

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

30/8

NZLR

CP No. 54/91

BETWEEN

IAN McLEAN HENDERSON
of Hastings, Freezing
Worker

Plaintiff

ISS1

AND

RICHARD GEORGE GUERIN
of Gisborne, Farmer

Defendant

Date of Hearing
and Judgment:

30 July 1991

Counsel:

Mr G W Calver
for Plaintiff

Mr B W Gilmour
for Defendant

JUDGMENT OF MASTER J H WILLIAMS

This is an application for summary judgment in which the Plaintiff seeks judgment against the Defendant for \$17431.

It is an unfortunate matter. These gentlemen have been friends for over twenty years and partners for about six or eight years up until June 1990 but the relationship between them has become strained as a result of the circumstances giving rise to this proceeding and they now find themselves claiming and counterclaiming on each other in a public court and making allegations against each other which can only be deprecated.

The claim for summary judgment arises out of the second partnership between these gentlemen. It was for five years from June 1985 to 1990 and operated either under the name of

the Henderson and Guerin Partnership or the Forest View Farm Partnership.

Before considering the terms on which the parties went into that arrangement, it is necessary to deal briefly with the earlier partnership in which they were both engaged. That was also a farming partnership, it operated at Porangahau and the partners went into it because they had been friendly for a number of years with Mr Henderson working for Mr Guerin. In the accounts for the second partnership for the year ended 31 March 1986 - which presumably included some part of the dissolution of the Porangahau Partnership - the current accounts show Mr Henderson contributing \$40125 and Mr Guerin \$19728 and the current accounts as at the same date record Mr Henderson as having introduced funds of \$58264 to the partnership, presumably the second partnership, by comparison with Mr Guerin's modest funds of \$380.

The parties agree that the second partnership arrangement between them was made orally in the light of their long friendship. They saw no need for a written agreement at that stage and they agree that Mr Henderson, as his capital contribution, was to provide cash for the partnership. They also agree that Mr Guerin was to contribute most of the labour required for the farming operations but where they sharply disagree is as to whether Mr Guerin's labour was to be his capital contribution to the partnership or not. They agree that any profits and losses from the partnership would be shared equally and that the partnership would operate on some leased land called Forest View Farm at Patoka near Napier for five years.

Over the years of the lease and the partnership, accounts were prepared for it first by a Mr Donovan and later by a Mr Dent. The parties disagree as to the purpose for which Mr Donovan's accounts were prepared. Mr Guerin says that they were prepared for taxation purposes only and did not accurately represent

the financial position of the partnership. Mr Henderson says that they were for all material purposes final accounts year by year and that in particular the accounts produced by Mr Dent for the year ended 31 March 1991 were effectively the accounts as at the dissolution of the partnership in June 1990. Mr Henderson says that as at the effective date of dissolution of the partnership he was owed \$18206 by the firm but Mr Guerin owed \$4431 to it. Even those figures, as will be seen, provoke disagreement between the parties and perhaps even between the respective accountants who have made affidavits.

One of the assets of the partnership and the one which has provoked the sharpest disagreement between the parties and probably provided the impetus for the commencement of litigation was a credit held by the partnership's financier, Wrightson Finance, at 31 March 1991. At that date Wrightson Finance held a credit of \$13129.44 for the partnership but nine days later, on 9 April, Mr Guerin withdraw \$13000 from Wrightson Finance. He says that he was entitled to it in the circumstances about to be described but Mr and Mrs Henderson take a different view. Mr Henderson in effect says that Mr Guerin withdrew that sum dishonestly.

It is now convenient to return to the commencement of the second partnership and examine the evidence in order to endeavour to ascertain the measure of agreement between these parties on the terms on which they went into partnership. Mr Henderson initially said that the terms were simple -

"I put up most of the money and the defendant carried out the greater share of the farm work. The partnership was on a fifty/fifty basis that is any losses or profits were to be shared equally"

and a little later he said -

"the whole deal between us was that I put in most of the money he put in most of the labour and that made us square. If Mr Guerin was to get a return for his labour then I would have wanted interest on my money" -

"I introduced the money and Mr Guerin introduced his labour in the expectation that we would make some money from the partnership venture."

