

IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 12 of 2008

NATHAN FUNK

CLAIMANT

AND

JULIAN PATT

DEFENDANT

Hearings

2012

8th February

9th May

29th May

16th July

16th August

Mr. Philip Zuniga SC for the claimant.

Mr. Hubert Elrington SC for the defendant.

LEGALL J.

JUDGMENT

1. The claimant and the defendant entered into an oral partnership agreement around 12th June, 2003 for the harvesting of logs and the production of timber. A term of the partnership agreement was that the parties would supply equipment, but that no party would have a

legal interest in the other party's equipment. It was agreed by the parties that the defendant would supply the following equipment, namely, a bulldozer, a front end loader, a long bed 10 wheeler truck, and a trailer. The claimant said, which is denied by the defendant, that he supplied equipment and buildings, a list of which is given as item 1, in the appendix. The defendant states that the listed equipment are partnership assets.

2. In relation to the sharing of expenses and profits of the partnership, there is a dispute by the parties. The claimant insists that it was agreed that operational expenses were to be shared equally, and that the profits were to be shared, in relation to sale of timber locally, in the ratio of forty percent for the claimant and sixty percent for the defendant; and in relation to export sales, the ratio would be sixty percent for the claimant and forty percent for the defendant. The defendant states that at the beginning of the partnership he covered all the operating expenses; and it was not until June 2006 that the parties agreed that operational expenses were to be shared equally. In relation to the sharing of profits, the defendant denied that there was any agreement that he would receive sixty percent on local sales and forty percent on foreign sales.
3. The partnership was not successful due to absence of proper financial reports and accounts, and allegations that the defendant was involved in other projects and was not focusing sufficiently on his responsibilities in relation to the partnership. As a result, the partnership came to an end in September 2006 with the agreement of

both parties. The claimant therefore on 14th November, 2006 wrote a letter to the defendant requesting the return of the listed equipment which were at that time at the defendant's "family ranch." The defendant refused to return the equipment on the ground that they were bought by financial input by the claimant, defendant and the partnership. They were partnership assets, according to the defendant, and therefore what was needed was an assessment made and a proper division among the parties of the partnership assets. In order to make the assessment there would, according to the defendant, be need for a proper financial statement or accounts of the partnership business, which also would be helpful in deciding the profits if any, of the partnership for purposes of sharing the profits.

4. Due to the refusal of the defendant to return the equipment, which the claimant contends that he wanted for another agreed project with one Juan Leiva, the claimant made a claim against the defendant for the value of the equipment; for converting them to the defendant's own use, and for special damages of \$30,000, which the claimant claimed he lost because the defendant had his equipment which resulted in him not complying with the separate agreement with Leiva. The claimant also claimed the percentage of profit due to him under the partnership agreement in the amount of \$31,975.24. In an amended statement of claim filed on 26th October, 2010, more than two years after the original statement of claim was filed on 10th January, 2008, the claimant made a new cause of action for \$47,000 due to him under an alleged contract with the defendant for the construction of roads. The claimant alleged that he paid \$301,000 to the defendant to construct

the roads, but the defendant completed only road works to the value of \$254,000 making an amount due to him of \$47,000. The claimant filed a claim against the defendant drafted as follows:

- “(1) An order for the delivery up of the claimant’s equipment, goods and buildings in excellent condition, or their value and damages;
- (2) Damages for wrongfully detaining or converting the said goods, equipment and buildings;
- (3) Under paragraph 12 hereof, the said sum of \$30,000.00;
- (4) Under paragraph 16 hereof, the said sum of \$31,975.24;
- (5) Under paragraphs 20 and 21 hereof, the said sum of \$47,000.00;
- (6) An account of the total assets of the Partnership before and at termination;
- (7) All necessary account or enquires;
- (8) Payment by the defendant to the claimant of all amounts due and owing to the claimant from the net profits of the partnership in accordance with the Partnership Agreement.
- (9) Interest under or pursuant to section 166 of the Supreme Court of Judicature Act;
- (10) Such further or other order as to the court may seem just; and
- (11) Costs.”

The Equipment

5. The defendant states that the claimant did not purchase the equipment listed in the appendix, and did not deliver them to the defendant; and

that all the equipment were partnership assets. Let us consider each item of equipment as it appears on the list.

