THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Exercising its Admiralty Jurisdiction

In the matter between Case No: AC 75/09

MICHAEL CAMERON-DOWN **PLAINTIFF**

and

THE EN COMMANDITE PARTNERSHIP PJ LAUBSCHER AND MC CAMERON-DOW **FIRST DEFENDANT**

PIERRE JAN LAUBSCHER **SECOND DEFENDANT**

THE MOTOR FISHING VESSEL *JULIETTE* **THIRD DEFENDANT**

BASIC BLUE TRADING 232 CC **FOURTH DEFENDANT**

Coram: ROGERS J

Heard: **16-19 FEBRUARY and 2, 3, 4 & 12 MARCH 2015**

Delivered: **15 APRIL 2015**

JUDGMENT

ROGERS J:

Introduction

[1] The plaintiff ('Cameron-Dow') invokes this court's admiralty jurisdiction in respect of various alleged maritime claims. The first defendant is an alleged en commandite partnership between Cameron-Dow and the second defendant ('Laubscher'). The fourth defendant ('Basic Blue') is a close corporation in which Laubscher holds a 70% member's interest. The third defendant is the fishing vessel *Juliette*, in relation to which Cameron-Dow says that he and Laubscher had a 40:60 partnership. Cameron-Dow is an attorney with an interest in fishing. Laubscher is a fisherman and qualified skipper.

[2] The only witnesses were Cameron-Dow and Laubscher. Mr van Embden appeared for the former. Mr Walther appeared for Laubscher and Basic Blue.[1]

[3] Cameron-Dow sues for repayment of money he lent to the alleged partnership and for an accounting by Laubscher in respect of the partnership ('the main claims'). In the alternative, and if, as Laubscher alleges, there was no partnership, Cameron-Dow seeks repayment of the same money on the basis that it was lent to Laubscher personally ('the alternative claim'). Cameron-Dow issued summons during August 2009, advancing at that stage only the main claims. On 16 February 2015 (the first day of the trial) I granted Cameron-Dow leave to amend his summons so as to include the alternative claim.

[4] Pursuant to the issue of summons *Juliette* was arrested. During June 2010 Laubscher brought an application for her judicial sale. Cameron-Dow opposed and brought his own application for the judicial sale of *Juliette* on different terms. The competing applications were argued before Cleaver J during October 2010. On 18 November 2010 he delivered judgment, granting Laubscher's application and

[1] I shall refer to exhibits by the letter of the exhibit bundle followed by the page number in that bundle. The bundles comprise: 'A' - the court papers in AC 08/2010; 'B' - the court papers in AC 70/2010; 'C' - the court papers in AC 85/2010; 'D' - the plaintiff's exhibit bundle; 'E' - the second defendant's exhibit bundle; 'F' - sample catching agreements. I shall refer to the pleadings bundle and notices bundle by way of the letters 'P' and 'N' respectively.

dismissing Cameron-Dow's. *Juliette* was duly sold (Laubscher bought it through an entity nominated by him). On 2 March 2011 the sale proceeds (R1 063 897,87) were paid into a fund account under the control of the Registrar. Following the payment out of certain expenses, the balance of the fund account as at 7 March 2012 was R1 038 467,20. That amount together with interest remains in the account.

[5] The issues in broad summary are: (i) whether a partnership agreement was concluded; (ii) if so, whether the partnership was confined to the ownership and letting out of *Juliette* or whether it included the fishing and other operations conducted by *Juliette*; (iii) whether the partnership agreement, if found to exist, was unlawful, having regard to the Marine Living Resources Act 18 of 1998 ('the MLR Act') and policies promulgated thereunder; (iv) in relation to the alternative claim, whether it has prescribed; (v) the amounts advanced by Cameron-Dow to the partnership alternatively to Laubscher.

The law to be applied

[6] Counsel assumed in argument that South African law applied. This is not necessarily correct, having regard to s 6(1)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the AJR Act'). If the claims asserted by Cameron-Dow are maritime claims in regard to which a South African court had admiralty jurisdiction as at 1 November 1983 ('old' maritime claims), I would be required to apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied as at that date to such a claim. There are two qualifications to this general principle: (i) Section 6(1)(a) does not derogate from the provisions of South African statutes applicable to the matter in question (s 6(2)). (ii) Section 6(1)(a) does not supersede an agreement relating to the system of law to be applied (s 6(5)).

[7] The expression 'maritime claim' is defined in s 1(1) of the AJR Act. Cameron-Dow's partnership claims arise out of or relate to (i) the ownership of a 'ship' as defined in the Act; (ii) the employment or earnings of a ship; and (iii) an agreement with regard to the ownership, employment and earnings of a ship. These are 'old' maritime claims (paras (a), (b) and (c) of the definition; Hare *Shipping Law &*

Admiralty Jurisdiction in South Africa 2nd Ed at 28).[2] These paragraphs of the definition were among those on which Cameron-Dow relied in his rule 4(3) certificate for *Juliette*'s arrest. Broadly speaking, therefore, issues relating to the formation, terms and incidents of the alleged partnership, including the alleged co-ownership of *Juliette*, are governed by English admiralty law as at 1 November 1983, subject to the two qualifications previously mentioned. I was not addressed on whether such law differed in any material respect from our own. Generally, our law of partnership is similar to England's.

[8] Because s 6(1)(a) does not derogate from relevant South African statutes, the alleged partnership agreement would be void if it violated the MLR Act and if voidness is on a proper construction of the statute the result of violation.

[9] Because s 6(1)(a) does not override a contractual choice of law, the question might arise whether, assuming a contract was concluded, the parties tacitly selected our common law as the governing law (cf Forsyth *Private International Law* 5th Ed at 325-329). The alleged contract has all its connections with South Africa though arguably a tacit selection of 'South African law' would not in itself override s 6(1)(a) because that provision, which is part of South African law, makes English admiralty law as at 1 November 1983 the South African law applicable to the claim. Because the effect of s 6(1)(a) was not appreciated by the parties, there were no allegations or evidence as to a tacit choice of law.

[10] I intend thus to proceed on the basis that English admiralty law as at 1 November 1983 strictly speaking governs the partnership claims but that any difference between that law and our own is not material in the present case. The illegality defence based to the MLR Act remains relevant.

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[2] Disputes regarding ownership of ships became part of English admiralty jurisdiction by way of s 4 of the Admiralty Court Act of 1840. Suits between co-owners regarding ownership, possession, employment and earnings of ships were subjected to admiralty jurisdiction in terms of s 8 of the Admiralty Court Act of 1861. For a brief survey of this jurisdiction as at the beginning of the last century, see Williams & Bruce *Admiralty Practice* 3rd Ed (1902) Vol 1 at 30-35. See also Meeson *Admiralty Jurisdiction and Practice* 2nd Ed (2000) paras 2.037 – 2.047 regarding the similar provisions now contained in ss 20(2)(a) and (b) of the Supreme Court Act of 1981.

[11] The alternative claim is not in my opinion a maritime claim. Mr Walther did not argue that because Cameron-Dow had invoked admiralty jurisdiction I could not exercise this court's ordinary civil jurisdiction to decide the alternative claim if necessary. However, that claim, and in particular the defence of prescription, would be governed by our own law. Even if the alternative claim were a maritime claim, it would not be an 'old' maritime claim, so our own law would in any event apply.

Separation of issues

[12] In regard to the main claims, Cameron-Dow claims inter alia a rendering and debatement of an account. Both sides filed expert reports by accountants setting out their respective views on the content of the account, assuming one had to be rendered. There were significant differences between them. At an early stage of the trial I expressed reservations about hearing this evidence before a determination of the merits. The reasons for my reservations were these: (i) If I found against Cameron-Dow on the main claims, the accounting evidence would be unnecessary. (ii) If I found for Cameron-Dow on the main claims, the content of the account might nevertheless be affected by my findings on the terms and extent of the alleged partnership. (iii) In any event, there were no pleadings on the content of the account, the claim simply being for the rendering and debatement of an account. The issues in relation to the content of the account were thus not properly defined.

[13] Mr Walther supported my prima facie view that the accounting evidence should be heard at a later stage if necessary. Mr van Embden did not resist this approach but understandably wanted clarity as to what was standing over. On 19 February 2015 I gave a formal direction that, to the extent that such matters were otherwise properly before me,[3] the amounts of the income and expenditure to be included in any account which Laubscher might be obliged to render, and thus the amount if any payable to Cameron-Dow thereunder, were to stand over for later determination, all other issues arising on the pleadings to be decided first.

[3] I made this qualification because I was doubtful whether the details of the account were in any event properly before me, having regard to the state of the pleadings.

The facts

[14] Cameron-Dow wrote many memoranda to Laubscher recording their discussions and transactions. It might thus be thought surprising that the existence of the partnership and its terms should be in doubt. The explanation is twofold: (i) First, Laubscher sought to neutralise the inference that would ordinarily arise from uncontested communications of this kind (as to which, see *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E-H) by claiming that he told Cameron-Dow not to bombard him with memoranda. Once they had agreed the terms of a partnership, Laubscher would seek his own legal advice. Laubscher also said that he only received some of the memoranda several months after the date on which they were written. (ii) Second, the memoranda were somewhat rambling and diffuse.

2005 to August 2006

[15] Cameron-Dow's son, Steven, and Laubscher operated fishing boats out of Hout Bay harbour. Steven's boats were *Growler* (a ski boat) and *Highlander* (a deck boat). Laubscher's boat was *Wicked Lady*. Cameron-Dow had a tunny boat called *Corsair*. Steven introduced Laubscher to Cameron-Dow in mid-2005 with a view to the latter assisting Laubscher in making application to the Department of Environmental Affairs and Tourism ('the Department') for tuna pole fishing rights in terms of s 18 the MLRA. (The Department had at that time invited applications for various kinds of commercial fishing rights.) Cameron-Dow duly assisted Laubscher, the application being in the name of Basic Blue which traded under the name Wicked Lady.

[16] In early December 2005 *Wicked Lady* sank. Laubscher asked Cameron-Dow to help him prepare the statement which had to accompany the prescribed incident report, also relevant to insurance.

[17] On 28 February 2006 the Department awarded Basic Blue commercial tuna pole fishing rights for eight years starting 1 January 2006. Basic Blue was only entitled to use *Wicked Lady* (though it had sunk in the meanwhile) with a maximum

crew of six. In terms of s 13 of the MLRA the exercise of Basic Blue's commercial fishing rights required an annual permit. Steven had a company called Twoline Trading 163 (Pty) Ltd ('Twoline') which also held fishing rights.

[18] At about this time C-Craft CC ('C-Craft'), an entity controlled by one Raymond Cooper ('Cooper'), was constructing a fishing boat in Hout Bay (the boat which became *Juliette*). Laubscher, who had recently lost *Wicked Lady*, and Steven displayed an interest in acquiring her. C-Craft furnished them with a quotation on 8 February 2006 for a price of R1 683 210, with a 5% deposit to be paid on order, R500 000 one week after order, another R500 000 two weeks after order and the balance upon launch.