In his affidavit in reply Mr Henderson, after saying that he put up all the cash for the Porangahau Partnership and did more physical work there than Mr Guerin did, then went on to say that the Forest View venture was on exactly the same basis as the Porangahau although that seems as though it may not be correct. However, concerning the Forest View Partnership, Mr Henderson said in his second affidavit:

"As to recompense for labour, the agreement over the years was always as I have earlier stated. This was balanced out by the money which I had put into the partnership."

and

"The agreement, was that I would not be paid interest on this money, and nor would Mr Guerin be charged interest on his current account with the partnership if it was in debit. That was supposed to be balanced out by the Defendant putting his labour, expertise and so on into the partnership."

Mr Guerin's view is somewhat different. He said:

"We had a surplus of cash from the Porangahau property which as I recall it was used to purchase some of the stock for the Forest View Farm venture. We also took stock from the Porangahau property to the Forest View Farm. The Plaintiff also put further money into the Forest View Farm Partnership venture. As I was not able to contribute money it was agreed that my contribution to the Partnership capital would be my labour, stock and plant and equipment contributed by me over the next five years."

and a little later, dealing with a suggested partnership agreement which the partners then accountant was to prepare, he observed:

"I understood that we wanted Mr Donovan to prepare a Partnership Agreement which put the Partnership on the footing that my contribution of labour, expertise, farm materials and stock would be taken into account and those contributions would be given a value for accounting purposes in the Partnership books.

No written agreement was ever prepared, but I continued in the Partnership on the understanding that when the Partnership ceased my contribution, by the provision of wages, expertise, stock and farm equipment, would be given a value and taken into account when the Partnership assets were divided between the Plaintiff and myself."

Each of the accountants have also made affidavits in this matter. Mr Donovan describes his understanding of the Partnership Agreement was that it was equal with Mr Henderson contributing a large share of the capital required for the partnership and Mr Guerin contributing the larger share of the labour, whilst Mr Dent, who became the Partnership's accountant for the year 31 March 1987 and following, described his understanding of the terms of the Partnership Agreement in terms similar to that used by Mr Guerin. That is understandable because of course Mr Dent was not a party to the initial discussions. However, he does go on to say:

"Upon the expiration of the lease in June 1990 the livestock on the property were sold and the partners were to come to an agreement between them as to how the remaining assets of the Partnership would be distributed."

It will therefore be seen that the parties have a sharp difference of view as to the terms of the Partnership and it is therefore necessary to examine the evidence in the light of the authorities bearing on the attempted resolution of factual differences arising between deponents on affidavits.

In the first place it is necessary to bear in mind that this being an application for summary judgment, the onus remains on the plaintiff throughout to satisfy the Court under R 136 and the cases decided under that Rule that the defendant has no defence to the proceeding.

Secondly, the approach to apparent differences of fact on affidavit is as set out in the well known passage from the speech of Lord Diplock and Eng Mee Yong v Letchumanan [1980] AC 331, 341 that a Judge is not:

"...bound to accept uncritically as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent or inherently improbable in itself it may be."

and as tempered by the judgment of Cooke P in Bilbie Dymock Corporation Ltd v Patel and Bajaj (1987) 1 PRNZ 84:

"In determine an application for summary judgment, the need for judicial caution to prevent prejudice to the defendant has to be balanced with the appropriateness of a robust and realistic attitude when that is called for by the particular facts of the case."

Applying those tests to the evidence there are a number of variations to be noted.

First, although Mr Henderson says that the Forest View Partnership was on the same basis as that for Porangahau, it appears his recollection may be in error in that respect in that he says he contributed the preponderance of the physical labour to the Porangahau firm but he agrees that it was Mr Guerin who was to contribute the larger part of the labour for the Forest View Farm.