(a) Circular sawmill

The defendant states that both him and the claimant approached one Jacob Wiebe to build a sawmill; that the cost of building the sawmill was \$15,000 of which the claimant contributed \$9,000 and the defendant \$6,000. The defendant further states that he placed a Cummings engine on the sawmill for which he paid \$6,000. He states that on this evidence the sawmill did not belong to the claimant but became partnership assets. The claimant, on the other hand, states that he made an oral agreement dated 15th October, 2003 with Jacob Wiebe for the construction of the circular sawmill. The claimant tendered a written agreement dated 17th December, 2004. This written agreement confirms the oral agreement; gives the price to build the sawmill; and a description of the mill; and states the parties to the agreement with their signatures, namely the claimant and Jacob Wiebe, described therein as the purchaser and seller respectively of the sawmill.

6. The defendant in his evidence in court swore that the sawmill did not belong to the claimant and it was not true that the sawmill was paid for by the claimant. This is inconsistent with his witness statement where he said that the claimant paid \$9,000 as part of the price for the sawmill. The defendant called Mr. Jacob Wiebe, whose signature appears on a witness statement dated 1st December, 2008. This witness, due to his position that he did not understand English properly, the court had to employ the service of court marshal, Mr. Chan who is fluent in Spanish to interpret his evidence, though his witness statement

is in fluent English. Jacob Wiebe said in his evidence in court that he never made a witness statement in this matter. He said he signed a witness statement that the defendant produced which was explained to him and he signed it because it was the truth. This witness states he does not understand English, and it is not precisely known what was explained to him. His witness statement shows that the defendant paid about \$13,000 with respect to the sawmill, out of a total price of \$17,000. But in his evidence in cross-examination, Wiebe said he built the sawmill for Mr. Funk, but he did not remember the amount paid. Mr. Wiebe evidence is inconsistent with his signed witness statement and I find him to be an unreliable witness. The defendant's evidence with respect to the sawmill is also unreliable, because of the inconsistency between his sworn evidence and his witness statement as shown above. Heinrich Hilderbandan, employee of Jacob Wiebe, also gave a witness statement which is remarkably identical in several aspects to Wiebe's statement. For the above reasons, I accept the evidence of the claimant that he paid for the circular sawmill and this equipment belonged to him.

(b) The edger, band saw, consumer planer, table saw, water cooler, air conditioner and 42 zinc sheets.

The defendant admitted in cross-examination that the above items were bought by the claimant, even though he had made a previous inconsistent statement with regard to some of the items in his witness statement. I accept the claimant's evidence and the defendant's admission that these items were bought by the claimant. They are therefore the claimant's equipment in accordance with the partnership

agreement that equipment provided by each partner remains his property.

(c) Commercial industrial planer

The defendant said that the claimant paid \$3,000 for this item, and the rest was paid by the partnership. He also said that Mr. Leiva paid the balance of \$2,000 making the total price of \$5,000 for this item. But in his witness statement he states that this item was “purchase by the partnership alone.” In his defence though it is stated that with respect to this item, the claimant provided BZ\$3,500.00 and the partnership BZ\$1,500.00. This is another instance of inconsistency of the defendant. I do not believe him. I accept the claimant’s evidence that he supplied this item. This item is the property of the claimant.

(d) Tool shed and office building

The defendant said he contributed to building the tool shed, and it was not completely built by the claimant. The defendant states that he and his worker Mr. Leiva built the tool shed and the office building, and provided the lumber, and that the office building was not paid for by the claimant. But in the defendant’s witness statement, he swore that around 2006 the office building at a total cost of \$15,000 was built by one Seferino Pott, and that he contributed \$2,000 in cash, and the partnership provided 3,000 feet of lumber at a cost of \$6,000, and purchased windows, doors and electrical accessories. But in the defence it is stated that the claimant paid BZ\$7,000 to construct the office building and for furniture and \$1,000 for galvanized roof; and the

defendant provided \$2,000 for construction of the office and the partnership provided wood to the cost of about BZ\$9,000.

7. The claimant, on the other hand, states that he supplied and provided the tool shed and office building and states the cost of them. Unlike the other items of equipment, there are no receipts or invoices by the claimant to support his evidence that he provided the tool shed and office building. Though there are discrepancies in the defendant's evidence, I am not satisfied on a balance of probabilities that the claimant has proven that he provided and paid for these structures, and that they were not partnership assets. I therefore hold that the tool shed and office building are partnership assets.

