



[2017] JMCC Comm. 37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2013 CD 00035

BETWEEN	FIRST UNION FINANCIAL COMPANY LIMITED T/A UNION ONE EXPRESS	CLAIMANT/ ANCILLARY DEFENDANT
AND	EDUARDO ANDERSON	DEFENDANT/ ANCILLARY CLAIMANT

Contract- Services rendered- Oral agreement – Consideration not specified- Part performance- Whether damages should be awarded to the Defendant on a quantum meruit basis

Dr. Delroy Beckford instructed by Samuel Beckford, Attorneys-at-law for the Claimant / Ancillary Defendant

Mr. Linton Gordon and Ms. Stacy Mitchell instructed by Foga Daley for the Defendant / Ancillary Claimant

Heard: 18th, 19th and 21st September, 2017, 6th October, 2017, 1st November, 2017 and 1st December, 2017

BATTS, J

[1] This judgment concerns the resolution of a dispute surrounding the provision of services and whether the remuneration for same included part ownership of the Claimant company. The issue as to who owned the intellectual property used in its business also falls for resolution. The Claim was withdrawn prior to the commencement

of trial and therefore only issues raised on the Counterclaim and the Defence to that Counterclaim arise.

[2] The Claimant is a company which carries on an international courier business which facilitates persons in Jamaica making purchases online. It is registered under the laws of Jamaica with registered offices at 13 Barbados Avenue, Cross Roads in the parish of Saint Andrew. The Defendant is an Information Technology Specialist.

[3] It is the Defendant's assertion that he owns undetermined shares in the Claimant by virtue of an oral contract. The terms of that contract involve his providing technical services in return for monetary payment and shares in the company. The amount of shares was to be determined at a future date. He says that he struck this agreement with Mr. Lloyd Campbell the Managing Director of the Claimant. The Claimant denies that there was such an agreement and says that the Defendant was merely contracted to perform the subject services. It is common ground that the Defendant assisted in developing software, and various other forms of intellectual property which were used in the Claimant's course of business.

[4] On the 13th March, 2013 the Claimant commenced proceedings by way of Claim Form against the Defendant. An Amended Claim Form was filed on 31st May, 2013 and followed later by a Further Amended Claim Form dated 10th June, 2013. On 31st July, 2013 the Defendant filed a Defence and Counterclaim to the Claim. An Amended Defence and Counterclaim was filed on 20th August, 2013. The Claimant discontinued its claim by way of Notice of Discontinuance dated 15th May, 2014. The Counterclaim remained and a Defence to Counterclaim was filed on the 2nd March, 2016.

[5] The Defendant averred that he and Mr. Lloyd Campbell, Managing Director of the Claimant entered into an oral agreement to start an international courier business. The terms of this oral agreement were that the Claimant would finance the venture and he would provide the information technology expertise and management during the start-up phase. The Defendant alleged also that he and Mr. Lloyd Campbell orally agreed that for his input he would be entitled to equity in the business. The percentage of that equity

was to be determined in December, 2012, when his contribution to the business was to be assessed.

[6] The Defendant sought the following orders in his amended counter claim filed 20th August, 2013;

“1. A Declaration that the copyright in the computer software formerly used by the Claimant lies with the Defendant who is the Author of the computer software within the meaning of the Copyright Act and that the Defendant’s retention of possession of said computer software in no way violates any alleged rights claimed by the Claimant.

2. A Declaration that the Defendant is the proprietor of the trademark Union One Express and design.

3. A Declaration that the Defendant is beneficially entitled to a percentage of the net profits made through the past, present and future operations of the business Union One Express

4. Recovery of Debt in the sum of \$643,500.00 as well as equity in Union One Express of 35% or such other percentage of annual net profits for the period deemed just by the Honourable Court.

5. Damages for breach of contract.

6. Aggravated damages

7. Costs

8. Interest pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) Act; and

9. Such other and further relief as this Honourable Court deems to be just.”

[7] The Defendant's counterclaim is supported by a witness statement which was filed on the 12th September, 2017 and stood as his evidence in chief. In it he chronicled the development of his relationship with the Managing Director of the Claimant company. He said that in or about November, 2010 he was engaged as a consultant to perform an IT audit on the computer system of an affiliated business to the Claimant in which Mr. Lloyd Campbell is involved. In early 2011 he was rehired as a consultant to implement changes that he had recommended in 2010. The Defendant said that in his capacity as IT consultant he interacted with Mr. Lloyd Campbell and Mrs. Lessanne Roper-Bennett. Mrs. Lessanne Roper-Bennett is the General Manager of First Union Financial Services Limited. He says that while he consulted at First Union Financial Services Limited, Mr. Lloyd Campbell and himself had several discussions on a variety of possible projects on which they could work together by leveraging his IT experience and the expertise of First Union Financial Services Limited. Subsequent to that discussion the Defendant created a proposal for a joint venture between himself and eMac Office Systems Ltd., a subsidiary of First Union Financial Services Limited. This venture did not materialise. The Defendant says that he and Mr. Lloyd Campbell also considered a payroll programme. However, on or about May 2012 he and Mr. Lloyd Campbell verbally agreed to start an international courier business.

