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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 107 of 1990

BETWEEN:

JOSE DA COSTA-ALVES
Appellant

AND:

FRANCISCO MILHEIRO BENTES
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 19 June 1995)

The appeal and cross-appeal

This is an appeal and cross-appeal by way of rehearing under rule 78.06 against certain orders (see pp17-18) made by the Master on 25 August 1992. In his amended Notice of Appeal the appellant contends that the Master erred in 8 ways, viz:-

(1) In finding that -

(a) the respondent contributed the sum of $6,940.00 in excess of the amount contributed by the appellant towards the capital of the partnership [see findings (1)-(4) at pp10-11];

(b) the appellant, during the term of the partnership, withdrew from the partnership monies the sum of $73,000.00 for which he has not accounted, and that sum is due by the appellant to the partnership [see

finding (8) at p12, and (f) and (g) below];

(c) there should be paid from the partnership the sum of $27,670.00, by way of allowance for wages to Maria Bentes from 17 March 1988 to 31 December 1988 [see finding on p12 and order no.(1) on p17];

(d) monies paid to the respondent whilst in Portugal were in respect of drawings by way of "holiday pay", and not a return of capital [see finding (c) on p16];

(e) the respondent and not the appellant was entitled to interest on loan of capital [see order 4(b) on p3, findings (1)-(7) at pp10-12, and (2) below]

(f) the value of the goodwill, plant and equipment of the business of Central Supermarket as at 31 December 1988 was $275,000, when the true value of those items must have been $334,805.00 [see (b) above, (g) below, and finding at pp13-14]; and

(g) the drop in value of stock to 1 July 1988 in an amount of approximately $73,000.00 should not be reflected in the value of goodwill of the said business, except in so far as it might (though in fact it did not) impact upon the 'maintainable earnings' stream of the business [see (b) and (f) above, and p13].

(2) In ordering that no interest be paid to the appellant by way of an allowance for a return on the appellant's interest in the partnership from 1 January 1989 to the date of payment to the appellant [see (1)(e) above, and order no.(5) on p18].

In his amended Notice of Cross-appeal the respondent contends that the Master erred in 2 ways, viz:-

(a) in allowing a value of $275,000.00 for the goodwill, plant and equipment of the business of Central Supermarket as at 31 December 1988, in that that value was excessive in all the circumstances [see finding at pp13-14, and cf.(1)(f) above]; and

(b) in finding that the appellant contributed to the business by way of capital the sum of $32,485.18, when the true figure should have been $20,000.00 [see finding (n) on p7].

The background to the Master's orders of 25 August 1992

On 21 November 1990 Angel J ordered, inter alia, by consent that:-

"1. The partnership of Central Supermarket be dissolved as from 1 January 1989.

2. The Master take accounts of the partnership as from the date of commencement of the partnership being 8 February 1984; and, for that purpose, [he] may appoint an independent accountant to assist in the taking of accounts.

- - -

4. The Master, by his agent, consider and make recommendations in relation to:

(a) an allowance for wages payable to Maria Bentes from 18 March 1988 to 31 December 1988 inclusive; and

(b) an allowance for a return on the [appellant's] interest in the partnership, if any, from 1 January 1989 to the date of payment to the Defendant."

- - -"

The following is common ground. The appellant and the respondent had entered into partnership on 8 February 1984 to conduct a business enterprise known as the 'Central Supermarket', in Darwin. They ran the business jointly, sharing the hours of work, until the appellant withdrew from participation in March 1988, following a nervous breakdown; he took no further part in running the business. The respondent continued to run it and in due course entered into partnership

with his wife for that purpose. He ran the business for over 3 years until he sold it on 5 August 1991. Questions then arose as to the division of the assets of the partnership between the appellant and the respondent. Hence this litigation.

By consent, the partnership is deemed to have terminated on 31 December 1988. That date appears to have been struck fairly arbitrarily. It meant that in taking the account directed at p3 the Master was required to find the value of the respective interests of the appellant and respondent in the assets of their partnership as at 31 December 1988. This entailed enquiring into matters such as: whether an allowance should be made for the work which the respondent's wife, Maria Bentes, had put into the business for some 9 months from March 1988 to 31 December 1988, as per direction 4(a) on p3; whether the respondent should pay interest to the appellant for his use of the latter's capital in the business, from 1 January 1989 until its sale in August 1991, as per direction 4(b) on p3 ; and as to the sources of the original capital contributions by the parties to their partnership, whether repayments of those capital sums had since been made, and to whose account. The value of the business as at 31 December 1988 was obviously a key question; so was the question whether certain 'findings' by the Master's investigating accountant Mr Blacker led to a conclusion that it was appropriate to deduct some $73,000 from monies otherwise due to the appellant on the termination of the partnership.

In July 1992 the Master made his findings, to which I now turn.

The Master's findings of 23 July 1992

The Master found the following 20 'preliminary facts':-

(a) On or about 8 February 1984, the parties borrowed the sum of $210,000 from Esanda Limited (Esanda), in order to purchase a business known as Central Supermarket from L. & A. Tsioupis (Tsioupis) for $290,000 for the goodwill and fixed assets. Tsioupis demanded and was to be paid an additional $10,000, making in all a purchase price of $300,000 for the goodwill and fixed assets.

