

HIGH COURT. 1960. 19, 26, May. ROTHWELL A.C.J.

Partnership - formation by mutual consent - absence of written agreement - dissolution.

Following a meeting early in the year 1959, the plaintiffs and others, with the defendant, agreed to form an association to promote boxing contests in Savai'i. The association was never registered. Operations at first were confined to Savai'i but at a later meeting, it was agreed to have contests in Upolu. Almost immediately after the commencement of the Upolu contests, an unsatisfactory situation arose in that there was a marked decrease in the participation and co-operation of members and it appears that thereafter, only the defendant took an active interest in the association's activities. On 2 October 1959, one of the original founders of the association died. On 17 October 1959, the defendant having become dissatisfied with the response of members in respect of the Upolu venture, caused a notice to be circulated amongst them and to the effect that after the Savai'i boxing finals on 24 October 1959, a general meeting would be called and members were requested to be present to receive their shares and/or to decide on the refund of subscriptions. On an action for dissolution of partnership and a claim for accounts -

- HELD: (1) That there was a partnership formed without writing but by mutual consent constituted by the original group; and that this partnership was dissolved by the death of an original member on 2 October 1959.
- (2) That the remaining partners by mutual consent continued thereafter in a new partnership which subsisted until after the final contest at Savai'i on 24 October 1959, and while not deciding whether the notice of 17 October 1959 effected a dissolution, that by acquiescence in the position created by that notice between 24 October and mid-December 1959, all partners concurred in a dissolution in terms of the notice.

Judgment for defendant.

ACTION praying for dissolution of partnership and taking accounts.

Phillips, for plaintiffs.
Metcalf, for defendant.

Cur. adv. vult.

ROTHWELL A.C.J.: This was an action praying for a dissolution of partnership and for the taking of accounts in respect of the said partnership. There was an alternative claim for accounts under another heading, namely, a constructive trust alleged in the defendant as trustee for the plaintiffs.

In or about the month of March 1959 the plaintiffs came into association with the defendant and also with three other persons who are not parties to the action with a view to incorporation of a company for the purpose of promoting boxing contests in the island of Savai'i. The company was in fact never registered, but it is necessary to consider the intentions of all persons associated with the venture at an early stage in order to determine the nature of their operations. On April 12, 1959 a meeting was held at which a list of proposed members was drawn up, and

it was arranged that a further meeting should be called for April 26, 1959. There was to be a subscription of £10 each from proposed members, and they were asked to bring their subscriptions to the meeting of April 26. The plaintiff, Ronald Berking, was appointed Secretary, and in fact acted in that capacity throughout the history of the operations of the group. He kept minutes and records and sent notices or otherwise arranged for meetings. Active operations commenced with a boxing contest on May 30, 1959. There was some delay in the payment of the £10 per capita contribution on the part of some members, but all contributions had been paid by July 11, 1959.

Operations at first were confined to the island of Savai'i but at a meeting held on July 25 a motion was carried that boxing contests should be commenced at Vailu'utai in the island of Upolu, and preparations to that end were pursued on the understanding that the opening night there would be August 11. This contest duly took place and after the contest that night there was a meeting at the home of Mr Stowers, where it was decided that the defendant should take the money arising from that contest and settle the relative debts incurred, as payments were to be made in Upolu, and that the same procedure should be followed in connection with later boxing nights at Vailu'utai. This motion went on to say that "after settling debts in Apia, Betham should account for the balance to the Secretary." Mr Betham was also to make out statements in respect of each boxing night to be handed to Mr Thomsen (who had been appointed Auditor) and who was to reduce them into proper form and also send them on to the Secretary.

Whatever the reason may have been, it is clear that help from the Savai'i members in respect of the Vailu'utai contests began almost immediately to drop off, and Mr Betham was authorised to hire helpers and pay them from the proceeds of the Vailu'utai contests at which they were employed. The final night at Savai'i was to be held on October 24, 1959 but owing to a late start the Vailu'utai series of contests was estimated to run for some weeks after the Savai'i series had been completed.

In the meantime Mr Betham apparently became dissatisfied with the assistance of Savai'i members in respect of the Vailu'utai contests, and he prepared a notice for members of the group as follows:-

"Salelologa.