[8] The Defendant said that it was Mr. Lloyd Campbell who suggested the name Union One. The name Union One Express was eventually used as the domain name because "Union One" was not available. The Defendant said that they wanted a domain name that matched the business name. The Defendant said that in accordance with the agreement the Claimant was generally responsible for financing the business. The Defendant said that he provided expertise; IT and managerial. This included conducting research on the requirements for implementation of the idea and leading in its execution as de facto Operations Manager. He said he oversaw the day to day operations after its launch and provided the necessary information technology expertise and logistics co-ordination.

[9] The Defendant said that he was not an employee of the Claimant. He said that he was held out to be the Operations Manager to make things easier in his interaction

with other companies. He said he worked for six months without compensation. He said that there was no agreement for him to receive a salary as it was always a term of the oral agreement between himself and Mr. Lloyd Campbell on behalf of the Claimant that they were business partners and that he would be entitled to equity in Union One Express. He said further that the reason that he did not bill the Claimant was because he was operating under the impression that he was contributing to a joint venture.

[10] The Defendant said that he created intellectual property, inter alia software and trademarks, for use in the Claimant's operations. He said that he was not contracted at any time to perform these services. He also said that he at no time transferred or assigned his copyright to the Claimant or anyone else.

[11] The Defendant said that the oral agreement was not honoured. His past and ongoing contribution was to be rewarded with a share entitlement, a monthly income and the official assumption of the role of Operations Manager. He said that the Claimant backpedalled on their agreement. According to the Defendant Mr. Lloyd Campbell said at first that "Union One", was bleeding "First Union". The Defendant indicated to him that he did not believe that to be true and his evidence is that by December, 2012 the Claimant had already achieved its one-year target of 1,000 customers. Mr. Lloyd Campbell then said that he needed an internal audit to determine the profitability of the business. He also asked the Defendant to set out what he was proposing in writing.

[12] The Defendant said that on the 1st January, 2013 he submitted his proposal to the Claimant which was in the form of a document titled "Operations Management Agreement" dated 31st December, 2012. He explained that he set out in the document the work that he had already done and what he proposed to do going forward as well as the options for his remuneration and profit/equity share. There was in the document a table of six options for compensation. Each contemplated equity in the Claimant and compensation for continued hands-on involvement in the company. I have reproduced the table below (Exhibit 1 document # 4).

OPTION	REMUNERATION	EQUITY
A	J\$ 195,000 per month	35%
B	J\$ 215,000 per month	30%
C	J \$ 235,000 per month	25%
D	J \$ 255,000 per month	20%
E	J\$ 275,000 per month	15%
F	J \$295,000 per month	10%

[13] The Defendant said that after receipt of the proposal Mr. Lloyd Campbell acting for the Claimant initially accepted option A. He said however that Mr. Campbell spoke about the need to have an audit done to; assess his management, reconcile the revenue and ensure there was no misappropriation prior to entering a signed agreement. The Defendant said that when he was told this he asked for payment for the six months of work. He said that in a meeting between himself, Lloyd Campbell and Lessanne Roper-Bennett, Mr Campbell agreed to make payment pending the audit. He said that he was asked to submit an invoice to trigger the payment.

[14] He prepared an invoice dated 4th January, 2013 which referred to Equity Option A, being 35% equity and a cash payment in the sum of \$1,170,000.00 (Exhibit 1 document # 5). He was told at the time that only 45% of the invoiced amount could be paid. The sum of \$526,500.00 was paid to the Defendant in two tranches. A payment of \$300,000.00 was made on the same day and a further payment of \$226,500.00 was

made on 16th January, 2013. The Defendant said that the sum of \$643,500.00 is the cash portion of the balance owing to him on that invoice.

[15] The Defendant said that the parties continued to negotiate his compensation. However, while they were negotiating Mr. Lloyd Campbell hired a software developer to reproduce the Defendant's software. Although the Defendant was upset that Mr. Lloyd Campbell contracted someone to fulfil a function within his area of expertise he said that he believed that they could still give effect to their agreement.

[16] The Defendant said however that Mr. Campbell told him that members of the senior management team were not happy working with him and that could cause a problem if he was involved in the business fulltime. The Defendant said that he had worked closely with those persons and was confident that this was not the case.

[17] On 21st February, 2013 the Defendant said that Mr. Campbell sent him two emails with the subject line "partial counterproposal". In them Mr. Campbell offered the following (see exhibit 1 document # 8);

1. *7% of the international net yearly income (international means online shopping revenue)*
2. *With or without the software you have written*
3. *\$600,000 in total cash pay out to you along with ownership of the software.*
4. *Silent Partnership (with Eduardo Anderson and available for consultation.)*
5. *Any special tasks to be done in First Union, you will be contacted and if work is done, you will charge a discounted price, to be discuss)*

[18] The Defendant said that he reduced his proposal to 20% and Mr. Lloyd Campbell later counter proposed with 10%. The parties were in the end unable to arrive at an agreement. The Defendant said that he was told to remove his equipment which he did.

