Privy Council Appeal No. 26 of 1983

Khurbur Ram Latchan *Appellant*

v.

Leslie Redvers Martin *Respondent*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JUNE 1984

Present at the Hearing:

LORD KEITH OF KINKEL
LORD SCARMAN
LORD BRIGHTMAN
LORD TEMPLEMAN
SIR GEORGE BAKER

*[Delivered by **Lord Brightman**]*

This appeal from the Fiji Court of Appeal concerns the existence of an alleged partnership at will between the appellant Khurbur Ram Latchan and the respondent Leslie Redvers Martin; if such partnership be established, the rights of Mr. Martin upon the dissolution thereof are also in issue.

The principal contention of the appellant, upon which he failed decisively at first instance and on appeal, is that the partnership was induced by the undue influence of Mr. Martin. His further contention is that, given the existence of a partnership, there ought now, over five years later, to be a sale of the partnership assets so far as they still exist, or an inquiry as to what they were worth when the partnership was dissolved in 1978, and that the trial judge was wrong to treat the partnership assets as appropriated to the appellant at balance sheet values as at the date of dissolution.

The story begins some 38 years ago. In 1946 Mr. Martin, who is now aged over 80, was in practice in Fiji as an accountant. The appellant's father, a dairy farmer, came into contact with Mr. Martin in
[30] the course of business and from time to time sought

his advice. When the appellant's father died in 1950, his widow continued the dairy business. She also relied upon Mr. Martin for advice. In 1950 the widow decided to launch out into a bus service, and obtained from Mr. Martin financial assistance to enable her to buy a bus. In or about 1962 at Mr. Martin's suggestion, the widow started an arrangement with him under which she would hand the daily takings to him at Suva, and he would place them in his own banking account at the Bank of New Zealand. At about this time the appellant, then around 21, became associated with the management of his mother's bus service.

In June 1965 the appellant started to run his own bus service. He called it "K.R.Latchan Bus Service". The takings of this new venture also were paid to Mr. Martin to bank on the appellant's behalf. Mr. Martin did not give receipts for the money he received because he was never asked to do so. As and when money was needed for either of the two businesses, the appellant requested cheques and these were at once drawn by Mr. Martin on his account. Mr. Martin kept books of account at his office, and he rendered annual accounts to the appellant and his mother. He also prepared their income tax returns. Later, the appellant began to pay the takings direct into Mr. Martin's bank account, furnishing him with particulars of the deposits to enable him to write up the accounts. The existence of this arrangement between the appellant, his mother and Mr. Martin shows beyond doubt the complete confidence that the appellant and his mother had in the reliability and integrity of Mr. Martin.

On 14th September 1970 the appellant, writing in his capacity as managing director of K.R. Latchan Bus Service, sent a letter in the following terms to an English company, Seddon Diesel Vehicles Limited ("Seddon") of Oldham, Lancashire:-

> "Seeing an advertisement in the Buyers' Guide to the Motor Industry of Great Britain, that you are interested in exporting Seddon Bus Chassis, I take this opportunity of writing to you.
>
> I am a Bus Proprietor and I am extremely interested in importing my own Chassis from your firm and if you are interested, I shall be too happy to negotiate with you...."

Further correspondence and negotiations ensued. The appellant expressed interest in becoming a distributor for Seddon in Fiji. Seddon informed the appellant that, as a dealer, he would be required to have a few vehicles in stock to meet immediate current demands, to offer maintenance and servicing to all users and to carry spare parts. On 4th November 1970 Seddon accepted the appellant's order for

the first two bus chassis, subject to the provision of letters of credit; and, importantly, confirmed that it now considered K.R. Latchan Bus Service exclusive distributors for Seddon bus chassis and buses in Fiji. On 25th January 1971 Mr. Martin gave a helping hand by writing to Seddon, setting out his own credentials and providing a good reference for the appellant. On 26th October 1971 a further six chassis were delivered. On 9th December 1971 the appellant registered the business name "Brunswick Motors" for a business described as "The Importation and Sale of Bus and Cargo Chassis and Body Building". It is not in dispute that it was Mr. Martin who arranged for all the necessary letters of credit and provided all the finance for the purchase of the chassis and spare parts. It was he who financed the construction of bodies which were built by the appellant on the imported chassis. In addition he would sometimes even finance the purchasers who bought these vehicles from Brunswick Motors.