(b) To qualify for the loan from Esanda ($210,000) and to assist in paying for the goodwill and fixed assets ($300,000), the parties raised initially a sum of $60,000 which came from the following sources:

	$
. Borrowed from National Bank by respondent	10,000
. Paid by appellant from his own money	10,000
. Borrowed by appellant from Jose Godinho (Godinho)	20,000
. Borrowed by respondent from Peter Cavanagh	15,000
. Borrowed by appellant from Russell Brown	5,000
	60,000

This $60,000 was deposited by the parties on 11 November 1983 into a National Australia Bank Savings account.

(c) In addition to the loan of $210,000 from Esanda and the $60,000 deposited as per (b) above, the parties had to find a further $30,000 to pay the purchase price of $300,000.

(d) To meet part of this $30,000 shortfall, an additional $10,000 was borrowed from Godinho making a total of $30,000 borrowed from him (see (b) above).

(e) In addition to purchasing the goodwill and fixed assets for $300,000, the parties purchased the stock in the business for the sum of $150,000.

(f) On or about 9 March 1984 the respondent and his wife, Maria Bentes, sold a business they owned known as Rapid Creek Supermarket (Rapid Creek) and, from part of the proceeds of that sale, the sum of $30,000 was paid by the respondent to Tsioupis being:

	$
. Amount in part payment of monies due for stock	20,000
. Amount demanded by Tsioupis over and above purchase price for goodwill and fixed assets	10,000
	30,000

(g) The shortfall of $30,000 referred to in (c) above was therefore met in part ($20,000) as follows:

	$
. Borrowed from Godinho (see (d) above	10,000
. Paid personally by respondent from sale of Rapid Creek (see (f) above)	10,000
	20,000

(h) There is no doubt that the remaining $10,000 of that shortfall was paid, but the evidence is not clear from whom and from what source it came. The respondent alleges that, from monies that he had accumulated while trading at Rapid Creek, he paid $15,000 towards this shortfall. The appellant disputes this but, in evidence, he did say that he thought the respondent had in fact contributed a further $10,000, though he was unclear from where this money had come. I accept the appellant's version as being the more likely. It is open to me to find, and I do so find, that the remaining $10,000 of the shortfall was paid by the respondent.

(i) The balance due on the stock, $130,000, was paid by the partnership.

(j) The respondent, from child endowment monies he and his wife held in a separate bank account, repaid the $5,000 due by the appellant to Russell Brown.

(k) The monies due to Godinho, $30,000, were repaid to him by the partnership.

(l) The respondent personally made 3 payments of $1,475 each (totalling $4,425) as part payment of what was owing to Peter Cavanagh (see (b) above). The balance of what was due to Cavanagh, was paid by the partnership.

(m) In August 1984 the appellant, as the respondent's attorney under power of attorney, received on behalf of the respondent the sum of $10,000 being the balance due to the respondent and his wife on the sale by them of their interest in Rapid Creek. This money was paid by the appellant into a term deposit in the name of the respondent and his wife with the partnership's bankers, ANZ Bank. It was so deposited **"as collateral for an overdraft"** for the partnership business. This sum was repaid by the appellant to the respondent in mid-September 1984 from the appellant's own money. Upon that repayment being made, the sum of $10,000 that had been deposited with the Bank belonged to the appellant.

(n) The appellant deposited further money with the ANZ Bank, to secure later increases in the business overdraft. In August 1988, the bank, in reduction of the overdraft, called up these deposits together with the interest accrued on them. The sum involved was $32,485. I find therefore that the appellant paid that sum towards reduction of the partnership's overdraft.

(o) In determining what is due to the parties from the proceeds of sale of Central Supermarket as a partnership asset, I was obliged to consider, inter alia, Blacker's figures in annexure "E" to his report. I do not, however, accept the value he has placed on stock as at 31 December 1988 [$108,790]. In arriving at that value for the purpose of the balance sheet and profit-and-loss account, Blacker took the same stock figure [for 31 December 1988] as that existing at 1 July 1988. This results in showing a gross profit margin of 23.57% which appears unrealistically high having regard to earlier margins. The figures for the year ended 30 June 1989, which are mentioned in exhibit "L", show a profit margin of 17.26%. This also supports the view that the gross profit margin on Blacker's figures are unrealistically high. Accordingly, I have accepted as fair and reasonable the gross

profit margin of 16.5% suggested in exhibit "L" for the period from 1 July to 31 December 1988.

(p) I find as acceptable the following figures in the profit-and-loss statement which is part of annexure "E" to Blacker's report, namely:

	$
. Sales for period 1/7/88-31/12/88	557,082
. Stock on hand as at 1 July 1988 [$108,790], purchases [from 1 July 1988] and freight	538,450
. Stock for private use	3,900
. Expenditure [1/7/88-31/12/88]	99,109

(q) The gross profit for the period 1 July 1988 to 31 December 1988 was therefore $91,919, being 16.5%, to the nearest dollar, of the sales figure of $557,082.