8. Section 21 of the Partnership Act Chapter 259 states that rights of partners defined by the Act, may be varied by the consent of the partners. The partners by consent agreed that equipment supplied by each partner remains that partner's equipment. The equipment mentioned above as belonging to a partner, therefore remains his equipment. In relation to the items above held as partnership assets the partners are entitled to share them equally under section 26 of the Partnership Act.

Profit sharing

9. According to the claimant, the net income of the partnership was \$417,217.44 from which the defendant was to receive \$230,330.46 or 60% and the claimant was to receive \$166,886.98 or 40%; but that the

claimant only received \$134,911.74 which leaves a balance owing to him of \$31,975.24. The burden is on the claimant to prove the net income of the partnership and the profits. Usually this is done by an experienced and qualified accountant who examined the accounts of the partnership and would provide the court with his findings of net income and profits, if any. In this case, no accountant was called to give evidence. The claimant called Juan Leiva and Elizabeth Villanueva who were his directing manager and marketing and sales manager respectively; and neither of them was a qualified accountant, nor did any of them examine the whole accounts of the partnership for the period of its operation, and neither of them gave any evidence of the net income of the partnership and profits. The accounting firm named Cajan's Accounting through its accountant Eleodora Cajun, prepared an accounting report on the partnership and a witness statement; but he was not called as a witness at the trial and so did not tender nor explained his report. The claimant, though, who is not an accountant, submitted a profit loss account in his first witness statement showing a net income of \$367,514.64. But there is no evidence as to who prepared these accounts. Moreover, the claimant in cross-examination says that he does not know if there is an account for the whole partnership. He states that to prove the accounts of the partnership he was relying on the above profit and loss account and the evidence of his accountant; but no such accountant was called. He admitted that he did not have any document showing all the items in the accounts. The claimant's witness Villanueva who I believe the claimant was referring to as his accountant testified that she began working for the claimant in 2006, the year the partnership ended and most of her evidence was

based on what she was informed and understood. She said that the accounts for the years 2003, 2004 and 2005 were incomplete because accounts from the defendant were unavailable. Mr. Leiva, the claimant's other witness also testified that he did not prepare accounts for the partnership nor was he in a position to state the status of the accounts of the partnership. The defendant disputes the accounts produced by the claimant and the net income of the partnership. The burden is on the claimant to prove, on a balance of probabilities, the net income of the partnership for the period of its operation and the profits, in order for the court to determine the profits payable to each of them in accordance with the percentage of profits agreed. I am not satisfied on the evidence, and on a balance of probabilities, that the claimant has satisfied the burden. A decision as to what percentage of the profits each party is entitled to has therefore become impossible since there is no proper evidence of accounts of the partnership.

Conversion

10. The claimant states that the defendant refused to return the equipment and is using them without his consent and therefore claims the amount of monies mentioned in the statement of claim for the use of the equipment. The defendant admits that he has all the equipment and that he did not deliver them to the claimant, because the claimant owed him money. The defendant says that if the claimant paid him the money owed, the claimant could get his equipment. The heart of the tort of conversion is the unlawful appropriation of another's chattel, whether for the defendant's own benefit or that of a third party: see *Clerk and Lindsell on torts 18th Edition page 726*. To prove the tort, the claimant

has to prove appropriation – an intentional taking by the defendant of the claimant’s equipment for his own use without the permission of the claimant. The taking has to be accompanied by an intention to exercise permanent or temporary dominion over the equipment or item. In *Sanderson v. Marsden and Jones 1922 LL Reports 467* it was held that an act of conversion amounts “to a deprivation of possession to such an extent as to be inconsistent with the rights of the owner and evidence of an intention to deprive him of that right”: see Atkin LJ at page 572. The evidence of the claimant is that the defendant refused to return his equipment and held them for his own use. The defendant admits, as we see above, that he has all the equipment and that he did not give them to the claimant because he owes him money. The essence of tort is the exercise of dominion over goods or items of the owner without permission and contrary to the owner’s interests. If the defendant felt that monies were owed to him by the claimant, he should file a suit for such monies rather than depriving the claimant of possession of his equipment. I find that the defendant is liable for the tort of conversion of those items of equipment which are owned by the claimant and are not partnership assets or property. But there is no evidence showing how the amounts claimed in the statement of claim for conversion were arrived at. The facts or matters considered by the claimant, in arriving at those amounts were not given in evidence and for this reason I would disallow them, but award nominal damages for conversion.