Secondly, Mr Henderson says that it was he who contributed most of the cash for the capital of the Forest View Partnership. That seems to be borne out by the accounts as at 31 March 1986 previously referred to but what does not appear from those accounts is what were the respective financial positions of the partners on the dissolution of the Porangahau Partnership. Mr Guerin says that they had a surplus of cash which purchased stock for Forest View and that they took stock from Porangahau to the Forest View Farm. If the partners had been in equal partnership in Porangahau, it seems difficult to understand why the funds introduced by Mr Guerin as at 31 March 1986 were so much less than those shown by the books as having been introduced by Mr Henderson. It may be that Mr Guerin was

overdrawn in the Partnership books for the Porangahau Partnership and that that explains the difference, but there is no evidence on that topic.

The next matter to which Mr Henderson draws attention is that he has never received interest on his capital contribution to the Forest View Partnership over the years of its operation. That certainly seems to be the position according to the books, but the evidence is silent as to whether the partners ever discussed that possibility and decided against it, or whether it was merely a matter which the parties did not address.

Similarly, no interest appears to have ever been charged to Mr Guerin over the term of the Forest View Partnership even though for an appreciable proportion of the life of that firm his account with the Partnership was in debit. Again, although that matter is now raised in the affidavits the evidence does not show whether the partners turned their minds to that matter at the commencement of the Partnership and decided to make no such provision, or whether it did not occur to them.

The next matter - although probably of lesser importance - is that the partners described Mr Guerin's contribution to the Partnership in slightly different terms. Mr Guerin variously describes his contribution as labour and stock and plant but also on occasions, claims that his equipment was an additional contribution. It is difficult to evaluate his assertion that he contributed stock and plant to the Partnership in the light of the small figure for his funds introduced as at 31 March 1986.

One of the major issues of course is that it is common ground that neither of the partners have been paid anything for the labour which they contributed to the firm over the years. Mr Guerin claims that Mr Henderson contributed virtually nothing by way of labour. Mr Henderson disagrees

although even he does not claim that his labour contribution was in any way comparable to that of Mr Guerin. Ideally of course if the arrangement at the inception of the Partnership was that Mr Guerin should have been paid for his labour then that should have appeared in the Partnership accounts for the years during which the Partnership endured even if that meant that an internal set of accounts for the firm had to be kept by contrast with the taxation accounts.

The position in which the parties now find themselves in that respect is it seems one of the underlying reasons for the parties becoming involved in litigation and it has a marked effect on the outcome of the firm at the date of its dissolution. That is demonstrated by the difference in view between the respective accountants. Mr Donovan says that as at 31 March 1991, the Partnership assets totalled \$18206 and its liabilities consisted of a debt to Mr Henderson of the same amount. The Court pauses at that point to note that Mr Donovan only shows the bank credit at that date as \$3130. That may be, and arithmetically appears to be, a typographical error for \$13130.

Mr Donovan then goes on to say that because of Mr Guerin's withdrawal of \$13000 from the Wrightson finance account, Mr Guerin now owes Mr Henderson the sum which Mr Henderson seeks in this proceeding, \$17431.

Without the Court endeavouring to usurp the accountant's functions, it may however not be the case that that is the arithmetical result. Mr Dent has tentatively re-worked the figures making allowance for Mr Guerin's capital contributions including an allowance for his labour. That shows that on that basis Mr Guerin is in fact owed \$18801.50 by the Partnership while Mr Henderson owes it \$5026.50 and after allowance for tax Mr Dent says that Mr Henderson effectively owes Mr Guerin \$5349 to achieve equality. Following on from that counsel submitted that if the accounts are now to be withdrawn to make an allowance to Mr

Guerin for his labour then that may well have taxation implications for either or both of the parties. Such may well prove to be the case but that is not a matter which arises for decision in this case.

Also as a result of the respective versions of the terms and operation of this Partnership now before the Court, Mr Guerin says that he has provided the Partnership with such things as farm materials, stock and permitting grazing of the Forest View Partnership stock on his own property, such that he is entitled in his calculation to the sum of \$23075. Mr Henderson has responded by drawing attention to his cash contributions over the years of about \$60000 to which must be added payments which he says he has made for stock and for transport.

