

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2010/0277

BETWEEN:

ALSON NICHOLAS

Claimant

and

ADOLPH AUDAIN

TRICIA AUDAIN

Defendants

Appearances:

Mrs. A Williams-Grant for the Claimant

Mr. Lawrence Daniel for the Defendants

2016; November 30

JUDGMENT

- [1] **HENRY, J.:** According to the business registration form, Alson Nicholas (Mr. Nicholas), Tricia Audain and one Calbert Francis carried on the business known as Rosenic Distribution. Adolph Audain is the husband of Tricia Audain and is the person credited with the idea of starting the business. Mr. Nicholas now claims against both Mrs Audain and Mr Audain damages for the conversion of a cheque in the amount of \$6,200.00 and for the conversion or detainment of certain goods and equipment belonging to the business. The defendants counterclaim for the sum of

EC\$94,472.53 for conversion by Mr. Nicholas of goods and monies of the partnership and loss of earnings of EC\$135,000.00.

The Claim

- [2] In his Statement of Claim, Mr. Nicholas avers that at the material time he was the Manager and sole financial investor in the Rosenic Distribution (Rosenic), which had as its principal business the sale and distribution of juices, coffee and related goods. Further, Adolph Audain (Mr. Audain) had agreed to invest in the business, but at the material time Mr. Audain and his wife Tricia Audain were not financial investors in the business. However, Mr. Audain assisted in the operations from time to time when asked by Mr. Nicholas. Tricia Audain (Mrs. Audain) was at the material time the secretary of the business.
- [3] In regard to the claim for conversion of the cheque, Mr. Nicholas avers that on or about the 6th of October 2008, prior to leaving the country on vacation, he left two Caribbean Union Bank (CUB) cheques numbers 0134 and 0135 for the sole purpose of paying freight and customs charges to facilitate the clearing of goods due from suppliers. On or about the 20th October 2008, he discovered that cheque number 0134 was issued by Mr. Audain to and cashed by one Mr. J. Pollard in the amount of \$6,200.00 for services allegedly performed by Mr. Pollard for the benefit of Mr. and Mrs Audain.
- [4] In regard to the claim for the conversion or detinue of goods and equipment of the business, in paragraph 5 of the claim he avers that on the 27th of October 2008, it was discovered that Mr. Audain represented to customers of Rosenic that goods totalling \$11,908.40 belonging to Rosenic, and which Mr. Audain had been asked to deliver on behalf of Rosenic, were goods belonging to him. Further, Mr. Audain also substituted the delivery note prepared by Rosenic for one of his own and requested that payment be made to him and not to Rosenic. Mr. Audain delivered the goods totalling \$11,908.40 belonging to Rosenic to the customers and was paid pursuant to the request. The business has not been compensated for those goods.
- [5] Additionally, it is averred that Mr. and Mrs. Audain through their business Flavaristic Refreshment Services (Flavaristic), have offered for sale equipment belonging to Mr. Nicholas and Rosenic, which equipment is valued at EC\$28,581.51.
- [6] In regard to the entire claim, Mr. Nicholas alleges that Mrs Audain was aware of the actions of Mr. Audain and colluded with him.

The Defence

- [7] Both defendants deny that they converted the cheque or goods belonging to Rosenic as alleged. They allege that Rosenic was a Partnership consisting of Mrs Audain, Mr. Nicholas and one Calbert Francis. According to them, the nature of the Partnership is set out in the Minutes of the partnership's first meeting dated 29th February 2006. It was agreed and understood that each partner owned one-third interest in the business; that all capital injection would be done only after

agreement by all partners and that all capital injections were the property of the Partnership. Further, that each partner would be responsible for the operation of the business, its debts/profits, jointly and severally.