On 1st November 1972 the Distributors' Agreement foreshadowed by Seddon's letter of 4th November 1970 was signed. The agreement was expressed to be made between B. Ashworth & Co (Overseas) Limited, who were the sole export concessionaires of Seddon, and Brunswick Motors, described as "also trading as K.R. Latchan Bus Service", of the other part. By this agreement the concessionaires appointed the appellant's company sole selling agent for Seddon in Fiji, Samoa and Tonga, for a term of 3 years with a possibility of extension. In return, the appellant undertook to purchase a minimum of 30 bus chassis or commercial vehicles a year, to hold in stock an adequate supply of spare parts for the benefit of Seddon customers in the three territories, and to provide free 500 mile servicing for all vehicles sold. Payment for vehicles, chassis and spare parts was required to be made in cash or by confirmed banker's credit in London before shipment. As a result of his expanding business, by the end of 1972 the appellant was heavily indebted to Mr. Martin. Furthermore, as found by the learned trial judge, on signing the Distributors' Agreement it became apparent that the appellant would be committed to finding a large amount of capital which he did not then have and had little prospect of obtaining, unless Mr. Martin or someone else was prepared to assist him.

Over some previous two years Mr. Martin had been raising with the appellant the question of partnership. From the inception of the business Mr. Martin had contributed his services and time as well as financing its operations. The appellant at first resisted this proposal, but ultimately it dawned upon him that he was not going to get a promise of finance which, following upon the Distributors' Agreement, he

urgently needed unless he were prepared to accede to Mr. Martin's suggestion of a partnership. A partnership would not only help to solve his financial problems, by dividing the burden of his existing indebtedness, but it would also ensure the flow of money which would be needed in the future. The comments of the learned trial judge are revealing:-

> "My assessment of the situation on the evidence before me is that the plaintiff an ambitious man fully realised the defendant was a fairly wealthy man - an elderly gentleman who was 'a soft touch'....
>
> Far from the defendant inducing the plaintiff to give him a share in the business at an unfair price, it was the plaintiff who prevailed on the defendant to finance him and it was only when the plaintiff realised that if he wanted further finance to continue the business and obtain the sole agencies for a popular chassis the price he had to pay was the admission of the defendant as a partner that he finally agreed.
>
> The plaintiff was no callous youth in 1972 - he was 31. For some years he had been managing the family businesses also financed by the defendant and had proved to be a successful manager. Quite independently of the defendant and without his prior advice he decided to import buses and build bodies and was about to commit himself to further very heavy capital expenditure.
>
> He acknowledges he had no experience as an importer and it is clear he had insufficient finance to embark on the new venture. That is why he consulted the defendant. During the time he operated Brunswick Motors on his own there is no evidence that the defendant interfered or imposed his will on the plaintiff in any way. At all times even after the formation of the partnership the plaintiff managed the business. The defendant appears to have done little more than receive and pay out moneys, keep accounts, prepare tax returns and when asked give advice and make funds available."

On 28th December 1972 the registered particulars of Brunswick Motors were changed by recording the name of Mr. Martin as an incoming partner with the appellant. The application to the Registrar was signed by both parties.

After Mr. Martin was acknowledged as a partner, with the appellant's industry and Mr. Martin's advice and financial assistance Brunswick Motors became a flourishing concern. Over the next five years 74 bus chassis were imported.

By 1978 the appellant came to the conclusion that he would like to get rid of Mr. Martin. The

appellant had just become a Member of Parliament, and no doubt was an important figure. As he said in evidence he knew that Brunswick Motors was making a lot of money by the end of 1977; Mr. Martin was an old man; the appellant regarded him as a nuisance, and felt he had to get rid of him. So, on 2nd October 1978 he wrote to Mr. Martin in the following terms:-

"Dear Sir,

I refer to our recent discussions concerning the business affairs of our partnership, Brunswick Motors and our personal differences arising therefrom. During our discussions on Friday, 29th September, 1978 I advised you that I wished to dissolve our partnership as from 30th September, 1978 and that I wanted you to draw up our partnership accounts as at that date.

