



IN THE SUPREME COURT OF BERMUDA

APPELLANT JURISDICTION

2008 No. 36

JOHN SIMMONS **Appellant**

and

ROBERT LEE **Respondent.**

Date of Hearing: 4th February 2009

Date of Judgment: 19th March 2009

Mr. Craig Attridge, Juris Law Chambers for Appellant

Mr. Robert Lee for Respondent

1. The Appellant and Respondent entered a contract dated 22nd June 2007 for the promotion of a concert in Bermuda.
2. The contract consisted of one page and the terms were as follows:
Both parties will invest 50% of the total cost of the promotions up front.
All expenses must be deducted from income prior to the sharing of profits.
Profits are to be shared in the ratio of: Robert Lee 52.5%, John Simmons 47.5%
The main act of the concert will be Jamaican dance hall artiste Mr. Vegas.

3. Annexed to the contract was another page setting out the estimates as follows:

<i>Expenditure Areas</i>	<i>Unit cost</i>	<i>Unit</i>	<i>Total Cost</i>
<i>Artiste performance fee</i>	12,000	1	12,000
<i>Advertising</i>	800	1	800
<i>Rental of venue</i>	1000	1	1000
<i>Plane tickets: Artiste</i>	1400	1	1400
<i>Disc Jockey</i>	1000	1	1000
<i>Work Permits</i>	300	2	600
<i>Hotel room nights</i>	250	3	750
<i>Meals/day</i>	50	4	200
<i>Transportation/Taxi</i>	100	1	100
<i>Security/hours</i>	58	35	2030
<i>Lighting & Sound</i>	800	1	800

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4. It is not certain that this page was before the learned Magistrate at the time of the trial but it is accepted by both parties that it bears the signature of them both and formed part of the contractual document.
5. The Appellant claimed there was a breach of contract resulting in him not receiving his share of the proceeds. He therefore filed a suit in the Magistrate’s Court against the Respondent claiming \$8,211.52 plus costs. The respondent counterclaimed for \$6,784.00.
6. The Magistrate dismissed the suit and the Appellant now appeals on the ground that the judgment was unfair. He is seeking reimbursement.

Interpreting the Contract

7. It seems clear from the words, “both parties will invest 50% of the total cost of the promotions up front,” that the parties intended that they would put up 50% each, of the total expenses prior to the event.
- In any event if they or any of them did not do so, the remaining share of their or his expenses was to be deducted from the receipts or profits prior to any

distribution of the receipts. This is clearly evident in the following words, “All expenses must be deducted from income prior to the sharing of profits.”

8. Once all the expenses were met on that basis, any profit would then be distributed on a 52.5 to 47.5 basis.
9. On the evidence, this appeared to be a fair arrangement as the respondent was the one who had initially initiated arrangements to put on the concert and had begun to incur expenses. His initial attempt had fallen through due to the unavailability of the main artist, apparently as a result of illness. He then approached the appellant apparently with an offer to take over the concert exclusively for a fee. When this was rejected they agreed to promote the subsequently held concert on the basis of the present agreement.
10. This they accepted at the appeal hearing. Further they agreed and conceded that in promotions such as these they may not always know all their expenses before the concert as things could change and vary and not be known until the conclusion of the concert. Thus the words “up front” in the contract could only mean that the expenses had to be paid as much as was possible before the concert but at latest before the profits were distributed from the gate receipts. They also accepted that some items were paid for by one party or the other or not paid for by one party or the other. Thus prior to any distribution of profits, if any, the accounts had to be first reconciled. Since there is no dispute about the receipts, the dispute lays in the reconciliation of the expenses only.

The Magistrate’s Findings

11. In a somewhat convoluted fashion the magistrate found as follows: *“The claim in this matter is for \$8,446.52. the issue, is whether or not Mr. Simmons is entitled to the sum of \$8,446.52 to set off his investment in a musical event at Clearwater beach on 7th July, 2007. The Facts: the claimant and his defendant entered into an*

agreementWhat is the issue in clause 2 of this agreement. What was meant “Both parties will invest 50% of the total cost of the promotions up front”.