[19] One option which Steven and Laubscher considered was financial assistance from Cameron-Dow. Laubscher says another option for him was to get financial assistance from his main customer, Blue Continent Products ('BCP'). Cameron-Dow's involvement must have been discussed by 16 February 2006, the date on which he wrote to Cooper proposing a price of R1,425 million and different payment terms. He said he would assist with issuing a guarantee or suretyship. On the same day he wrote the first of many memoranda to Steven and Laubscher. From this memorandum it appears that some sort of joint venture involving the three of them was under discussion. The new boat (I henceforth call her *Juliette*, though this name was only chosen later, the name *Wicked Lady* being used in earlier memoranda) would be owned 40:40:20 by Steven, Laubscher and Cameron-Dow. The profits from *Growler*, *Highlander* and (when it was launched) *Juliette* would be used to pay off the amounts owing on these boats, whereafter they would look to buy a fourth. The acquisition of a fourth boat would provide a means for Laubscher to obtain independence. Cameron-Dow thought *Juliette* should be financed by a bank, in regard to which he was happy to assist with a guarantee.

[20] On 2 June 2006 Cameron-Dow issued a cheque for R100 000 from his firm's trust account to C-Craft to secure *Juliette* but it was only banked on 29 June 2006, after the conclusion of the agreement for the purchase of the boat, which occurred on 23 June 2006. On that day, and following a meeting between himself, Steven and Laubscher on 21 June 2006, Cameron-Dow concluded a written agreement with

Cooper to buy *Juliette* for R1,38 million excluding VAT (R1 573 200 inclusive of VAT, a slight reduction from the quotation of February 2006). There was to be a deposit of R100 000 (Cameron-Dow had already provided a cheque), R500 000 by 7 July 2006, R200 000 by 31 July 2006, R300 000 on launch and the balance at a monthly rate of R100 000 as from the month following launch. The contract recorded that although Cameron-Dow undertook the obligations of the purchaser in his personal capacity, the boat would 'be transferred to and be owned by a partnership and/or close corporation (to be finally determined by [Cameron-Dow] in his discretion)'. Steven and Laubscher signed the agreement beneath the words 'Confirmed for good order and as witnesses'.

[21] Cameron-Dow testified that his next memorandum, bearing the date 28 July 2006 and addressed to Steven and Laubscher, was dictated on 22 June 2006 but only typed by his secretary after he had left for an overseas trip. It referred to the 'thoughts' discussed by them the previous day (ie on 21 June 2006). Since Cameron-Dow says that the partnership agreement was concluded during June 2006, this memorandum is on his version the closest to a contemporaneous recordal. The following is a summary of the memorandum read as a whole:

(i) The end object was that there should be five fishing boats – three owned by Steven, one by Laubscher and one by Cameron-Dow.

(ii) Two of these boats, *Growler* and *Highlander*, were already in existence. Steven would continue to own them. He still owed money on these boats to (among others) his father.

(iii) The third boat, *Juliette*, would initially be acquired by Cameron-Dow and Laubscher in a 40:60 ratio. Laubscher would provide funding of R350 000. Cameron-Dow would provide the balance and would assist Laubscher with his share of the funding if necessary.

(iv) The fourth boat (this became *Nicky-B*) would be owned by Steven alone. He would get funding from BCP and his father.

(v) The fifth boat (this never materialised) would be acquired by Cameron-Dow and Laubscher in a 60:40 ratio.

(vi) Steven would apply the majority of the profits from his existing two boats to assist in the financing of the third, fourth and fifth vessels; and Cameron-Dow and Laubscher would allow the profits from *Juliette* to be used in a similar way.

(vii) Cameron-Dow, who intended raising his share of the funding from the existing Investec mortgage bond over his home, would need to be promptly repaid. He acknowledged that Laubscher was likely to be in a similar position in respect of his share of the funding.

(viii) Boat ownership and fishing operations could and probably should be separated (ie the identity of the boat owner and the fishing operator would be different).

(ix) *Juliette* and the fifth boat (those in which Cameron-Dow and Laubscher would have a joint interest) would be owned by close corporations. If Laubscher wished to become independent rather than carrying on 'in partnership', a swap would be made so that each of them had one boat.

(x) There was, in general, an agreement that 'matters should be decided by fairness wherever possible', that they should not try to 'negotiate hard with each other' and that pooling resources and working together gave each of them the best chance of achieving their objective.

[22] Cameron-Dow concluded his memorandum thus:

'The above are various thoughts for your consideration. Obviously any of them can be changed in any way by discussion, if either of you wants to improve the thinking in any aspect.'

[23] On 29 June 2006 C-Craft banked the deposit of R100 000. On 7 July 2006 Cameron-Dow caused the next instalment of R500 000 to be paid by way of a cheque drawn on his firm's trust account. The cheque does not appear to have been signed by him personally, so this may well have occurred while he was overseas.[4] The next instalment, of R200 000, was due on 31 July 2006. On that date Cameron-Dow paid C-Craft R300 000, again by way of a cheque drawn on his firm's trust account. Cameron-Dow testified that he mistakenly overpaid. Laubscher in his evidence doubted it was a mistake and suspected that the additional R100 000 was

[4] The cheque was in an amount of R600 000. Cameron-Dow testified that he paid an additional R100 000 to secure the fourth boat contemplated in his memorandum of 28 July 2006.

initially intended as a further payment towards the next boat for Steven. Be that as it may, C-Craft credited the full R300 000 in reduction of the price owed on *Juliette*.

[24] Thus by 31 July 2006 Cameron-Dow had contributed R900 000 to fund the purchase of *Juliette*. He had also prepared a memorandum for Laubscher and Steven dated 28 July 2006 recording what had been discussed on 21 June 2006.

[25] Also on 28 July 2006, Cameron-Dow wrote to his daughter's boyfriend, Chris Pike ('Pike'), a fisherman, to ascertain Pike's interest in skippering one of the boats in the joint venture. This letter was copied to Laubscher and Steven. While the letter is not a model of clarity, it accords in general terms with the contemporaneous memorandum. The letter to Pike said that the boat currently in Cooper's yard would be owned by Laubscher and Cameron-Dow, as would another boat in due course. He said that he and Laubscher would either own the two boats in partnership or Laubscher would own the one and he would own the other. He again mentioned separating boat ownership from fishing operations. Together with *Highlander* and the new deck boat to be acquired by Steven, there should fairly shortly be four deck boats. Laubscher and Steven would each skipper one and Laubscher's son might be interested in skippering a third. Cameron-Dow suggested that Pike consider skippering the fourth, in regard to which he sketched certain proposals.

[26] There was no reason for Cameron-Dow not to have furnished copies of his memorandum and letter to Laubscher promptly on or after 28 July 2006. At any rate, and regardless of when exactly Laubscher received them, he did not challenge their contents.

[27] The memorandum of 28 July 2006 had mentioned a contribution of R350 000 from Laubscher. It emerged that there was a misunderstanding as to the precise amount and the parties then agreed that Laubscher would pay R300 000, which sum Laubscher deposited into Cameron-Dow's firm's trust account on 4 August 2006. Cameron-Dow used R218 000 of this amount to pay Pertech for electronics for *Juliette*. (The purchase agreement with C-Craft had allowed a provisional sum of R60 000 for electronics.) Since there is no clear evidence that the remaining

R82 000 of Laubscher's R300 000 was applied to *Juliette*, one will need to be bear this balance in mind in any accounting between the parties.

[28] On 4 August 2006 Cameron-Dow wrote to Steven, with copy to Laubscher, recording the financial position between father and son as at that date. He said that the Investec mortgage bond over his home had provided the funding for *Highlander* and now for *Juliette*. He recorded that Steven owed him R575 000 in respect of *Growler*, *Highlander* and the deposit of R100 000 to Steven's next boat (the one following *Juliette*). He also recorded that he had to date paid R900 000 towards *Juliette*. The profits from the fishing venture would need to be used to service the interest on Cameron-Dow's mortgage bonds. Although not altogether clear, I understand Cameron-Dow to have been saying that the profits from the operations on Steven's boats should be applied to service interest on Cameron-Dow's mortgage bonds to the extent of R575 000; and that Laubscher, because of his 60% interest in *Juliette*, would also have to accept responsibility (ie out of his share of *Juliette's* profits) for some of the interest on the money borrowed by Cameron-Dow to fund the acquisition of *Juliette*. He concluded by observing that in some instances it would be extremely difficult if not impossible to allocate expenses and interest accurately between the various operations and proposed that in such instances 'we must just settle on a fair way and not worry about too much precision'.

[29] On 14 August 2006 Cameron-Dow wrote again to Laubscher and Steven, attaching for convenience a copy of his letter of 4 August 2006 and asking them to confirm the arrangement so that he and his wife would have peace of mind that the repayment of the Investec facility was a priority, which he recognised would rank equally with Steven's credit agreement with Standard Bank (he still owed R90 000 to the bank) and Laubscher's additional bond taken out for his contribution to *Juliette* (ie Laubscher's R300 000). By 'rank equally' Cameron-Dow plainly meant that, in regard to the profits made on Steven's boats, these would be applied pro rata as a first charge to repay Cameron-Dow's advances to Steven of R575 000 and Standard Bank's R90 000; and that in regard to the profits made from *Juliette*, these would be applied pro rata as a first charge to repay the funding provided by Cameron-Dow and Laubscher (to date R900 000 and R300 000 respectively).

[30] Steven and Laubscher countersigned the letter of 14 August 2006. This probably occurred at a meeting on 15 August 2006, to which Cameron-Dow made reference in his next memorandum to them dated 28 August 2006. The following paragraphs bear quoting:

'Thirdly, I record the decision made that the new vessel will be named *Juliette* and will go through Wicked Lady Fishing/Pierre for the purposes of recovering the VAT input, even though same is owned as to 60% to Pierre and 40% to me, and in due course this will be transferred into a close corporation, once acquired and registered for VAT.

The operating company will be Basic Blue in respect of *Juliette* and Pierre will account to me for 40% of profits generated by *Juliette* in both entities, in a manner we can work out together.

In due course when the 5th vessel is built and is owned as to 60% by me or a close corporation in which I have 60% membership and 40% by you or the close corporation in which you have 40% we can decide whether to simplify matters by either changing to 50/50 in each of the two entities (or reducing to 1 entity to minimize bookkeeping) or separate by each selling 40% to the other so that we have one CC each.'

[31] I do not accept Laubscher's explanation for his failure to challenge this and earlier memoranda and letters. I referred earlier to the *McWilliams* case where Miller JA said the following (at 10E-H, citation of authority omitted):

'I accept that "quiescence is not necessarily acquiescence"… and that the party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion.'

[32] There was no satisfactory explanation here. I reject as false Laubscher's evidence that from the outset he told Cameron-Dow not to send him memoranda

until they had reached firm agreement, whereafter he would consult his own attorney. If that had been Laubscher's attitude, Cameron-Dow would not have bought *Juliette* or paid the money. He would also not have wasted his time writing letters and memoranda which bear the hallmark of an attempt to be transparent and avoid confusion. Furthermore, the memoranda and letters I have mentioned do indeed purport to record arrangements between the parties and one of them was even counter-signed, yet Laubscher on his own evidence did not seek advice.