[19] The Defendant said that after the parties were engaged in litigation the Claimant caused an advertisement with his photograph to be published in the newspaper. The advertisement stated inter alia that he was no longer an Information Technology Consultant for First Union Financial Group and Operations Manager for Union One Express Limited and was no longer authorized to carry out transactions involving the companies. The Defendant says that he was embarrassed as the advertisement had given the impression that he was conducting business in a capacity for which he had no authority and was consequently portrayed as untrustworthy. The Defendant says that Mr. Lloyd Campbell also circulated a number of emails and memoranda maligning him within the company. The Defendant says that he was described in an email as a plague like human being. It was said that his actions may lead to layoffs.

[20] Jovan Evans gave a witness statement in support of the Defendant. His witness statement was filed on 12th September, 2012. He worked in a technical capacity with the Claimant company. His evidence is that he does not know the details of the business relationship between the Defendant and Mr. Lloyd Campbell or the Claimant. His evidence is therefore of no assistance in determining whether the Defendant is entitled to equity in the Claimant or damages and if so to what extent. He said however that the Defendant created the logo used currently on the Claimant's website. He said that the website was hosted on the Defendant's server.

[21] The Claimant by Amended Defence to Counterclaim filed on the 20th August, 2013 alleged that the Defendant was engaged as an independent contractor to provide services of developing software for its ownership and use. It says that he was paid for this service. The Claimant denied that there was an agreement that the Defendant would at some later date obtain an equity interest in the Claimant. The Claimant also denied that the Defendant performed any services as part of such bargain.

[22] Mr. Lloyd Campbell gave evidence in support of the Claimant. He said that he is the managing director of the Claimant, Union One Express Limited and Union Point Corporate Options Limited. He said that he was first introduced to the Defendant in 2012. His evidence is that the Defendant was engaged as a consultant for First Union

Financial Services Limited on a contractual basis. Mr. Campbell says that there was no written agreement but that the Defendant would submit an invoice for settlement, subject to approval, for any work that he did and any services rendered. Mr. Campbell said that on or about June 2012 he conceptualized the idea of Union One Express to diversify the portfolio of First Union Financial Services Limited, a company with which he is affiliated. He said that he came up with the name and knew that he would need software to manage such an operation.

[23] Mr Campbell said that on or about 19th June, 2012 he saw the Defendant and Mr. Kevin Barrett in the server room in the New Kingston Office of First Union Financial Services Limited. He says that he told both of them about his idea for an online shopping courier service and asked if they could build the software for it. According to him the Defendant agreed to carry out the services and was to get back to him with the cost to set up the software. He said that before he left the Defendant said that his (Mr Campbell's) idea was something that he had always wanted to do and asked whether he had any interest in partnering with him. Mr. Campbell said that he responded by saying that he has resources to pay for the work to be done but it is something that he would have to think about. His evidence was that he never got back to the Defendant about that. He said that the very day of that conversation he went to the Office of the Registrar of Companies and registered the Union One Express company. He said that he used this name because he wanted to deliver an express service. In fact it was the Claimant that registered a business name "Union One Express" (see exhibit 1 document # 16).

[24] I pause at this juncture to indicate that by consent **Exhibit 1** (a Bundle of documents agreed) was adduced into evidence. It is not paginated and the document references in the index are not generally helpful, for example document #21 is described as "Copies of Bundle of Exhibits FA11-EA21 Copies of emails referred to as exhibits in Affidavit of Eduardo Anderson filed July 3, 2013". The lack of pagination impeded the evidence taking and impacted the preparation of this judgment. It was also in breach of an order of Sykes J made on the 31st July, 2017. To add further confusion in the bundle which was paginated, (Judges Bundle filed 15th September, 2017), the

page numbers were out of sync with the index. This is entirely unsatisfactory and, had I been aware of Sykes J's order, the trial would not have started and Counsel very likely would have personally borne the cost of the adjournment.

[25] I return to the evidence of Mr. Campbell who said that the Defendant commenced working and at each step he would submit an invoice for services rendered and would go to Mrs. Roper Bennett for approval of sums to be paid.

[26] Mr. Campbell said that he had heard a disturbing allegation against the Defendant concerning impropriety during his employment at the National Water Commission. He said that this was of concern to him because the National Water Commission is a company with which his companies do business. He said that this prompted him to call the Defendant to tell him to consolidate the work he had done for the business. This he says included handing over the passwords for the domain name, the source code for the software, the passwords for social media pages and the domain name. The Defendant's response was that the domain name belonged to him.

[27] Mr. Lloyd Campbell stated that he asked Mrs Roper Bennett to act as a mediator to see how much information she could get from the Defendant regarding the password for the system. He said that the Defendant refused to hand over the information. At that point he called the Defendant, used expletives at him, and demanded that he leave the premises. He said that the Defendant left the premises and within 24 hours of his departure there was a shutdown of the IT system including the facebook account. He said that there was also a hack into the Claimant's paypal account and money was taken from the account. His evidence was that within the same period there was a shutdown of the server. He said that another IT specialist had to be employed to hack into the system, block the invader and change the password for the operating system. The website was later rebuilt.