17th October, 1959.

MEMBERS OF THE SAVAI'I SPORTS SYNDICATE:

I wish to advise you all that through lack of co-operation and not keeping with the original plan I outlined at the start I have decided to refund all subscription plus whatever dividend you are entitled to.

Through this lack of co-operation the formation of a Limited Co. was withheld. The subscription of all members are still held in trust by the Acting Secretary Mr R. Berking.

After the Savai'i finals at Salelologa on the 24th October 1959, a general meeting will be called and all members are requested to attend to receive their shares.

I regret to have taken this action but I have no other alternative.

Thanking you.

Yours faithfully,

(A.M. Betham)
CONVENOR"

Mr Berking, the Secretary, said that this letter was "received by me before the finals on October 24."

In cross examinations he said "the letter of October 17 was handed to me by Betham. He also gave me some for distribution. I distributed them. I am not sure if all members got them."

Mr Betham in his evidence said "I prepared the letter of October 17 handed Berking a copy and copies for all members. Schwalger has admitted receiving a copy. It was discussed at the time."

This last reference is rendered necessary by a statement by Mr Schwalger in evidence that he had not had a copy of the letter of October 17. In answer to a question by the Court he said - "I don't think I have seen it before."

This seems a rather inconclusive reaction to a letter which might be expected to make more definite impression.

After the Savai'i finals on October 24 the contests were continued at Vailu'utai but the defendant send neither net cash proceeds nor statements in respect of these contests to the Secretary Berking. Round about the middle of December 1959 a set of accounts headed "winding-up Statement" was prepared by Mr Thomsen (apparently on instructions from the defendant) and these were handed to the Secretary Berking for distribution to members, and in respect of this statement and the surrounding circumstances Mr Berking had the following to say -

"I received a copy of the so-called winding-up statement in December. Before the finals at Vailu'utai. It was never authorised. Betham wanted a meeting on December 19. I did not call it."

There was in fact an emergency meeting of some sort on December 20 at which eight of the plaintiffs namely, Berking, Schwalger, Ah Sue, Pereira, Slade, C. Bartley, Purcell and White were present. This, Mr Berking said, was to discuss defendant's attitude. It was decided by those present that they would claim and remove what they considered to be their property after it has been used for the boxing contest at Vailu'utai which was scheduled for the following night. This operation was in fact carried out. The Secretary Berking took charge of the surplus cash, and he and the others dismantled and removed various items of equipment. The boxing ring was purchased from the Marist Brothers for £20 (which was paid by Berking out of his own moneys later to be reimbursed from the cash takings). The moneys have been paid into a Post Office Savings Account and it is assumed that the equipment is also being held pending the decision of these proceedings.

This action was then launched by plaintiffs, who contend for a subsisting partnership, and now ask for its dissolution and for accounts.

The determination of the matters at issue between the plaintiffs and the defendant necessitates a decision as to what was the nature of the group which commenced and continued these boxing operations and what effect if any was brought about by the defendant's letter of October 17, 1959.

It seems clear that the group of sixteen people (including the three who were not parties to this action) was a partnership formed without writing but by mutual consent as is evidenced by its operations. Halsbury's Laws of England Third Edition Volume 28 page 483 -

"Partnership is the relation which subsists between persons carrying on business in common with a view of profit."

It was contended by Mr Metcalfe for the defendant that as a company was contemplated from the outset, the association was not a partnership. I cannot find any support for this proposition. It is true that promoters

associated only to form a company do not constitute a partnership, and this would have been the result if the intention had been carried out which was expressed in an early circular sent by the defendant to interested persons. This circular said -

"all this information should be ready and available for discussions so that business will commence as early as possible immediately after the company is registered."

Business as we have seen was in fact commenced soon after the prospective shareholders got together, and was carried on for a period of some months, and the company was in fact never registered. I find therefore that there was a partnership constituted by the mutual activities of the sixteen people associated together for the purpose of profit and on the basis of common and equal shares.