(r) The cost to the business of goods sold between 1 July 1988 and 31 December 1988 was therefore $465,163, calculated as follows:

	$
. Sales	557,082
. Less gross profit	91,919
	465,163

(s) On the figures which I have accepted from Blacker's report, the value [at cost] of stock on hand as at 31 December 1988 was therefore $69,387 calculated as follows:

	$
. Stock on hand as at 1 July 1988 [$108,790], including purchases [from 1 July 1988] and freight	538,450
Less -	
. Goods sold between 1 July 1988 and 31 December 1988 (as per (r) above)	465,163

. Stock for private use (as per annexure "E" to Blacker's report)		3,900	
		469,063	469,063
[Assessed stock on hand, 31/12/88, at cost:]			69,387

(t) Reconstructing Blacker's profit-and-loss statement by incorporating the above figures, there was therefore a net loss of $7,190 for the period 1 July to 31 December 1988, as follows:

			$
SALES (as per annexure "E" to Blacker's Report)			557,082
COST OF GOODS SOLD:			
. Stock on hand at 1 July 1988, purchases and freight (as per annexure "E" to Blacker's report)	538,450		
. Stock for private use (as per annexure "E" to Blacker's report)	3,900		
. Stock on hand as at 31 December 1988 as per (s) above	69,387		
	73,287	73,287	
		465,163	465,163
GROSS PROFIT			91,919
EXPENDITURE			
. As per annexure "E" to Blacker's report			99,109
[Net loss for period 1 July-31 December 1988]:			(7,190)

He then turned to: calculating what was due from the partnership to the parties in returning their respective capital investments in their partnership, and returning monies they had each paid out on its behalf; the nature of the differing sums then found to be due to them, under the terms of their partnership agreement of 8 February 1984; and the calculation of any contra amounts due by the parties to their partnership for drawings from the partnership not accounted for, and for their trading loss of $7,190 in the period March - December 1988. He expressed his conclusions on these matters in 9 findings, viz:-

(1) there is due from the partnership to the respondent, on 1 January 1989, being the date of dissolution of the partnership, the sum of $49,425 in respect of monies invested by him in or paid by him on behalf of the partnership, made up as follows -

	$
. Monies he borrowed from National Bank [see par(b) on p5] and invested in the partnership	10,000
. Additional monies he paid to Tsioupis [see par(h) on p6]	10,000
. Monies paid to Tsioupis from sale of Rapid Creek, being $20,000 towards purchase of stock and further $10,000 towards purchase of goodwill etc. of Central Supermarket [see par(f) on p6]	30,000
. Repaid to Russell Brown [par(j) on p7]	5,000
. Part repayment to Peter Cavanagh [par(l) on p7]	4,425
	59,425
Less monies repaid by the partnership to the respondent on 16 March 1988	10,000
	49,425

(2) there is due from the partnership to the appellant on 1 January 1989, the sum of $42,485 in respect of capital invested by him in or paid by him on behalf of the partnership, made up as follows -

	$
. Paid from own monies [see par(b) on p5]	10,000
. Monies belonging to appellant, held on deposit with ANZ Bank and applied by that Bank in reduction of partnership bank overdraft (see pars (m) and (n) on p7]	32,485
	42,485

(3) under Clause 5 of their partnership agreement [which provided that "they shall contribute equally"] the partners therefore each contributed towards capital the sum of $42,485;

(4) pursuant to Clause 6 of their partnership agreement [p19], there is therefore due to the respondent the sum of $6,940, being the amount [$49,425-$42,485] paid by him in excess of his due proportion of capital (namely $42,485), which constitutes a loan by him to the partnership and carries interest at 'bank rate' (as defined in the partnership agreement) during the currency of the loan;

(5) because of the piecemeal manner in which each partner contributed shares in capital and the uncertainty of their evidence, it is too problematical to fix the actual date when the respondent's contributions exceeded that of the appellant and so, doing the best I can, I fix the period in relation to which interest is payable to the respondent in respect of the loan, as commencing from the date of dissolution of the partnership to the date of settlement of the sale of Central Supermarket as a partnership asset, namely 5 August 1991;

(6) the rate of interest calculated in accordance with Clause 24 of the partnership agreement is 23% (in round figures), being the average minimum rate of interest charged by the Commonwealth Banking Corporation on unsecured overdrafts between 1 January 1989 and the date of dissolution of the partnership (see letter of David Francis & Associates, dated 2 April 1992 and enclosure

admitted into evidence by consent of the parties after the conclusion of the proceedings before me);

(7) there is therefore due to the respondent interest amounting to $4,130 (in round figures) on the amount of the loan ($6940) referred to in paragraph (4);

(8) the appellant, during the term of the partnership, withdrew from the partnership monies the sum of $73,000 for which he has not accounted and that sum is due by the appellant to the partnership; and

(9) the net loss of $7,190 [see par(t) on pp9-10] sustained by the partnership in respect of the period 1 July 1988 - 31 December 1988, when shared equally between the partners, amounts to $3,505 in respect of each of them.

The Master then dealt with the directed question - see 4(a) on p3 - whether an allowance should be made for wages payable to Maria Bentes for working at the supermarket from March to December 1988, viz:-

"I find that there should be paid, from the partnership, the sum of $27,670 by way of allowance for wages to Maria Bentes from 17 March 1988 to 31 December 1988, calculated as follows -

	$
. 17 March to 15 May 1988	5,950
. 16 May to 30 June 1988	4,343
. 1 July to 31 December 1988	17,377
	27,670

======"

He then turned to the major question of the valuation of the goodwill, plant and equipment of the supermarket business as at 31 December 1988. He expressed his finding on that question, and the reasons therefor, in the following terms:-

