BARBADOS
[Unreported]
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
Civil Appeal No. 22 of 2009

BETWEEN:
JOYCE GRIFFITH Appellant
AND
PHILIP VERNON NICHOLLS Respondent

BEFORE: The Hon. Marston C.D. Gibson, Chief Justice, The Hon. Sandra P. Mason and The Hon. Andrew D. Burgess, Justices of Appeal.

APPEARANCES: Mr. Amilcar Branche, Attorney-at-Law for the Appellant, Mr. Elliott Mottley, Q.C., Mr. Edmund Hinkson and Ms. Andrea Simon, Attorneys-at-Law for the Respondent
2012: March 5
2013: October 4

DECISION

INTRODUCTION
[1] BURGESS JA: The respondent, Mr. Philip Nicholls, the appellant, Ms. Joyce Griffith and another, Mr. Allan Watson, were the partners of the former partnership of Cottle Catford & Co., Attorneys-at-Law. They were also the parties to an agreement providing for the dissolution of that partnership. Mr. Nicholls brought an action in his own name against Ms. Griffith pursuant to that dissolution agreement. Ms. Griffith denied that he could do so.

[2] This case is therefore essentially a simple breach of contract claim. However, this essential simplicity has been somewhat clouded by the fact that the contract in respect of which the breach is alleged concerns the dissolution of a partnership. In particular, Ms. Griffith's denial of Mr. Nicholls' breach of contract claim is predicated on the interplay between the Partnership Act, Cap. 313 (Cap. 313) and contractual agreements in the allocation of partnership rights and liabilities.
Because of the respondent's cross-appeal, the case also raises a subsidiary issue in respect of interest awards on judgments.

[3] Professionals in Barbados today are employing the partnership as a business organisation more and more. So, although we have not felt any difficulty in coming to the conclusion at which we ought to arrive in this case, we have decided to write this opinion examining the interplay between the relevant principles of partnership law and ordinary contract law in the context of this case which we hope will be of some assistance to these professionals.
For the same reason, we thought it appropriate to explore the rules on interest awards in the context of partnership agreements.

BACKGROUND
The Pleadings
[4] On August 16, 2005, Mr. Nicholls, filed an action in the High Court (Civil Suit No. 1612 of 2005) against Ms. Joyce Griffith and, it may be noted, (Civil Suit No 1613 of 2005) against Mr. Allan Watson. Para [4] of the Statement of Claim in Civil Suit No. 1612 of 2005 averred that, by an agreement made on December 31, 2002 between Mr. Nicholls, Ms. Griffith and Mr. Watson, it was agreed that the partnership of Cottle Catford & Co would be dissolved with effect from December 31, 2002. Para [5] claimed that it was a term of the said agreement that Mr. Nicholls, Ms. Griffith and Mr. Watson, would repay the amounts owed by the partnership in the proportions of their ownership in the partnership. Paras [6] and [7] alleged in effect that Mr. Nicholls demanded repayment pursuant to clause 4 of the agreement. Para [8] further alleged that Ms. Griffith, in breach of the agreement, failed, neglected or refused to repay the sums owed by her under the agreement and claimed that sum calculated at $456,102.36 and interest thereon.

[5] On September 20, 2005, a Defence and Counterclaim to the Statement of Claim was filed by Ms. Griffith. Para [2] of the Defence and Counterclaim stated that clause 4 of the Statement of Claim was not admitted, and went on to claim that the partnership was automatically dissolved on December 31, 2002 on the retirement of Mr. Watson in accordance with the Partners Pension Agreement dated January 1, 1992 "and according to Law".