[33] Laubscher's suggestion that he sometimes received memoranda or letters months after they were written was made in a generalised fashion whenever a particular memorandum presented him with difficulty. There was no reason for Cameron-Dow to have held back any of the memoranda and letters. I may add that in a pre-trial conference the parties agreed that documents in the bundles were what they purported to be and that communications addressed to parties were received by them and, where the date of receipt was indicated, received by them on such date. Although each party reserved his right to require the other formally to prove these matters in respect of any particular document, there was no such challenge prior to trial. Furthermore, it was not put to Cameron-Dow in cross-examination that any of the memoranda and letters were not sent to or received by Laubscher or that they were only received long after the dates they bore.

[34] These documents, viewed in the light of Cameron-Dow's evidence, satisfy me that Cameron-Dow and Laubscher concluded an agreement essentially in the terms alleged by Cameron-Dow. It is unnecessary to decide whether the agreement was strictly speaking one of partnership because it would nevertheless, subject to the illegality defence, be a valid contract. The partnership label, and whether it was en commandite, would only be important if some aspect of the parties' relationship inter se or with outsiders needed to be answered with reference to the law of partnership. That is not the case here. We are concerned only with a dispute between Cameron-Dow and Laubscher, and the terms of their agreement can be sufficiently deduced from the evidence.

[35] It is unnecessary to decide what contracts (if any) involving Steven and his entities were concluded. There were certainly one or more loan agreements

between Steven and his father. There was also an intention by the three of them to cooperate in fishing operations which were expected to be conducted on four or five deck boats. Laubscher explained in evidence that it is advantageous for skippers to cooperate with each other in locating fish at sea. They could also cooperate in getting supplies at lower cost and in marketing their fish to best advantage. But regardless of what broader contracts or intentions may have existed, there was a separate contractual relationship between Cameron-Dow and Laubscher in regard to the vessels in which they were to be jointly interested.

[36] The terms of the agreement between the two of them included, in my view, at least the following:

(a) Cameron-Dow and Laubscher would be joint owners of *Juliette* in the ratio 40:60, though they envisaged that they might in due course hold such interest indirectly through a close corporation.

(b) *Juliette* would be employed in tuna pole fishing operations and skippered by Laubscher, for which he would be entitled to remuneration of 15% of the total value of fish caught. This would be a cost to the fishing operations before the division of profit.

(c) All profit made from the ownership of *Juliette* and the operations conducted by her would be shared in the ratio 40:60.

(d) Although *Juliette* was to be owned by them personally or in due course by a close corporation, the fishing operations would be conducted by Basic Blue by virtue of the tuna pole fishing rights it held.

(e) Given that Basic Blue was 70% owned by Laubscher and that Cameron-Dow was not a member thereof, Laubscher was obliged to use his position in Basic Blue to ensure that Cameron-Dow received 40% of the profits made in Basic Blue from the operations of *Juliette*.

(f) The profits from the ownership of *Juliette* and the operations thereof would be applied in the first instance to repay the financial contributions made by Cameron-Dow and Laubscher together with interest at the rates charged by their banks on their respective mortgage bonds.

(g) They would use the profits from *Juliette* to facilitate the purchase of a second boat in which they would be jointly interested, with the ownership and profit-sharing ratios reversed. To the extent that the second boat was used to exploit commercial fishing rights in the name of one or other of them or of an entity controlled by one or other of them, the same arrangement as in respect of Basic Blue would apply mutatis mutandis.

(h) Once there were two fully paid boats, either of them could elect to terminate their relationship on the basis that each of them would be entitled to sole ownership (directly or indirectly through a close corporation) of one boat.

[37] The terms set out above accord in their essence with those pleaded by Cameron-Dow in his particulars of claim as amplified in his replication and trial particulars. That an agreement with these terms was concluded in mid-2006 is fortified by subsequent events and repeated references by Cameron-Dow in memoranda and letters to the joint venture and partnership with Laubscher. It would be tedious to refer to all of them but I shall mention some below.

September 2006 – July 2007

[38] The 2006/2007 tuna season started in September 2006. The parties had expected that by then *Juliette* would have been delivered. She was not. Much of the later trouble can be traced back to this delay. Because *Juliette* was not ready, Steven and Laubscher reached an interim arrangement for Laubscher to skipper *Highlander*.

[39] The main problem as 2006 drew to a close was that *Juliette* had still not been delivered. On 18 December 2006 Laubscher and Cameron-Dow concluded an addendum with Cooper/C-Craft relating to the purchase of *Juliette*. By that stage Cameron-Dow had paid C-Craft R900 000. The next payment, in terms of the original agreement, was R300 000 on launch. Because Cameron-Dow had paid an extra R100 000 at an earlier stage and because Cameron-Dow and Laubscher had taken direct responsibility for the electronics (to which a provisional sum of R60 000 had been allocated in the original contract), the revised amount due on launch was R140 000. In the addendum Cameron-Dow and Laubscher agreed to pay that

amount within 24 hours while Cooper guaranteed to provide a seaworthy certificate by 22 December 2006. Cooper also agreed, by way of the addendum, that for every day the seaworthy certificate was delayed beyond 22 December 2006 he would pay R2000 as damages which he acknowledged as fair, having regard to lost fishing profits and previous delays.

[40] This addendum, which was written out by Cameron-Dow in hand in Laubscher's presence, described the parties as Cooper/C-Craft on the one side and 'Wicked Lady Fishing/Pierre Laubscher/MC Cameron-Dow (Wicked Lady)'. Both Laubscher and Cameron-Dow signed the agreement. This is further confirmation that Laubscher understood that there would be joint ownership of *Juliette* and a joint interest in the fishing profits conducted by Basic Blue under the style Wicked Lady.

[41] On the following day, and in accordance with the addendum, an amount of R140 000 was paid to C-Craft. Of this sum, R40 000 was in the form of a cheque which Cameron-Dow caused his firm to issue on its trust account. The balance of R100 000 was paid by Steven, apparently from profits made by *Highlander* and in the spirit of the broad joint venture under discussion. The precise character of this latter payment is contentious. As a matter of pleading, Cameron-Dow alleged that Steven lent R100 000 to the partnership and ceded the claim to his father prior to the institution of action.

[42] On 29 December 2006 a survey certificate in respect of *Juliette* was issued by the South African Maritime Safety Authority ('SAMSA'). However, it is common cause that the boat was still not in a satisfactory condition. A test run in Hout Bay during January 2007 revealed that the pumps were not operating properly. To jump ahead, Laubscher testified that he worked hard on the boat over the next few months. *Juliette's* first fishing trip was in April 2007 but its propeller fell off on 16 May 2007 and Steven had to tow her back to harbour using *Highlander*. In July 2007 Laubscher was able to take *Juliette* on a snoek fishing trip to St Helena Bay. *Juliette* began tuna fishing during September/October 2007.

[43] Reverting to the chronology, Laubscher testified that in mid-January 2007 he returned to Hout Bay from a fishing trip on *Highlander*. He said he was unhappy

about two things, namely (i) that in his view Steven's company Twoline had not paid him everything he was due for skippering *Highlander* and (ii) that *Juliette* was still not ready. He also claims to have ascertained that Steven had lost interest in the joint venture. His evidence was that he met Cameron-Dow in Hout Bay on about 16 January 2007. He was angry and wanted to get out of his relationship with the Cameron-Dows. He said he wanted his money back and that Cameron-Dow could keep *Juliette*. In chief he testified that Cameron-Dow rejected this, saying that Laubscher should keep the boat.

[44] Given the money Cameron-Dow had paid, this simple description of the discussion seems most implausible. In cross-examination Laubscher was taken to his replying affidavit in his application for *Juliette's* judicial sale. In that affidavit he said that a 'partnership or joint venture of sorts' had initially been envisaged between Cameron-Dow, Steven and himself but that it was 'never finalised or crystallised'. He also said that Steven 'withdrew completely' from the proposed joint venture in August 2006. (His oral evidence was less precise as to when Steven supposedly indicated his lack of interest. The fact that Steven had caused Twoline to pay R100 000 towards the purchase of *Juliette* on 19 December 2006 is inconsistent with the proposition that Steven was no longer interested in pursuing the joint venture, and Cameron-Dow denied that his son had ever indicated any such thing to him.) In para 12 of his affidavit, Laubscher went on to say the following (I shall substitute for his nomenclature the terminology used in this judgment):

'After various discussions to resolve contributions to the purported venture, Cameron-Dow and I resolved the matter in early 2007 on the basis that I would take delivery and ownership of *Juliette* on completion by C-Craft. I would thereafter contract Basic Blue to conduct fishing operations. Cameron-Dow would be entitled to 40% of the net profit I received from Basic Blue's fishing operations in order to recoup his contribution, plus interest. Net profit was pegged at 30% of turnover generated by fishing operations.'

To explain why he had only thereafter paid R164 000 to Cameron-Dow, he added that the latter's action in causing *Juliette* to be arrested made it impossible for him to make any further payments to Cameron-Dow.

[45] When asked in cross-examination whether the above assertions were correct, Laubscher – after a lengthy pause – answered in the affirmative.

[46] Some of the features of the partnership alleged by Cameron-Dow can be discerned in Laubscher's affidavit. However, the version in the affidavit seems to be that although a partnership had been discussed in 2006 the agreement was never finalised and that a settlement was concluded in January 2007 the terms of which were that Cameron-Dow abandoned his right to part-ownership of *Juliette* and limited his claim to one for repayment of the monies advanced by him plus interest on the basis, however, that he would only be entitled to such repayment as and when same could be funded from the lesser of 40% of Basic Blue's net profits or 30% of Basic Blue's fishing turnover.

[47] Laubscher did not plead this supposed agreement in the present proceedings nor was it put to Cameron-Dow in cross-examination. What Mr Walther put to Cameron-Dow was that he and Laubscher had met in mid-January 2007, that the latter had been disgruntled and that there had been discussion about the one buying the other out. Cameron-Dow remembered Laubscher being unhappy about the state of *Juliette* but denied that there had been talk of one of them buying out the other – he said that happened much later. Mr Walther then clarified his cross-examination by saying that it was <u>not</u> Laubscher's case that the discussion had resulted in any agreement, only that there had been such a discussion.

[48] It is only by an agreement of the kind that Laubscher alleged in the affidavit that he could have made good his claim to be the sole owner of *Juliette*. I am satisfied that no such agreement was reached in January 2007. The version alleged in the affidavit is commercially implausible. It was not pleaded or put to Cameron-Dow. Laubscher only adopted it, somewhat hesitantly, when it was shown to him in cross-examination.

[49] The existence of the supposed settlement is also at odds with two memoranda which Cameron-Dow wrote to Steven and Laubscher in January 2007 and with a letter he wrote at that time to Cooper. The first of the memoranda, dated 18 January 2007, did not refer to any meeting between the parties within the last few days. Cameron-Dow was concerned about the large amount still owing on his mortgage bond and wanted repayment from the fishing operations of Twoline and

Basic Blue[5] as soon as possible. He referred to the payment of R100 000 made by Twoline towards *Juliette* on 19 December 2006, R50 000 of which was said to have been by way of repayment of money owed by Twoline to Laubscher as skipper of *Highlander* and the other R50 000 an advance by Twoline 'to Pierre or Wicked Lady Fishing (Pierre and Michael partnership)'. He said that he was mindful of the fact that Laubscher had also borrowed money on his bond and that whatever arrangement regarding repayment applied to him must extend to Laubscher as well. For the moment the confusion regarding the character of Twoline's payment of R100 000 is not germane. What is important is that Cameron-Dow expressly referred to an existing partnership between himself and Laubscher and that the memorandum is entirely at odds with the settlement mentioned by Laubscher in the affidavit. Laubscher did not react to this memorandum by refuting its contents.

