HCA8921/1998

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 8921 OF 1998

BETWEEN

CHAN YU LEUNG also known as RAIN CHAN Plaintiff

and

WU HOK BIU also known as ALEX WU 1st Defendant

WU SHIU WING 2nd Defendant

Before : Hon Yam J in Court

Dates of Trial : 2–4 May 2001

Date of Handing Down Judgment : 18 May 2001

J U D G M E N T

Background of the dispute

The plaintiff and the 1st defendant had agreed in late 1995 to cooperate in a business selling metal enclosure boxes for air-conditioning units. They dispute the legal relationship in their cooperation. The 1st defendant agreed, however, that they had agreed to share the net profits equally. He was to pay all the capital expenditure in setting up the business. His father, the 2nd defendant, would be registered as the sole proprietor of this business called Linkful Technology Co. ("Linkful"). But the

2nd defendant was only a nominee. The plaintiff would work full time for the business.

The plaintiff said that it was a partnership business. Furthermore, he would be paid the salary of $30,000 per month on top of the 50% net profit sharing.

Was there a partnership?

Partnership is a state of affair. It does not depend on the words used by the parties. It does not even depend on the intention of the parties, i.e. whether the parties did or did not intend to enter into a partnership relationship. It is the state of affair from which the law would construe a partnership. The 1st defendant's evidence appeared that he always intended to own the business and that, essentially, he agreed that the plaintiff was some kind of an agent, who would receive commission. It is not the 1st defendant's case that he employed the plaintiff. However, he did not give evidence that he had ever expressly told the plaintiff that that was his intention. He simply agreed that the plaintiff should manage the operation of the business and he would receive 50% of the net profits.

On the face of it, the 1st defendant's own case has satisfied the test in section 3(1) of the Partnership Ordinance, i.e. a partnership is the relation which subsists between persons carrying on a business in common with a view of profit. Further, section 4(c) provides that the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business. I do find in this case the state of affair in the business of Linkful was a partnership relationship.

Was there an agreement to pay salary?

However, since the parties do not dispute that both of them were to share equally in the net profits or losses of the business, it does not seem to matter whether the court finds the relationship was a partnership relationship or not. The parties, however, dispute seriously on whether there was an agreement whereby the 1st defendant agreed that the plaintiff would receive a monthly salary of $30,000 from January 1996 which was voluntarily reduced by the plaintiff to $15,000 per month from January 1997.

The plaintiff said there was such an agreement. However, in practice, he did not receive regular payments of salary. He accepted this because he knew the business was not profitable initially and its financial position needed to improve before it was realistic to receive payment. However, by early 1997, the position was becoming unacceptable and he agreed with the 1st defendant that he should be paid $15,000 a month which was realistic given the state of the business by that time. Since then he received $15,000 a month and the same was entered every time in the ledgers as "salary" by the 1st defendant. The plaintiff ceased to work for the business from about July 1997 other than to chase up payments of some outstanding invoices.

The 1st defendant, however, said that those payments from time to time, although labelled as salary were in fact advance commission which have to be brought into calculation at the end of the day when the net profit is calculated. In this respect, I prefer the plaintiff's evidence than the 1st defendant. The entries in the ledgers are for "salary". The 1st defendant said that this was because there was no room to write the word

"commission" or "advance commission". This is physically not true. The space in the ledgers is large enough even for the full words "advance commission" for the 1st defendant's handwriting. In any events, as submitted by Mr Johnathan Harris, counsel for the plaintiff, that the 1st defendant could have used abbreviations. The 1st defendant's excuse is entirely unacceptable.

I also accept the submissions that it is unlikely that the plaintiff would have agreed to run the business for a year without receiving any payment at all, particularly when he had been unemployed for some time. The injection of money into the business by the 1st defendant was not large. His involvement in the activities of the business was not much either. It is not surprising that the plaintiff would have expected and received the 1st defendant's agreement to payment of a salary for his full time work in the business. It is unlikely that the plaintiff would have agreed to receive half of the net profit to be calculated at the end of the year only.