[6] The major thrust of Ms. Griffith's defence is contained in paras [3] and [3] (i) of her Defence and Counterclaim. These paragraphs demand being quoted in extenso. They read as follows:

"3. By Clause 4 of the Agreement mentioned and referred to in paragraph 4 of the Statement of Claim it was stipulated as a Condition precedent

that the indebtedness of each partner to the partnership as at the 31st day of December, 2002 would be ascertained by an audit of the firm's accounts as of that date and the stated amount would form part of the said Agreement. Up to the present date no audit of the partnership's accounts has been carried out nor has the defendant been furnished with such audited accounts by the Plaintiff. In the premises the Defendant is not liable to the Plaintiff in any sum or at all.
(i) With regard to Clause 5 of the said Agreement it is an express and/or implied condition precedent that all tangible assets of the said partnership would be sold and the value received therefrom would be paid into the account of the said partnership at FirstCaribbean International
Bank, Broad Street on or before the 30th day of June, 2003 before
the indebtedness of each partner to the partnership could be determined. The
Plaintiff has not up to the present date certified to the Defendant the agreed
book value of the assets nor delivered a statement of the value received or the
sum of money standing to the credit of the said account of the partnership at
FirstCaribbean International Bank as provided for under Clause 7 of the said
Agreement."

[7] In a nutshell, Ms. Griffith in her Defence denied being indebted to Mr. Nicholls unless and until proper accounts were produced to her in accordance with the condition precedent in the agreement. She, however, in para [4] of her Defence and Counterclaim intimated that she would pay to the former partnership such amount as was owed by her to the partnership when and after the proper accounts were produced to her in accordance with the condition precedent in the agreement.

[8] Mr. Nicholls filed his reply to the Defence and Counterclaim on October 13, 2005.
In it, he denied that the partnership was automatically dissolved on December
31, 2002 on the retirement of Mr. Watson in accordance with the Partners
Pension Agreement dated January 1, 1992 "and according to Law" and reaffirmed
that the partnership was dissolved pursuant to the December 31, 2002 agreement. He admitted that the taking of an account was a part of the December 31, 2002 agreement but stated at para [2] as follows:

"Clause 4 of the said Agreement is prefaced by the words "as soon as practicable". An audit has not been carried out because of the failure of the defendant and Allan Watson to repay their debt to the Partnership forcing the financial burden of the Old Partnership to fall solely on the shoulders of the Plaintiff. As such it has not been possible for the Plaintiff to pay for such an audit as he has had to service the debts of the Defendant and Allan Watson out of his own resources."
Hearings
Before Cornelius J:
[9] The suit was first heard by Cornelius J in Chambers on March 7, 2006. At this hearing, it was argued by Ms. Griffith that Mr. Nicholls could not sue for the partnership debt without accounts being taken and settled. Mr. Nicholls made no objection to the presenting of the accounts and Cornelius J entered an order that the Plaintiff file the accounts "to date".
[10] Mr. Nicholls subsequently filed accounts in the High Court in accordance with Cornelius J's order. Despite the accounts being filed, the matter took over a year to come back before Cornelius J due to the inability of Mr. Nicholls and Ms. Griffith to settle the terms of the order made by Cornelius J. The sticking point was whether "to date" stated in the order meant as of the date of the order made by Cornelius J. The order was only settled by Cornelius J herself issuing an order on 5 September 2007 confirming that the date to which the accounts were to be filed was "as on December 31, 2002".

The Consent Order by the Court of Appeal:
[11] On a motion made and filed in this Court on 18 May, 2007, Ms. Griffith sought leave to appeal the order made by Cornelius J on the 7 March, 2006. By Order made on the 3 December, 2007 and entered on the 19 February, 2009, this Court dismissed the application for leave to appeal and ordered by consent inter alia:

"(1) That the Respondent/Plaintiff produce to the Appellant/Defendant on the 17th and 18th days of December 2007 at the office of the Respondent/Plaintiff;

(a) the former partnership accounts, bank statements and records as at the 31st day of December, 2002;
(b) unaudited accounts of receipts and payments
of the former partnership debts and liabilities from the 1st day of January, 2003 to today's date, the 3rd day of
December, 2007.
(2) That the Appellant/Defendant within seven (7) days of the date
hereof, pay her portion of the expense of preparing the unaudited accounts that have already been prepared.

(3) That the Appellant/Defendant and the Respondent/Defendant pay their respective share of the costs in respect of updating the unaudited accounts to the 3rd day of December 2007.

(4) That on the settlement of these accounts that be submitted to the High Court to be entered as judgments in respect of the Defendants liabilities of the former partnership."