[28] Mr Campbell said that his request for the Defendant to remove his software from the premises was not a breach of an agreement for equity. He said that his request was related to the Defendant's threatened breach of or breach of his IT services agreement

with the Claimant where he refused to deliver up relevant information concerning the IT operating system. The Defendant he says also threatened to disable access to the website. All this, he said, arose from a disagreement in respect of invoices submitted for services rendered.

[29] Mr. Lloyd Campbell's evidence is that he and the Defendant had no discussion about any equity arrangement. He did however recall seeing the proposal that the Defendant had prepared. He said that there was no agreement for equity. He said further that there was no agreement to award the Defendant equity in the future. Mr. Lloyd Campbell in addressing the issue of payment to the Defendant said that the assertion that the Defendant was employed as an operations manager and not paid was false. His evidence was that the Defendant was always instructed to present an invoice for services performed and payment would be subject to his approval. He said further that the Defendant was paid the sum of \$526,500 as an independent contractor. Mr. Lloyd Campbell said that the Defendant thereafter refused to negotiate any further payment as was previously agreed.

[30] Mr. Campbell said that the Defendant was never told that the domain name registered would be his or for his exclusive benefit. He says further that the Defendant was not the creator of the Claimant's logo. He said that the logo for Union One Express was made from images bought from Shutterstock.com and Services Limited. He says that it was agreed that Mr Evans would manipulate the images to form part of the logo.

[31] Kevin Barrett an Information Technology Manager at the Claimant gave a witness statement in support of the Claimant. His witness statement was dated 12th September, 2017 and stood as his evidence in chief. He deponed that he introduced the Defendant to Mr. Lloyd Campbell to act as an IT consultant. He said that it was Mr. Campbell's idea to start the business. He also said that it was Jovan Evans who developed the Claimant's website and that it was up and running before any portal designed by the Defendant. His evidence is that the Defendant did not develop any logo or trademark for the Claimant. He said that the domain was to be transferred to the

Claimant and that he was present when Mr. Lloyd Campbell told the Defendant to get all of the information he needed and he would get paid for his services.

[32] Mr. Barrett said that to his knowledge the Defendant was given a company credit card to transact company business which he used in an unauthorized manner to transact his personal business.

[33] The parties and their witnesses were all cross examined. In cross examination the Defendant admitted that not all the details of the work he carried out were agreed on in May, 2012. Mr. Campbell in cross examination admitted that he communicated with the Defendant during the six-month period and made inputs on what should be done. As regards the equity share the Defendant maintained throughout that there was an agreement that he would share in the equity of the Claimant company. He confirmed that he was in negotiations with Mr. Campbell and had rejected his offer of 7% of net profits. It is important to note that Mr. Campbell, in cross examination, indicated that if his counter offer had been accepted he would have offered even a lower percentage.

[34] The Defendant admitted in cross examination that Jovan Evans made an input to the logo with the horse image on the Claimant's website. He said that he did not have any agreement that the software or logo created would be owned by him. When asked what was meant by the term "subject to approval" on the invoice he sent to the Claimant, the Defendant explained that Mr. Campbell did not receive the invoices directly. They are sent to accounts and the General Manager Mrs Roper-Bennett. He said that he indicated on the invoice which option was chosen and so by his wording he was indicating that it was on the permission of Mr. Campbell. He said that it was on the Claimant's receipt of that invoice that he was paid.

[35] Mr. Lloyd Campbell when cross examined insisted that the Defendant was always paid whenever he submitted an invoice. He said "so he submits so we pay". He was however not sure if the Defendant was owed any sums. His general attitude from his answers and demeanour was that he wanted to be rid of the Defendant.

[36] The other witnesses were not very knowledgeable on the circumstances which led to the establishment of the Claimant. Jovan Evans said in cross examination that he made modifications to the horse image used as the Claimant's logo.

[37] The Parties made written and oral submissions before me. I will summarise the respective contentions. The parties are to rest assured that each submission was carefully considered. I summarize the Claimant's submissions below:

- (a) *The Defendant was employed as an independent contractor*
- (b) *There is no binding contract for the Defendant to receive equity in the Claimant as there was no offer and acceptance.*
- (c) *Even if there was offer and acceptance there was no consideration.*
- (d) *The Defendant is not entitled to any sums claimed because of anticipatory breach*
- (e) *The Defendant has no proprietary interest in the computer software formerly used by the Claimant.*
- (f) *The Defendant raised the issue of relief on a quantum meruit basis at the last moment during the course of the trial and this relief is not possible in a claim of this nature.*

[38] Counsel for the Defendant on the other hand submitted that:

- (a) *There was an oral agreement for the Defendant to acquire an interest in the Claimant.*
- (b) *The Defendant is entitled to remuneration for the work, effort, time and resources that he has invested.*
- (c) *If the Court is not prepared to order shares to be transferred then he is entitled to damages.*