> "In arriving at a valuation of the goodwill of the business, I have had to consider the reports and evidence of Michael Charles Rentinck (Rentinck) and Iain Summers (Summers).
>
> In exhibit 9 and in evidence, Summers explained his calculation of the 'maintainable earnings' stream. In the attachment to that exhibit, he shows the maintainable earnings stream for the 4 years from [the year] ending 30 June 1985 to that ending 30 June 1988, at an average of $66,841. Applying a capitalization rate of 20% to that earnings stream, Summers arrive at a value of $334,205 which, allowing for the value of capital assets at the book value of $18,908 as at December 1988, results in a value of $315,297 or, in round figures, $315,000 as the value of goodwill and fixed assets as at 31 December 1988.
>
> Having found, however [see (8) on p12], that $73,000 was removed from the business [by the appellant] and not accounted for, I see it as necessary in assessing a fair figure for goodwill to factor that sum back into the evaluation of profits before 1988.
>
> The capitalization rate fixed by Summers was done on his accepting that the poor result in 1988 was no more than a "glitch" which did not occur again in subsequent years. In all the circumstances, I accept his evidence that what occurred in that year was impermanent.
>
> Rentinck's capitalization rate of 33_%, in my view, is too high. It is unreasonable to apply such a high rate, unless something had occurred resulting in permanent damage to the earning capabilities of the business. No such factor has been shown to have existed.
>
> However, factoring back the $73,000, Summers' capitalization rate of 20% produces a valuation, on his calculation, of $224,000 for goodwill. It seems to me that, as suggested on the appellant's behalf, a minimum valuation of between $241,750 and $285,000 would be more reasonable. In all the circumstances, I accept the value of $275,000 put by the appellant's counsel as a fair and reasonable value for the goodwill plant and equipment as at 31 December 1988. I find accordingly."

The Master then drew these figures together, to calculate what was due to the partnership as at 31 December 1988 from the sale of the supermarket in August 1991, viz:-

"I find therefore that, out of the proceeds of the sale of Central Supermarket, there is payable to the partnership the sum of $84,987 calculated as follows -

		$
. Value at 31/12/88 of goodwill including plant and equipment [see p13]		275,000
Add		
. cash on hand, at bank and in access account (as per annexure "E" to Blacker's report)		25,037
. stock on hand as at 31 December 1988 [as per (s) on p8]		69,387
. Shares Independent Grocers (as per annexure "E" to Blacker's report)		337
[Partnership assets as at 31/12/88]:		369,761
Less -		
. liabilities as at 31/12/88, being accrued expenses and trade creditors (as per annexure "E" to Blacker's report)	120,683	
. non current liability, being loan from Esanda (as per annexure "E" to Blacker's report)	136,421	
. wages due to Maria Bentes [see p12]	27,670	
[Partnership debts as at 31/12/88]:	284,774	284,774
[Nett value of partnership at 31/12/88]:		84,987

He then proceeded to assess what was due to (or from) the appellant and the respondent respectively by (or to) the partnership, as at 31 December 1988, viz:-

"On the findings, recommendations and calculations I have made, I find that -

(a) there is due to the respondent from the partnership, as at 31 December 1988, a sum of $62,295 calculated as follows -

	$
. Respondent's Capital Account:	
initial capital [contribution] [see (3) on p11]	42,485
loan to partnership [see(4) on p11]	6,940
interest on loan [see (5), (6) and (7) on pp11-12]	4,130
Add	
. share of profits as per Blacker's report -	
1 July 1987 to 15 May 1988	10,654
16 May to 30 June 1988	1,681
	65,890
. Less [one-half share of] loss in respect of period 1 July 1988 to 31 December 1988 [see (t) on p9]	3,595
Cr.	62,295; and

(b) there is due, by the appellant to the partnership, as at 31 December 1988, a sum of $19,225, calculated as follows:

	$
. Appellant's Capital Account:	
. initial capital [contribution] [see (2) and (3) on p11]	42,485
Add	
. share of profits as per Blacker's report -	
1 July 1987 to 15 May 1988	10,654
16 May to 30 June 1988	1,681

.	goods taken by respondent for own use (as per annexure "E" of Blacker's report)		3,900
.	Drawing by respondent (as per annexure "E" to Blacker's report)		1,502
			60,222
Less			
.	money withdrawn [see (8) on p12]	73,000	
.	goods for private use (as per annexure "E" to Blacker's report)	2,852	
.	[one-half share of] loss in respect of period 1 July 1988 to 31 December 1988	3,595	
		79,447	79,447
	Dr.		19,225

"

The Master explained, for reasons he stated, that:-

(a) he had taken no account of the value of certain private motor vehicle expenses ($218) or sundry expenses ($227);

(b) he had made no allowance for drawings by the respondent other than those identified in the Blacker report; and

(c) he had found that any monies paid to the respondent on going to Portugal in 1984 were "in respect of drawings by way of 'holiday pay' and not a return of capital."

In the light of these findings and calculations the Master proceeded to calculate what was due to

each party as at 31 December 1988, from the proceeds of sale in 1991, as follows:-

		$
".	Balance due to partnership [as at 31 December 1988 - see pp13-14]	84,987
.	Add monies overdrawn by appellant and due to partnership [set out at pp15-16]	19,225
		104,212
	Less	
.	return of capital etc. to respondent [as calculated at pp14-15]	62,295
	Balance	41,917

I find that there should be paid out of the proceeds of sale of Central Supermarket to the appellant for his [one-half] share in that balance the sum of $20,959."