- [8] They also aver that at all material times, Mrs Audain was a majority financial investor in the partnership and the Secretary and the person designated to correspond with the bank regarding any changes to the Partnership Accounts. Mr. Audain was the principal operator of the business, with responsibility for the accounting records, securing new accounts/customers etc. According to the Audains, it was Mr. Audain who started the business and it was upon his knowledge of the business that the Partnership relied. Mr. Nicholas was responsible for transportation of the goods and banking.
- [9] According to the pleading, it was the usual practice that in the absence of any partner, the partnership cheque books and deposit books were left with the other partners. Contrary to the usual practice, cheque number 0134 was given to Mr. Audain by Mr. Nicholas' brother, to clear bills on behalf of the business. Mr. Audain avers that he issued cheque number 0134 to J. Pollard for services he had rendered to the business, and not for Mr. Nicholas' personal benefit.
- [10] Mr. and Mrs. Audain state that the only monies received by Mr. Audain were for goods sold on invoices # 091301 and 091302, which were purchased by Mr. Audain directly from the supplier in accordance with the supplier's wishes. They categorically deny that they delivered goods, belonging to Rosenic, to customers and requested that payment be made to them. They also deny that they used goods belonging to Rosenic for their personal use and benefit.
- [11] Mr. and Mrs. Audain also deny that through their business Flavoristic they have offered for sale equipment belonging to Mr. Nicholas and Rosenic. They state that the equipment referred to by Mr. Nicholas have not been paid for by him and that Mr. Nicholas abandoned that equipment.
- [12] Further, they aver that it is the unilateral actions of Mr. Nicholas in acting contrary to the terms of the Resolution agreed between the parties which have caused the demise of the partnership business.

The Business known as Rosenic Distribution

- [13] Mr. Nicholas' position is that he is the sole financial investor of the business while Mr. and Mrs Audain maintain that the business is a partnership of which they are equal partners.
- [14] Mr. Nicholas admits that along with Colbert Francis, Mr. Audain was one of the original organizers of Rosenic. His evidence is that it was Mr. Audain who suggested that Mr. Nicholas, Colbert Francis and himself start a business for the sale and distribution of coffee products juices and beverages. Sales would primarily be made to the hotels. The three agreed to operate under a partnership. His further evidence is that Mr. Audain asked that his wife's name be recorded instead of his because of his position elsewhere. This was done and the partners were recorded as Alson Nicholas, Colbert Francis and Tricia Audain.

- [15] Mr. Nicholas also gave evidence as to the intention and arrangement of the partnership. His evidence is that the intention and agreement was that each of them would put in an equal amount of cash into the business and share the profits and losses equally. He does not deny that initially they intended the business to operate as a partnership. He states however, that neither Mr. Audain nor his wife Mrs. Audain ever made the agreed financial investment, only Mr. Nicholas and Colbert Francis did. Therefore Mr. and Mrs. Audain should not be allowed to benefit from his financial investment.
- [16] With regard to the structure of the partnership, Mr. Nicholas' evidence is that all three would meet to discuss decisions to be taken. After Colbert Francis left then Mr. Nicholas and Mr. Audain would meet. Mr. Nicholas and Mrs Audain were the signatories to the business account after Colbert left. Accordingly, whenever, Mr. Nicholas travelled he would leave the cheque book with Mrs. Audain. On a day to day basis, Mr. Nicholas was responsible for clearing of the goods and machines from the ports, writing invoices, paying taxes, depositing the funds and writing the cheques and dealing generally with the banking arrangements. Mrs. Audain was the Secretary, otherwise she had no involvement in the business. She signed communications to the bank or the cheques when he was off island.
- [17] The evidence of Colbert Francis supports Mr. Nicholas' evidence in many respects. Colbert's evidence is that he was approached by Mr. Audain with the idea of setting up the business. The proposal was that Mr. Audain, Mr. Nicholas and Colbert Francis would start the business as a partnership. They decided to name the business Rosenic Distribution. It was agreed that each would contribute \$4,000.00. On the particular day all three went to the bank to open the business account, Mr. Nicholas put in his \$4,000.00. Colbert Francis only had \$1000.00. Mr. and Mrs Audain made no contribution. They indicated that they would make the contribution later. The bank statement shows the initial deposit of \$5,000.00 made on 13th March 2006. About two weeks later, Colbert Francis added another \$2,000.00 to his contribution. Mr. and Mrs Audain still had not put any funds into the account. Rosenic was able to get started with the \$7,000.00 contribution. Shortly after, Calbert took the decision to leave the partnership effective 30th September 2006. He was repaid the amount he had invested plus an additional \$1,000.00. His evidence is that at the time he left Rosenic, Mr. and Mrs. Audain had made no financial investment in Rosenic.
- [18] With regard to his financial investment in Rosenic, Mr. Audain's evidence differs from that of the other witnesses. His evidence is that the agreement was that the initial investment would be in the form of cash deposits or payment of bills at the start of the business. His evidence is that Mrs. Audain's investment amounted to \$16,574.69 and was made up of wage and travelling payments to the salesman/technician, duties and taxes, purchase of spare parts and products. He refers to the 2006 statement of income and expenditure prepared by him which shows that between 6th February and 20th May 2006 Tricia made contributions totalling \$8,950.00. Mrs Audain in her witness statement says her initial investment in the business consist of payments made by her "to bring in Products and parts".