The purpose of this letter is to formally record in writing my instructions to you. Please have the required accounts prepared by noon on Monday, 9th October, 1978 so that the partnership assets may be properly distributed as mutually determined by ourselves or as determined by a court of law.

Yours faithfully,
K.R.LATCHAN"

On 16th January 1979 the appellant issued proceedings against Mr. Martin. By then, however, a proper distribution of the partnership assets sought by the above letter had ceased to be the appellant's objective. Instead he sought, first, a declaration that he was the sole proprietor of Brunswick Motors and was entitled to al. the income and profits of the firm from its inception; secondly, he claimed in the alternative that there had existed a confidential relationship between himself and Mr. Martin as a result of which Mr. Martin acquired a position of influence over the appellant and had induced him by the exercise of undue influence to accept him as a partner. Mr. Martin counter-claimed for a declaration that a partnership existed which was dissolved from 30th September 1978.

Three years went by before the action came to trial. During that period the appellant continued to run Brunswick Motors as if the business were his own, and he neither consulted Mr. Martin nor accounted to him. He at no time conceded the existence of a partnership.

In October 1979 Mr. Vilash, a chartered accountant and a partner in Messrs. Peat Marwick Mitchell & Co., acting on the instructions of the appellant, attended at the offices of Mr. Martin's solicitors to inspect Mr. Martin's books of account and, as he termed it in

his evidence, "to re-structure the accounts". He completed this task by June 1980 and made copies of the re-structured accounts available to both parties' solicitors and to Mr. Chau, Mr. Martin's accountant. In his amended statement of claim the appellant sought, on the alternative basis of the existence of a partnership, a declaration that in settling the accounts between him and Mr. Martin, 14 items of account should be dealt with in a particular way.

The trial of the action and counter-claim began on 17th May 1982 before Mr. Justice Kermode and was concluded on 27th May. Judgment was reserved, being delivered on 13th October. The learned judge held, first, that there was overwhelming evidence to prove the existence of a partnership agreement. Secondly, on the question whether the partnership agreement should be set aside on the ground that it was induced by undue influence, the learned judge held that the circumstances and nature of the relationship between the appellant and Mr. Martin were not such as to raise a presumption of undue influence on the part of Mr. Martin. Thirdly, he held that even if there were a special relationship which gave rise to such a presumption, the evidence satisfied him that no undue influence was in fact exerted by Mr. Martin to induce the appellant to agree to a partnership.

The learned judge then disposed of the 14 points raised by the appellant on the accounts. He decided each of them in favour of Mr. Martin except for two items, commission and accountancy fees, totalling $21,030.92, which he held Mr. Martin was not entitled to debit in the partnership accounts. At this point it might have been thought that the trial judge had, with the concurrence of the parties, finally settled and passed the partnership accounts. However, the appellant's counsel, towards the close of his final submission, sought to argue that his case had been conducted on the basis that the accuracy of the accounts was not in issue and that they should now be submitted to a referee to be settled. This submission was rejected by the learned judge, who said this:-

> "There is no need to refer the accounts to a referee as they have been checked and double checked by two firms of accountants. Mr. Vilash on behalf of the plaintiff inspected and reported on the accounts and prepared reconstructed accounts.
>
> Mr. Chau, whose evidence I accept, testified that he and his staff had checked all accounts and he could vouch for the accuracy of the accounts kept by the defendant.
>
> Mr. Chau also considered the accounts prepared by Mr. Vilash and made a summary of seven points

> of difference between those accounts and the accounts prepared by the defendant (Ex.46). All those differences have been considered by me and do not require to be referred to a referee."