I consider the 1st defendant to be more truthful on a further ground. The 1st defendant's case has always been based on a partnership business whereupon he would also be liable to shoulder half of the losses, together with his monthly salary. After his monthly salary was paid, the partnership would probably suffer losses and the eventual sum the 1st defendant would have to pay him would be less. Nonetheless he maintains his case all along and did not say he was entitled to 50% commission on top of his salary.

Year end bonus?

The plaintiff also claims for a year-end bonus payment. However, he frankly admitted there was no express term of agreement in that respect. He just added that further sum in accordance with his understanding of his legal entitlement. In the absence of any express or implied agreement, I am afraid there is no presumption of end of year payment under Part IIA of the Employment Ordinance, Cap.57. Thus, I would disallow the end of year payments as claimed by the plaintiff. The plaintiff's entitlement for salary should be less the sum of $30,000 for the end of year payment for 1996 and the sum of $14,506 for the year 1997 as claimed.

Length of employment

Further the plaintiff also claims for his salary up to 19 December 1997 when he gave notice for the termination of the partnership. However, on the evidence of the plaintiff, he was asked by the 1st defendant to leave Linkful in July 1997. He was later on barred from attending the office of Linkful. He is at the most entitled to one month payment in lieu of notice. Thus, I would only allow his claim for salary at $15,000 per month up to 31 August 1997.

The plaintiff's claim for reimbursement

There are two incidental matters. First, there was the plaintiff's claim for reimbursement in the two sums of $8,000 and $6,000. The plaintiff gave evidence that he did pay this two sums for and on behalf of the business. Receipts therefor were produced. The 1st defendant cannot say that the paid sums were not so paid. He only said that he would only pay the sums if the business made sufficient money on the projects to cover these

costs. This is no defence at all when the plaintiff did advance money for the benefit of the business. I would allow the claim.

The 1st defendant's counterclaim for goods sold

Secondly, on the other hand, the 1st defendant counterclaims for the price of goods sold by the partnership to the plaintiff. There was no dispute that Linkful paid $19,521. The plaintiff claims that the mark-up price should be between 10% to 15% whereas the 1st defendant said the mark-up price should be 30% on the contract price, because he included a 15% penalty on the ground that he had to look into the matter. In my view, there is no justification for the 1st defendant to impose a 15% penalty on top of the normal profit margin. Thus, I would only allow the mark-up price of 15% calculated as follows : $19,521 x 100/85 = $22,966.

Conclusion

The plaintiff agreed that if the court found a partnership relationship and that the plaintiff was entitled to $30,000 per month for the year 1996 and $15,000 from January 1997, the plaintiff would ask for an account to be taken as he is not satisfied with the unaudited account presented by the 1st defendant. The total amount now due and owing from the 1st defendant to the plaintiff can only be ascertained after the taking of the account by a Master as apparently the partnership has suffered a loss when the salary of the plaintiff is taken into consideration. Both parties should share the losses of the partnership equally.

The formal judgment shall be drawn up by the plaintiff for the comments of the 1st defendant (if any) before submission for my approval in

light of my judgment herein since there are quite a number of claims under the Statement of Claim.

Counsel for the 2nd defendant submitted that there is no cause of action against the 2nd defendant and thus the 2nd defendant should be entitled to costs. However, I agree with counsel for the plaintiff that the 2nd defendant was joined because he is the registered proprietor of Linkful. It is necessary that he is bound by the judgment. He did not take any active part in the trial. I consider that the plaintiff is entitled to costs against both the 1st defendant and 2nd defendant in the action herein. Accordingly, there is an order *nisi* for costs to the plaintiff against the 1st and 2nd defendants.

(D. Yam)
Judge of the Court of First Instance,
High Court

Mr Johnathan Harris, instructed by Messrs Alvan Liu & Partners,
for the Plaintiff

Mr Raymond Lau, instructed by Messrs Laurence Pang & Co.,
for the Defendants