- [19] Mr. Nicholas denies that the agreement was that the initial investment would be either cash or payment of bills. Mr. Nicholas' evidence in regard to the first shipment is that he cleared the shipment on behalf of Rosenic. Payment was made from Rosenic's account on 18th May 2006. Mr. Nicholas' evidence is that he was unaware of the 2006 statement before the start of this litigation.
- [20] Partnership involves a contract between the partners to engage in a business with a view to profit. Each partner may contribute property, skill or labour or cash. The existence of a partnership is a matter of fact. Generally speaking, the essential elements of a partnership are:
- (a) There must be a business;
 - (b) The business must be carried on by two or more persons in common with a 'view to a profit';
 - (c) A contract express or implied.
- [21] From the evidence before the court, including the minutes of the meeting held 28th February 2006, the court is satisfied that the parties intended to and did enter into a partnership agreement to carry on the business known as Rosenic Distribution. The court finds that even though Mr. Audain initiated the formation of the business, because of his employment elsewhere, he did not want to be named. The three named partners were Alson Nicholas, Colbert Francis and Tricia Audain. Each was intended to have equal interest in the business.
- [22] The court accepts the evidence of Colbert Francis and Mr. Nicholas that the agreement in respect of capital contribution to the partnership was in the nature of cash. Each partner was to contribute \$4,000.00 cash. While there may have been previous preparatory acts, the court finds that with the opening of the partnership bank account in March 2006, the partnership commenced.
- [23] The court finds that Mrs. Audain failed to make that initial contribution to the partnership. There is no evidence before the court to support Mrs Audain's contentions that it was common for the partners to pay expenses that would be used as their interest in the business. The contributions of the other two partners consisted of cash only. Even if Mrs Audain could prove that she paid for products or parts or for the alleged wage and travel expenses of the salesman/technician, without an agreement that such payments represented her contribution to the partnership, the payment cannot be so credited. At best the alleged payments would constitute a debt owing from the partnership to Mrs Audain.
- [24] The court also accepts the evidence of Mr. Nicholas that in 2008, the business was in need of additional investment. In October 2008 Mr. Nicholas and Mr. Audain agreed to invest a further sum of \$10,000.00 each. According to the bank records Mr. Nicholas did deposit \$10,000.00 into the business account. Mr. and Mrs. Audain were given a further opportunity to make the cash contribution. However, despite promises to deposit both the \$4,000.00 plus the additional \$10,000.00 no sums were deposited. Although Mr. Audain continued his involvement in the business, and Mrs Audain continued to perform the duties of Secretary, they never made the agreed cash contribution to the partnership.