The learned judge then turned to the question of the rights of the partners inter se consequent upon the facts that (i) the partnership had been dissolved in September 1978 and (ii) the partnership business had ever since been continued by the appellant as if it were his own. The rights of the parties depend upon the provisions of the Partnership Act (Chapter 248) and the application of those provisions in the light of the relevant equitable considerations. Sections 39 and 40 are in the following terms:-

> "39. After the dissolution of a partnership the authority of each partner to bind the firm and the other rights and obligations of the partners continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but not finished at the time of the dissolution but not otherwise:.....
>
> 40. On the dissolution of a partnership every partner is entitled as against the other partners in the firm and all persons claiming through them in respect of their interests as partners to have the property of the partnership applied in payment of the debts and liabilities of the firm and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners of the firm and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the court to wind up the business and affairs of the firm."

With a trivial exception, these provisions correspond verbatim with the same sections in the United Kingdom Partnership Act 1890.

The learned judge declined to order a sale of the assets, as would be usual on a dissolution in the absence of some agreement to the contrary, because such a course had ceased to be practical. He expressed his reasons as follows:-

> "The balance sheet of the firm as at the 30th September 1978 discloses that the firm had assets of a total book value of $379,901.28 as at that date.
>
> The market value of the assets of a partnership on the dissolution of the partnership would in most cases be established by the sale of those assets.
>
> This is not practicable in the instant case for several reasons. The plaintiff claimed and still

> claims to be entitled to all the assets. Instead of winding up the business as he should have done he continued operating the business using the assets of the partnership. Four years have now elapsed since the dissolution and the nature and possibly quality of the assets has changed....
>
> To arrive at a division of the partnership assets in view of the circumstances I treat the plaintiff as a purchaser of the business at the gross asset value of $379,901.28."

In so doing, the learned judge treated the book values shown in the accounts as the fair market values of the assets as they then existed, for the very good reason that these were the values put upon such assets by the appellant himself, being values based on cost and depreciated where necessary.

In the result the learned judge gave judgment in favour of Mr. Martin in the sum of $257,387.73, representing the repayment of the debt due to him by the partnership plus his share of the capital.

Finally their Lordships must record the learned judge's observations on costs, because his order became part of the subject matter of the appeal:-

> "....The plaintiff has succeeded only on two items in his alternative claim regarding the accounts. He has throughout maintained his stand that the defendant was not a partner or entitled to anything at all. His conduct during the hearing which disclosed on several occasions that he is a person who is not prepared to be bound by his oath disentitles him in my view to an order for costs albeit he has been partially successful.
>
> The defendant on the other hand has succeeded on the major part of his counter-claim. While I have no doubt that the plaintiff would in any event have sought to evade his liability to account for the defendant's share of the partnership assets there was no justification for the defendant arbitrarily charging accountancy fees and commission. He could, once the action had commenced, have conceded that he was not legally entitled to make such charges and offer to credit the partnership with the amounts involved. Had he done so he would have been entitled to costs.
>
> There will be no order as to costs on the claim or the counter-claim. Each party is to bear his own costs."

The appellant appealed. The Court of Appeal was in complete agreement with the trial judge as to the existence of a partnership agreement, as to the absence of any circumstances giving rise to a presumption that Mr. Martin had exercised undue

influence over the appellant in order to bring about such agreement, and as to the absence of undue influence. On appeal to this Board, the appellant's counsel courageously persisted against all the odds in his claim that the partnership had been procured by undue influence. In rejecting this submission their Lordships feel that there is nothing which they can usefully add to all that has been so convincingly said on this issue by the trial judge and by the Court of Appeal.