12. Although this was a good starting point, unfortunately the learned magistrate never clearly answered this question.
13. He instead continued, *“Mr. Simmons stated that he paid \$11,500 in expenses, albeit \$1,000 paid to for rental of the venue is in dispute, and the sum for the air ticket. Expenses outlined in Exhibit 3. The claimant contends that it was his understanding that both parties were to pay 50% of the cost being cash on or before the concert. The claimant further claims the gates’ gross yield \$9,808, which was documented in a balance sheet prepared by Ms Isadore Lee, mother of the Defendant who participated in the preparation of the concert and intimately involved in the management of the promotion and overseeing the gate admission and later dispensing the funds to the creditors. (see Exhibit 2) The Claimant claimed that the defendant failed to pay his 50% and that he was due 47.50% of his income from the gate. On the other hand the defendant disputes the claimant’s understandings of the agreement basically because he approached the claimant in May of 2007 and offered him the right to a concert featuring Vegas, a concert personality from Jamaica, who had cancelled a previous engagement on May 24th due to ill health. The defendant was requesting the sum of \$12,000 granting the Claimant exclusive right (date) for the new concert of July 7th, 2007. However, the Claimant offered to go 50-50 with the defendant and hence the agreement was produced.*
14. The above illustrates the learned magistrate’s failure to separate the arguments from the facts and thus answer the question he posed himself. Had he stopped there however, he would have been able to conclude that the 50/50 as he called it, meant that the expenses of the endeavour were to be shared or met by the parties on a 50/50 basis; then properly assessing the evidence before him as to who spent what or not, he would have been able to make the relevant adjustments, if any,

- before turning his mind to any issue of profit under the 52.5/47.5 arm of the agreement.
15. His failure to separate the issues and to separate the arguments from the finding of facts lead to a misconstruing of the evidence as well as a misconstruing of the terms of the contract and ultimately an inevitable compounding of his misconstruction as illustrated below.
 16. The learned magistrate continued: *The defendant offered to the Claimant exclusive rights for \$12,000 is important as he invested the sum of \$12,000 in the promotion of the same artist for the May 24th concert which was delayed until 7th July. The Court takes into account that the Defendant had covered a substantial amount of ground work at his own cost to advance the promotion to this stage.*
 17. This is a complete misconstruing of the evidence and will be returned to later in the judgment.
 18. The learned magistrate continued- *The defendant maintains that his financial input of \$12,000 prior to the July concert was his \$50% share and the \$11,500 less \$1,000 to be deducted for cost of the venue and a deduction of \$500 for the air ticket (\$950) and not (\$14,000 which means his financial in put was \$10,000 which was the Claimants share under the Agreement that the only profit to be shared in accordance with the agreement dated 22/6/2007. In accordance the break down supplied by the defendants mother Isadore Lee after all expenses, there was only a profit of \$474.25(see Exhibit 2) which was not disputed by the claimant. So the Defendants contribution has to be evaluated and credited to him. Therefore the Court having considered the facts and the documents presented to the Court, this claim is dismissed.*

Assessing the Real Facts

19. Contrary to the findings of the magistrate the facts for example showed that the respondent never paid the artist \$12,000 up front. In fact he paid \$6,000 which was the down payment with the other \$6,000 to be paid once he arrived in Bermuda and before he performed. This is supported by Exhibit 2 prepared by Ms Lee, the respondent's mother. It was also admitted and agreed at the appeal hearing and further accepted that the Appellant paid the further \$6,000 whilst the artist was at the hotel in Bermuda.
20. An examination of exhibit 2 may be helpful. That exhibit is set out as follows:

MR. VEGAS JULY 7th, 2007
ROBERT LEE

<i>INCOME</i>	<i>\$9,808</i>
	<i>-----</i>
<i>EXPENSES</i>	
<i>Concert/Appearance Fee</i>	<i>\$6,000</i>
<i>Local Artist Artist#1</i>	<i>\$ 100</i>
<i>Artist#2</i>	<i>\$ 100</i>
 <i>AIRFARE/TRAVEL EXPENSES</i>	
 <i>PAYROLLTAX 7.25% TRANSPORTATION/AIRFARE/TAXI</i>	<i>\$ 949.75</i>
 <i>ROOM/ BOARD/OTHER ARTIST EXP</i>	
 <i>Hotel-Hamilton Princess Room 1&2</i>	<i>\$ 912.00</i>
<i>Meals for each person \$40 per day per person</i>	<i>\$ 140.00</i>
 <i>OTHER EXPENSES</i>	
<i>Venue Rental (Keep Yard)</i>	<i>\$ 1000.00</i>
<i>Tent</i>	<i>\$ 400.00</i>
<i>Rental/labour</i>	
 <i>SET UP EXPENSES</i>	
<i>Sound/Stage and lights</i>	<i>\$ 1000.00</i>
<i>Security 12@ \$50 per hour</i>	<i>\$15000.00</i>
<i>DJ</i>	<i>\$ 1000.00</i>

<i>ADMINISTRATIVE EXPENSES</i>	
<i>Work Permits (\$293.00 each)</i>	<i>\$ 879.00</i>
<i>Transportation</i>	<i>\$ 250.00</i>
<i>Miscellaneous Admin Costs</i>	<i>\$250.00</i>
<i>Tickets Printing/Flyers/Advertising</i>	<i>\$853.00</i>
 <i>TOTAL EXPENSES</i>	 <i>\$ 9,333.75</i>
 <i>NET PROFIT</i>	 <i>\$ 474.25</i>

21. The Appellant submits that exhibit 2 illustrates evidence of double accounting which resulted in the increasing of the alledged expenses by the Respondent, exclusion of the contribution by the appellant and thus an unfair distribution of the expenses. If therefore the proper adjustments are made, even if the enterprise resulted in a loss, he would nevertheless be due a refund from the respondent under the 50/50 expense arm of the agreement. In fact it is accepted that the enterprise resulted in a loss because the actual income of \$9,808 which was made from the sales is not at all in dispute while the main artist fee of \$12,000 exceeds the income. However the appellant's submission is that the magistrate was wrong to out rightly dismiss his claim.

The Findings

22. Perhaps the best approach to this problem is to remove the now undisputed \$12,000 expense from the table, since both parties accept that they each paid \$6,000.00 up front to the artist before he performed.
The dispute therefore lies in what this court will refer to as the additional expenses.
23. At this hearing, the total additional expenses were found to be \$11,163.00, set out as follows- Advertising \$853, Venue \$1000, Artist plane ticket \$1,400, DJ plane ticket \$1,000, work permits \$879, Hotel 912, Payroll tax \$949.75, Meals \$140.75 transport \$250, Security \$1500, Sound/Lighting \$1,000, DJ \$1,000, Misc \$250.

24. All of the above were accepted, except that \$879 for work permits for three persons ought to be adjusted downwards by \$293 to two persons as it was admitted that only the artist and one other person came.
- The amounts for the plane tickets were not seriously disputed.
- The adjusted total additional expenses, therefore amounted to \$10,900. If divided on a 50/50, basis that would be \$5,450 payable by each party.
25. The evidence is that the Appellant paid to the Respondent \$1,300 which went towards the sound and the security. That contribution to his half of the additional expenses would reduce his outstanding balance to \$4,150. He did pay another cheque of \$1,500 to the respondent towards the rental of the venue. The respondent said it was lost and the appellant said it never returned. So that will not count to reduce his outstanding balance.
26. It seems clear therefore that before any profits can be distributed from the undisputed \$9,808 gate receipts, the respondent would be entitled to recoup the \$5,450 spent by him together with the \$4,150 still outstanding by the Appellant. That would be a total of \$9,600 from the \$9,808 leaving \$208 to be divided between them on the 52.5 to 47.5 basis. That entitles the Respondent to keep \$109.20 and he must pay the Appellant \$98.80.
27. The appeal is allowed to that extent.

Dated this 19th day of March 2009.

Hon. Carlisle Greaves
Puisne Judge