[39] A convenient starting point for my analysis, and one which goes to the heart of the dispute between the parties, is whether the Defendant entered into an agreement with the Claimant for an equity share in the Claimant. The position of the parties varies greatly in this regard. It is agreed that the relationship between the parties began with the Defendant in a consultancy role to First Union Financial Services Limited. This dispute relates however to the Claimant: First Union Financial Company Ltd t/a Union One Express. It is common ground that Mr. Lloyd Campbell was acting for and spoke on behalf of the company. The parties agree that the Defendant carried out services, specifically IT services which included inter alia producing a website for the Claimant's use. The precise details of the Defendant's compensation were never agreed. However, the parties must have had some form of agreement for the Defendant to have worked for 6 months without pay. He had some expectation of remuneration. The agreement between the parties was an oral one. In order to assist in deciding whose evidence to accept as to the terms of this oral agreement I have considered the conduct of the parties before as well as after they began their working relationship. This is permissible see **Brian Royle Maggs t/a BM Builders (A Firm) v Guy Anthony Stayner Marsh and Marsh Jewellery Co Ltd** [2006] EWCA Civ 1058. That court said:

“Determining the terms of an oral contract is a question of fact. Establishing the facts will usually, as here, depend upon the recollections of the parties and other witnesses. The accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the agreement has been concluded. Receiving evidence of such words or actions does not mean that the judge is losing sight of his task of deciding what the parties agreed at the time of the contract. It is simply helping him to decide whose recollection is right.”

[40] The Defendant said that the agreement was reached in May, 2012. He agreed in cross examination that not all of the services he provided were detailed in the agreement. He informed Mr. Campbell of some of the tasks he undertook and for others he did not. According to him the agreement was for him to provide his technological expertise. What is obvious is that the Defendant was significantly involved in the business and his services were used for the benefit of the business. The Defendant says that his actions were based on the premise that there was an agreement that he

would obtain an equity share in the Claimant. The Claimant admits that Mr. Lloyd Campbell did subsequently enter into negotiations with the Defendant for an equity share in the Claimant. I find it difficult to believe that a business man would offer an independent contractor shares in his company for services performed in circumstances where there was no prior agreement to that effect.

[41] I find as a fact that there was at all material times an agreement that the Defendant and the Claimant would enter into business together. The Defendant's remuneration for services provided would include an equity share of the Claimant determinable at a later date. I find, and this is common ground, that the Defendant commenced working for the Claimant, and did so for 6 months without remuneration. I also find as a fact that the Defendant was told to remove his equipment because of the dispute which arose concerning the percentage of shares that he should be allotted. I find therefore that there was no anticipatory breach on the Defendant's part when the equipment was removed.

[42] The Claimant submitted that there exists no binding contract. According to Counsel for the Claimant there was no offer made by the Defendant capable of acceptance in May 2012, since the scope of activities to be performed were not specified nor told to Mr. Lloyd Campbell. I do not agree that the offer made was incapable of acceptance merely because every single task undertaken by the Defendant was not itemized and agreed on. I find, based on the behaviour of the Defendant and Mr. Campbell and their interaction during the course of business, that it was agreed that the Defendant would contribute his expertise in establishing the business. This he did to great effect.

[43] The Claimant also submitted that the purported promised consideration, that is, 'an equity share', does not specify any particular share, let alone any particular value to the alleged promise, and is too vague. Counsel said that the purported consideration does not amount to a legal obligation. He said further that an agreement to agree in the future does not create a binding agreement. He relied on the authority of **Walford v Miles** [1992] 2 A.C. 128. He says where terms are vague for uncertainty the courts are

slow to find a binding contract, see **G. Scammel & Nephew Ltd v Ouston** [1941] A.C. 251.

[44] Counsel for the Claimant said further that there was no consideration for the alleged oral agreement. Counsel says that the purported promised consideration of an equity share in the company does not satisfy the required test that consideration must be sufficient for a binding agreement to exist. The Claimant says that courts have interpreted the requirement that consideration must be sufficient either in terms that the consideration must have some definite economic value and/or, alternatively, that the purported promised consideration is not vague.

[45] In **Keith Garvey v Ricardo Richards** [2011] JMCA Civ 16, Harris J.A. stated at para. 10 that:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence.”

[46] As I have already said the parties did enter into an agreement to operate a business together. It is clear to me that there was an intention to create legal relations. The Defendant worked for a period of 6 months in pursuance of this agreement all the while at intervals communicating with the Claimant on the work that he was carrying out. There was clearly offer and acceptance in that the Defendant offered to contribute his services for an equity share to which Mr. Campbell agreed. The Claimant agreed to fund the startup and this was accepted by the Defendant. It is agreed between the parties that work was carried out, an invoice was submitted by the Defendant and partial payment made.

[47] I agree that an agreement to agree in the future cannot amount to a binding contract, per Maugham LJ in **Foley v Classique Coaches, Limited** [1934] 2. K.B. 1 at page 13;

“It is undisputable that unless all the material terms of the contract are agreed there is no binding obligation. An agreement to agree in the future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it.”

