IN THE FIJI COURT OF APPEAL
(AT SUVA)

CIVIL JURISDICTION

CIVIL APPEAL NO.77 OF 1986

(CIVIL ACTION NO.851 OF 1982)

BETWEEN:

CHANDU DALPATBHAI PATEL — Appellant

and

HASMUKHLAL RAMBHAI PATEL &
SURENDRA CHHOTUBHAI PATEL — Respondents

Mr. F.G. Keil — for the Appellant
Mr. J.G. Singh — for the Respondents

Date of Hearing : 25th August, 1992
Date of Delivery of Judgment : 18th November, 1992

JUDGMENT OF THE COURT

This is an appeal from a decision given in October 1986 in proceedings commenced in September 1982. Although we believe that the outcome of the appeal is clear, the case had some peculiar features that we think it proper to mention.

So far as the background facts are concerned there is no dispute, and we can do no better than repeat what the learned trial Judge stated about them:

> *" This action arises out of a family partnership which was operated between 1968 and 1977. The firm of D.R. Patel & Sons was established many years ago by the late Dalpatbhai Rambhai Patel. It was primarily a wholesale and retail business dealing in hardware, cutlery, toys, fireworks, jewellery, fancy goods, cosmetics and similar items. Goods were imported direct from overseas.*

Dalpatbhai Rambhai Patel died in 1968. He left a widow, Maliben, and three sons, Parbhubhai, Bhaichandbhai and the plaintiff. He had two daughters married to the two defendants. Up to the time of Dalpatbhai's death, his sons-in-law were employed in his firm. Before he died, he had expressed some desire to give the defendants some share in the profits of what was a highly sucessful business.

Dalpatbhai's estate was inherited by his widow and three sons. As none of them was prepared to take over the management of D.R. Patel & Sons, it was agreed that a partnership be formed between the widow and the sons of the founder and the two sons-in-law. Bhaichandbhai had a legal qualification. He drew up the partnership agreement which was signed by all the parties.

The agreement provided that the defendants would be entitled to their share in the business "only as long as they continue to participate in the day to day running of the business". Parbhubai was given an option of acquiring a 30% share if he participated in the running of the business, otherwise he retained an equal one-sixth share. He never took advantage of that situation. In the result the defendants devoted their full time and attention to the business while the plaintiff, his mother and two brothers drew between them two-thirds of the profits earned by the enterprise.

In addition, the inactive partners had the advantage that they shared exclusively in the benefit of the rents of certain properties, including the premises in which the business operated, which they inherited as part of Dalpatbhai's estate. For the purposes of the accounts of D.R. Patel & Sons, this income was included as being that of the partnership, but, the defendants were excluded from any share in it.

Clause 15 of the partnership agreement reads:

> "An interest at the rate of six pounds(6.0.0.) per certum per annum shall be payable on profits that have not been withdrawn from the business. "

The plaintiff claims this interest which has not been paid or credited to him. It was agreed by counsel at the outset of the hearing that two issues were to be tried, the first being whether or not the plaintiff was entitled to an account of such interest. "

The second issue related to a claim by the plaintiff arising out of a business being run by the defendants in the last few years of the partnership and said to be in competition with trial of the partnership. We shall refer to this later.

The learned trial Judge found against the plaintiff on both issues. As to the first he held that the proceedings were not properly constituted so far as parties were concerned, and that the plaintiff, because of his conduct, was not entitled to pursue a claim for interest on undrawn profits of the parnership. As to the second, the Judge found that the business run by the Defendants was not in competition with that of the partnership.

The only ground of appeal in relation to the first issue was that there had been no waiver or estoppel by the plaintiff that would preclude his right to require interest to be paid to him, and that the Judge had "erred in law and on the evidence in fact" and so finding. The other two grounds of appeal asserted that the Judge had so erred in finding against the plaintiff on the second issue.

The partnership agreement, which was dated 8th July 1968, provided for a commencement date of 12th May 1968. The agreement also provided for termination, and the partnership has in fact dissolved with effect from 12th April, 1977.

Partnership accounts were drawn up each year, the first being for the period 12th May to 31st December, 1968, thereafter for each year ending on 31st December, and a final account for the period ended 12th April 1977. These accounts have not been made the subject of any challenge or dispute except as appears hereafter. They each set out the profits from the partnership for the period, and from the building account, show the amount drawn by each partner for the period, leaving a balance of what amounts simply to undrawn profits at the end of the period. The amounts have not been disputed. The defendants kept the accounts and caused the annual statements to be drawn up.