Special Damages

11. The claimant also made a claim for special damages in the amount of

\$30,000. The claimant states that he lost this amount because he could not, due to not having the equipment, comply with a contract with one Juan Leiva. The claimant claims special damages of \$30,000 being monies which he lost due to not being able to supply some of the equipment the defendant took for purposes of a written contract with Juan Leiva dated 9th March, 2007 concerning the harvesting and production of timber. The written contract was tendered in evidence and the equipment that were needed for this separate contract is listed in the written contract at paragraphs 13.2 and 13.3. The claim by the claimant for special damages is an addendum to the contract of 7th March, 2007, signed by the claimant and Mr. Leiva dated 19th October, 2007 (exhibit N.F. 4) in which the claimant agreed to reduce his earnings under the principle contract with Leiva by \$30,000 because of the claimant not supplying the equipment which were required for that contract, but which was in possession of the defendant. Though there is evidence that the claimant agreed to reduce the earnings, I have no evidence that the reduction actually occurred and that the claimant suffered the amount he is claiming. The claimant gave evidence and I find nothing in his evidence that he actually suffered this reduction. I am therefore not satisfied on a balance of probabilities that the claimant has proven the special damages claimed.

12. It was submitted by the defendant that there was no winding up of the partnership under the Act and therefore no party was at liberty to deal with or dispose of the property of the partnership. Section 34 of the Act states that a partnership may be dissolved in certain ways, but this is “subject to any agreement between the parties.” The parties agreed to

dissolve or bring to an end the partnership in September 2006. As the partnership was terminated by mutual agreement, there is no need for winding up. There is also no right to a notice under section 34 of the Act: see *Moss v. Elphick 1910 1 KB*. Section 41 provides that on dissolution of a partnership, any partner has a discretion to apply to wind up the partnership. This section does not make it mandatory that a winding up application must be made. A partnership can be voluntarily dissolved, as in this case, rather than applying to the court for winding up of the partnership. Moreover, under section 21 above rights of parties under the Act may by consent of the partners be varied either expressly or impliedly. There was therefore no compulsion on the part of the partners to apply to the court to wind up the partnership and it could be implied from the facts and circumstances above of the case that any right of winding up was varied by the parties.

Road Construction

13. As shown above, the claimant amended his claim, more than two years after the filing of the original claim, to make a new claim for \$47,000 for road construction as shown above. No objection was taken to the amendment, and witnesses gave evidence and were cross-examined in relation to the amendment. According to the claimant, there was on 21st March, 2005 an oral agreement with the defendant to do road construction works for him which were to facilitate the harvesting of timber. The details and nature of the construction of the roads, the cost and the amounts paid by the claimant are given in exhibit NF5 in the claimant's second witness statement. This exhibit, the claimant states, was delivered to him by the defendant showing how the \$47,000 are

owing to the claimant. Exhibit NF5 has no signature of the defendant who has denied receiving the \$301,000 mentioned in the exhibit for road construction, and he denied he completed only \$245,000 worth of the work as claimed by the claimant.

14. The defendant therefore said he did not owe the claimant the balance of \$47,000. The defendant also denied liability for this amount on the ground that the claimant did not enter into any contract with him personally for the road construction; but with a company named Julian Patt and Sons, a company registered under the Companies Act. But in cross-examination, the defendant swore that the construction of the road was separate from the partnership and it was a personal agreement between him and the claimant. This is another inconsistency in the defendant's evidence.

15. The claimant has given evidence of the cheques and bank transfers to prove he paid the \$301,000 and also gave details of the construction, including the miles of roads constructed. The claimant's evidence was not shaken in cross-examination. I have seen the parties and observed their demeanour and how they answered questions in the witness box. I accept the evidence of the claimant that he paid to the defendant \$301,000 for construction works but the defendant completed works to the value of \$254,000. In accordance with the agreement the defendant has to return the difference to the claim of \$47,000.