- [25] The capital of a partnership consist of the aggregate of the sums contributed by its members, for the purpose of commencing or carrying on the partnership business, and intended to be risked by them in that business¹. The court has found no evidence that Mrs. Audain ever made the required contribution to capital of the partnership.
- [26] By October 2008, differences leading to mistrust had arisen between Mr. Nicholas and Mr. and Mrs Audain. The partnership was reduced to two sides - Mr. Nicholas on one side and Mr. and Mrs. Audain on the other side. Each side accuses the other of making decisions and taking actions without consultation. Each in turn became suspicious of the other. Amazingly no partnership meeting on the matter was called. Each side resorted to unilateral action.
- [27] By late September 2008, Mr. Nicholas was preparing to go on vacation in October. He was concerned about leaving the partnership, including its cheque books, in the hands of the Audains. So he took two decisions. He calculated what bills would need to be paid while he was away and left only those cheques to cover those items. By letter dated 1st October 2008, Mr Nicholas wrote to CUB indicating that he would be on vacation from October 06 to November 03 2008. He instructed the bank that during that period, only cheques made out to Jasco Agencies, LIAT and the Comptroller of Customs should be drawn on the account. Any other cheque should not be honoured without his permission. He also advised the bank that he wished to have Tricia Audain removed as a signatory to the account. Further, on 6th October 2008, before leaving the country he left cheque No 0134 for the sole purpose of clearing certain goods ordered by Rosenic due to arrive while he was on vacation.
- [28] The evidence is that Aramatic Refreshment Services (Aramatic) was one of the main suppliers of the goods sold by Rosenic. In fact Rosenic was its distributor in Antigua. Rosenic had in June 2008 entered into an agreement with Aramatic for use of their equipment. Having become aware of the actions taken by Mr. Nicholas, by letter dated October 21, 2008, Mr. Audain wrote to Art, the Manager of Aramatic complaining of certain alleged improprieties on the part of Mr. Nicholas, including the removal of his wife as a signatory on the Bank account. He concluded that Mr. Nicholas was trying to "take over Rosenic." Under the heading "Moving Forward" Mr Audain wrote:
- 1) At this point in time I have removed myself from Rosenic Distribution.. I am no longer associated with Mr. Alston Nicholas. This partnership is now ended.
 - 2) I have secured a small sum of money from Rosenic Distribution which I will supplement with my personal resources to pay the last invoice sent. This will be done next week.
 - 3) I have secured all spare equipment. Repairs will be conducted by Tan or in his defiance, Trevor.
 - 4) I will complete the process of having Equipment Loan agreements with customers and Adolph Audain completed by Thursday 23rd October 2008
 - 5) I have begun invoicing under Adolph Audain

¹ Lindley & Banks on Partnership, 16th Edition page 422

[29] Mr. Audain then undertakes to pay off all invoices outstanding to Aramatic. He concludes by stating:

"All of the above hinges on the assumption that Aramatic is prepared to continue in Antigua and continue with the author as opposed to Rosenic Distribution. Should this assumption be incorrect, responsibility for the debt will shift elsewhere and equipment will be returned to Rosenic. I have put too much time into this business to see it fail especially by my hands."

[30] On cross-examination he stated that when he discovered the contents of the letter to CUB, he attempted to secure some business and salvage what he could and it was for that reason that the correspondence was sent. Mr. Audain also admitted on cross-examination that prior to writing to Art, he had not informed Mr. Nicholas that he no longer wished to be associated with him or that the partnership had ended. By the time Mr. Nicholas returned from vacation, not only had Rosenic lost the distributorship with Aramatic, but Mr. Audain was in possession of the equipment previously used by Rosenic.