The statement of claim of the plaintiff was -

> *"for interest payable on his capital in the said partnership and on his share of the profits not withdrawn from the business in accordance with the provisions of the partnership agreement."*

It was never suggested that this was other than a claim for interest pursuant to Clause 15, his entitlement to which the plaintiff calculated on the accounts sometime after he was given them in 1978. He and another partner took over the business on

12th April 1977 and closed it down; the stock has cleared and the debts paid. Presumably there was a capital distribution to the partners but the evidence is silent about this. The only claim is for interest (see statement of claim para 3). The plaintiff gave this evidence (record p.35):

> *"I have only sued two partners. The other partners do not owe me anything. The interest is payable on the capital. I did not see why I should sue all the others. "*

One problem is that neither the pleadings nor the record disclose how the claim of the plaintiff was calculated. The statement of claim alleges that "full particulars of the said claim have been supplied to the Defendants", but they do not appear in the record. Again this is not material to the outcome of this appeal, but it is relevant in relation to a matter we propose to discuss. The amount claimed was alleged to be payable by the two defendants in unequal shares, $613.96 by the first defendant and $4,674.71 by the second defendant. Why this was so does not appear. It probably does not matter.

There was also a claim that in 1974, before the partnership was dissolved, the two defendants had started up a business of their own which ran in competition with that of the partnership, that they used partnership property and that they should be made to account to the plaintiff for a share of the profits made during the period 1974 to the date of dissolution.

The defence to the plaintiff's claim for interest was that sometime after the partnership commenced it was agreed between the partners that no partner would make a claim for interest. It went on to state that no claim for interest was made during the lifetime of the partnership, nor upon dissolution nor thereafter until the issue of the writ - a period of over 5 years. The defence pleaded that the plaintiff was estopped from claiming interest and that "in view of the undue delay on the part of the Plaintiff in claiming interest he is deemed to have abandoned his right (if any) to interest." Whether this was intended to raise a defence of waiver, or laches, or whatever, probably does not matter, for reasons that will appear. There was a cross claim, but no evidence was adduced in relation to it. The learned Judge, in a reserved decision, dismissed the plaintiff's action.

The matter of any absence of parties to the proceedings - ie. the remaining partners - was not raised in the defence, nor in any submissions made at the conclusion of the case; the only reference to this matter is the passage in the evidence which we have earlier quoted. In his final submissions counsel for the defendants mentioned the re-opening of the accounts of the partnership, but this was in relation to the defence of estoppel. However, in his reserved judgment the learned Judge said:

> *"The plaintiff's failure to join the other former partners is a bar to his obtaining an account in these proceedings." (record p.62)*

He had earlier mentioned the case of Hills v Nash (1844) 1 Phillips 594 at p.598 and said:

> *"It is a general rule that an action for an account of the partnership transactions by one of the partners against some of the others, all the rest should be joined as parties to the suit." (record p.61)*

His Lordship also said:

> *"The plaintiff has selected the two defendants and demanded that they account to him for their share of the interest due to the dissolved partnership. But, if the defendants owe anything on this account they are not accountable to the plaintiff alone. The plaintiff's claim cannot be entertained without the taking of a new partnership account."(ibid)*

Three things need to be said about this.

Firstly the action brought by the plaintiff was not for an account of any sort; it was for a debt alleged to be owing by the defendants to him. The case referred to by the learned Judge was a suit for winding up; it is clear law that in an action for dissolution or the taking of accounts, all partners within the jurisdiction should ordinarily be joined; there are some exceptions, but basically this is mandatory. The same rule applies in cases of partnership disputes which "involve the taking of some account in which all the partners are interested or the granting of an injunction or the appointment of a receiver" (Lindley on Partnership 14 Ed. p.522). But none of those things applied here. There was no challenge to the

accounts, there was no claim to surcharge or falsify, or otherwise to re-open them in any way. There is no reason to suppose that if the plaintiff was entitled to interest on undrawn profits a calculation could not be made that would show the proportion payable by the defendants out of their share of the proceeds on dissolution. The particulars which the statement of claim alleges had been supplied to the defendants might have shown just such a calculation, and resulted in the defendants not challenging the amount nor raising any defence other than the two that we have mentioned earlier, and which had nothing to do with the accounts. If such a calculation could be and was made, then it did not involve the other partners at all. In such a case the situation is stated in Lindley op.cit. thus:

> *"In actions between partners not involving any partnership account or any interference with persons against whom no relief is sought, the general principles applicable to actions generally must be observed" (ibid).*

We have no reason to disagree with this statement.

The second matter is that if a Judge at first instance proposes to base his decision upon a matter not raised in the pleadings nor canvassed in the hearing, nor alluded to during submissions, then it is incumbent upon him to raise the matter with counsel and seek their assistance, if they wish to give it. It is true to say that in the present case the learned Judge based his decision upon finding of fact in relation to other matters; nevertheless a case should not go off on such a matter unless the parties have been given an opportunity to consider it,

call further evidence or make submissions as they may think appropriate.

The third matter is that the absence of parties in a matter such as this one is a procedural defect. It may be that certain parties cannot or need not be joined; this does not mean that the action cannot proceed. Indeed, the law in England relating to the joinder of parties in a partnership action has been relaxed. Of course any deficiency in relation to joinder of partners should be raised at the outset of the hearing, or before, if not by the defendant then by the court. But whenever it is raised the proceedings should not be dismissed for want of parties until the protagonists have been given an opportunity to consider this aspect. The law in England in relation to actions by and against partners is to be found in Lindley Ch.14, and is very much the same as that which is to be found here in Order 15 rule 6:

"Misjoinder and Nonjoinder of Parties" :

> "6(1) - No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The rule goes on to provide a mechanism or procedure to be adopted in order to enable other parties to be joined should that be necessary.