[12] Pursuant to the consent order, a meeting was convened at Mr. Nicholls' office on 17
December, 2007 at which partnership accounts prepared by Mr. Forde, Mr.
Nicholls' accountant, were presented to Ms. Griffith. On 20 February, 2008, Ms. Griffith's and Mr. Watson's accountant, Mr. Burrowes, wrote to Mr. Nicholls requesting further information in respect of these accounts and this was supplied by Mr. Nicholls.

[13] In November, 2008, Ms. Griffith and Mr. Watson terminated the services of Mr. Burrowes and failed to retain a new accountant. Despite this failure, Ms. Griffith refused to attend meetings arranged by Williams JA to settle the partnership accounts claiming, in respect of the last such

meeting, that she needed to have the services of an accountant.

Before Crane-Scott J:
[14] On April 30, 2009, Mr. Nicholls made an interlocutory application by way of summons filed on the said date for an order that, inter alia:

"The Accounts of the Old Partnership of Cottle Catford & Co. between the Plaintiff and the Defendants prepared by Carlyle Forde and submitted to this Court in 2006 be accepted and confirmed as the Accounts for the Partnership as to the end of 2004 with the adjustments for income received in 2006 as outlined in the said Accounts."

[15] The summons was heard by Crane-Scott J on 15 and 27 May, 2009; 2, 22, 23 and 29 June, 2009; 13 July, 2009; 10, 11, 18 and 21 August, 2009; and, 10, 11, and 17 September, 2009. During this period, in the words of Crane-Scott J:

"[3]…the Defendants made numerous requests for additional information and particulars to be provided by the plaintiff to enable them to conduct a detailed examination of the partnership accounts which had been prepared by Mr Carlyle Forde, the Chartered Accountant, with a view to their ultimately being settled by the Defendants as contemplated in the Court of Appeal Consent Order of 3rd December, 2007.
[4] The vast majority of the Defendants' requests for information and further particulars were incorporated in numerous interim orders which were duly perfected and filed by the Plaintiff and served on the Defendants with a view to facilitating the process.

[5] In instances where it was more convenient (due to the sheer volume of the documents to be inspected) for the requested information to be physically examined or inspected by the Defendants in an out-of-Court venue, orders were made for such meetings to be facilitated at the offices of the accountant, Mr Forde, at times convenient to the parties or their representatives and to him."

[16] In these hearings also, Crane-Scott J painstakingly went through each line of the accounts prepared by Mr. Forde and after Ms. Griffith and Mr. Watson had confirmed their correctness and that they had no objection to the line items, adopted these accounts as the settled accounts of the partnership.

[17] On 21 September 2009, Crane-Scott J ordered at para [36] of her judgment, in so far as it affects the appellant, as follows:

"1) The Accounts of the former partnership of Cottle Catford & Co. between the Plaintiffs and the Defendants prepared by Mr Carlyle Forde as contained in the following documents, namely,

i. Statement of Funds available at December 31, 2002 and Funds Received and Paid after December 31, 2002 (with Supporting Schedules) updated as at August 26th 2009 and filed herein on the 8th day of September, 2009 and subsequently amended with leave of the Court on September 14, 2009 and filed herein on the 14th day of September, 2009

ii. ...

iii. Judgment for the Plaintiff be and is hereby entered against the First Defendant in the sum of $441,576.00 certified in the accounts of the former partnership to be due by the First Defendant to the Former Partnership and to the Plaintiff together with interest thereon at the rate of 4% per annum from the date of service of the Writ to the date hereof and at the rate of 8% per annum from the date hereof until satisfaction."

The Defendants/Appellants were granted a stay of execution for six weeks after they gave notice of appeal.

The Issues in this Appeal

[18] In September of 2009, Ms. Griffith filed a notice of appeal against this order of Crane-Scott J. In early December of 2009, this Court, at the hearing of that notice, determined that the notice was defective and granted leave for the filing of the proper notice. This was filed on 18 December 2009 and on 8 January 2010 Mr. Nicholls filed a respondent notice. After a number of adjournments, the appeal was finally heard on 5 March, 2012.

[19] The notice of appeal contained twenty grounds of appeal and the respondent notice a claim for variation of the rate of interest awarded by Crane-Scott J. Be that as it may, it has emerged from the written and oral submissions to this Court by the appellant and respondent that the determination of this case really involves three principal issues. The first is whether Mr. Nicholls' action in the High Court (Civil Suit No. 1612 of 2005) in his own name against Ms. Griffith to recover the moneys owing by her was properly brought. The second is whether Crane-Scott J wrongly applied the law in settling the partnership accounts. The third is whether the rates of interest awarded by Crane-Scott J should be varied in any way.