[31] Further, Mr. Nicholas' evidence, which the court accepts, is that on 7th November 2008 when he visited Sunsail, one of Rosenic's main customers, he was told that Sunsail was in receipt of correspondence from Mr. Audain that he had the sole distributorship rights for the products. Mr. Nicholas also received similar information from Royal Antiguan Hotel, another customer of Rosenic. When he contacted the Sales Director at Aramatic, she advised him that Mr. Audain had made a proposal to take over the business and had a plan on how he was going to pay. He was advised by her that Rosenic's distributorship had been revoked. She later forwarded a letter to him dated 20th October 2008. The letter, exhibit AN6, is referenced "Distribution contract between Aramatic Refreshment Services and Rosenic Distribution". The letter simply states:

"This letter is to advise of our intention to discontinue using Rosenic Distribution as our distributor in Antigua.

Please make all the necessary arrangements to hand over all equipment owned by Aramatic Refreshment Services and loaned to Rosenic Distribution to Mr. Adolph Audain one month from now."

[32] By that time Mr. Audain, it is alleged, was already in possession of most of the machines, included those Rosenic had purchased and were not on loan from Aramatic. According to Mr. Nicholas' evidence, these included 3 Comobar 2000 paid for in 2006 and a Bunn LCC6 paid for in June 2008. His evidence is that he expected Mr. Audain to return these machines to him or pay him their value, but to date the machines have not been returned nor has he been compensated.

[33] His further evidence is that he is aware that from October 2008, Mr. Audain registered a business named Flavoristic Refreshment Services which has as its purpose the distribution of coffees, juices and teas. According to him it is this business which has offered for sale equipment belonging to

Rosenic which equipment together with customs, duties and freight charges paid value the sum of \$28,581.51.

- [34] Mr. Nicholas asserts that it was as a result of false representations made to the suppliers why the supplier pulled the distributorship from Rosenic. He states that Mr. Audain used the opportunity of his absence on vacation to sweep a lucrative business away from him. He states that as a result of the loss of the distributorship, he had goods in stock that could not be sold and had to be destroyed by the Central Board of Health.

Claim For Conversion of the Cheque

- [35] Partnership is a relationship based on mutual trust. It has long been established that partners owe each other a duty of good faith, that is, to act honestly and for the benefit of the partners as a whole. In fact, partners are said to be in a fiduciary position towards each other².

It is clear that a partner can commit an act of conversion in respect of partnership property. Of course, the mere fact that he takes possession of it will not be sufficient to amount to a conversion, because he is entitled to the possession of it. Neither party, however, is entitled to exclusive possession, and, if one of the two does an act which can be justified only by the right to exclusive possession, then he converts³.

- [36] Mr. Audain admits that he issued cheque number 0134, given to him for the purpose of paying certain customs charges to Mr. Pollard in the amount alleged. He states:

"I took the second cheque to Mrs. Audain and discussed further the goings-on and with her consent, I wrote the second cheque to Mr. J. Pollard to return the monies borrowed from him to undertake Rosenic's business as well as a surplus of \$1200.00 for any incidentals that may arise until Mr. Nicholas" return to Antigua."

- [37] Tricia Audain's evidence in respect of the loan is as follows:

"I have known Jimmy Pollard for about 10 years. He is a friend of both my husband and I. He is employed by Bargain Centre. When I was removed from the account at CUB, we needed assistance with certain things. He assisted us with that - with funds for Rosenic. He assisted us with about \$5,000.00. There was stuff that needed to be done for Rosenic when we had the suppliers and technicians in. Mr. Nicholas didn't give us any cheques so we had to borrow the money to do the stuff."

- [38] The technicians referred to were on island in September. At that time she was off island, however her evidence is that she knew that they were not paid. Her evidence is that she wrote out the check to J. Pollard because she needed to pay back the debt. According to her there was no need to tell

² Geoffrey Morse, Partnership Law, second edition, Chapter 5

³ Baker v Barclays Bank Ltd [1955] 2All ER 571

Mr. Nicholas she was writing the cheque to Mr. Pollard. There was nothing wrong. She denies that she and her husband conspired to take \$6,200.00 from Rosenic.