The Master then made certain recommendations arising from these findings; these recommendations became the findings and final orders made on 25 August 1992, and the subject of this appeal under r78.06. They were that:

"(1) There be paid by the partnership to Maria Bentes the sum of $27,670.00 by way of wages in respect of the period 18 March 1988 to 31 December 1988 [see p12];

(2) Out of the proceeds of the sale of the partnership business known as Central Supermarket, there is payable to the partnership the sum of $84,987.00 [see pp13-14];

(3) There be paid to the appellant by the partnership in respect of his share as at 1 January 1989, of the monies due to the partnership from the proceeds of sale of the

partnership business the sum of $20,959.00 [see p17];

(4) The balance of the monies due to the partnership from the proceeds of sale of the partnership business [$83,253] be paid to the respondent; and

(5) No interest be paid to either party in respect of the money found to be due to each of them."

The submissions on the appeal

(a) General

Mr Waters of counsel for the appellant relied on the materials placed before the Master; his submissions were directed at the logic of the Master's findings. In general, Mr Waters submitted that the Master's findings should be approached in the manner indicated by *Warren v Coombes* (1978-79) 142 CLR 531. Most of the findings in issue involved the drawing of inferences. While giving respect and weight to the inferences drawn by the Master, the Court should reach its own conclusion about the inferences which should be drawn from established primary facts, since it is in as good a position as the Master to do so. Having reached its own conclusions in that way, the Court should not shrink from giving effect to them.

(b) The capital accounts of the partners

(i) The sum of $6940: finding (4) on p11

Mr Waters did not challenge the Master's finding (3) on p11 that each of the partners are to be taken to have contributed as initial capital the sum of $42,485. In a secondary submission on the nature of the sum of $6,940 - see

findings (1)-(4) on pp10-11 and ground (1)(a) on p1 - he challenged finding (4) on p11, submitting that that sum should be treated as a capital contribution by the respondent, and not as a loan by him to the partnership. To my mind the resolution of this question is determined by Clause 6 of the partnership agreement which provides, as far as material:-

> "If any partner shall from time to time with the consent of the other partners, advance to the partnership any sum in excess of his due proportion of capital [here $42,485] the same shall be a debt due by the partnership to the partner advancing the same and shall bear interest at bank rate during the continuance of the loan. No sum lent shall of itself be deemed an increase in the capital of the partner advancing the same or entitle him to an increased share in the profits of the partnership. Every or any such sum together with the interest for the time being accrued in respect thereof shall in the absence of any agreement between the partners to the contrary be repayable by the partnership - - -".

It is clear from finding (4) on p11 that the Master relied on Clause 6 in treating the $6,940 as a loan. I think that he was quite correct in his approach and his conclusion. I reject this submission.

Mr Waters' principal submission in relation to the sum of $6,940 was that the Master failed to consider in relation thereto an amount of $7,000 which, he contended, had been advanced by the partnership to the respondent in the period May - August 1984, when he took his family to Portugal on an extended holiday. See ground (1)(d) on p2. This sum was adverted to by the Master in his finding on Portugal and "holiday pay"; see (c) on p16. In terms, his finding was:-

> "I find that such monies as might have been paid to the [respondent] on his going to Portugal [in 1984] were in respect of drawings by way of "holiday pay" and not a return of capital [to him]. There is no

> evidence from which I can or should conclude that the [appellant] did not also receive a similar amount by way of "holiday pay" for vacations taken by him during the time when he was active in the partnership."

As to the first sentence it is not clear from the evidence before the Master at transcript pp351, 443 and 446 that the respondent was paid $7,000 by the partnership in 1984. The Master was clearly not satisfied that this payment had been made; that is undoubtedly why he expressed his conclusion in the conditional form of "such monies as might have been paid". Accordingly, there is no finding by the Master that $7,000, or any other sum, was paid to the respondent.

There was a clear conflict in the evidence as to whether a first sum of $5,000 had been paid over, as Mr Henwood of counsel for the respondent pointed out; there seems, however, to be no conflict that a later sum of $2,000 was sent to the respondent by the appellant. The state of the evidence as to payment of the $5,000 being what it was, I am unable to draw a conclusion contrary to that drawn by the Master, who had the benefit of the witnesses before him. Clearly, however, $2,000 was paid to the respondent. Mr Waters submitted that the Master's inference that any monies paid over were "by way of holiday pay" was pure speculation. The evidence is not clear that the appellant ever received any "similar amount" by way of "holiday pay"; the second sentence in the finding on pp19-20 by its double negative wrongly reverses the proper evidentiary burden as to that matter. It provides no support for the conclusion that any payments were "holiday pay", which it was clearly intended

to support. I am unable to conclude from the appellant's evidence at transcript p511 that he took 'holiday pay'.

Mr Waters' submission was that it should be found that the $7,000 was paid by the partnership to the respondent, and that this "wiped out" the $6,940 which the Master had found at (4) on p11 to be a loan by the respondent to the partnership; this 'wiping out' would also mean that the consequential interest of $4,130 (see (5), (6) and (7) on pp11-12) would be "wiped out". I reject the submission but I consider that the principal sum of $6,940, which retains its character as a loan, should be reduced by the $2,000 paid to the respondent, and the interest thereon reduced accordingly.

(ii) Elements of the appellant's capital account ((b) on pp15-16)

Mr Waters initially submitted that the appellant had never been paid the sums ($10,654 + $1,681 + $3,900 + $1,502) totalling $17,737 listed under "Share of profit as per Blacker's report" on p16. Mr Henwood agreed but contended that that sum had been fully taken into account in the Master's final calculation of what was due to the appellant set out at p17. Ultimately, Mr Waters conceded the point.