[20] We will hereafter consider each of these issues seriatim.

First Issue--Was Mr Nicholls' action in his own name against Ms Griffith for the moneys owing by her properly brought?

[21] Mr. Branche for Ms. Griffith has with, admirable courage and no little skill, attempted to craft a case for answering this question in the negative. His entire argumentative edifice was constructed on the elementary principle of partnership law, espoused in cases like Crawshay v Collins 2 Russ 325 at p 347; West v Skipp 1 Ves. Sen at p 242; Foster v Donald 1 Jac & W 252 per Lord Eldon; Richardson v The Bank of England (1838) 4 My & Cr 165 at pp 172-174, that the relation between partners is not that of debtor and creditor, unless and until the partnership accounts have been finally taken after dissolution and a balance has been ascertained to be owing from one to another. Building on this basic rule, Mr. Branche argued that, at the time of the filing of the action by Mr. Nicholls, it could not be said that Ms. Griffith was indebted either to him personally or to the former partnership as the accounts had not then been settled. The action, being not an action for a partnership account, was defective and could not therefore have been maintained and should have been dismissed by Cornelius J.

[22] Mr. Branche's argument continued that the consent order made by this Court was made without prejudice to Ms. Griffith's foregoing defence and was not intended to, and did not cure the defect in the original proceedings. According to him, the consent order made by this Court was to the effect that, upon the settling of the accounts of the former partnership, that they be submitted to the High Court to be entered as judgments in respect of the appellant's liabilities to the partnership. Consequently, there should have been an amendment to the cause of action initially filed in the High Court by Mr. Nicholls to bring an action for a partnership account.

[23] Mr. Branche observed that, despite being granted leave to amend his statement of claim for the purpose of showing the increased amounts due from Ms. Griffith upon the settling of the accounts, Mr. Nicholls did not amend the cause of action initially filed. For this reason, Mr. Branche submitted that the action before Crane-Scott J was not maintainable and that this Court should not uphold the reasoning of Crane Scott J as Mr. Nicholls' "claim is not adequately supported".

[24] According to Mr. Branche, as a corollary to the foregoing, another fundamental partnership principle applied to prevent the respondent from recovering in the action as instituted by him. It is that a partner, like Mr. Nicholls, has no right of action against another partner, like Ms. Griffith, for the balance owing to him until after final settlement of accounts, and money lent to a partnership by a partner cannot be recovered in a common law claim for money lent: a partner is only entitled to be indemnified by the partnership out of its assets or by way of a contribution by his partners. So that where partners, like Ms. Griffith and Mr. Nicholls, are under a joint liability in respect of a particular transaction arising out of or connected with the partnership, and one of them is compelled to pay more than his share of such joint liability, as Mr. Nicholls admittedly had to do in this case, the court will not enforce his right of contribution in respect thereof against his co-partner, Ms. Griffith, except in an action for a general partnership account.

[25] It is evident that this elaborate analytical structure erected by Mr. Branche is predicated on the applicability of the general principles of partnership law to this case. So, during the course of his oral submissions to this Court, the Court raised the question with him as to whether these general principles had supplanted common law freedom of contract principles and as such were not subject to any agreement between the partners. He answered, as he had to, that they had not. After all, section 21 of Cap. 313 provides generally as follows:

"The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either expressed or inferred from a course of dealing."

And both section 26 (1) (which sets out the rules as to the interests and duties of partners) and section 46 (which sets out the rules for distribution of assets on final settlement of accounts) of Cap. 313 are expressly stated to be "subject to any agreement" between partners. It is here that the difficulty in Mr. Branche's submissions on this first issue lies.