[50] On 23 January 2007 Cameron-Dow wrote to Cooper regarding the delays in the delivery of *Juliette* and the outstanding work she required. It is common cause that Laubscher prepared the snag list attached to the letter. In the opening paragraph Cameron-Dow said that he was writing 'after careful discussion and consideration of all issues with my partner Pierre Jan Laubscher'. In a postscript he described himself and Laubscher as part-owners of the boat. He put Cooper to terms to complete the outstanding work.

[51] On the next day, 24 January 2007, Cameron-Dow wrote a memorandum to Laubscher and Steven, referring to a meeting held the previous evening in Hout Bay. He described his memorandum as a supplement to the one of 18 January 2007. He dealt with money owed by Twoline to Laubscher. He recorded that they had agreed that, of the R100 000 paid by Twoline to C-Craft on 19 December 2006, R50 000 would be treated as part-payment by Twoline of money owed to Laubscher while the other R50 000 would be treated as an advance by Twoline to 'Wicked Lady Fishing (myself and Pierre in partnership)'. He concluded the memorandum by saying that the next month or two might be 'fairly tight with Pierre and I having to get *Juliette* fishing and Steven committed to paying for his new vessel…'. This

[5] Referred to by its trading style 'Wicked Lady'.

memorandum once again confirms the existence of the partnership and cannot be reconciled with the allegations made by Laubscher in the affidavit.

[52] Also inconsistent with Laubscher's allegations regarding the alleged settlement of January 2007 is that Cameron-Dow made further payments in connection with *Juliette*. These included R42 406,88 and R5650 to insurance brokers on 2 February 2007 and 7 May 2007 respectively for the insurance of *Juliette*; R5650 and R17 000 on 6 March 2007 and 3 April 2007 respectively to HBBOA for diesel; and R20 000 and R15 000 to C-Craft on 10 May 2007 and 6 June 2007.

[53] The diesel payment of R17 000 was recorded in a memorandum by Cameron-Dow to Laubscher and Steven on 18 April 2007. This memorandum referred to the subsisting '*Juliette* joint venture/partnership' between Cameron-Dow and Laubscher.

[54] Cameron-Dow dealt with the payment of R20 000 to C-Craft in a memorandum to Laubscher and Steven on 17 May 2007, saying that the payment 'was a straight loan from Mike to Raymond Cooper as Pierre was not happy that it should be paid on behalf of the *Juliette* joint venture and Mike elected to make it on his own account'. (It is unclear what this payment was intended to cover. The payment pre-dated the incident in which *Juliette's* propeller fell off.)

[55] The payment of R15 000 to C-Craft[6] related to the acquisition of a new propeller after *Juliette's* propeller fell off at sea, being half the cost of the replacement propeller sourced by Cooper. It is common cause that Laubscher's view was that C-Craft should take full responsibility and that they (he and Cameron-Dow) should not contribute. Cameron-Dow nevertheless made the payment in an attempt to get *Juliette* seaworthy again as soon as possible. He mentioned this

[6] Although Cameron-Dow in his evidence said that this payment was made on 1 March 2007 he must be in error. The propeller incident occurred in mid-May 2007. His memorandum of 7 June 2007 (C222-223) recorded that he had made the payment the previous day. Cooper's handwritten receipt at D296, which is undated, must thus have been issued on 6 June 2007.

payment in his memorandum to Laubscher and Steven of 7 June 2007, a memorandum which in several places referred to the '*Juliette* joint venture'.[7]

[56] It will be recalled that in Laubscher's affidavit alleging the January 2007 settlement agreement he made reference to net profit being 'pegged at 30% of turnover generated by fishing operations'. As with his reference to the 40% of net profit, this figure of 30% of turnover does have a link with reality, though I reject Laubscher's evidence regarding the supposed settlement. On 5 February 2007, apparently following a suggestion by an official of the Department, Basic Blue submitted an application for approval to increase *Juliette's* crew from 6 to 14.[8] (In the Department's parlance, this was a request for an 'increased effort'. Tuna pole fishing rights such as those held by Basic Blue are limited not by tonnage of fish but by crew numbers.[9]) Cameron-Dow assisted Basic Blue to prepare the application, and Cameron-Dow commissioned Laubscher's oath. *Juliette's* owner was described as 'Wicked Lady Fishing'. The application recorded that Basic Blue had already received approval to switch its catching vessel from *Wicked Lady* to *Juliette*.

[57] One of the documents which had to be submitted with the application was an agreement between the applicant and the boat owner. To that end, Cameron-Dow drafted a short 'catching agreement' between Basic Blue and the owner, described as 'Wicked Lady Fishing (Pierre Jan Laubscher)'. In terms of the catching agreement the owner made *Juliette* available to Basic Blue to conduct commercial tuna fishing operations. The period was two years, thereafter terminable on three months' notice. Basic Blue was required to maintain the boat and pay all running expenses. As consideration for its right to operate the boat, Basic Blue was obliged to pay the owners '30% of the value of its catch to be determined by the full amount received by [Basic Blue] for such catch, and to be vouched to the reasonable satisfaction of the Owners from time to time'. For convenience I shall refer to this consideration as rent. It is from the catching agreement that Laubscher seemingly

[7] For subsequent memoranda with similar references, see E159 (11 June 2007), C229 (18 June 2007), C230 (19 June 2007) and D38 (11 October 2007).
[8] The prescribed form does not seem to have been designed for this purpose but rather – as its heading indicates – for applications for the 'replacement/entry of a fishing vessel'.
[9] See s 14(1) of the MLR Act read with the definition in s 1 of 'total applied effort'.

derived the 30% figure in his allegations regarding the supposed settlement of January 2007.

[58] Cameron-Dow was tackled in cross-examination about his role in drafting and commissioning the application of 5 February 2007. It was put to him that, on his version regarding ownership of *Juliette*, the application – by attaching an agreement which reflected the owner as Wicked Lady Fishing in the person of Laubscher – was knowingly false (ie failed to disclose Cameron-Dow's 40% share of the boat). While Cameron-Dow rejected imputations on his integrity, his answers on this particular issue were not very satisfactory.

[59] Cameron-Dow testified that the catching agreement was prepared solely to meet the formal requirements imposed by the Department and did not affect his partnership with Laubscher. He was suggesting, as I understood him, that the catching agreement was not, as between himself and Laubscher, intended to have contractual effect. The 30% figure, he said, was standard in relation to catching agreements.[10] I am not satisfied that I can treat the catching agreement as simulated. Deneys Reitz, who wrote a letter of demand on behalf of Cameron-Dow on 27 April 2009, appear to have been instructed to treat it as a valid contract.[11] However, Cameron-Dow is nevertheless right that this does not make much difference as between himself and Laubscher. I have already concluded that the partnership agreement related not only to the ownership of *Juliette* but also to the fishing operations conducted by her. The rent (30% of fishing turnover) would be an amount received by the partners in respect of their ownership of *Juliette*. Assuming that the partners did not incur any expenditure properly attributable to their ownership of *Juliette* (all or most of which would, in terms of the catching agreement, be borne by Basic Blue), the rent would constitute net profit in their hands and be shared between them in the ratio 40:60. Basic Blue's payment of the rent would reduce its net profits from the fishing operations, in which the partners were also entitled to share in the ratio 40:60. Without the catching agreement and

[10] Cameron-Dow drafted several such catching agreements. Of the four sample agreements included in exhibit 'F', three used the figure of 30%.
[11] D124 para 6.

resultant obligation of Basic Blue to pay rent, the net profits in Basic Blue would be correspondingly higher.

July 2007 – June 2008

[60] I have already mentioned certain events which occurred over the period February to July 2007. In the latter part of August 2007 Laubscher sent Cameron-Dow a budget forecast and cash flow projection for 'Juliette Fishing' covering the period September 2007 to August 2008 ('the budget'). The evidence regarding the budget was somewhat confused. The witnesses made reference to the budgets attached to the plaintiff's request for trial particulars[12] without clearly identifying which version, if any, of those budgets was the version Laubscher sent to Cameron-Dow. I nevertheless think it is possible to conclude that as a matter of probability the budget Laubscher sent to Cameron-Dow was the one at P112-113 and that the other versions (at P108-111) came from Laubscher's discovery. I say so because the version of the budget at P112-113 is the only one which is reconcilable with the comments made by Cameron-Dow in his email to Laubscher of 22 August 2007 in reaction to the budget.[13]

[61] While the detail of the budget is not of great moment, Laubscher's general approach is important. He projected gross sales for the year of R2,5 million, from which he deducted cost of sales of R1 285 068 and operating costs of R188 715, giving a net profit of R1 026 217. On the second page of the budget, in a segment headed 'Distributable Earnings', he recorded a 'profit retention' of R177 936 (ie profit to be ploughed back into the fishing operations), the balance of R848 280 being split 40:60 between Cameron-Dow and himself (R339 312 and R508 968, described as 'Vessel Hire MCD' and 'Vessel Hire PJL'). Laubscher could only have prepared this budget in the belief that there existed a 40:60 partnership between Cameron-Dow and himself and that the partnership covered the whole of the ownership and operations of *Juliette*. I reject as untrue Laubscher's explanation that the budget was

[12] P108-113.

[13] In the email (at E163-164) Cameron-Dow referred to the 'present' average monthly catch of 14,8 tons, the word 'present' in context meaning the figure reflected in Laubscher's budget. The total catch for the year of 178 tons reflected in the 5th line of the budget at P112 translates into a monthly average of 14,84 tons. This is considerably higher than the monthly average in the other two versions of the budget.

simply an exercise in ‘playing around with various numbers’, if by that he meant that he did not at that time genuinely believe there to be a 40:60 partnership. The budget does not reflect the 30% rent payable by Basic Blue to the owner in terms of the catching agreement. As I have explained, the inclusion of this figure would have made no difference to the distributable profit; there would simply have been a slightly different presentation, with a 40:60 split of the rent and a further 40:60 split of a reduced net profit.

[62] *Juliette* started fishing for tuna in September/October 2007, with Laubscher as skipper.

[63] Cooper began to press Cameron-Dow for payment of the balance allegedly owing on *Juliette*. Cooper’s reconciliation of 19 November 2007 was followed by a tax invoice for R423 460 on 23 April 2008. This included an amount of R69 000 for additional work done at the purchaser’s request.

[64] On 12 May 2008 Cameron-Dow sent a short memorandum to Laubscher and Steven, saying that he was awaiting a set of accounts as he had not received a report or accounting of any description whatsoever.