When one endeavours to sum up all those views, it becomes apparent that it is not possible to resolve the differences of view between these parties as expressed in their affidavits. It may ultimately prove to be the case, as Mr Henderson says, that his contributions were to be balanced out by Mr Guerin's labour and expertise so that at the end of the day the parties were to be equal but it may be a matter for doubt as to whether the parties ever turned their mind to the method by which that balancing out would be achieved. Certainly, in this Court's view, despite the fact that there has never been any claim by Mr Guerin to be paid or credited with the value of his labour during the term of the Partnership, the fact that something of the sort may have been considered at the time cannot be wholly discounted, nor can the possibility that the use of Mr Henderson's money was to be equated with the use of Mr Guerin's labour. At bottom, this Court is of the view that these gentlemen made an oral agreement and the only way finally to determine the terms on which they agreed or the matters on which they omitted to agree, is by testing their respective versions of events on oral evidence.

In the light of that the Court reaches the view that the plaintiff has failed to satisfy it to the standard required by R 136 and the cases decided under that Rule that the defendant has no defence so the application for summary judgment accordingly requires to be discussed.

In the light of that the Court need deal briefly only with some of the other matters raised in the affidavits.

The first of those is that Mr Guerin said that Mr Henderson had failed to disclose all material facts in his initial affidavit and in particular had failed to disclose a payment to him of some \$35000. It seems true that that payment was not adverted to but whether or not it was material and the reasons for the payment being made do not require resolution in this matter.

Secondly, counsel for Mr Guerin claimed that the summary judgment procedure was not available in this instance because this was essentially a dispute between partners which invoked the equitable jurisdiction of Court thus debarring the use of the summary judgment procedure under RR 135 (1)(c) 447. That too does not arise for decision in this matter. Mr Henderson sued for the debt which on the accounts at 31 March 1991 was owing. It may be that that means that the claim was not "wholly" within the equitable jurisdiction and that accordingly summary judgment was not debarred.

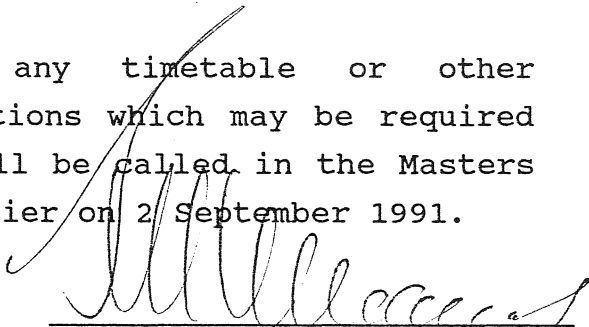
Thirdly, Mr Gilmour submitted that the plaintiff's case was partly based on fraud because of the plaintiff's allegation of Mr Guerin's dishonest withdrawal of \$13000 from Wrightson Finance. Despite the authorities on that topic it is the tentative view of this Court that that submission may be stretching the terms of R 135 (1)(a)(iv) 184 in that whatever may have been Mr Guerin's motives for withdrawing those funds - and he says he was entitled to them - the sum shown on the books at the end of the day as payable by Mr

Guerin to Mr Henderson does not necessarily seem to invoke a claim involving fraud.

The final matter is that that parties have expressed themselves in strong terms about one another in the affidavits in this matter. That as the Court said in introduction, is unfortunate and is to be deprecated but at the end of the day does not affect the outcome of these proceedings.

The Court's formal orders therefore are :

1. That the application for summary judgement by the plaintiff against the defendant is discussed both as to liability and as to quantum.
2. Since the matter is likely to to to trial it is appropriate that the costs of the application be reserved. Hearing time including delivery of judgment 1 1/2 hours.
3. The question of any timetable or other consequential directions which may be required is adjourned and will be called in the Masters Chambers List in Napier on 2 September 1991.



Master J H Williams QC

Solicitors: Gresson Grayson & Calver, Hastings
for Ian McLean Henderson

Bannister & von Dadelszen, Hastings
for Richard George Guerin