[48] The circumstances are different where there is part performance. In the matter at bar although an important term was not agreed the parties had embarked on contractual performance. There was an agreement to agree the percentage share entitlement of the Defendant in the company. This is a contract in which remuneration was not specified. Such an agreement is not invalid. In **Foley** the parties agreed inter alia that;

“The vendor shall sell to the company and the company shall purchase from the vendor all the petrol which shall be required by the company for the running of their said business at a price to be agreed by the parties in writing and from time to time”

[49] This term was held to be valid. The court implied into the contract that the price should be reasonable. In the matter before me the parties agreed that the Defendant would provide services in consideration for an equity interest in the Claimant and that his interest would be determined at a certain date. To give business efficacy to this agreement the court must imply into this agreement that the equity share should be reasonable, that is, it should bear some relationship to the value of the work done and to be done.

[50] I am fortified in the view that there is a valid contract because the agreement was being performed by the parties. The Defendant has executed his side of the bargain and the Claimant has partially executed his. The authors of **Halsbury’s Laws of England** (Vol 22 (2012)) para 276 had this to say about partially executed agreements;

“26. Partially executed agreements

*Where an 'agreement' remains executory on one side, but has been wholly or partially executed on the other, the very fact of execution may itself tend to lead to the conclusion that the 'agreement' is binding; or, where it is only partially executed on the one side, the court may alternatively deduce that there is a binding contract broadly on the terms of the 'agreement', but merely in respect of the executed part; and, **where the 'agreement' has been partly or wholly executed on both sides, it would seem probable that the courts would give their assistance** (my emphasis added) ³, even sometimes to the extent of giving retrospective effect to the terms eventually agreed”*

The learned authors in their footnote stated:

“3. It is fairly common, particularly in large commercial ‘contracts’, for the two parties to continue to send each other counter-offers in what has become known as the ‘battle of the forms’ after they have commenced performance, and even up to completion of the envisaged project. Sometimes, this may result in a concluded contract, as in the ‘last shot doctrine’. If not, presumably, there is a fairly strong degree of likelihood that in such circumstances a court will decide that there is a contract on one of the following bases: (1) the terms agreed, with the court’s idea of what are reasonable terms being supplied to fill all areas of omission or disagreement; or (2) the entire contract being constructed on the basis of what the court thinks is reasonable, the terms which the parties have agreed being evidence of what is reasonable in the circumstances . In the absence of any contract, the parties may be left with claims in restitution.”

The authors of Halsbury continued in their discussion on partially executed contracts (para 276):

“It is especially common in the case of large commercial agreements to find that terms which would probably be too vague and incomplete to constitute a binding contract whilst the matter remains wholly executory tend to be held binding when they have been wholly or partially acted upon, as in a sale of land by a garage (A) to a coach operator (B) on the express condition that B would buy all his petrol from A 'at a price to be agreed by the parties from time to time'. Further instances of this approach may be found in 'forward contracts', as where the parties provide for the renewal of an existing contract on terms which are not clearly defined; or a commercial licensing agreement which does not specify prices or quantities of goods to be handled by the licensee; or where there is

a common usage in a trade to use a particular standard form of contract; or a contract for immediate insurance 'at a premium to be arranged'; or where work commenced whilst the parties continued to negotiate the terms of a building contract.

Similar problems have arisen in relation to rent review clauses in leases which fail to set out the machinery for implementing the review. Prima facie, such a rent review clause is ineffective, with the result that, in respect of that period of the lease, either the old rent will continue to be payable; or a reasonable rent must be paid.

In the above situations, a partially executed agreement will not necessarily fail merely on the ground that it envisages further agreement between the parties. Should the parties subsequently fail to agree the outstanding matters, it has been said that the contract will only fail if that failure makes it unworkable or void for uncertainty; and that it is unlikely to be the outcome where the outstanding matter is only of subsidiary importance. On the other hand, the 'agreement' is likely to fail as a contract where the outstanding matter is substantial; and a remedy can then only be sought in restitution or tort."

[51] The evidence is that the parties have been unable to reach an agreement on the compensation package to be given to the Defendant. The Claimant says no agreement to negotiate an equity existed. This is despite the evidence of the Claimant's counter offer to the Defendant of an equity interest and his payment on an invoice with a compensation package inclusive of equity. I hold that there was such an agreement. The Defendant is entitled to a reasonable sum for his services. I say a reasonable sum as the court is not minded to force unwilling persons to partner in business relationships. Therefore, as it concerns an award of equity in the Claimant, this court is not minded to order either specific performance of the transfer of shares or the payment of future profit share. This however does not preclude the Defendant from obtaining a remedy on a quantum meruit basis. It is in this way that the court will determine a reasonable sum.

[52] There are various circumstances in which the term quantum meruit is used. According to the learned authors of **Halsbury's Law of England** (Vol 28, 2012) para 408:

“The term 'quantum meruit' is used in different senses at common law. For example, in some cases quantum meruit is used to express the measure of recovery in a contractual claim. In other cases it is used to denote a restitutionary claim. The claim is clearly contractual in nature where it is one to recover a reasonable price or remuneration in a contract where no price or remuneration has been fixed for goods sold or work done. Where, however, no contract is ever concluded between the parties or the contract is void or otherwise unenforceable, the claim cannot be contractual in nature and is likely to be restitutionary. In other cases it can be difficult to discern whether the claim is contractual in nature or restitutionary. Where the implication of an obligation to pay a reasonable sum is a genuine one on the facts, reflecting the intention of the parties, the claim is contractual, but where the obligation is imposed as a matter of law, the claim is more likely to be restitutionary.”