A fortuitous circumstance must now be considered, namely, that one of the original members of the partnership, Mrs Luaipou Jessop, died on October 2, 1959. It is, of course, elementary law that the death of one partner brings a partnership to an end, and this must have been the effect in the present instance of the death of Mrs Jessop on the date mentioned. The activities of the remaining partners, however, continued without interruption, and although it is clear that their minds were not directed to any legal consequence of their actions there must be held to have been a constructive partnership, brought into being by such continued action between the fifteen remaining members with the assets then remaining available on a notional dissolution and re-constructions.

We now come to the effect of the letter of October 17 by which the defendant purported to dissolve the partnership and continue operations on his own and for his own benefit. Quoting again Halsbury Volume 28 page 503 -

"Partnership at will may be determined at any time by any partner on giving notice to the others."

This in my view has clear application to the circumstances of the present case, but it is not quite so clear that the defendant has in fact given notice to the other partners. The authorities available to me seem to be confined to the power of a partner who acts in a representative or ministerial capacity to bind the firm in respect of dealings with third persons. There seems to be no authority relating to the power of such person exercising an internal function to bind other members of the partnership for whom he acts. It is clear, however, that Mr Berking was from the outset accepted by all members of the partnership as its Secretary and the medium by which notices in connection with the business of the partnership should be received or sent as the case might be. His authority in that respect as far as third parties are concerned is clear and unequivocal, and I think it can only be assumed that he has equal authority in respect of the members of the partnership to receive a formal notice issued by one of the members and handed to him for distribution. Fortunately, however, I am not called upon to decide this point (which may nevertheless be sound) because I propose to base my decision on another aspect of the relations of these people inter se.

Mr Berking says he got the letter of October 17 before the Savai'i finals on October 24. It was a letter which purported to terminate completely the financial rights of all partners other than the defendant in a venture which appears to have been profitable and which was extending to the island of Upolu and might therefore be expected to yield still more profit. It might be expected that it would have provoked considerable discussion and dissatisfaction amongst the people who were thus to be condemned to a loss of their share in a valuable asset. In spite of this, however, the defendant thereafter operated the boxing contests at Vailu'utai without assistance from the plaintiffs (except to a minor extent which I shall deal with shortly) and did not account to the Secretary or, as he had expressly been required to do, forward cash or records in respect of the

Vailu'utai operations. No person sought to dispute the defendant's right thus to determine the partnership, or objected in any way until the so-called winding-up statement was presented to them about the middle of December after the lapse of approximately two months.

Here again the Court is required to draw inferences from proved facts, and I find that this two months' silence is inconsistent with anything other than a tacit acceptance of the fact of dissolution in terms of the notice of October 17 in acquiescence by the plaintiffs.

The only evidence tendered to disprove such acquiescence was firstly that the defendant continued to operate under the business licence in the name of Savai'i Sports Limited which had been issued on July 16. I do not think that this is a matter of any substance. The other evidence tendered to disprove acquiescence was to the effect that some members of the partnership (resident in Savai'i and amongst the plaintiffs in this action) had helped with official duties at Vailu'utai between October 24 and December 21. Mr Berking says he acted as a Judge on one occasion and was asked also on another occasion but owing to some fortuitous circumstances he was not able to carry out the duties. He also says that the plaintiff Schmidt acted in some capacity on another night. The defendant admitted in his evidence in chief that this had been so, but said that he treated Mr Berking as an interested visitor and asked him if he would judge. He did not know about the other incidents alleged by Mr Berking and in any event they were, I think, also of little importance.

It may be that the defendant was rather casual in assuming that he would be allowed to purchase all the assets and equipment of the partnership in order that he might carry on in his own right but I think that that was his honest intention.

I find therefore that there was a partnership of sixteen persons constituted by the original group and that this was dissolved by the death of Mrs Jessop on October 2, 1959. I find further that the remaining 15 partners by mutual consent continued thereafter in a new partnership which subsisted until after the final night at Savai'i on October 24, 1959. Without deciding whether the letter of October 17, 1959 effected a dissolution by its being served on all other members of the partnership, I find that by acquiescence in the position created by that notice between October 24, 1959 and mid-December 1959 all partners concurred in a dissolution in terms of the notice. This finding also disposes of any question of constructive trust.

There must therefore be judgment for the defendant, and I expressly refrain from commenting on the subject matter of the so-called "winding-up statement" of December 1959, because that statement is not before me as such in these proceedings and there may well be items in it which are open to comment.