(iii) The finding that $27,670 should be paid by the partnership to Maria Bentes; p12 and ground of appeal 1(c) on p2

Mr Waters noted that the 2 questions for resolution by the Master on this point were: should Mrs Bentes receive

some amount as a wage allowance for her work in the supermarket from March to December 1988; if so, how much should she be paid. The appellant attacked only the Master's answer to the first question. Mr Waters submitted that it was not appropriate in the circumstances to make any wages allowance at all. He observed that the Master had stated his finding at p12 in a very bald way; he had not discussed whether Mrs Bentes had an agreement whereby she received wages, or the basis on which she worked at the supermarket. Indeed, there was no finding that she had in fact worked there, though the appellant did not deny that she had.

Mr Waters submitted that Mrs Bentes, when working at the supermarket, was not in a wage-earning commercial relationship. He submitted that the basis on which she worked there from March to December 1988 was reflected in Exhibit A, her 50/50 profit-sharing partnership agreement with her husband of 15 May 1988, which she entered into some 6 weeks after the appellant left. The Master had clearly ignored that agreement, in allowing a sum for her wages (p12). Mr Waters conceded that the Master's approach must have been conditioned by what was common ground between the parties - that their partnership agreement of 14 February 1984 subsisted until 31 December 1988. Accordingly, Mrs Bentes must have been working for that partnership until the end of 1988. However Mr Waters submitted that she had never made a claim for wages and that was the necessary first step. Further, in August 1991 the supermarket business of which by then she had been a 50/50 owner since 1 January 1989 had been sold for some

$320,000, and meanwhile she had been using the goodwill of which the appellant owned 50%, without having paid anything for it.

Mr Waters referred in support to Mrs Bentes' evidence and that of the respondent and Mr Rentinck; he noted that there was no evidence of any agreement that she would work for wages in the period March - December 1988, and that in fact she had never received any wages.

He submitted that on the evidence the finding and order that the Master had made (p12, and (1) on p17) were not open to be made; the question of her wages was really a sham.

Mr Henwood submitted that from May 1988 Mrs Bentes believed she was working on her own account, under her partnership agreement with her husband, a matter which was not clarified until the order of this Court of 21 November 1990, and consent order 4(a) on p3 was made to resolve the situation that thereby arose.

I do not accept Mr Waters' submission. I consider that the Master was correct in his finding at p12 and in making his order (1) at p17.

The submission that from 1 January 1989 Mrs Bentes was a 50/50 partner in the supermarket enterprise, had paid no capital 'entry fee' to obtain that position, and had shared in the sale profit in 1991, while correct, does not in my opinion bear upon her situation prior to 1 January 1989.

(iv) The value of the goodwill plant and equipment of the business as at 31 December 1988 (pp13-14); see grounds of appeal (1)(b) at p1, and (1)(f) and (g) at p2

Mr Waters submitted that the Master had fallen into fundamental error in reducing Mr Summer's valuation of $334,205 by a perceived need -

> "- - - to factor [the $73,000 'removed [by the appellant] from the business and not accounted for'] back into the evaluation of the profits before 1988." (p13)

First, there was no proof that $73,000 had been "removed from the business and not accounted for." Second, even if it were proved to have occurred, in making his calculations the Master had wrongly taken the $73,000 into account twice. First, he had deducted it from the appellant's capital account as money he had withdrawn; see p16. Second, he had used it to reduce the valuation of goodwill (p13) "from $315,000 to $275,000, by factoring the $73,000" into the evaluation of profits; yet it must already have been reflected in the value of stock on hand as at 1 July 1988 ($108,740). I now deal with these submissions.

In (8) at p12 the Master found that "the appellant - - - withdrew from the partnership monies the sum of $73,000 for which he has not accounted - - -". At p13 he said:-

> "Having found - - - that $73,000 was removed from the business [by the appellant] and not accounted for, I see it as necessary in assessing a fair figure for goodwill to factor that sum back into the evaluation of profits before 1988."

Mr Waters submitted that finding (8) on p12 was against the evidence; there was no evidence or tangible accusation to sustain that finding. No reasons were given for the findings at (8) on p12, repeated at p13. I note that it is clear that for some time prior to his departure in March 1988 the appellant had been largely in charge of the banking for the business. Mr Waters submitted that the idea that the appellant had removed $73,000 from the business by not banking receipts, emerged from some assumptions made by Mr Rentinck the accountant responsible for preparing the business' accounts. In his report to the Master of 29 October 1991 Mr Blacker stated:-

> "During this period [this is apparently a reference to the period 1 July 1987 - 15 May 1988, when an unofficial stock-take was completed] it is alleged that [the appellant] withdrew $73,000 from the business in cash."

The source of this allegation appears to be a letter of 10 February 1989 from Mr Rentinck, the partnership's accountant from 1986, to the parties stating:-

> "[The appellant] ceased to attend to the partnership's business from 17 March 1989 [sic, 1988].
>
> There was a serious cashflow problem and it appeared that substantial amounts of cash from sales had not been banked. In addition most suppliers withdrew credit terms.
>
> - - -
>
> A number of adjustments have been made to the personal loan account. - - - The major ones charged to [the appellant's] account are:-
>
> - - -
>
> (c) an amount of $73,000 in respect of sales not banked. If this amount had not been

> allowed for, the partnership would have incurred a loss of $51,692. As it stands now the gross profit margin [the percentage of cost of goods to sales] is just under 15% which is still small for this type of business."

