

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

**Common Law & Equity Division
2004/CLE/GEN/01024**

BETWEEN

BERKLEY MILLER

Plaintiff

AND

**TERVERIS MOSS
(doing business as Cost U Less Imports)**

First Defendant

AND

**BRIDGETTE FORBES
(doing business as Cost U Less Imports)**

Second Defendant

Before: Stephen G. Isaacs

Appearances: Miss Kara Turnquest and Mr. Patrick Sweeting and Miss Kaye
Nottage with her for Plaintiff
Mr. Charles Mackey for Defendants

Hearing Date: 12 & 19 February 2010

J U D G M E N T

By an Originating Summons filed 18 August 2004 the Plaintiff has sought the following reliefs:

1. A declaration that the First and Second Defendants produce any and all bank records, books of accounts, papers, records, documents and audited financial records of the income of the Defendants' operating as Cost U Less Imports for the period November 2002 through August 20th, 2004.
 2. A declaration that the First and Second Defendants produce all records relating to the purchase of inventory and equipment related to the business Cost U Less Imports for the period November 2002 through August 20th, 2004.
 3. A declaration that a Receiver be appointed.
 4. That the cost of this application be provided for with the Defendants being ordered to pay the Plaintiff's costs thereof.
 5. That such further or other order be made in the premises as the Court deems fit.
2. By his Affidavit in support filed 7 September 2004 the Plaintiff referred to a written agreement between himself and the Defendants to share in the profits of a meat business and the related expenses equally. The agreement exhibited to his Affidavit provides as follows:-

"This agreement made on the 3rd day of November, 2002 constitutes an arrangement between Cost U Less Import located Alexander Blvd, Nassau Village, Nassau, Bahamas and Berkely Miller (Shareholder).

Cost U Less Imports agrees to provide Fifty Percent (50%) of all shares for the meat section of the business to Mr. Berkley Miller. All profits and expenses are to be shared equally between both parties which includes, but is not limited to the following:

RENT

Landlord of the building agrees to rent a second portion of the building (located Alexander Blvd to Cost U Less Imports) for an additional \$1,500 per month. First and last month's rent of \$3,000 must be paid to secure store. Each party agrees to pay half of rent which is \$1,500 each for the first month and \$750 for each successive month.

Additionally, store will need renovation to accommodate the meat. All expenses are to be totaled and divided equally.

EQUIPMENT

Machinery will need to be purchased for the meat section. The sum of all invoices (including customs and freight) will be calculated and divided between both parties.

SUNDRY

All other expenses involved with the meat division will be divided equally between Cost U Less Imports and Berkley Miller.

PROFIT

Profit is determined after all expenses have been deducted from the earnings of the meat division.

Funds will be distributed once a month at the end of each month. Profit is to be shared equally between Cost U Less Imports and Berkley Miller.

Shareholder is not to take active part in running of business. All receipts and accounts with regard to shareholders interest will be presented at time of disbursement of funds.”

3. He claims to have invested \$25,700.00 as shown on receipts exhibited to his Affidavit. Those receipts however amount to \$24,200.00. Additionally, no shares were ever issued as the business is not a limited company.

4. I note here that one of the receipts reflects that \$6,000 was received from Cost-U-Less, the other receipts reflect payments from the Plaintiff. To date there has been no evidence of the purchase of equipment or supplies, and the Defendants have not produced any book of account or records for the Plaintiff to inspect.

5. The Defendants countered by their joint Affidavit filed 14 October 2003 that \$24,200.00 was paid by the Plaintiff, \$7,200 of which was earmarked for a truck to be purchased for the Plaintiff. They say that the meat business never got off the ground, and allege that the Plaintiff was paid approximately \$34,000 partly in cash and partly by way of items purchased for the Plaintiff. They also stated that a Dodge Ram valued at \$38,000.00 was conveyed to the Plaintiff. Exhibited to their Affidavit is a list of items with prices shown to be advanced to the Plaintiff as well as cash advances, and his signature is affixed at page one. Page two shows a total of \$31,782.00 advanced, \$34,000.00 received from the Plaintiff with a balance of \$2,218.00 owing to the Plaintiff. As the funds earmarked for the meat

business and the purchase of a truck were comingled, there is no way to determine what the \$2,218.00 owing to the Plaintiff is actually owed for.

6. The First Defendant also states that \$20,444.00 was seized by the United States Customs for failure to declare, but those funds were recovered in December 2003 after a court hearing.

7. By a second Affidavit filed 10 November 2004 the Plaintiff claims to have paid \$9,000.00 to the First Defendant in mid 2000 for the purchase of a truck which he received in 2002. He claims that he was only told of the confiscation of the funds by the United States Customs in late 2003. It is noted that this transaction falls outside of the period under scrutiny.

8. In a later Affidavit filed 31 May 2005 the Plaintiff claims that the First Defendant owed him \$7,000.00 for dry wall work. He added \$2,800.00 as requested to purchase the truck. He expected delivery in 2000 but did not receive the truck until early 2004.

9. In reply to the Affidavit of the Plaintiff's Affidavit of 31 May 2005 the First Defendant by his Affidavit filed 27 October 2005 claims that he found a truck for \$7,800.00. He says the dry wall work cost \$4,000.00, the Plaintiff gave him \$2,800.00 and he lent the Plaintiff \$1,000.00 for a total of \$7,800.00. He went on to say that the truck eventually cost \$11,600.00, that the Plaintiff gave him an additional \$3,800.00 toward the truck and \$5,200.00 toward the meat business.

