation Charges

It was part of the plaintiff's case that he had been put to considerable expense by having to engage a firm of accountants for the purpose of analysing and re-constructing the accounts kept by the defendant, and he included a prayer for relief in respect of all costs incurred by him in that way. This was disallowed by the learned Judge.

We are inclined to the view that this would have been a proper claim by the plaintiff because of the confusing and primitive nature of the defendant's records. There seems to have been ample justification for the employment of skilled accountancy assistance in order to analyse and make sense out of those records. We find ourselves, however, confronted by an absence of proof as to what would have been an appropriate sum to award. In his judgment the learned Judge refers to having been informed by Mr. Chernov that the accountants' charges were $15,000. It is possible this ought to have been a reference to Mr. Koya or Mr. Shankar as it seems unlikely that counsel for the defendant would have been in possession of this information.

However, that may be, the real problem arises from the fact that we can find no reference in the evidence to charges which were incurred in this way. What does emerge is that the firm of accountants extended their investigations to cover the plaintiff's other businesses and so the total charge would not all have been attributable to the present proceedings.

Although we are sympathetic on a matter of principle, we do not feel justified in guessing at what an appropriate award might be and this ground of appeal must accordingly fail for lack of proof of quantum.

14. Costs

The learned Judge declined to make any order as to costs on claim or counterclaim.

Each party has appealed against this. For the reasons we will give when we deal with this topic under the cross-appeal the plaintiff's appeal concerning costs must fail.

15. Other matters

Lest it be thought we have overlooked them we should mention that there were a few remaining matters included among the grounds of appeal with which we have not specifically dealt. It is sufficient to say that they are for the most part of a minor procedural nature. We have considered them but can find no merit in any of them and do not propose to refer further to them.

CROSS-APPEAL

The defendant has cross-appealed in respect of three matters.

1. Accountancy fees

In each year the defendant debited the partnership with accountancy fees. These were disallowed by the learned Judge upon the basis that the defendant had acknowledged that part of his contribution to the partnership was the provision of accounting services, and that there was no evidence of agreement by the plaintiff for a charge to be made for these services. He accordingly concluded that the charges made represented a remuneration to the defendant in his capacity as a partner in contravention of section 25(f) of the Partnership Act. With respect to the learned Judge we feel unable to agree.

We think this is a matter which turns upon whether the plaintiff agreed that the charges should be made. If he did, then, notwithstanding that they may have had the character of remuneration, the defendant was entitled to claim them. The learned Judge considered there was no evidence that the plaintiff agreed to them, but we think that there was. We referred in a number of the plaintiff's grounds of appeal to the fact that he saw and understood each year the statements of account and must be taken to have approved them and agreed to their contents. We think the same comment applies in respect of the accountancy charges. These were regularly shown in the accounts, year by year, and were evidently the subject of no protest or objection. We consider this amounts to agreement by him that the charges be made. We accordingly allow the cross-appeal as to accountancy charges which should be restored as a debit against the partnership.

2. Commission

The defendant also charged against the partnership commission on the sums advanced by him. These were disallowed by the learned Judge and we consider they were correctly disallowed.

It is true that, like the accountancy charges, commission appears in the accounts, although only in three of the years and that the plaintiff at the time accepted them. They differ from accountancy fees, however, in that they lack any proper basis at all.

The charge for commission was referable solely to the sums advanced, and it was acknowledged on behalf of the defendant that it could be no more than a procurement fee. As there was no question of procurement involved because the defendant simply drew on his own account there could be no proper basis upon which commission could be charged. This ground of cross-appeal must fail.

3. Costs

The outcome of the proceedings in the Supreme Court was that the plaintiff succeeded upon two of his prayers for relief. These were the exclusion from the accounts of the charges made by the defendant for accountancy fees and commission. These two items together totalled $10,515.46. He failed on all other matters and in particular on his challenge to the validity of the partnership and his claim for the taking of accounts. On the counterclaim the defendant succeeded and obtained judgment for a total of $257,387.73. It is not easy to understand why in those circumstances there was no order for costs in favour of the defendant.

The question of costs is one which is in the discretion of the Court, but that is a judicial discretion and is to be exercised in the light of established practice. We consider that costs ought to have followed the event and that the cross-appeal is entitled to succeed in this regard.

The amount of the costs is less easy to determine.

It cannot be an order for costs in full because the plaintiff succeeded in part and some regard must be paid to the unsatisfactory nature of the defendant's records which had a direct bearing on the length of the trial. In the circumstances we consider a proper award would have been to allow the defendant his costs but reduced by one-quarter. Regard would, of course, have to be paid to the amended amounts involved as the result of the appeal and cross-appeal.

SUMMARY

We summarise our findings in this way. The appeal is allowed in respect of the finding as to the date of commencement of the partnership which should be November, 1971, and not the 2nd February, 1971.
It is dismissed on all other grounds.

The cross-appeal is allowed in respect of:

1. The disallowance of accountancy fees charged by the defendant. These are to be restored as a debit against the partnership.

2. The disallowance of costs to the defendant. There will be an order for costs to the defendant in the Supreme Court but reduced by one-quarter.

The cross-appeal is dismissed in respect of the remaining ground.

The appeal has failed on all except one minor point and the cross-appeal has succeeded on two of the three grounds raised.

The defendant is accordingly entitled to his costs on the appeal and the cross-appeal.

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Vice President

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Judge of Appeal

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Judge of Appeal