Mr Blacker stated at pp1-2 of his report:-

> "The following journal entry appears in the work papers of M.C.Rentinck;
>
> Journal Entry 24
> [The appellant] DR$73,000.00
>
> Sales CR$73,000.00
>
> (Estimate of Sales not Banked)
>
> In M.C. Rentinck's letter [of 10 February 1989] it is noted that the $73,000.00 has been estimated, to ensure a gross profit margin of [about] 15%. This appears to be a reasonable estimation given the historic gross profit margins referred to earlier. [These were 14.328% for 1985, 15.098% for 1986, and 12.499% for 1987].
>
> Although I concur with the averaging process, I cannot confirm what cash or stock, or both, was removed from the business during this period. It would appear that a considerable shortfall was evident but I have no knowledge of who is responsible for that shortfall."

Mr Waters submitted that this analysis showed that the figure of $73,000 had been arrived at by Mr Rentinck by looking at the gross profit margins figures for previous years (p26), comparing them with the figures he had for 1988, and assuming the gross profit margin for 1988 should and would in fact have been about 15%, that being a reasonable estimate in light of the margins in the previous years.

In his evidence before the Master on 11 March 1992 (transcript p206 et seq.), Mr Rentinck explained that by charging the appellant's loan account with $73,000 (on the

basis he had withdrawn that sum), sales had been correspondingly taken to be increased by $73,000. He explained that if this had not been done, the gross profit margin would have been 10.22% instead of 14.9%. Mr Rentinck explained that he made his assessment that there was a cash deficiency on the basis that he knew of the takings in the supermarket and they were not reflected in deposits at the bank. Further the gross profit figure since 1984 had been more or less constant around the 15% mark; now there was a drop of at least 5% from 15%, on gross profit. Mr Rentinck explained that he had arrived at the figure of $73,000 by looking at the average gross profit margins in previous years. He explained that he had made an "assumption" that in 1988 that margin would have been 15%; he said at transcript p209:-

> "I calculated that if there was a profit margin of 15% - - -. What I had to find out is roughly what was missing. - - - I didn't know what was received except what was in the books. So I had to make an assumption that if things had been normal as with the 4 previous years, - - - what would be the average gross profit margin; and if that margin had been maintained [at 15%] - - - the sales would have had to be at least $73,000 higher [than was recorded], to obtain that margin."

Mr Rentinck had been told by the respondent that any taking of cash from the business would have been by the appellant. However, the respondent in his evidence before the Master did not make any such allegation against the appellant. Mr Waters submitted that there were many reasons why it should not inevitably be inferred that the appellant was responsible for the depletion of stock which admittedly had occurred; there was evidence that the business was going

through bad times, its credit had been suspended, and it was not generating sufficient cash-flow to stock the shelves. So there was a rational explanation for decreased cash receipts, other than that the appellant was pocketing the money.

It is true that it is not an inevitable inference that the appellant had pocketed money which should have been banked. However, having reviewed all the evidence on the point in the transcript, it appears to me to be most probably what had occurred, as Mr Henwood submitted. I agree with the Master's conclusion on this point.

Considering as I do that the Master was correct in his answer to the first question, the next question relates to how he dealt with the $73,000 which he found the appellant had removed from the business.

Mr Waters submitted that to "factor [the $73,000] back into the evaluation of profits" so as to assess "a fair figure for goodwill" was wrong. The Master had rightly adopted Mr Summers' 20% capitalization rate as applied to a maintainable earnings stream calculated at $66,841. A capitalization rate, in Mr Summers' words (Exhibit 9, p2) -

> "- - - is simply the rate of return on funds invested which a purchaser of the business would require, mindful of the risks involved, [if he were] to be induced to purchase the business."

However, Mr Waters submitted that the Master had erred in deciding to "factor back" the $73,000 into the evaluation of profits when assessing goodwill. First, the low cash receipts were a one-off "glitch" in a particular year, so that they would not be taken into account in goodwill calculations in

any event. Second, to the extent that the $73,000 was a relevant factor, it was already reflected in the value of stock for 1988, so it had already been taken into account, as Mr Blacker had accepted Mr Rentinck's approach.

Mr Henwood of counsel for the respondent explained how the Master arrived at the range $241,750 - $285,000 at p13; at transcript p383 Mr Summers had explained that if the $73,000 were not included as sales, the average maintainable earnings over 4 years would be reduced from $66,841 by (¼ x $73,000), yielding on a capitalization rate of 20% not $334,205 but $241,750.

I consider that the Master erred in "factoring back" the $73,000 to reduce the goodwill, when he had already debited that sum from the appellant's capital account as money he had withdrawn from the business. Mr Henwood appeared to concede that having found that the $73,000 had been taken from the business by the appellant as an unauthorized withdrawal, and having debited it to his capital account, the Master should not then have reduced the figure for goodwill from that determined by Mr Summers ($315,000) which was based on a maintainable earnings stream in which the $73,000 had been correctly written back into sales. The correct figure for goodwill at 31 December 1988 is $315,000 as calculated on p13.

(v) <u>The question of interest payable to the appellant; ground of appeal (2) on p2</u>

Mr Waters submitted that money found due to the appellant as at 31 December 1988 should carry interest,

pursuant to Clause 6 of the partnership agreement, as the respondent and his wife had had the benefit of that money from that date until they sold the business in August 1991, and thereafter. He submitted that the interest should be at the "bank rate" as defined in the agreement, or at the rate prescribed by the Supreme Court Act if Clause 6 were held not to apply.