The Court of Appeal then turned to consider whether it was correct for the trial judge to have settled and passed the partnership accounts, without directing them to be taken before a referee, and held that the trial judge was right. Their Lordships do not hesitate to express the same view. The partnership was dissolved over five years ago. The so-called re-structured accounts were the creation of the appellant's own accountant and came into being in 1980. They have been long since presented to, and considered by, Mr. Martin's accountant. All points of doubt which the parties desired to raise by the time the action came to trial were considered by the trial judge, pronounced upon and then appealed by the appellant. Yet the appellant still claims that an order should have been made for the taking of the partnership accounts, and for the appointment of a referee to conduct enquiries into the affairs of the partnership. He submits that "...in view of the inadequacies of the respondent's accounting and the irregularity of his conduct in the course of the partnership, justice and fairness could not possibly be done on the basis of the limited inquiry into the accounts carried out at the trial". Passing over the supposed irregularity of Mr. Martin's conduct, their Lordships consider that it is totally misleading to describe what occurred at the trial as a "limited inquiry into the accounts". It was a full and detailed survey of all the points in issue. Justice and fairness demand precisely the reverse of what is sought by the appellant. To permit the appellant to delay matters, certainly for months and perhaps for years while the accounts of the partnership are re-investigated at a great expenditure of time and money would indeed be a denial of justice.

Two points of substance remain. First, whether it was right to appropriate the assets to the appellant at a price, instead of directing a sale. Secondly, if that was the right course, whether it was correct to attribute to the assets the book values thereof contained in the re-structured accounts.

The normal course on the dissolution of a partnership is to sell the assets. That is what the court will usually order in the absence of an agreement to the contrary. But, as the Court of Appeal pointed

out, citing *Lindley on Partnership*, the rule is not inflexible and the sale "is merely adopted in order that justice may be done to all parties"; (15th Edition, page 673). Section 40 of the Act does not direct a sale, but only gives a partner a right "to have the surplus assets....applied in payment of what may be due to the partners....and for that purpose any partner may....on the termination of the partnership, apply to the court to wind up the business and affairs of the firm". The power of the court is not confined to ordering a sale, but is a broader power, namely, to wind up the affairs of the partnership in such a manner as to do justice between the parties. In the instant case a sale of the partnership assets is not practicable. The appellant did not carry on the business after 30th September 1978 as he should have done, with a view to winding up the business. He carried the business on with a view to continuing it as a going concern for his own exclusive benefit. The assets of Brunswick Motors which are available for realisation in 1984 are not the assets which were available for sale, and ought to have been sold, at the date of the dissolution of the partnership in 1978. Indeed the appellant's counsel came near to conceding, if he did not actually concede, that a realisation of the assets of Brunswick Motors as that business now exists and the division of the proceeds between the partners would not be a fair mode of adjusting the rights of the partners inter se.

If, as is clearly the case, an order for a realisation of the present assets of Brunswick Motors is not a proper method of ascertaining what is due to Mr. Martin, what alternative course should be adopted? The course taken by the trial judge, and affirmed by the Court of Appeal, was to appropriate the assets of Brunswick Motors existing at the date of the dissolution of the partnership to the appellant at their balance sheet values. The appellant cannot properly object to an appropriation to himself, because that is precisely what he did over the four years which preceded the trial, and which he maintained he had the right to do throughout the trial and the appeal. The only question can be, at what value should such an appropriation be made? The trial judge and the Court of Appeal took book values. Since such values were those placed upon the assets by the appellant himself, being their cost or depreciated cost, their Lordships can discern no injustice whatever in such approach. It is far more likely to yield a result fair to both sides than a retrospective inquiry and valuation carried out today, which the appellant's counsel suggested was the proper course.

The final subject matter of appeal was costs. Although Mr. Martin established his claim to a partnership, successfully resisted a charge verging upon

fraud, recovered a judgment for over $257,000 and was unsuccessful only to the extent of a half share of $21,030.92, the trial judge made no order for costs in his favour. Their Lordships have already quoted the reasons given by the learned judge. As the Court of Appeal observed, it is not easy to understand why, in the circumstances, there was no order for costs in favour of Mr. Martin. The Court of Appeal reversed the order to the extent of allowing Mr. Martin three-quarters of his costs below. The appellant nevertheless submitted that there were no grounds for interfering with the discretion exercised by the trial judge. In the opinion of their Lordships the reasons given by the trial judge for depriving Mr. Martin, a successful defendant, of his costs were not adequate. The Court of Appeal were right to set his order aside and to exercise their own discretion.

For the reasons indicated their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant must pay the costs of the appeal.