[53] Lord Clarke, in **Benedetti v Sawiris and others** [2013] UKSC 50 (delivered 17 July 2013), in addressing a claim in restitution and unjust enrichment, made a brief comment and comparison with contractual relief on a quantum merit basis. At paragraph 9 of the judgment he said :

“It is common ground that the correct approach to the amount to be paid by way of a quantum meruit where there is no valid and subsisting contract between the parties is to ask whether the defendant has been unjustly enriched and, if so, to what extent. The position is different if there is a contract between the parties. Thus if A consults, say a private doctor or a lawyer for advice there will ordinarily be a contract between them. Often the amount of his or her remuneration is not spelt out. In those circumstances, assuming there is a contract at all, the law will normally imply a term into the agreement that the remuneration will be reasonable in all the circumstances. A claim for such remuneration has sometimes been referred to as a claim for quantum merit. In such a case, while it is no doubt relevant to have regard to the benefit to the defendant, the focus is not on the benefit to the defendant in the way in which it is where there is no such contract. In a contractual claim the focus would in principle be on the intentions of the parties (objectively ascertained).”

[54] This is a contractual claim and not a claim for restitution. The Defendant in his Amended Counterclaim has pleaded damages for breach of contract.

[55] Counsel for the Claimant submitted that the Defendant's counter claim does not include a claim for relief on a quantum meruit basis and as such he cannot obtain that remedy. Counsel also submitted that he was not alerted to a claim for relief on a quantum meruit basis. Counsel submitted that the Defendant raised the issue of relief on a quantum meruit basis at the last moment during the course of trial. Counsel added that the Defendant's pleadings do not disclose any cause of action in unjust enrichment. As such Counsel says that he was not put on notice of this relief being claimed by the Defendant. He went on to say that it was not in the Defendant's pre-trial memorandum as none was prepared or in its opening statement regarding the issues the court is being asked to address. Counsel submitted that the Defendant did not seek to amend its pleadings to incorporate a claim based on unjust enrichment, and the accompanying relief of quantum meruit, as an alternative to its claim in contract.

[56] I respectfully disagree. In the first place counsel for the Defendant did put the Claimant on notice in his opening statement when he said;

"So we are here for the Court to determine the following:

- 1. Whether the Court can find credible evidence on the witness statement and oral evidence if any from the parties to arrive at the conclusion on a balance of probabilities that there was an oral agreement for the Defendant to acquire an interest based on the work and time he put in*
- 2. Whether the Defendant is entitled to remuneration or compensation for the work effort time and resources that he has put into the matter.*
- 3. What quantum of damages / remuneration should the Defendant be awarded if the court finds that he is not entitled to shares or equity but is entitled to compensation"*

[57] Quantum meruit is not, as counsel for the Claimant, seems to think, a cause of action; neither is it necessarily wedded to a claim to equitable relief. In this instance it is a method of assessing or computing damages in a contractual claim. The Claimant was alerted to a claim for damages for breach of contract which included an assessment of the value of work done. The Amended Counterclaim filed on 20th August, 2013 and the

evidence in support are sufficient to alert the Claimant that the issue of quantum meruit was live. The suggestion by the Claimant that the Defendant ought to have pleaded damages for unjust enrichment is incorrect. Unjust enrichment has not been pleaded because this a claim for breach of contract.

[58] Where parties have entered into agreements and have failed to agree consideration or where the intended consideration in specie fails the court has quantified loss or damage on a quantum meruit basis. In **Adolphus v Popper** (1986) 39 WIR 76 the court found that there was an agreement between the parties for work to be done and a commission to be paid. The rate or amount of commission was not agreed. The Belizean Court of Appeal upheld the trial judge's decision to determine this sum on a quantum meruit basis. The court relied on the dictum of Lord Atkin in **Way v Latilla** [1937] 3 All ER 759 who at page 763 said:

“There is no material in the present case upon which any court would decide what was the share which the parties must be taken to have agreed. But while there is therefore, no concluded contract as to remuneration, it is plain that there existed between the parties a contract of employment under which Mr Way was engaged to work for Mr Latilla in circumstances which clearly indicated that the work was not to be gratuitous. Mr Way therefore, is entitled to a reasonable remuneration on the implied contract to pay him quantum meruit.”

Lord Atkin continued at page 764

“There are many employments the remuneration of which is by trade usage, invariably fixed on a commission basis. In such cases, if the amount of the commission has not been finally agreed, the quantum meruit should be fixed after taking into account what would be a reasonable commission, in the circumstances, and fixing a sum accordingly. This has been an everyday practice in the courts for years. But if no trade usage assists the court as to the amount of the commission, it appears to me clear that the court may take into account the bargaining between the parties not with a view to completing the bargain for them, but as evidence of the value which each of them puts upon the services. If the discussions had ranged between 3 per cent on the one side and 5 per cent on the other, all else being agreed, the court would not be likely to depart from somewhere about those figures and would be wrong in

ignoring them altogether and fixing remuneration on an entirely different basis, upon which possibly, the services would not have been rendered at all.”