[65] On 19 June 2008 Cameron-Dow addressed a letter to Cooper/C-Craft dealing with the latter’s claim for R423 460. Cameron-Dow testified, and Laubscher did not dispute, that Cameron-Dow sent this letter in draft to Laubscher before finalising it. The only part of the draft which Laubscher asked Cameron-Dow to correct was Laubscher’s skipper fee – 15%, rather than 12%. Cameron-Dow’s letter was aimed at trying to persuade Cooper to accept R50 000 in full and final settlement. To this end, Cameron-Dow foreshadowed a substantial claim for damages against Cooper/C-Craft. In so doing, he described the ‘broad agreement” between Steven, Laubscher and himself. In regard to the *Juliette*, this involved the 40:60 venture between himself and Laubscher. Elsewhere in the letter he specifically referred to this agreement as a partnership. The partnership’s damages claim against

Cooper/C-Craft was said to amount to R324 360.[14] Once again, Laubscher's part in this letter confirms the existence and scope of the partnership.

July 2008 – July 2009

[66] I can summarise the remaining history more briefly. Cameron-Dow's repeated requests for an accounting from Laubscher in the second half of 2008 fell on deaf ears.[15] They finally met in mid-December 2008 on which occasion, according to Cameron-Dow, there was discussion about the possibility of one of them buying out the other. Cameron-Dow wrote to Laubscher on 12 December 2008 suggesting that it would probably be best to dissolve the partnership. He wrote again on 18 February 2009 with a provisional calculation of what he believed he was owed for monies lent and for his profit-share.

[67] Laubscher then engaged attorneys, Bisset Boehmke & McBlain ('BBM'). There was correspondence and telephonic communication between Cameron-Dow and BBM over the period March to June 2009. In a letter dated 6 March 2009 BBM notified Cameron-Dow that they had contacted an accountant, Mr Peter Napier ('Napier'), to prepare 'a proper partnership accounting'. Napier was, so it transpired, Basic Blue's accounting officer. I reject as unworthy of credence Laubscher's evidence that this exercise was undertaken on a 'hypothetical' basis as if there were a partnership as alleged by Cameron-Dow. BBM gave no hint of this and did not say that the exercise was being undertaken on a without-prejudice basis. Later in March 2009 Napier sent Cameron-Dow draft partnership financial statements for the years ended February 2007, February 2008 and February 2009. These drafts appear to be confined to vessel hire which the partnership was entitled to receive from Basic Blue. For obvious reasons they were unacceptable to Cameron-Dow.

[14] The arithmetic in para G2 of the letter (at D49) has gone awry but the detail is unimportant. In para G2.2 Laubscher's skipper's fee is said to be 12% but the quantified figure of R154 500 is correctly based on 15% (R1 030 000 x 15% = R154 500). The loss to the partnership would then be R315 180, not R324 360 (R1 300 000 – R154 500 = R875 500 x 36% net profit percentage = R315 180).
[15] D53-54 (13 August 2008), D53-54 (13 October 2008) and D62-64 (10 December 2008)

The institution of action

[68] Summons was issued on 18 August 2009, at which time *Juliette* was arrested.

[69] Laubscher filed his plea in December 2009. It was signed by Laubscher's then senior counsel and Laubscher's new attorneys, John Taylor & Associates Inc. In the plea Laubscher described himself as the owner of *Juliette*. Although Laubscher denied being a member of the partnership cited as the first defendant, he pleaded the conclusion of an oral agreement in June 2006 with the following terms: (i) that Cameron-Dow would lend Laubscher money sufficient to enable the latter to acquire *Juliette*; (ii) that Basic Blue would conduct the fishing operations on *Juliette*; (iii) that the profits from the fishing operations would be split 40:60 between Cameron-Dow and Laubscher; (iv) that Cameron-Dow's allocation of 40% of the profits would first be applied in repayment of the monies lent by him to Laubscher. Laubscher admitted, further, that over the period June 2007 to May 2008 Cameron-Dow was paid R164 000, adding that this constituted payment of Cameron Dow's 40% share of the net profits. Laubscher admitted that he had not rendered an account but denied being obliged to do so.

[70] This version of the plea came very close to admitting Cameron-Dow's version of the partnership. The main point of difference is that Laubscher did not admit that Cameron-Dow's 'loan' was repayable as a first charge against the fishing profits. Instead he pleaded that Cameron-Dow's 40% share in the fishing profits (effectively, Basic Blue's profits) would first be applied in repaying Cameron-Dow's loan obligation. Of course, this makes no commercial sense. If Cameron-Dow's right was an ongoing entitlement to 40% of Basic Blue's profits and nothing more, there was no point in distinguishing between money received by him on account of his 'loan' and other money. Be that as it may, at this point Laubscher's defence seemed simply to be that Cameron-Dow's share of the profits did not amount to more than R164 000.

[71] The litigation then progressed (if one can call it that) at snail's pace. There were the competing applications by Laubscher and Cameron-Dow for the judicial

sale of *Juliette*, resolved by Cleaver J's judgment of 18 November 2010. In the meanwhile C-Craft and Cooper in January 2010 issued summons against Cameron-Dow for payment of the alleged outstanding balance of the purchase price, alternatively for cancellation of the agreement and the return of *Juliette*. More than five years later, the C-Craft/Cooper action is still pending. In the present case, 2012 and early 2013 seem to have been taken up with discovery and trial particulars. Laubscher then engaged his current attorneys and counsel, through whom an amended plea was delivered on 2 April 2013. In effect, Laubscher withdrew his previous averments indicative of a partnership. What he now pleaded was that in June 2006 Cameron-Dow agreed to lend him an amount sufficient to enable him to acquire *Juliette*, that Basic Blue would conduct the fishing operations and that Laubscher was to repay the loan 'as soon as possible from the proceeds of the aforesaid fishing operations'. This version, which lacks any commercial plausibility, I reject as false.

[72] Laubscher claimed in evidence that his original plea was drafted by his erstwhile counsel and attorneys without consultation with him and that he first saw it several months later. Only in consultation with his new attorney did it become apparent that no partnership agreement had ever crystallised. Again, I do not find this explanation credible.

The agreement proved

[73] I have set out in para 36 above the agreement I find proved. Subject to the illegality defence, I do not think the agreement's enforceability is affected by the fact that the fishing operations were to be conducted by Basic Blue. Although the latter was cited as the fourth defendant, it is unnecessary to find that it was actually a party to the agreement between Cameron-Dow and Laubscher. The latter was the 70% member of Basic Blue. In that capacity he had an indirect entitlement to 70% of Basic Blue's net profit. As between himself and Cameron-Dow, Laubscher was obliged to ensure that 40% of Basic Blue's net profit (to the extent that this represented profit from *Juliette*'s operations) was paid to Cameron-Dow. This he could do by obtaining a distribution from Basic Blue to himself of a sufficient amount to ensure that Cameron-Dow received his due.

[74] Where one of two partners has the conduct of partnership business, such person has an obligation in law to account to his partner in respect of the business, at the latest upon dissolution (Voet *Commentary on the Pandects* 17.2.11; *LAWSA* 2nd Ed Vol 19 para 296; *Tshabalala & Others v Tshabalala & Others* 1921 AD 311 at 318; *Purdon v Muller* 1961 (2) SA 211 (A) at 231H-232; *Countertrade Establishment (Pty) Ltd v EBN Trading (Pty) Ltd* 1995 (1) SA 762 (N) at 770E-H). Where a ship is co-owned, a court exercising admiralty jurisdiction will require the managing owner to render an account of the ship's operations and has the power to settle the account. The co-owner is entitled to complete a disclosure from the managing owner (Meeson *op cit* para 2-041 and 2-043).

[75] I am thus satisfied that Laubscher is obliged to render an account of the operations conducted on *Juliette* and to pay Cameron-Dow so much as is owing to Cameron-Dow from the profits of such operations. (Cameron-Dow's right to share in the proceeds of the partnership asset, viz *Juliette*, will not involve payment by Laubscher to Cameron-Dow but a division of the net sale proceeds held by the Registrar in the *Juliette* fund account.)

[76] Although the operations which the parties had directly in mind were tuna pole fishing operations, they must have intended that all commercial operations conducted by *Juliette* while they were co-owners would be within the scope of the partnership. The accounts to be prepared by Laubscher must thus include the snoek fishing trip of July 2007, the salvage operation conducted in August 2008 and any other operations conducted by *Juliette*. (*Juliette* was one of a number of boats engaged during August 2008 in the salvaging of logs which came adrift in Table Bay Harbour following a storm. Cameron-Dow drafted the salvage contracts for *Juliette* and the other boats.)

[77] Although the parties envisaged the acquisition of a second boat in which they would be jointly interested, this did not come to fruition. While the delay in *Juliette's* delivery may have played some part, the main reason is that Laubscher failed to render any account to Cameron-Dow regarding *Juliette's* operations or to make *Juliette's* profits available for funding the second boat. Cameron-Dow was thus entitled to bring matters to a head by issuing summons and having *Juliette* arrested.

This inevitably signalled the termination of the partnership, subject to a proper accounting.

The illegality defence

[78] Laubscher made the following allegations in his amended plea regarding the illegality defence.

(i) In terms of the MLR Act the Minister published a General Policy on the Allocation and Management of Long Term Commercial Fishing Rights ('the General Policy') and a Fishery Specific Policy for the Management and Allocation of Commercial Fishing Rights in the Tuna Pole Fishery ('the Tuna Policy').

(ii) The broad objectives of the policies were the management of fishing resources and equitable allocation to suitable stakeholders, particularly previously disadvantaged persons and fishermen with a genuine interest in fishing.

(iii) The application process was competitive and aimed at identifying the best applicants.

(iv) The submission of false information or non-disclosure was a ground for refusing or taking away rights. It was a criminal offence to tell deliberate falsehoods.

(vi) An applicant could be excluded if he submitted more than one application.

(vii) The Department wanted to know who the 'real beneficiaries' of the fishing rights were, and adopted the 'follow the buck' principle.

(viii) Fishing vessels had to be registered with SAMSA and the Department in order to be nominated as a catching vessel. Unless the applicant was the owner, the applicant had to furnish full and truthful details about the catching agreement and ownership of the vessel.

(ix) If the agreement alleged by Cameron-Dow existed, he – acting as the attorney for Laubscher and/or Basic Blue when they applied for fishing rights and made related applications – failed to disclose his interest in such rights and deliberately caused his client to file false declarations regarding *Juliette's* ownership and the true beneficiaries of the rights.

(x) Cameron-Dow's conduct was contrary to the duties of an attorney, was against public policy and good morals, and was illegal. His conduct was aggravated by the fact that he had interests in other fishing rights and vessels at all material times.

(xi) The alleged partnership is thus illegal and unenforceable.

[79] Laubscher led no evidence in support of the illegality defence. Mr Walther in argument relied on the General Policy and Tuna Policy as annexed to a notice of objection filed by Laubscher to an amendment with which Cameron-Dow did not proceed.[16] The annexed General Policy was described as 'Draft General Policy: May 2005'. I queried the evidential basis on which I was entitled to have regard to these annexures. Mr Walther said that he understood them to have been published in the *Government Gazette*. After completion of argument he delivered to me a copy of the General Policy as published in the Government Gazette in 2005 as Schedule A to the 'Invitation To Apply for Rights to Undertake Commercial Fishing for Hake Longline, West Coast Rock Lobster (Offshore), Squid, Seaweed, Tuna Pole and Demersal Shark'. Those parts of the draft General Policy to which Mr Walther referred in argument are identical to the General Policy as published. In terms of s 5(1) of the Civil Proceedings Evidence Act I must take judicial notice of the General Policy. Since Mr Walther in argument did not rely on the Tuna Policy, I shall not concern myself with it though it too seems to have been published as a schedule to the above Invitation.