16. Counterclaims

The defendant made the following counterclaims:

- “1. An order that the parties proportion of ownership of equipment and building of the partnership be assessed based on the financial input made by the claimant, the defendant and the partnership towards their acquisition and that those assets be appropriately divided between the claimant and the defendant;
2. An order that the claimant accounts for BZ\$42,000.00 of partnership money from the export sale of lumber and that those money be divided on basis of 60% to the defendant and 40% to the claimant;
3. An order that the claimant account for BZ\$20,000.00 from the sale of lumber between period of September, 2006 and December, 2006 and that these be divided on the basis of 60% to the defendant and 40% to the claimant;
4. An order that the claimant account for BZ\$47,453.48 being his personal expenses which he wrongfully deducted from the sales of lumber as operational expenses and this be divided on the basis of 60% to the defendant and 40% to the claimant;
5. An order that the claimant account for the total sum of BZ\$36,338.00 being monies from the sale of lumber to Graniel, New Hope and Habet respectively and that the monies be divided on basis of 60% to the defendant and 40% to the claimant;
6. An order that the claimant account for the sum of \$83,405.85 being the balance of the defendant’s 60% of the net proceeds of sales of lumber as shown in the financial statements;
7. An order that the defendant should be compensated for the use of his land for housing of partnership equipment and building at a rate of \$5,000 per month and

the payment of a watchman at the rate of \$1,500 per month as of January, 2007;

8. Damages;
9. Interest pursuant to section 166 of the Supreme Court of Judicature Act;
10. Such other order as the court may deem just;
11. Costs.”

17. In relation to the counterclaim at (1) above the equipment held above as partnership assets will be divided in equal shares under section 26 of the Act. In relation to claims (2) to (6) both inclusive, no accounts or financial statements of the partnership was tendered, and there is no evidence of an accountant to prove these amounts. The defendant to support these claims relies on financial statements including cash receipts and vouchers, but as shown above, these financial statements and documents were not tendered in evidence nor were they explained to the court. The defendant retained accountants Cajan who reviewed financial records, but though he made a witness statement and prepared a report, he was not called as a witness and his report which is a bundle of numerous documents, and would need some explanation, was not tendered in evidence. In relation to item 7 of the counterclaim, the defendant testified that the equipment was partnership property and that he kept the equipment because the claimant owed him money. There is no evidence of an agreement with respect to the counterclaim at 7. For the reasons above, the counterclaims are dismissed, except for paragraph 1 thereof.

Conclusion

18. The evidence disclosed that there was an oral partnership agreement between the claimant and the defendant in which it was agreed that the parties would supply equipment but no party would have a legal interest in the other parties' equipment. Accordingly the equipment, namely, the edger, band sawmill, consumer sized planer, commercial sized table planer, commercial planer, 12000 air conditioning system and water cooler and forty-two zinc sheets, are owned by the claimant and are not partnership assets. The circular sawmill, the tool shed and office building are partnership assets which shall be divided in equal shares between the claimant and the defendant. After a valuation of these assets, either party is entitled to sell his share to the other party. Due to the absence of evidence of a qualified accountant, and financial statements and accounts for the whole period of the partnership, the net income and profits of the partnership were not established and therefore the claim for specific profits have not been proven. Due to the said absence of evidence, the defendant has failed to prove paragraph 2 to 7 of the counterclaim. The claimant has proved that there was an oral contract for the construction of road and that the sum claimed is due to him.

19. I therefore make the following orders:
 - (1) The defendant is ordered to deliver to the claimant, his agent or servant not later than 1st October, 2012 the following property:
 - (a) One edger and all components thereof.

- (b) One ban sawmill and all accompanying blades, roller tracks chains engine and all other related components.
 - (c) One 14" consumer size planer.
 - (d) One commercial sized table saw with two horse power engine.
 - (e) One 24" commercial industrial planer.
 - (f) One 12000 BTU split unit air conditioning system.
 - (g) One combination water cooler.
 - (h) Forty-two zinc roofing sheets.
- (2) It is ordered that the following are partnership assets:
- (a) One circular sawmill including blade sharpener, hydraulic carriage and other components necessary for its functioning.
 - (b) A tool shed/office building.
 - (c) Office building with conference table, chairs, office desk and windows.
- (3) It is ordered that the partnership assets at (2) above are owned by the claimant and defendant in equal shares and either party, after a valuation of the assets, is entitled to sell his share to the other party.
- (4) The claims for profits and sums for hire of the equipment and for special damages are dismissed.
- (5) The defendant shall pay nominal damages in the sum of \$4,000 to the claimant for conversion.
- (6) The defendant shall pay to the claimant the sum of \$47,000 as over payment to the defendant from the claimant for the construction of roads.

- (7) The defendant to pay interest on the said sums at 6% per annum from 16th August, 2012 until total sum is paid
- (8) The defendant to pay costs to the claimant in the sum of \$2,000.

Oswell Legall
JUDGE OF THE SUPREME COURT
16th August, 2012

APPENDIX

Item 1

List of Equipment