[59] The Claimant submitted, in the alternative, that any claim for quantum meruit should reflect the sum payable on the balance of the invoice submitted as opposed to a 35%, or any, equity interest for which there was no agreement. This submission does not reflect the intention of the parties. The Defendant is entitled to the sum owing on the invoice in addition to an additional award reflective of the value of the equity.

[60] The Claimant submitted further that to award the Defendant damages on a quantum meruit basis and to grant his copyright claim would be tantamount to double recovery and unjust enrichment. I do not agree. A declaration concerning copyright ownership is a separate issue from that of the quantification of damages for services rendered and for which there has not been full payment. There is no evidence that the parties had discussed let alone agreed anything related to the ownership of copyright.

[61] The Defendant's evidence is that the value of his services is 14-15 million dollars. This does not seem to be within the range of compensation contemplated by the parties themselves. The Defendant proffered no evidence, such as an independent practitioner in the area or otherwise, to support his estimate of the value of services. In determining the true intent of the parties I had regard to the proposal submitted to the Claimant by the Defendant on which sums were paid. From the chart of options (see paragraph 12 above) it is seen that as his share of equity increases remuneration per month decreases proportionately. So that 5% of equity represents \$20,000 in monthly remuneration. A 35% equity therefore represents \$140,000 per month. Applying this latter sum to the 6 month period for which the Defendant worked in the company one gets \$840,000. The invoice dated 4th January 2013 (Exhibit 1 document # 5) had an amount of \$1,170,000 (195,000 x 6 months) **and** 35% equity. The invoice was submitted and partially paid. Mr. Campbell thereby accepted the figures and the claimed equity as reasonable. That I find is a reasonable estimate of compensation for the work done. In addition to the balance owed on the cash portion of the invoice (\$643,500), the

Defendant is therefore also entitled to \$840,000 in respect of the 35% equity in the Claimant.

[62] As it concerns the intellectual property claim counsel submitted that the proprietary interest in the software developed by the Defendant belongs to the Claimant. This is in accordance with the terms of engagement between the Defendant and Claimant whereby the Defendant was engaged as an independent contractor to develop such a system for the use, benefit and ownership by the Claimant. The Claimant said this position has not been challenged under cross examination.

[63] The Defendant was not an employee. In evidence before me the Defendant asserted, and I accept, that the intellectual property concerned belonged to him. The **Copyright Act** assigns copyright to the author of the work. The evidence received in this trial has satisfied me that the Defendant was the author of the created intellectual property. This was to be part and parcel of his investment in the venture. The Claimant submitted no evidence of any assignment of ownership.

[64] Section 22 of the **Copyright Act** makes provision for the ownership of copyright as follows:

“(1) Subject to the provisions of this section, the author of a protected work is the first owner of any copyright in that work unless there is an agreement to the contrary.

Subsection (1) shall not apply to copyright subsisting in a work pursuant to section 146.

Where a protected work is a work of joint authorship the authors thereof shall be co-owners of the copyright in that work.”

[65] The provisions are clear and were explained and applied by the Court of Appeal in the case of **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Services Limited (Jamaica)** [2015] JMCA Civ 20, see in particular paragraph 149 of the judgment of Harris P (Acting).

[66] With regard to the logo the images were purchased by the Defendant and it was he who arranged them in a certain manner and modified the images to create the logo. He admitted that he did so with the assistance of Jovan Evans. The Defendant registered the logo with the Jamaica Intellectual Property Office and the registration is held by him. The certificate of registration was admitted in evidence see Exhibit 1, document # 15. The registration of the mark by the Defendant is *prima facie* evidence of his proprietary interest in the mark. The court cannot however turn a blind eye to the contribution of Jovan Evans.

[67] Mr. Evan's relationship with the Claimant began with his submission of a quote to build a website for the Claimant. His quote was accepted and he began to work on the website. The submission of this quote gives rise to the inference that Mr. Evans was a contractor and not an employee. There was however no evidence elicited in this regard. There was also no evidence of whether there existed a contract between Jovan Evans and the Claimant for the assignment of intellectual property developed by him during the course of the working relationship. What is clear however is that the Defendant did not solely develop the logo. The court cannot therefore grant the declaration that he has sought. As a result of the insufficiency of evidence I would decline to express a final determination on the proprietorship of the trademark and design.

[68] In the result, and for the reasons stated herein, it is adjudged and declared as follows:

1. The Defendant is the owner of the copyright in the computer software formerly used by the Claimant as the Defendant is the author of the computer software within the meaning of the Copyright Act.
2. Judgment for the Defendant against the Claimant in the amount of \$1,483,500.
3. Interest at 3% from the 4th January, 2013 (the date of the partially paid invoice)
4. Costs to the Defendant to be agreed or taxed.

[69] Counsel will I trust pardon me if I express gratitude to Ms. Carissa Mears, a judicial clerk, whose able assistance facilitated the timely preparation and delivery of this judgment.

David Batts
Puisne Judge