As mentioned earlier, the trial Judge proceeded to base his decision upon another aspect. He said : (record pp.62-3)

> *"As far as the merits go on this particular issue, the defendants' position is supported by the fact accounts were prepared each year from 1969 to 1977 and no provision was made in any year for the payment to any partner of interest on his undrawn profits. No partner took any action to have these accounts redrawn so as to show what was due to the partnership in respect of the interest under Clause 15. The defendants as working partners continued to give their time and labour to D.R. Patel & Sons on that basis. Had the interest been charged, whether paid or not, this would have reduced the profit available for distribution. It is not possible to say that the defendants, in accepting the prepared accounts, did not act to their detriment in continuing as the working partners. I consider that the former partners, including the plaintiff are now estopped from raising this issue. In any event, the circumstances disclosed by the evidence would support the view that there was a waiver (either expressed or implied) by all the partners of any rights which they may have had under Clause 15. This may be inferred from the course of dealing which I have described. (See Partnership Act, Cap.248 section 20).*
>
> *This issue must be resolved in favour of the defendants. "*

Although not expressly stated, it is probable that His Lordship had in mind the evidence given by the second defendant (record pp.45-6):

> *"The partnership account provides for interest on undrawn profits. It was all done in a rush. The third and fourth partners were to leave. This was 8 July '68.*

We were called to a meeting and the clause read out and a few changes were made and finally accepted. A few days later I thought about the clause and I felt I would be badly hit by that clause. I had very little capital and I would have to pay interest, although I was fully engaged.

I raised objections. The first four partners had a share in the rent of properties.

We all met and it was decided not to implement that clause. It was not the same day. It was all done verbally. Everyone agreed. I would not have worked for them, I would have left.
On this basis the accounts were drawn up each year and no interest was ever paid.
Plaintiff did not make a demand for interst until '75. None of the other partners have ever demanded interest. She wrote asking for a share in Patels South Seas. She never asked for interest."

The reference to "account" is clearly a reference to "agreement".

The latest statement of the law in relation to this topic to which it is apposite to refer is to be found in Chitty on Contracts (25th Ed.) General Principles:

" $1500. A waiver is also distinguishable from a variation of a contract in that there is no consideration for the forbearance moving from the partner to whom it is given. It may therefore be more satisfactory to regard this form of waiver as analagous to, or even identical with, equitable forbearance or "promissory" estoppel. Although consideration need not be proved, certain other requirements must be satisfied for such a waiver to be effective: first, it must be clear and unequivocal; secondly, the other party must have altered his position in reliance on it, or at least acted on it."

We believe it is apposite to quote the views of Lord Pearson expressed in Woodhouse A.C. Israel Cocoa Ltd. v Nigerian Produce Marketing Co. Ltd. (1972) AC 741 at p.762 that "promissory estoppel" is "far removed from the familiar estoppel by representation of fact and seems, at any rate in a case of this kind, to be more like waiver of contractual rights". The authors go on: "In a number of later cases "waiver" and "promissory estoppel" .....are treated as substantially similar doctrines, the requirements and effects of one being stated in terms equally applicable to the other. Indeed the courts now sometimes use "waiver" interchangeably with "promissory estoppel" (or similar expressions) when discussing situations in which it is alleged that one party to a legal relationship has indicated that he will not enforce his strict legal rights against the other."

Whether the defence of "abandonment" amounted to waiver or estoppel, we are of the view that one or other of the doctrines to which reference has been made was open to be applied by the learned Judge on the facts before him. The accounts prepared by the defendants were not challenged on the basis of error or fraud. Even if the right to claim interest on undistributed profits was not strictly waived by the plaintiff and was held in abeyance, then it would, in our opinion be inequitable to allow him to enforce them in these proceedings. No other partner has joined him in doing so, the final accounts have been accepted and the partnership wound up and assets disposed of some five years before the commencement of proceedings, with no intimation

in the meantime that the plaintiff claimed that any right existed. The appeal does not succeed on this aspect.

So far as concerns the plaintiff's claim for an account of profits in relation to a business carried on by the defendants for some time prior to 1977, and said to be in competition with that carried on, on behalf of the partners, the learned judge found that the plaintiff had not established his claim. He said:

> *"There is nothing to show that Patels South Seas Enterprise engaged in business of the same nature as the partnership or was in competition with it.*
> *..... There is nothing to indicate that at any time during the subsistence of the partnership they engaged in a business inconsistent with their obligations as partners of the plaintiff and his family."*

No grounds have been made out that would cause us to interfere with this finding.

As we said earlier, the cross claim of the defendants was not pressed.

The Order will be:

Appeal dismissed with costs.

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Mr. Justice Michael M. Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

.....
Sir Peter Quilliam
Judge of Appeal