The First Defendant also claims to have spent a further \$9,300.00 on the truck for parts, labour, transportation, freight and duty. He denied that the \$2,800.00 paid by the Plaintiff was for additional parts. The total value of the truck he claims was \$24,500.00 (although the numbers above amount to \$24,700.00).

10. By an Affidavit of Kanora Seymour filed 7 September 2008 she essentially gave evidence that she understood the parties to be partners in the business. She worked at Cost-U-Less between July 2003 and February 2004.

11. Corvin Bastian by his Affidavit filed 11 September 2008 said that he worked with the Plaintiff for approximately three years, that the parties formed a partnership, that the Plaintiff paid \$9,000.00 and \$7,000.00 which was paid to the Second Defendant for the business.

12. Given this evidence in chief the Plaintiff repeated much of it in cross-examination. It must be borne in mind that the purchase of a truck was not a part of the agreement between the parties. The focus of this judgment is the meat business specifically.

13. The Plaintiff repeated that he paid \$17,000.00 toward the meat business that never materialized. He denied having received the items on the list, notwithstanding that his signature appears thereon. He claimed not to recall signing the statement for items received, and instead claims to have only signed for \$2,400.00. He claims that he paid a further \$6,000.00 to purchase items that would turn over quickly after the meat business did not get off the ground.

14. Contrary to his evidence in chief he said in re-examination that he was told that his \$17,000.00 and other cash was confiscated a couple of days after he handed the money over. He claims that there was a plan B and that with his contribution of \$6,000.00 to purchase quick turn over items he became a part of the business. This action however revolves around the agreement exhibited and the reliefs claimed in the Originating Summons. There is no written evidence of a plan B.

15. The cross-examination of Covin Bastian and Kanora Seymour did not alter the factual background in any significant way insofar that they repeated that the Plaintiff paid \$17,000.00 toward the meat business and that he was considered a partner in the business respectively.

16. The First Defendant said in his cross-examination that \$7,000.00 of the Plaintiff's money was for the meat business, which contradicts his evidence in chief. He said that the funds confiscated were returned to him in 2006, again contradicting his evidence in chief which places the return date at December 2003.

17. He said that the list signed by the Plaintiff was prepared by the Second Defendant, and that the Plaintiff took things from the shop without permission but the Plaintiff did list the items.

18. The quality of the evidence on both sides leaves a lot to be desired. Apart from the written agreement and the list of credited items and cash advances, there is not much that can safely be accepted as being accurate on a balance of probabilities.

19. If there were clear evidence that there was a total failure of consideration for the Plaintiff's infusion of \$17,000.00 which is a figure that can be accepted by the Plaintiff's version of events, but rejected by the Defendants' version, then the Plaintiff would be entitled to recover that amount with interest and perhaps damages due to a breach of contract. This principle is demonstrated in ***Royal Bank of Canada v R (1913) AC 283; Kwei Tek Chao v British Traders and Shippers Ltd [1954] 2QB 459 at 475.***

20. I do not accept that the Plaintiff can avoid the effect of his signature on the list of items and advances by stating simply that he does not remember signing the statement. His signature, which has not been shown to be forged, obliges him to accept the contents of that statement, which means that he received from the business dry goods and cash advances totaling \$31,782.00 in value from the Defendants.

21. It appears therefore that he did not sustain a loss by reason of a breach of contract. He has as a matter of fact, been fully compensated for any cash advanced and is not entitled to further damages (***see Robinson v Harmon (1848) 1 EXC 850.***

22. With regard to his expectation to receive interest on his investment, he has almost doubled his investment judging from his own evidence, even though the meat business never materialised.

23. The cases of *Chaplin v Hicks [1911]* and *Forman & Co. Pty Ltd v The Liddesdale (1900) AC 190* do not assist the Plaintiff firstly because his evidence in chief was inconsistent with his evidence in cross-examination, and secondly because the meat business that he attempted to invest in never materialized and he was, by the evidence, compensated for his investment.

24. The argument that the Defendants' negligent act or omission made the performance of the contract impossible and was self induced as in *The Super Servant Two (1989) 1 Lloyd's Rep 148* would carry some weight if the evidence presented was consistent. The Plaintiff's credibility however was severely tested, particularly with regard to his receipt of goods and advances, the statement for which he claimed not to recall signing. The confiscation of the seed money resulted from the passing of extra cash to the First Defendant by his wife before he travelled. The funds were returned making it difficult to establish any negligence.

25. The reliefs claimed by the Plaintiff relate to the meat business that never materialized. Even had that business come into existence, the Plaintiff would only be entitled to examine documents related to it. As it stands the records that do exist can only relate to the dry goods business of Cost-U-Less.

26. It is not relevant whether or not the Plaintiff was a partner in the dry goods business, and he is not entitled to any relief against that business, as the agreement relates to the meat business only.

27. It is the conclusion of this Court that the Plaintiff is not entitled to the reliefs claimed and the action is therefore dismissed.

28. On the question of cost, the evidence of the Defendants was equally as inconsistent as that of the plaintiff. In these circumstances the Court will exercise its discretion to depart from the usual order that costs follows the event. Each party shall bear their own costs.

Dated the 4th day of November A.D. 2010

Stephen G. Isaacs J.