[26] It is palpably clear that the action filed by Mr. Nicholls against Ms. Griffith in the High Court in Civil Suit No. 1612 of 2005 was based on an alleged breach of the dissolution agreement made on December 31, 2002 between himself, Ms. Griffith and the other partner, Mr. Watson. Ms. Griffith, in her Defence and Counterclaim did not deny this agreement. In fact, as has been seen, she claimed to rely on clause 4 of this agreement for a defence to the action, namely, that it was a condition precedent to her liability to pay moneys due under the agreement that the indebtedness of each partner be ascertained by an audit of the firm's accounts as at the date of the agreement.

[27] The conclusion, then, that Mr. Nicholls and Ms. Griffith's dissolution rights and duties were the subject matter of the dissolution agreement is impatient of debate. Accordingly, Mr. Nicholls, as a party to that contract, was entitled to sue any other party to that contract, of course including Ms. Griffith, for breach of that contract. This is basic contract law and sections 26 and 46 of Cap. 313 are expressly declared to be subject to any contract between partners. The upshot of all this is that Mr. Nicholls was fully entitled, as he did, to bring the action in his own name in the High Court in Civil Suit No. 1612 of 2005 against Ms. Griffith for breach of contract. There was no need for him to bring an action for a general partnership account under partnership law.

[28] The case has always been treated, and we may add correctly, as a breach of contract action. It was so treated before Cornelius J who made an order on this basis and in pursuance of Ms. Griffith's counterclaim for the accounts of the partnership to be audited and for specified accounts to be made and taken as a condition precedent to her liability under the dissolution contract. We pause here to stress that it was never contended by Ms. Griffith that the condition precedent here prevented the formation of the dissolution contract: her only contention was that the condition precedent had to be fulfilled for liability to arise under that contract. The subsequent consent order in this Court was made on the same basis as that of Cornelius J.

[29] It is our judgment, then, that in the foregoing circumstances, Crane-Scott J
was correct to interpret the consent order of this Court as inferentially upholding the cause of action as originally filed by Mr. Nicholls. Ms. Griffith, having counterclaimed for a partnership account pursuant to the terms of the dissolution agreement, could not at the same time deny Mr. Nicholls' right to sue for breach of that contract. Accordingly, Mr. Branche's contention that Crane-Scott J "wrongfully failed to determine as a matter of law the correct cause or causes of action in the Plaintiff's claim and the defendant's defences thereto" is misconceived. What was the correct cause of action was not in issue at any stage of the proceedings and there was certainly no reason for Crane-Scott J to treat it as an issue for her determination. Her only task was to settle and confirm the accounts of the former partnership pursuant to this Court's consent order. She did just that.

Second Issue--Did Crane-Scott J wrongly apply the law in settling the partnership
accounts?
[30] In approaching this second issue, Mr. Branche contended that the methodology adopted by Crane-Scott J in settling the accounts of the former partnership of Cottle Catford & Co was insufficient in law to establish that the accounts prepared and certified by Mr. Forde, Mr. Nicholls' accountant, were the settled accounts of that partnership. According to Mr. Branche, Crane-Scott J should have followed the formula and procedure as set out in sections 45 and 46 of Cap. 313. He cited these sections in extenso but failed to comment on the fact that both sections are expressly stated to be "subject to any agreement" between the partners. The question as to whether sections 45 and 46 of Cap. 313 should have been followed by Crane-Scott J is this: was there "any agreement" between Mr. Nicholls and Ms. Griffith as to how the partnership accounts were to be settled?

[31] In our judgment, the consent order made by this Court was such an agreement
aimed at establishing a machinery for settling the accounts in furtherance of clause 4 of the dissolution agreement. The law which leads to this conclusion is well settled but may be advantageously retraced here.

[32] In the English Court of Appeal case of Siebe Gorman & Co Ltd v Pneuipac Ltd [1982] 1 All ER 377 at 380, Lord Denning said of orders by consent:

"There are two meanings to the words "by consent". That was observed by Lord Greene MR in Chandless-Chandless v Nicholson [1942] 2 KB 321 at 324. One meaning is this: the words "by consent' may evidence a real contract between the parties….The other meaning is this: the words "by consent" may mean "the parties hereto not objecting". In such a
case, there is no real contract between the parties….In every case, it is
necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without obligation?"