[80] The evidence of applications made by Basic Blue is confined to its application for tuna pole commercial rights in 2005 (awarded on 28 February 2006) and the application made in February 2007 to increase *Juliette'*s crew from 6 to 14. Of these two applications, only the one of February 2007 was actually adduced as a documentary exhibit.[17] One knows that Basic Blue must have applied, prior to February 2007, to switch its catching boat from *Wicked Lady* to *Juliette* but no evidence regarding that application was adduced.

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[16] N119-166 and N167-179.

[17] I do not know whether any other applications, not referred to in oral evidence, are contained in the exhibit bundles. I made it clear to counsel that the only documents to which I would have regard were those actually referred to in oral evidence. This accords with the pre-trial agreement between the parties recorded in para 7.6 of the minute dated 28 October 2013 (P172).

[81] Basic Blue applied for and was awarded its commercial tuna pole fishing rights before any agreement was concluded between Cameron-Dow and Laubscher. The vessel specified in the application, as one knows from the Department's award, was *Wicked Lady*. Apart from the fact that the application itself was not adduced as an exhibit, there is no reason to suppose that Laubscher made any false statements in the application.

[82] Basic Blue's application to switch its catching boat from *Wicked Lady* to *Juliette*, presumably made in the latter part of 2006, was not adduced as an exhibit. There is no evidence that anything said in it was false.

[83] This leaves Basic Blue's application of February 2007 for an 'increased effort'. I find it difficult to understand on what basis an agreement concluded in mid-2006 could be rendered unlawful by what was done in February 2007, unless the agreement could only be carried out by unlawful means or unless it was alleged and proved that the parties, when they concluded the agreement, intended to carry it out by unlawful means (as to which, see *Claasen v African Batignolles Construction (Pty) Ltd* 1954 (1) SA (O) at 556H-557A; *Kartsein v Moribe & Others* 1982 (2) SA 282 (T) at 291C-G); *Wypkema v Lubbe* [2007] 4 All SA 1224 (SCA) para 17 – a line of authority to which no reference was made in argument).

[84] I do not think the agreement alleged by Cameron-Dow was one which could not be carried out except by unlawful means nor did Laubscher so allege. Basic Blue already held its tuna pole commercial fishing rights by the time Cameron-Dow and Laubscher concluded their agreement. I think it may be accepted on the evidence that they did not intend to ask the Department to transfer the commercial fishing rights from Basic Blue to the partnership or to approve the partnership arrangement but I am not persuaded that the MLR Act as read with the General Policy required them to seek transfer or approval. Their arrangement was not intended to affect the identity of the entity which held the fishing rights (Basic Blue).

[85] Cameron-Dow's interest in Basic Blue's profits, by virtue of his agreement with Laubscher, was a less direct interest than he would have held had he become a 40% member of Basic Blue, so it is legitimate to ask whether Cameron-Dow could

have become a 40% member of Basic Blue without getting the Department's approval. The answer in my view is yes. Section 21(1) states that subject to the provisions of the Act a commercial fishing right may be leased, divided or otherwise transferred. Although I was not referred to the relevant regulations, I shall assume for purposes of argument that such lease, division or transfer may only occur by following a prescribed process. But on the face of it a fishing right is not leased, divided or transferred merely because a 70% member of the entity which holds the fishing right agrees to transfer a 40% member interest to a person who was not a member of the entity when the latter acquired its fishing right. That this is the view of the Department is confirmed by clause 12 of the General Policy which states, after referring to s 21(1), that if a member of a close corporation or company alienates some or all of his interest or shares but the fishing right remains with the same entity, approval for the transfer does not generally have to be obtained. The exception is if the transfer results in a change of control of the juristic entity. The clause states that in the case of a listed public company the sale of more than 35% of the shareholding requires approval. The necessary implication is that in other instances control bears its ordinary meaning, namely the power to exercise the majority of votes at a meeting of members, a power which – absent any special arrangements – is conferred by a holding of more than 50% of the member's interest or shares (see *Inland Revenue Commissioners v J Bibby and Sons* [1945] 1 All ER 667 (HL) at 670F-G and 671A; *Barclays Bank Ltd v Inland Revenue Commissioners* [1961] AC 509 at 523-524 and 534; *Secretary of State for Employment v Chapman & Another* [1989] ICR 771 (CA) at 775C-G and 778F-G).

[86] If Cameron-Dow could without the Department's approval have obtained a 40% member interest in Basic Blue, I do not think it was unlawful for him to obtain without the Department's approval a less direct interest in 40% of Basic Blue's profits by way of an agreement with Basic Blue's 70% member.

[87] The MLR Act and the General Policy place emphasis on the transformation of the fishing industry. Even if there were no change in control of an entity holding the fishing rights, a change in the member interest or shareholding could result in a change in the transformation profile of the entity. I was not referred to the statutory provisions if any which prevent this sort of abuse. It is enough to say that in the

present case the agreement between Cameron-Dow and Laubscher was not intended to alter, and did not alter, the transformation profile of Basic Blue. Their agreement did not deprive Basic Blue's two minority members (who collectively held 30%) of such rights as they otherwise had to participate in Basic Blue's management and profits.

[88] As to ownership of *Juliette*, the MLR Act and the General Policy do not prohibit co-ownership of boats used by the holders of commercial fishing rights. To the contrary, the expression 'local fishing vessel' is defined in s 1 of the MLR Act as meaning a fishing vessel registered in South Africa and which is 'wholly owned and controlled by one or more South African persons', necessarily implying that there can be co-ownership. Cameron-Dow and Laubscher were and are 'South African persons' as defined in s 1. (In this respect there may be a difference between who may hold commercial fishing rights on the one hand and who may own local fishing vessels on the other. Clause 7.2 of the General Policy reflects a view by the Department that a partnership cannot apply for and be allocated commercial fishing rights. This is based on the fact that s 18(3) of the MLR Act provides that only 'South African persons' may hold commercial fishing rights and that s 1 defines 'South African person' as covering only South African citizens and companies, close corporations and trusts controlled by South African persons. It is unnecessary for me to express an opinion on the correctness of this view.)

[89] As partners, Cameron-Dow and Laubscher were intended to be and were in fact co-owners of *Juliette*. It was only in February 2007 that it became necessary for Basic Blue to make an application involving information about its right to use *Juliette*. It is not to Cameron-Dow's credit that he participated with Laubscher in submitting an application which, with reference to the attached catching agreement, represented that Laubscher alone was the owner. But I am not satisfied that when they concluded their partnership agreement in mid-2006 there was an intention to make misrepresentations about *Juliette's* ownership. And I am far from satisfied that it would have made any difference to the Department if the catching agreement had described Laubscher and Cameron-Dow as co-owners of *Juliette*.

[90] I thus reject the illegality defence.

The relief on the main claim

[91] On the main claim Cameron-Dow seeks: (i) payment from the partnership and in rem against *Juliette* of R1,6 million allegedly 'lent' by him to the partnership; (ii) payment from the partnership and in rem against *Juliette* of R100 000 as cessionary of Steven's claim for money lent to the partnership; and (iii) the rendering of an account by Laubscher and payment of any amount found owing thereon to Cameron-Dow, such payment to be made by the partnership and Laubscher and in rem by *Juliette* jointly and severally.

[92] Cameron-Dow's characterisation of the money he paid in connection with *Juliette's* acquisition as a loan requires comment. He was a 40% member of the partnership. A partnership has no juristic personality apart from its members (*Michalow NO v Premier Milling Co Ltd* 1960 (2) SA 59 (W) at 61D-F; *LAWSA* op cit para 277). A person cannot lend money to himself nor is it Cameron-Dow's contention, in the main claim, that he lent the money to Laubscher personally. It is not unusual for partners to speak of 'lending' money to the partnership but from a practical point of view what they usually mean is that such money, unlike a normal capital contribution, is to be repaid as a first charge from the partnership assets or profits, prior to the return of ordinary capital contributions and prior to any division of residual assets and profits in accordance with their agreed sharing ratio (cf *Schlemmer v Viljoen & Andere* 1958 (2) SA 287 (T) at 287E-G; *LAWSA* op cit para 321; Banks *Lindley & Banks on Partnership* 19th Ed paras 17-05, 19-06, 22-05 and 25-43). In my view the monies which Cameron-Dow and Laubscher put up (in their language as 'loans') were contributions to the partnership with this particular character. I shall refer to them as 'advances'. The advances were put at the risk of the partnership business. For example, if *Juliette* had been lost without insurance and before any profit was made, there was no debtor whom Cameron-Dow could sue for repayment of his money. What the parties intended, in describing the monies as loans, was that those amounts would be repaid to them before the division of profits in the 40:60 ratio.

[93] It is thus not possible to make a simple order for repayment of the advances as distinct relief. The advances must feature in the account to be drawn and

debated. This accords, on my understanding, with the statement in *Lindley & Banks on Partnership* supra that a partner has no independent cause of action in respect of an advance made to the partnership though in a settling of accounts the advance must be satisfied in priority to ordinary capital (para 25-43 footnote 44, citing *Green v Hertzog* [1954] 1 WLR 1309). In *Green* Goddard CJ, with whom the other members of the court concurred, said that where a partner 'lends' money to the partnership 'there are no creditors or debtors in the ordinary acceptance of those terms' because he is 'advancing some of that money to himself'. Goddard CJ continued (at 1312):

'There is no common law claim here for money lent: it is a loan by one partner to the partnership; it is money lent to the partnership, and section 44(2) of the Partnership Act, 1890, shows how that money is to be reclaimed and dealt with. There must be a taking of the accounts, and if it be shown that there is enough money in the partnership accounts to repay the plaintiff the money that she has advanced, or some of it, after the creditors of the partnership have been paid, she will get that money in priority to the others.'

[94] The English Partnership Act of 1890 by and large codified the existing law. In *Green* Goddard CJ referred to *Richardson v Bank Of England* (1838) 4 My & Cr 165 where Cottenham LC said the following in relation to monies 'lent' by a partner to the partnership (at 171-172):

'But though these terms "creditor" and "debtor" are so used, and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the known law of partnership than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. The supposed creditor has no means of compelling payment of his debt; and the supposed debtor is liable to no proceedings either at law or in equity … . The supposed creditor's debt is due from the firm of which he is a partner; and the supposed debtor owes the money to himself in common with his partners; and, pending the partnership, equity will not interfere to set right the balance between the partners ….

But if, pending the partnership, neither law nor equity will treat such advances as debts, will it be so after the partnership has determined, before any settlement of account, and before the payment of the joint debts or the realisation of the partnership estate? Nothing is more settled than that, under such circumstances, what may have been advanced by one partner, or received by another, can only constitute items in the account … .'