[39] Mrs. Audain admits that there are no documents evidencing a loan from J. Pollard to Rosenic. J. Pollard was not called to give evidence. There is also no evidence that either Mr. or Mrs. Audain was authorised to borrow on behalf of the partnership. There is no evidence that the \$1200.00 was used to "run the business" of Rosenic. Mr. Pollard cashed the cheque one day before Mr. Audain indicated to Art that he was no longer associated with the partnership.

[40] While the court is mindful that there is no claim for breach of fiduciary duty before the court, the events surrounding the payment to Mr. Pollard and the events immediately following, including the letter to Art, undermines Mr. Audain's claim that the funds were used to further the business of Rosenic. On a balance of probabilities the claimant has proved that the funds withdrawn from Rosenic's account were used for the benefit of the defendants.

Conversion of Goods and Equipment

[41] The claim is that Mr. Audain substituted the delivery notes prepared by Rosenic Distribution for ones of his own and requested that payment be made to him and not to Rosenic Distribution. The hand written substituted invoices are exhibited at pages 4 and 5 of the record. The invoices bear the note "Please make cheques to A. Audain". To date the business has not been compensated for these goods. Both invoices total \$10,226.25.

[42] While Mr. Audain was not a recorded partner, it was he who was in contact with the customers and overseas suppliers. He had significant influence with them. Furthermore, he held himself out to them as a partner of the business. In his letter to Art, the Manager of Aramatic, he states: "The goings on at Rosenic over the past week is a climax of improprieties that has been perpetrated by my business partner, Mr. Alson Nicholas."

[43] While the defendants have categorically denied that they converted goods belonging to Rosenic, Mr. Audain has admitted that he received monies for goods sold on invoices 091301 and 091302. He asserts that these goods were purchased by him directly from the suppliers in accordance with the suppliers wishes. Further that at the time, the customer, Sunsail, had learnt of the dispute between the partners and had discontinued business with Rosinic. However, on cross-examination Mr. Audain stated that it was an error to request that cheques be made payable to A. Audain and denied that he had received payment on the same invoices.

[44] Mr. Audain's actions towards Rosenic's customers also undermined his assertion that it was the customers, without any input from him, who discontinued business with Rosenic. With regard to the said invoices, Mr. Audain has admitted that he made out the invoices and instructed that payment be made to "A. Audain". The court is satisfied that he received payment in accordance with the instructions and Mr. Nicholas is entitled to damages in the sum of \$10,226.25. However, the claimant has not proven that Tricia Audain knew of or consented to the actions of Mr. Audain.

- [45] Further, with regard to the claim for \$28,581.51 for equipment retained by the defendants, the court is satisfied that the Bunn LCC coffee dispenser (exhibit AN5) was purchased by Rosenic and remained the property of Rosenic. It is one of the items now listed with Flavoristic, the defendants' business. It is valued at US\$500.00. With regard to the other two machines, Mr. Nicholas refers the court to exhibit AN10. However, same does not provide proof of purchase by Rosenic. Mr. and Mrs Audain were not entitled to retain the Bunn machine after their withdrawal from the partnership. Accordingly Mr. Nicholas is entitled to recover the US \$500.00

The Counterclaim

- [46] The defendants seek damages for the actions taken by Mr. Nicholas in his letter to CUB before leaving on vacation. They state that the unilateral action caused Tricia Audain loss of earnings from the business for receivables amounting to \$22,608.04. They also complain that Mr. Nicholas' instructions to CUB to only accept cheques drawn on certain specific vendors resulted in CUB dishonouring a cheque made by Mr. Audain with the approval of Tricia Audain causing both defendants unnecessary embarrassment. Apart from their mention in the Counterclaim there are no details given. No evidence was tendered in regard to these claims. No mention is made of them in their witness statements and no evidence was tendered in support of them at trial. The paucity of details and evidence means that there is no evidence before the court to support those aspects of the counterclaim. They are therefore dismissed.
- [47] The defendants also assert that Mr. Nicholas continued to sell partnership goods after October 2008, totalling \$42,760.00, which he converted to his sole use and benefit to the exclusion of Tricia Audain. Thirdly that Mr. Nicholas sold partnership goods listed on invoices #1365872D and 136582F and obtained \$20,285 which he applied for his sole benefit.
- [48] The defendants also claim the sum of \$15,000.00 as compensation for the loss of several days work as a result of the "fabricated" instructions to the bank. Also they seek a further sum of \$120,000.00 for lost employment income as a consequence of the criminal investigation which followed Mr. Nicholas' instruction to CUB to report to the police that a business cheque was cashed for Mr. Audain's personal use. A further sum of \$8,819.13 loss of income as a result of the unilateral action of Mr. Audain to misinform CUB and by removing Tricia Audain as signatory on the partnership account. This sum is also described as the amount in the partnership accounts which has been converted by the claimant to his own use.
- [49] With regard to their claim for sums converted by Mr. Nicholas in and after October 2008, Mr. Audain states in paragraph 36 of his witness statement:

"That in October 2008 I wrote all customers of Rosenic instructing them to make all payments to me in an effort to foil Mr. Nicholas' treacherous plans. Mr. Nicholas then countered with a letter to all customers from his lawyer indicating that Mr. Nicholas alone should receive payments for Rosenic. Mr. Nicholas was portrayed as sole proprietor of Rosenic Distribution in the correspondence sent by his lawyer . . . to Rosenic's customers.

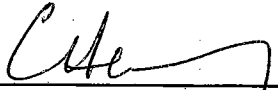
It was clear that Mr. Nicholas had in fact been successful in converting the monies of \$8,819.13 in the business account, the receivables of the business hereto marked "AA11" valued at \$35,643.80 and the value of the stock in hand marked "AA12" amounting to \$58,643.80 for his own personal gain."

- [50] With regard to the claim for conversion of monies generated after October 2008, given that Mr. Audain declared the partnership ended as of 21st October 2008, the defendants have not proven their entitlement to share partnership profits or income after that date.
- [51] Further, with regard to the claim for conversion of the income from invoices #1365872D and #136582F both dated 13th October 2008 and for conversion of other income generated before 21st October 2008, Tricia's evidence is that she received a total of \$12,000.00 in profits up to April 2008. It appears from the evidence that although Mrs. Audain did not pay in her contribution to capital, Mr. Nicholas was hopeful that the deposit of the \$4,000.00 plus the \$10,000.00 would be paid in sometime in September 2008. He continued to treat Mrs. Audain as a partner, including the payment of profits. However, having never paid in the contribution up to the time the partnership ended, it is highly doubtful that Tricia can claim entitlement to profits and a share of the stock in trade.
- [52] In regard to her claim, Tricia refers the court to exhibit TA7 which consists of several customer statements on Rosenic's letterhead. Some statements include invoices from 2006 and 2007. Also included is a document headed "Rosenic Distribution Stock Value. It lists various stocks with a total value of \$66,960.00. There is no corresponding summary of expenditure for the same period. The only income and expenditure statement of Rosenic submitted into evidence is for the year 2006. There is therefore no evidence before the court from which the court can determine whether Rosenic earned profits during the period for which she claims.
- [53] With regard to the sum of \$135,000.00 claimed as damages arising out of the complaint by Mr. Nicholas to the police, the claim is without merit and is dismissed.
- [54] The defendants have failed to prove their entitlement to the relief sought. The counterclaim is therefore dismissed in its entirety.

[55] Accordingly, judgment is granted in favour of the claimant on his claim as follows:

- 1) The sum of \$6,200.00 being damages for the cheque converted by the defendants for their use and benefit;
- 2) The sum of \$10,226.25 being damages for the goods converted by the First defendant Adolph Audain for his use and benefit
- 3) The sum of US500.00 being damages for the equipment converted by the defendants for their use and benefit ;
- 4) Interest at the rate of 5% from the date of filing of the claim until payment
- 5) Prescribed costs.

[56] The counterclaim is dismissed.


CLARE HENRY
High Court Judge
Antigua and Barbuda