

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF
GUYANA

(REGULAR JURISDICTION)

2017 – HC – DEM – CIV – SOC – 297

BETWEEN:

1. THOMAS PINKERTON

**2. ANDERSON CHEMICALS (GUYANA)
LIMITED**

Claimants

-and-

1. GUYANA WATER INCORPORATED

**2. JAMES SAMUELS trading under the
name and style as JGS Business
Services**

Defendants

BEFORE THE HON. MR JUSTICE NARESHWAR HARNANAN

APPEARANCES:

MR. LYNDON AMSTERDAM FOR THE CLAIMANTS

MR. NIGEL NILES FOR THE 1ST NAMED DEFENDANT

MR. DEVINDRA KISSOON FOR THE 2ND NAMED DEFENDANT

DECISION:

1. The main issues in this matter are:

- A. Whether a cause of action disclosed against the 1st named defendant;

- B. Whether the 1st named Claimant entered into the Contracts for the supply of Seaquest to the 1st named Defendant in his personal capacity;
 - C. Whether the Partnership Agreement between the 2nd Defendant and the 2nd named Claimant is a lawful and binding Agreement.
2. A determination of these issues one way or the other will lead to consequential orders by this Court.

ISSUE A:

3. At the outset and having regard to the evidence and legal submissions by the parties, it is clear that the claimants have not disclosed any cause of action against the 1st defendant. There is no evidence before the Court which suggests that GWI has not honoured the provisions of the contracts in issue or any suggestion that GWI has breached any contractual term therein.
4. This Court therefore dismisses the claims against the 1st named defendant, without more.

ISSUE B:

5. The recitals of the Contracts which are before the Court set out the parties and their obligations. There is no issue as to the capacity in which GWI, and James Samuels entered these contracts. There is also no question in the Court's mind that Thomas Pinkerton entered into these contracts in his personal capacity. The contracts set out clearly that he entered then in his personal capacity, whilst trading as Anderson Chemical (*sic*).
6. Therefore, any want of legal capacity afflicting the 2nd named claimant as a result of being struck off the Companies Register at the time when the contracts were signed, is irrelevant when examining the contracts.
7. It is clear from the evidence before the Court that he was envisaged to provide whatever technical expertise was required to be fulfilled. The contracts, therefore, were lawful and capable of being enforced by the parties.

ISSUE C:

8. This is the main issue in this matter as it is a dispute between the parties of the partnership agreement which gave rise to the proceedings before the Court.
9. The 2nd named defendant contends that there was never any valid partnership agreement and therefore completely unenforceable. He argues that Anderson Chemicals (Guyana) Ltd., entered the partnership agreement in June 2016, when it was struck off the Companies Register since December 12, 2014. He contends therefore that the purported partnership was void from the very beginning.
10. He further contends that even if there was a valid partnership agreement, it was terminated because the claimants are guilty of repudiatory and/or fundamental breaches, which entitled the 2nd claimant to treat himself as discharged from the partnership. Further, he contends, to avoid any doubt, the partnership was terminated by notices issued in February and November 2017.
11. The claimants disagree with the contentions of the 2nd defendant and argue that the company was struck off the Register for failure to file their Annual Returns and in any event, the Company has been restored to the Company Register after fulfilling their statutory obligations.
12. They argue that the Company remained in existence and was still a legal person during the time it was struck from the Register.

THE LAW:

13. The question for this Court is, what is the effect of the Company being taken off the register of companies.
14. **Section 8** of the **Companies Act, Cap. 89:01** of the Laws of Guyana state:
 - (1) Upon receipt of articles of incorporation, the Registrar must issue a certificate of incorporation in accordance with section 479; and **the certificate shall be conclusive proof of the incorporation of the company named in the certificate.**

(2) A company shall **come into existence** on the date shown in its certificate of incorporation.

15. **Section 30** of the ***Interpretation and General Clauses Act, Cap. 2:01*** of the Laws of Guyana provides that:

(1) Where any written law contains words **establishing** or providing for the establishment of a **body corporate**, those words shall, unless the context otherwise requires, operate—

(a) to vest in that body **when established**—

(i) perpetual succession;

(ii) the power to sue in its corporate name;

(iii) the power to enter into contracts in its corporate name, and to do so that, as regards third parties, the body shall be deemed to have the same power to make contracts as an individual has;

(iv) the right to have a common seal and to alter or change that seal;

(v) the right to acquire and hold any movable or immovable property for purposes for which the body is constituted and to dispose of, or charge, such property;

(vi) the right to regulate its own procedure and business;

16. **Section 488** of the ***Companies Act*** further provides that:

Where a body corporate is **struck off the register**, the liability of the body corporate and of every director, officer or shareholder of the body corporate shall continue and may be enforced as if it had not been struck off the register.

17. A certificate of incorporation therefore evidences and establishes the body corporate status of the company, and when so established, it is vested with perpetual succession.

18. The question which must be answered is whether the act of striking off the register affects the corporate status established by the entity's certificate of incorporation. This Court could find no provision in the ***Companies Act***,

Cap. 89:01, which provides that the entity's corporate existence comes to an end when it is struck from the Register for reasons set out in **Section 487** of the said Act.