[95] Since the agreement between the parties was that the advances together with interest would be repaid as a first charge, the profits together with the proceeds from the sale of *Juliette* must, in the account, first be applied to repay such sums.

[96] Although the detail of the income and expenditure has been deferred for later determination, the trial was conducted on the basis that I must determine at this stage the amount 'lent' by Cameron-Dow to the partnership. I must thus rule on the extent of his advances. Mr van Embden in argument accepted that certain of the amounts set out in Cameron-Dow's pleadings and trial particulars had not been proved. I confine myself to the schedule of payments on which he relied in argument. I have mentioned most of the payments in my survey of the evidence and shall thus not elaborate except where necessary.

[97] I am satisfied on a balance of probability that Cameron-Dow advanced the following amounts (totalling R1 012 576,17) on the dates indicated and that they should be reflected in the account together with interest from the relevant dates:

(i) R100 000 on 29 June 2006;

(ii) R500 000 on 7 July 2006;

(iii) R300 000 on 31 July 2006;

(iv) 40 000 on 19 December 2006;

(v) R42 406,68 on 2 February 2007;

(vi) R5 650 on 6 March 2007;

(vii) R17 000 on 3 April 2007;

(viii) R7 519,49 on 7 May 2007.

[98] The interest to be credited to Cameron-Dow in respect of the above advances must be at the rate charged from time to time by Investec on his mortgage bond.

[99] Regarding the payment of R6877 to Pertech on 10 September 2007, Cameron-Dow said in evidence that he could not be sure it related to *Juliette*. I thus disallow it.

[100] I am satisfied that Cameron-Dow made two further payments reflected on the schedule, namely R20 000 and R15 000 to C-Craft on 10 May 2007 and 6 June 2007 respectively (the latter erroneously recorded in Mr van Embden's schedule against the date 1 March 2007). I am not satisfied, however, that they were made with the express or implied authority of his partner. It is common cause that Laubscher objected to the partnership's making any contribution towards the replacement of *Juliette's* propeller. Since the propeller incident occurred on 16 May 2007, and since Cameron-Dow mentioned an amount of R15 000 as being his contribution in respect of the replacement of the propeller, the payment of 6 June 2007 was for his own account. Although the oral evidence suggested only one instance where Laubscher objected to payment, Cameron-Dow's memorandum of 17 May 2007 recorded that Cameron-Dow's payment of R20 000 to C-Craft on 10 May 2007 was a loan by Cameron-Dow to Cooper because Laubscher was not happy for it to be paid on behalf of the partnership. It thus appears that Laubscher must have objected to both of these payments. At any rate, Cameron-Dow has not proved on a balance of probability that these two amounts are properly to be brought into account in the partnership.

[101] Mr van Embden's schedule reflects five payments totalling R89 500 made by Cameron-Dow to Laubscher personally (R30 000 on 12 March 2007, R23 000 on 3 April 2007, R4000 on 5 May 2007, R12 500 on 28 September 2007 and R20 000 on 30 September 2007). In a letter of demand to Laubscher dated 29 July 2009[18] Cameron-Dow's attorney (a colleague at his firm) recorded his instructions as being that these amounts were lent to Laubscher by way of a separate agreement. In Cameron-Dow's memorandum of 11 October 2007 he said, with reference to the last two payments totalling R32 500, that he was assuming that they would be treated as a personal loan to Laubscher but that he would be happy to regard it as a loan to the partnership if Laubscher preferred. There was no evidence of a response

[18] E321-323.

from Laubscher. Cameron-Dow's oral testimony does not persuade me that these payments were advances or contributions to the partnership. They will thus not feature in the partnership accounting. If they are recoverable, it would have to be by way of the alternative claim.

[102] This leaves the payment of R100 000 paid by Steven's entity, Twoline, to C-Craft on 19 December 2006. I am satisfied that this amount related to *Juliette*. However, Cameron-Dow's memoranda of 18 January 2007 and 24 January 2007 indicate that only R50 000 was a loan by Twoline to the partnership. The other R50 000 was a part-payment in reduction of Twoline's indebtedness to Laubscher for the skippering of *Highlander*. Since there was no response to the memoranda, I must assume that all parties accepted this treatment. This means that, to the extent of R50 000, Twoline's payment to C-Craft was treated as a payment to Laubscher for skipper's fees which the latter contributed to the partnership by allowing it to be paid to C-Craft. It follows that, in addition to the sum of R300 000 advanced by Laubscher on 4 August 2006, he contributed a further R50 000 on 19 December 2006.

[103] Twoline's loan of R50 000 to the partnership was not a capital contribution by a partner. It gave rise to a creditor/debtor relationship between Twoline and the partnership. Cameron-Dow's evidence of the cession of this claim was not altogether satisfactory but it is probable that by the time summons was issued Steven intended that his father should have the right to pursue the claim. The difficulty is, however, that Cameron-Dow's pleaded case is that Steven personally lent the money to the partnership and that it was Steven who purported to cede the claim to him. The contemporaneous documentation, and in particular Cameron-Dow's memorandum of 24 January 2007, indicates that it was Twoline which lent the money. In the absence of an amendment (which might in turn be met by a defence of prescription), I do not think I can uphold Cameron-Dow's claim for repayment of the R50 000 lent by Twoline.

[104] It is common cause that Cameron-Dow received repayments totalling R164 000 as follows:

(i) R12 000 on 1 June 2007;

(ii) R50 000 on 1 November 2007;

(iii) R25 000 on 3 December 2007;

(iv) R12 000 on 2 January 2008;

(v) R15 000 on 1 February 2008;

(vi) R30 000 on 11 March 2008;

(vii) R20 000 on 3 May 2008.

[105] Cameron-Dow's primary pleaded case is that these repayments were received from the partnership (ie out of partnership assets) whereas Laubscher, consistent with his denial of the partnership, claimed that they were repayments by him personally. Although I have concluded that Cameron-Dow did, to the extent of R89 500, lend funds to Laubscher personally, I cannot find that any of the repayments totalling R164 000 related to the personal loans. It follows that Cameron-Dow's partnership advances together with interest must, in the account, be reduced as at the dates and by the amounts listed in the preceding paragraph.

Other matters concerning the account

[106] Given the form taken by the pleadings, I have not been asked to determine the advances made by Laubscher nor, on the state of the evidence, am I in a position to do so.

[107] It is common cause that Laubscher paid R300 000 into Cameron-Dow's firm's trust account on 4 August 2006. In the subsequent dealings between the parties this was accepted as his 'loan' to the partnership, being of the same nature as the 'loans' made by Cameron-Dow. It was put to Cameron-Dow in cross-examination that only R218 000 of Laubscher's payment had been applied to *Juliette*. This appears to be the position if one has regard to Cameron-Dow's memorandum of 18 September 2006. The memorandum is at odds with what I understood to be the imputation in cross-examination, namely that Cameron-Dow had acted improperly in relation to his trust account. He was open about the fact that only R218 000 had

been applied to *Juliette*. Nevertheless, Cameron-Dow's evidence was that the payment of R300 000 was credited to himself, not Laubscher, in his firm's trust accounts. If the balance of R82 000 was not refunded to Laubscher (and Cameron-Dow did not suggest it was), the most plausible construction of the facts is that to the extent of R82 000 capital funding previously provided by Cameron-Dow was substituted by capital funding from Laubscher. This would be in line with the agreement that Laubscher would contribute R300 000 to *Juliette's* acquisition and Cameron-Dow the balance.

[108] On this basis, the balance of Cameron-Dow's capital advances plus interest as at 4 August 2006 must be reduced by an amount of R82 000. Laubscher, conversely, is entitled to be credited with a capital advance of R300 000 as at that date. Laubscher is entitled to a further credit of R50 000 as at 19 December 2006, arising from the part-settlement of his skipper's fees paid directly by Twoline to C-Craft on behalf of the partnership. I think it appropriate to make a provisional ruling that the account include at least these sums as advances made by Laubscher. However, the evidence suggests that Laubscher may have made other advances as well. He may also have received repayments. These matters will need to to be dealt with in the account and debatement thereof.

[109] Like Cameron-Dow, Laubscher's advances must be credited with interest as from the relevant dates at the rate charged from time to time by his bank on his mortgage bond.

[110] Since I cannot find that the catching agreement was a sham, the account should be prepared on the basis that the catching agreement was operative. For reasons I have explained, this should not make any practical difference to Cameron-Dow but Laubscher might be prejudiced if the catching agreement were disregarded. This is because Laubscher, as a partner in the ownership of *Juliette*, is entitled to 60% of the net profit from the rent whereas he might effectively only benefit from 30% of Basic Blue's profits, given his obligation to account to Cameron-Dow for 40% of the fishing profits and his empowerment partners' 30% member interest.

[111] The rent paid or payable by Basic Blue, equal to 30% of the total value of catches, will thus be a separate stream of income. Only such expenses as Basic Blue was not obliged to meet under the catching agreement would be deducted in arriving at the profit from this income stream.

[112] The other income stream is from Basic Blue's fishing and other operations in relation to *Juliette*. Subject to the exception mentioned hereunder, all expenditure actually and bona fide incurred by Basic Blue in relation to her various operations should be recognised in the account.

[113] The one exception concerns any management or other fees paid to Laubscher over and above his 15% skipper's fees. It appears that one of the issues which might become contentious between the parties is whether allowance should be made for Laubscher's time in getting *Juliette* seaworthy, particularly over the period January to April 2007. (Cameron-Dow, of course, also spent some time on the affairs of the partnership.) I indicated to the parties during the course of the hearing that it would be desirable to determine at this stage any contentious points of principle relating to the account, ie those which did not turn on expert evidence or quantification detail. Whether in principle Laubscher is entitled to compensation for time spent is one such question. However since counsel did not address the question in argument I prefer not to rule on it, even provisionally. I thus leave open whether Laubscher can bring into account fees (other than the 15% skippering fee) actually paid to him by Basic Blue or an allowance for time spent on the affairs of the partnership.

[114] In considering this question the parties might nevertheless wish to bear in mind that in English law a contract of partnership ordinarily excludes any implied agreement for the payment of services rendered for the firm by any one of its members, from which it follows that one partner cannot charge another with compensation for his own trouble in conducting the partnership business. The mere fact that it would be reasonable to compensate him is not sufficient (*Lindley & Banks on Partnership* supra para 20.43). This is now reflected in s 24(6) of the Partnership Act of 1890 (and see *Medcalf v Mardell & Others* [2000] EWCA Civ 63 paras 79-83).

[115] The general rule is the same in our law (Visser et al *Gibson South African Mercantile & Company Law* 8th Ed p 248). In *LAWSA* 2nd Ed Vol 19 para 292 the learned authors say that, in the absence of an agreement for compensation, each partner is expected to perform all the duties contemplated by the contract without any fee or reward. They add, however, that if a partner

'has performed special work beyond that performed by the others, and which was not contemplated as part of his duties under the contract, he will be entitled to claim remuneration for his services'.