That statement of the law has been cited with approval in a number of West Indian cases including Phipps et al v Morrison (Unreported) (Civil Appeal No 86 of 2008 J'ca CA); Alexioux et al v Campbell (Unreported)(Commonwealth Appeals Nos 6 and 7 of 2006 Bah CA); Hillocks Agencies Ltd v Saunders International Sales Corp (Unreported) (Civil Appeal No 9 of 1992 St V CA).

[33] In the instant case, the consent order was manifestly of the first category identified
by Lord Denning MR. In other words it evidenced a real contract between the partners. It imposed an obligation on Mr. Nicholls to provide Ms. Griffith with specified accounts of the former partnership on a stipulated date and place; it expressly provided for the payment by Ms. Griffith and Mr. Nicholls of the expenses incurred in the preparation of the accounts; and it provided the settlement of these accounts to be entered as judgment in respect of Ms.
Griffith's liabilities of the former partnership. The test as to whether these were terms accepted by Mr. Nicholls and Ms. Griffith is whether the reasonable man would believe that they assented to these terms: see Centrovencial Estates plc v. Merchant
Investors Assurance Co. Ltd. [1983] Comm. L R 158; The Hannah Blumenthal [1983] 1 AC 834. In our view, the only reasonable conclusion to be drawn in all the circumstances of this case is that the reasonable man would believe that they so assented.

[34] So, there is no doubt that there was an agreement in the form of the consent order on how the accounts of the former partnership were to be settled. Admittedly, this agreement did not contain any express term authorising the settlement of these accounts by the court in the event of either party doing anything which might frustrate such settlement. But such a term is to be implied, if necessary, on the "officious bystander" test to give efficacy to the consent
order. This test was described by MacKinnon LJ in the English Court of Appeal case of Shirlaw v Southern Foundries Ltd [1939] 2 KB 206 at 227 where he said:

"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

It is not in the realm of dispute that, if at the time of the consent order an officious bystander had said that there should have been an express term in the order that in the event of either party seeking to frustrate the settlement of the partnership accounts that they were to be settled by the court, the parties would have said "Oh, of course".

[35] In sum then, the machinery for settling the accounts of the former partnership was
contained in the terms of the consent order, including an implied term that, in
the event of either party doing anything to frustrate such settlement, the
court should settle the accounts in accordance with those terms. This is
precisely what Crane-Scott J did. In fact, contrary to Mr. Branche's contention, the consent order, being an agreement, Crane-Scott J was precluded by the express words of sections 45 and 46 of Cap. 313 from following the formula and procedure as set out in those sections. In these premises, it is difficult to resist the conclusion that Crane-Scott J was plainly correct in applying the law as she did in settling the accounts

of the former partnership.

Third Issue--Should the rate of interest awarded by Crane-Scott J be varied in any way?

[36] Mr. Nicholls, in the Respondent Notice, claims that so much of Crane-Scott's judgment:

"as awarded interest to the Plaintiff/Respondent at a rate of 4% per annum from the date of the service of the respective writs of summons to the date of judgment and interest at a rate of 8% per annum from the date of judgment to the date of satisfaction should be varied in any event as follows:

1. To vary the rate of interest awarded to interest at a rate of 12% per annum or such other rate as the Court thinks fit for the period January 1, 2003 to April 8, 2007 on the sum of $870,576.00 being the full amount of the First Defendant/Appellant's indebtedness prior to the apportionment of the First Defendant/Appellant's one-third fee of $429,000 received from Kingsland Estates Limited which apportionment reduced the amount owing by the First Defendant/Appellant.

2. ...

3. In the alternative:

(i) To increase the rate of pre-judgment interest awarded to the Plaintiff/Respondent against the First Defendant/ Appellant from 4% per annum from the date of service of the writ to the date of judgment to 12% per annum or such other rate as the Court thinks fit for the same period;

(ii) ...

(iii) To increase the rate of interest awarded to the Plaintiff/Respondent against the Defendants/ Appellants
from 8% per annum from the date of judgment to the date of satisfaction to 12% per annum or such other rate as the Court thinks fit for the same period."

Mr. Branche agrees that the rate of interest awarded by Crane-Scott J was wrong but contends that instead the rate awarded should have been 6% in accordance with section 26 (4) of Cap. 313.

[37] These claims for variation of the rate of interest awarded by Crane-Scott J can be summarily disposed of.