19. It is this Court's view that the absence of any such provision is indicative of legislature's intention to preserve the corporate status of the company. This Court is further of the view that something so significant as affecting the corporate status of a body corporate would have been provided for in the statute, like in **Section 330**, which expressly sets out how an external company is disabled from suit, etc., if it is not registered under the **Companies Act**.
20. In the circumstances, this Court finds that the fact that Anderson Chemicals (Guyana) Ltd, the 2nd named claimant was struck from the register of companies, does not affect its corporate existence, and its capacity, insofar as it relates to its ability to enter into valid agreements. The act of restoration which it undertook would have a retroactive effect going back to the date it was taken off the register.
21. To have a contrary outcome would have serious consequences in commercial ventures, as companies may be intentionally allowed to fall within the categories set out in **Section 487**, and be struck from the register, with a view to avoiding contractual obligations, or even complying with judgments of a Court.
22. Having so found, the issue to be determined is whether the 2nd defendant is entitled to treat the partnership as ended if the claimants are found to be guilty of repudiatory/fundamental breaches of the partnership agreement.
23. From the evidence before the Court, it is clear that the aforesaid parties were operating on the ground with very loose arrangements, which seemingly evolved into both parties doing their own thing. A dispute having arisen between them, they both now seek shelter and protection from the document they ought to have been conducting business from in the first place.
24. The fact of the matter is that the 1st named claimant would have admitted submitting expense claims which have been honoured by the 2nd defendant.

Expenses he agreed were to be borne by the partnership. The partnership agreement provides that the profits and losses of the venture would be divided between and borne by the parties in equal proportions. This clearly evidences that they both had completely different expectations of what the partnership agreement set out quite clearly in writing.

25. Further, the fact of the matter is that on the 30th December 2016, both parties signed a further contract with GWI for the supply of Seaquest, when the 2nd defendant contends that in December 2016, he expressed to the 1st claimant that he did not wish to do business with him or Anderson Chemicals.
26. How then does the 2nd defendant rationalise and justify this further acknowledgment of the contractual rights and obligations amongst all the parties on the 30th December 2016, as against his contention that he did not wish to do business with either of the claimants?
27. It is a fact that the claimants did not perform any tasks related to the supply of Seaquest subsequent to the 1st January 2017, as the 2nd defendant asserted. The 2nd defendant would have solely performed the obligations under the 30th December 2016 contract with GWI. Was this through the fault of the claimants which entitled the 2nd defendant to treat their partnership as being repudiated?
28. This Court could find no evidence before it which suggests on a balance of probabilities that either of the claimants committed acts consistent with demonstrating fundamental breaches or committed acts which may be considered to be a repudiatory breach of the partnership agreement, entitling the 2nd defendant to treat the partnership agreement as coming to an end.
29. If there were, the 2nd defendant would have been justified in taking lawful steps to bring the partnership agreement to an end. He asserted that the intention was that the 1st claimant was to offer technical expertise during the contracts, which he says he never provided.
30. He further asserts that he operates a first-class business operation sparing no expense to deliver a first world product and buying experience to its

customers, procuring large commercial contracts from established private and government entities on the strength of its history in the market place.

31. This clearly establishes that the 2nd defendant, by his own admissions, is imbued with a strong business ethic and who understands the intricacies of operating large business ventures charged with fulfilling obligations under various contracts.
32. If he were dissatisfied with the performance, or lack thereof, of the claimants, then he ought to have taken lawful steps to determine their contractual agreements or seek lawful remedies. He clearly did not. This Court could also find no evidence which suggests that the 1st claimant did not intentionally perform any obligations he was tasked with under the contracts in issue.
33. It is clear from the evidence that the technical expertise of the 1st claimant became redundant after the modalities of procurement, mixing, batching and delivering the product became regularised in consultation with GWI. Further, according to the partnership agreement, at the very outset, it appears that the profit split was inequitable since the 2nd defendant was obligated to bear the start-up costs and expenses of the partnership, whilst being further obligated to share the profits of the venture equally with the claimants.
34. Notwithstanding, the inviolability of contractual agreements is a doctrine of significance and parties to a contractual agreement cannot whimsically treat obligations thereto according to their fancy. Steps ought to have been taken to lawfully determine or vary the terms of the contract between the parties.

CONCLUSION:

35. It is therefore the view of this Court that the claimants are collectively entitled to general damages for breach of contract as against the 2nd named defendant in the sum of \$500,000.00.
36. It is further ordered that the 2nd named defendant do produce an account to the claimants of the sum of monies received from GWI pursuant to the

contracts dated the 23rd June 2016 and the 30th December 2016, together with an account of all expenditure incurred, further to the aforementioned contracts, on or before the 31st October 2019.

37. It is further ordered that the 2nd defendant do pay to the claimants half the assessed profits flowing from the performance of the aforementioned contracts, if any, as special damages for breach of contract.
38. The Counterclaim filed by the 2nd named defendant is dismissed in its entirety as being unmeritorious, moreso in light of the provisions of the partnership agreement which this Court has upheld as valid and subsisting, but only further to the aforementioned contracts the parties entered into with GWI.
39. There will be costs to the Claimants as against the 2nd defendant - agreed during the first case management conference – in the sum of \$500,000.00. The Court having dismissed the Claimants claim against the 1st defendant, it is further ordered that the Claimants pay costs to the 1st defendant in the sum of \$250,000.00.
40. There will be interest applied to the monetary awards pursuant to the *Law Reform (Miscellaneous Provisions) Act*, commencing from the date of filing these proceedings. All costs awarded must be paid on or before the 31st October 2019.



Nareshwar Harnanan
Puisne Judge
01 October 2019