This is the matter referred to by Angel J in order (4)(b) on p3; I understood Mr Henwood initially to concede the point, but later he submitted that the Master's approach should be followed. I consider that interest is payable on the sum due to the appellant on and from 1 January 1989 until date of payment at the rate fixed under s85 of the Supreme Court Act, save that where money has been set aside in a trust account to provide for any monies found payable to the appellant, the interest thereon to date shall be such as was earned in that trust account. I turn next to the respondent's cross-appeal.

The submissions on the cross-appeal (p2)

Ground of cross-appeal (b) (p3): amount of contribution by the appellant

Mr Henwood submitted that the appellant had not contributed $32,485 to the partnership capital. Sums had bee lodged in the Bank to secure the business' overdraft, and was only contributed as capital in August 1988. He submitted that the interest thereon, which he said was $12,485, should not be allowed as a contribution by the appellant to capital, because

it was really interest earned by the partnership on the appellant's capital contribution of $20,000. If the appellant had contributed his $20,000 in 1984, as the respondent had, the partnership would not have needed an overdraft facility of the size which it required.

The result was that the appellant's capital contribution was $30,000 not $42,485, as against the respondent's $49,425. The consequence on one view was that the respondent's capital contribution ($49,425) exceeded the appellant's ($10,000) by $39,425 between 1984 and August 1988, and the respondent was entitled to interest on $39,425 for that period, under Clause 6 of their partnership agreement. On an alternative view, the appellant should be treated as having made a capital contribution of $30,000 in 1984; the sum of $12,485 was interest, and was due to the partnership. Since the appellant's contribution was $30,000 not $42,485 as shown on p11, sums of $30,000 represented each partner's contribution in terms of Clause 5 of the partnership agreement (cf. (3) on p11), and pursuant to Clause 6 the respondent is deemed to have made a loan to the partnership of ($49,425 - $30,000 = $19,425) and not ($49,425 - $42,485 = $6,940); (cf. (4) on p11).

Interest is payable to the respondent on $19,425 at the "Bank rate" under Clause 6; cf.(6) at pp11-12.

Mr Waters objected to this ground being entertained. This line of argument had never been raised before the Master. The parties had agreed to have the appeal dealt with on the materials before the Master, but the appellant could only

grapple with this matter by calling evidence to determine what the arrangement between the parties was. Mr Henwood contended that it would have been open to have raised the matter before the Master. On the whole, I think the way the parties have approached this appeal points to this ground not being entertained; I so rule.

Ground of cross-appeal (a) (p2): whether value of $275,000 for goodwill etc is excessive

Mr Henwood submitted that to allow goodwill at $275,000 was too high, for a number of reasons; the absolute "top" would be $241,750. He accepted Mr Summers' methodology, but considered that there should have been further deductions to take account of higher labour costs; this would reduce the value for goodwill from $241,750 to $165,000, though this was calculated on a 20% capitalization rate which he considered too high. He submitted that the Master had erred by not considering the question of a necessary additional labour force, with increased wages. Further, the trend of sales and of profits had been downwards from 1985 to 1988, and had trended upwards only from 1988 to 1991. The unfavourable factors of the tenure of the supermarket and the sales trend as at 31 December 1988 meant that a 20% capitalization rate was too low; it should approximate Mr Rentinck's rate of 33_%. Mr Henwood took me at length to the evidence of Mr Summers, who was cross-examined on these matters. The Master had not dealt with this evidence. At transcript p421 Mr Summers said that he would:-

> "- - - be looking to probably put a margin of at least another 5% on that capitalization rate [of 20%] for the risk entailed in recovering that market - - -"

in a similar situation to that which happened to this business in 1988.

Mr Henwood provided me with calculations on a 20% capitalization rate where the $73,000 had been factored out to reduce the maintainable earnings stream to $48,000; the figure for goodwill would then be reduced to $242,000. In the result the appellant's claim would be one half of $51,987. At a 25% capitalization rate, for which he argued, the goodwill value becomes $194,000 and the appellant's share is of the order of $2,000. However, as I do not consider that the $73,000 should be "factored out", these calculations lack validity.

Mr Henwood submitted that if the Master's approach were correct, the value of goodwill must be below $275,000, because the capitalization rate had to be increased above 20%.

With respect to Mr Henwood's punctilious and detailed arguments, I see no reason why Mr Summers' rate of 20% should be increased. As Mr Waters pointed out, Mr Summers had in fact paid proper regard to all the relevant circumstances of this case except the question of the lease. It appeared that the lessors required the payment of a $50,000 premium for an extension of the existing lease beyond 1994, for a further 10 years. Mr Summers was unaware of that; however it does not appear that it would have affected his capitalization rate. Clearly, the Master accepted Mr Summers as a reliable witness.

Conclusions

Several of the appellant's grounds of appeal have succeeded, as follows. Ground (1)(a) (p1) is allowed insofar as the sum of $6,940 is reduced to $4,940; the concomitant interest must be reduced accordingly. Grounds (1)(d), (e), (f) and (g) and (2) also succeed. Grounds (1)(b) and (1)(c) fail.

Both grounds (a) and (b) (pp2-3) relied on by the respondent in his cross-appeal, fail.

I will hear the parties further as to the orders which should flow from these conclusions. As that cannot occur until 10 July they are at liberty to approach the Master for appropriate orders, if they can agree on the appropriate amounts.