[38] First, on its express language, section 26 (4) of Cap. 313 does not apply in this case. That subsection applies only to an interest award where a partner makes, for the purposes of the
partnership, an actual payment or advance beyond the amount of capital which he has agreed to subscribe. That is clearly not the case here. Accordingly, Mr. Branche's contention is wholly unsupported.

[39] Second, we agree with Mr. Mottley QC that, even though she did not say so expressly, Crane-Scott J correctly awarded interest pursuant to section 35 of The Supreme Court of Judicature Act, Cap. 117A (Cap. 117A). However, we cannot agree with Mr. Mottley QC that Crane-Scott J had any discretion under that section to award what he calls "more realistic rates based on modern conditions" than she awarded.

[40] It is not in the terrain of dispute that section 35 (1) governs her powers to award interest between the date when the cause of action arose and the date of judgment. That subsection provides:

"…..in any proceedings tried in the High Court for the recovery of debt or damages that court may, if it thinks fit, order that there be included in the sum for which judgment is given interest at such rate as may be prescribed by rules of court on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

On its plain words, this subsection gives to the court an unrestricted discretion
to determine whether or not to award interest between the date when the cause of
action arose and the date of judgment. On the other hand, in respect of such rate of interest, the subsection restricts the court to awarding what is prescribed in the rules of court. Crane-Scott J was therefore correct to restrict the award between the date when the cause of action arose and the date of judgment to the interest prescribed by the rules of court as is mandated by section 35 (1).

[41] Crane-Scott J was similarly correct in refusing to discover the discretion claimed by Mr. Mottley QC in respect of her interest award on the judgment from the date of judgment until satisfaction. Section 35 (5) governs such an award. This subsection provides, in so far as it is relevant as follows:

"The Court shall award interest at such rate as may be prescribed by rules of court on

(a) a judgment debt or on such part thereof as for the time being remains unsatisfied from the date of judgment until satisfaction..;"

The use of the word "shall" in this subsection clearly denies any opportunity to
find that Crane-Scott J was possessed of any discretion to award interest other than "at such rate as may be prescribed by rules of court".

[42] We would only add that the copious English authorities cited by Mr. Mottley, QC in support of the view that Crane-Scott J could exercise a

discretion to award “more realistic rates based on modern conditions” were based on statutory provisions substantially different from those in section 35 of Cap. 117A. Unlike section 35 of Cap. 117A, the relevant English legislation gave the court power to award interest “at such rate as the court thinks fit or as rules of court may provide”. Crane-Scott J was therefore correct to distinguish those authorities and to apply section 35 of Cap. 117A as mandating interest awards “at such rate as may be prescribed by rules of court”.

[43] It is here that Crane-Scott J’s award demands some explanation. The Rules of the Supreme Court 1982, the applicable rules in this case, do not prescribe any rate of interest, nor indeed does any other relevant written law. Be that as it may, the long standing practice in our courts has been to award interest in respect of the period between the date when the cause of action arose and the date of judgment at a rate of 4%, and 8% in respect of an interest award on the judgment from the date of judgment until its satisfaction. In fact, this practice has acquired the status of an unwritten rule of court.

[44] The legal genesis of this practice is not clear. However, it seems to have originated in section 13 (a) of the now repealed Supreme Court of Judicature (Amendment) (No. 2) Act, 1961-55. That subsection amended section 46 of the now repealed Supreme Court of Judicature Act, 1956 to read as follows:

“In any proceedings for the recovery of debt or damages, the Supreme Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate, not exceeding eight per centum on the whole or any part of the period between the date when the cause of action arose and the date of payment.”

It appears that it is out of this amendment that the practice of awarding interest in respect of the period between the date when the cause of action arose and the date of judgment at a rate of 4%, and 8% in respect of an interest award on the judgment from the date of judgment until its satisfaction. This practice has been treated as a rule for purposes of section 35 of Cap. 117A and constituted the legal basis of Crane-Scott J’s award.

Disposition

[45] In the result, this appeal fails on the grounds raised. The Respondent’s claim for the rate of interest to be varied also fails. Accordingly, we dismiss both the appeal and the claim for variation of the rate of interest.

Chief Justice

Justice of Appeal Justice of Appeal.