They refer in that regard to Voet 17.2.19 and *Liquidators of Grand Hotel and Theatre Co v Haarburger & Others, and Fichardt & Daniels* 1907 ORC 25 where Maasdorp CJ in turn cited *Britannia Gold Mining Co v Yockmonitz* (1890) 7 SC 218. In the latter case De Villiers CJ said that if a partner has performed special work beyond that performed by his co-partners and not contemplated as part of his duties under the contract of partnership, 'and *a fortiori* if his partners have undertaken to pay him for such work', there is 'nothing inconsistent with the fiduciary character of the contract that he should accept such payment' (at 226). In that case, which, like *Grand Hotel*, concerned a company's directors rather than partners, there was an agreement for the payment of brokerage. Voet 17.2.19 states that generally a partner's share of profits is regarded as a sufficient reward for his services but that a fee can be judicially awarded to a partner who 'handles and furthers the affairs of the partnership mainly or solely, where he was not liable by covenant to render such service beyond the others' (Tr Gane).

[116] Here there was express agreement that Laubscher was entitled to charge the partnership a 15% skippering fee. There was no evidence of an agreement for the payment of other remuneration. If, despite the absence of such agreement, South African law would, depending on the particular facts of the case, allow Laubscher a right to reasonable remuneration for additional services, the question briefly discussed at the beginning of this judgment as to whether South African or English law applies to the partnership may become relevant.

[117] I have said that the advances plus interest made by the parties must feature in the account to be drawn and will enjoy priority in the distribution of partnership

assets and profits. I was not addressed on what will happen if the assets and profits are insufficient to cover the advances plus interest. One possibility is that the entitlement of Cameron-Dow and Laubscher must abate pro rata in accordance with the amounts of their advances plus interest. Another possibility is that the partners must contribute to make good the loss in accordance with their profit-sharing ratio (cf *Lindley and Banks* supra para 25-46 read with para 20-05). I prefer, in the absence of argument, to express no opinion on these and other possibilities, particularly since the eventuality of a loss on the advances may not arise.

The alternative claim

[118] Given my findings on the main claim, the alternative claim is relevant only in respect of the five payments to Laubscher totalling R89 500. That these payments were made and that Laubscher became indebted to Cameron-Dow in respect thereof was satisfactorily proved.

[119] Laubscher raised several unmeritorious defences based on the National Credit Act 34 of 2005. He pleaded that Cameron-Dow had failed to register as a credit provider in terms of s 40 of the Act[19] and that he had failed to comply with s 129 and 130 of the Act. Cameron-Dow only made loans to the extent of R89 500, beneath the threshold specified in s 40. In respect of these loans, Cameron-Dow indeed complied (to the extent necessary) with ss 129 and 130 (see his firm's letter of demand dated 29 July 2009[20]). But in any event, I do not think the Act applied at all. In terms of s 4(1) the Act only applies between parties dealing at arm's length. Although these particular loans were not partnership contributions, they were made by one partner to another in the context of a partnership relationship. Cameron-Dow was not and is not in the business of lending money. There is not even evidence that interest was specifically discussed in relation to these personal loans, though the understanding may have been that they would attract interest in the same way as the capital contributions.

[19] Para 19.2 of the amended plea erroneously refers to s 14.
[20] E321-323.

[120] Laubscher's main defence is that the alternative claim has prescribed. The amendment of the particulars of claim to include the alternative claim was only made on 16 February 2015. Mr van Embden did not try to persuade me that the alternative claim did not seek to enforce a 'debt' different from the main claim. Although the attitude of our courts may have become more benevolent to creditors in this regard (as to which, see *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A); *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA); *Rustenburg Platinum Mines v Industrial Maintenance Painting Services* [2009] 1 All SA 275 (SCA); *Aeronexus (Pty) Ltd v Firstrand Bank Ltd t/a Wesbank* [2011] ZASCA 21; *Imperial Bank Ltd v Barnard NO & Others* 2013 (5) SA 612 (SCA)), I have no doubt that a claim based on a debtor/creditor relationship arising from loan is substantially different from a claim which a partner enjoys to have partnership assets and profits applied in the first instance to repay capital advances made by the partners.

[121] Since Cameron-Dow through his attorney made written demand for the repayment of the personal loans on 29 July 2009, the 'debts' he sought to enforce in the amended particulars of claim became 'due' for purposes of prescription by not later than that date. Self-evidently the debts had prescribed long before 16 February 2015 unless there was an intervening interruption of prescription.

[122] The pleadings on prescription are not satisfactory. If Cameron-Dow intended to rely on interruption, he should have dealt with this in his amended replication since he bore the onus to allege and prove interruption (*Anglorand Securities Ltd v Mudau & Another* [2011] ZASCA 76 para 16). The omission might be attributable to the fact that the pleadings on prescription were filed during the course of the trial and did not receive as much thought as they required. Laubscher himself, in his amended plea, unnecessarily anticipated and sought to refute one possible act of interruption.[21] It might thus be unfair to Cameron-Dow to uphold the defence of prescription simply because of his failure to plead interruption.

[2121] Para C of the special plea.

[123] Nevertheless, I am satisfied that none of the acts of purported interruption on which Mr van Embden relied in argument (supposed acknowledgements of liability as contemplated in s 14 of the Prescription Act) meets the test laid down by the law.

[124] Mr van Embden argued that the first interruption occurred on 23 July 2010 by way of Laubscher's original plea. I have already summarised the relevant paragraphs. Although Laubscher alleged there that all the monies contributed by Cameron-Dow had been personal loans to him, he did not admit an existing indebtedness in respect of those loans. His contention seems to have been that Cameron-Dow, by causing *Juliette* to be arrested in August 2009, had made further performance impossible. It is not enough that Laubscher admitted the conclusion of a loan agreement. What was required, in order for there to be an interruption in terms of s 14, is that he should have acknowledged a liability which still existed (*Anglorand* supra para 15 and cases there cited) in terms which excluded any defence as to the debt's existence (*Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 38).

[125] Mr van Embden argued, along similar lines, that there were acknowledgements of liability in Laubscher's replying affidavit in Case AC 70/2010 filed on 23 July 2010 and in his reply of 26 April 2013 to Cameron-Dow's request for further particulars for purposes of trial. The replying affidavit seems to me to be no more an acknowledgement of liability than the original plea. The trial particulars come closest to containing an acknowledgement – in para 32 Laubscher admitted borrowing money from Cameron-Dow and said he was uncertain about the total amount payable, and in para 34 he admitted that he was liable to repay any balance proved to be owing in respect of the monies advanced by Cameron-Dow to him.[22] These answers were repeated in Laubscher's amplified trial particulars of 21 August 2013.[23] It is unnecessary to decide, however, whether the trial particulars amounted to an acknowledgement of liability, because by 26 April 2013 the relevant debts had already prescribed. If a debt has prescribed, an acknowledgement does not revive it (*Desai NO v Desai & Others* 1996 (1) SA 141 (A) at 147G-H). An acknowledgement

[22] P119-120.
[23] See paras 38 and 40 at P131-132.

might in appropriate circumstances be accompanied by a new contractual undertaking to pay but that was not alleged or proved here.

[126] Laubscher's defence of prescription to the alternative claim thus succeeds and Cameron-Dow's claim for repayment of the amounts totalling R89 500 must be dismissed.

Costs

[127] Cameron-Dow has had substantially greater success than Laubscher, measured by value and by time devoted to the issues at trial. Laubscher has succeeded in warding off the ceded claim of R100 000 and has prevailed in regard to the personal loans totalling R89 500. Certain modest amounts initially included in Cameron-Dow's alleged advances to the partnership have fallen by the way. I think provisionally that Laubscher should be ordered to pay 75% of Cameron-Dow's costs associated with the issues determined by his judgment. Because I have not heard expert evidence concerning the detailed content of the account, the costs order will at this stage exclude such costs but I shall make provision for them to be claimed later.

[128] Since counsel could not fairly have been expected to address costs on all permutations, both parties will be entitled to seek a reconsideration of the costs order upon notice in accordance with the order below.

Order

[129] I make the following order:

(1) All references in this order to paragraphs are to paragraphs in the above judgment.

(2) Paras (6) to (9), (11), (12), (15) and (16) of this order are made provisionally subject to para (18) below.

(3) The second defendant is ordered to render an account to the plaintiff of all the operations conducted on or by way of *Juliette* over the period June 2006 until the arrest of *Juliette* on 20 August 2009 ('the account').

(4) The account shall reflect the advances made by the plaintiff to the partnership as set out in para 97 together with interest as set out in para 98. The plaintiff must, within two weeks of this order, furnish to the second defendant the interest rates contemplated in para 98.

(5) The plaintiff's advances plus interest as calculated in terms of (4) must be reduced by the amounts and as at the dates listed in para 104.

(6) The plaintiff's advances plus interest as calculated in terms of (4) must also be reduced by R82 000 as at 4 August 2006.

(7) The account shall reflect the advances made by the second defendant to the partnership as including those set out in para 108 together with interest as set out in para 109. If the second defendant claims to have made any further advances, he shall be entitled to include them in the account, together with all repayments received by him.

(8) The account must comply with the principles set out in paras 76 and 110-112.

(9) The net proceeds from the sale of *Juliette* together with interest thereon as held by the Registrar in the *Juliette* fund account ('the net proceeds'), and the net profit from the ownership of *Juliette* and the operations conducted on or by way of her over the period June 2006 to August 2009 ('the net profit'), must be reflected in the account as being applied as follows:

(a) payment to the plaintiff and the second defendant of their respective advances plus interest;

(b) payment to the plaintiff and the second defendant of any remaining net proceeds and net profit in the ratio 40 (the plaintiff):60 (the second defendant).

(10) Any amount payable in terms of the account to the plaintiff from the net profit shall be payable by the second defendant.

(11) The second defendant must deliver the account to the plaintiff within two months from the date of this order.

(12) If the parties cannot reach agreement on the content of the account within one month of its having been delivered to the plaintiff, either party shall be entitled to apply to this court, on notice to the other party, for further directions regarding the determination of the points of dispute.

(13) The plaintiff's claim, as purported cessionary, for payment of the amount of R100 000, as pleaded in paras 18-21 of the amended particulars of claim, is dismissed.

(14) The plaintiff's alternative claim for payment of the amounts lent by him to the second defendant personally and totalling R89 500 is dismissed on the basis that the said claims have prescribed.

(15) The second defendant is to pay 75% of the plaintiff's costs associated with the issues determined by this judgment excluding at this stage, however, the costs of the plaintiff's expert Mr Hylton Greenbaum.

(16) If the matter comes again before court to determine points of dispute in relation to the account, the plaintiff's entitlement to the said expert costs shall be determined at that hearing. If the matter does not again come before court as aforesaid, the plaintiff may apply, on notice to the second defendant, for an order that the second defendant pay the said expert costs.

(17) If either party wishes the court to reconsider any of the provisional orders made in paras (6) to (9), (11), (12), (15) and (16) above after hearing further evidence and/or argument, such party shall, within two weeks of the making of this order, deliver written notice to that effect, indicating which orders the party wishes the court to reconsider, the modification sought and whether the party claims a right to lead further evidence on the matters in question or only wishes to address further argument. If such notice is delivered, the court will give further directions for the hearing of the matter. If no such notice is delivered in respect of any particular provisional order, such order will become final after the expiry of the two-week period (subject always to such right as the party may have to pursue an appeal).

ROGERS J

APPEARANCES

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