

**Judgment 14/2009**

**C v D (a limited liability company) – Royal Court (Civil  
Action File 1307) – 20 March 2009**

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**Civil Procedure - Exceptions de Fond – Royal Court Civil Rules, 2007 (Rules 16, 50 and 60) –  
the test set out in Cherub Investments Ltd v Channel Islands Aero Club (Guernsey) Ltd –  
plaintiff to provide further particulars**

**Approved Judgment  
20 March 2009**

**IN THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)**

**DECISION ON EXCEPTIONS DE FONDS**

**Between**

**C**

**Plaintiff**

**-v-**

**D**

**Defendants**

**(A limited liability company)**

**Date of hearing: 16<sup>th</sup> March 2009**

**Date of Judgment: 20<sup>th</sup> March 2009**

**Before: John Russell FINCH Esquire, Lieutenant-Bailiff**

Advocate for Plaintiff: The Plaintiff was not legally represented  
(Advocate J A S White assisting the Court)

Advocate for Defendants: Advocate C M Fooks

**Cases and other materials referred to:**

1. *Yaddehige v Credit Suisse Trust Limited and Others [2007 – 08] GLR 282*
2. *Cherub Invs. Ltd v Channel Islands Aero Club (Guernsey) Ltd (1982) (Guernsey Court of Appeal, Number 234)*
3. The Royal Court Civil Rules, 2007, Rules 16(7) 50(2)(1) and 60
4. Chitty on Contracts (28<sup>th</sup> Edition) vol 1, para 2-028.

## JUDGMENT

1. For the purposes of this decision, it is only necessary to state this is part of a mosaic of complex and intertwined matrimonial and civil proceedings initiated by Mrs C. The subject matter of both claims is essentially the same and I have been trying to keep a procedural grip on the case since last year. At a hearing on 16<sup>th</sup> March, 2009, I endeavoured to set out a straightforward and explicable timetable, without an unnecessary number of procedural steps and possible pitfalls, that would get the cases up and running for a trial date fixed on 23<sup>rd</sup> June 2009. Whether my efforts are greeted with success will be seen in due course and, I hope, judged by a sympathetic and generous posterity. One problem is that we are at the technical procedural stage of the case and, despite the lucidity and moderation of Advocate Fooks, it is necessary to ensure C, not being represented, is not put at any disadvantage. In relation to the civil (as opposed to the Matrimonial) Case, Advocate J A S White came along, not to represent C, but to assist the Court, for which I was most grateful.
2. The matter that now falls for determination is the Exceptions de Fond raised by Advocate Fooks on behalf of the Defendant Company (hereafter “D”). The claim is for £88,750.00 remuneration for work done by C for the period 2001 – 2007. The relevant documentation is in the white folder and I shall use the pagination therein. At the hearing on 16<sup>th</sup> March, 2009, I heard submissions on the Exceptions and indicated I would produce a written decision within the week, which I now do. Plainly, the form of the proceedings depends very much on how this preliminary issue is resolved.
3. The Exceptions de Fonds read (page A6):
  - “1. *There was no contract between the Plaintiff and the Defendant for any remuneration.*
  2. *There is no other legal basis for the claim by the Plaintiff against the Defendant.*”
4. There are two relevant parts of C’s “*material facts*” relating to her case which need to be quoted:

*“The Contract of Employment between the Plaintiff and the Defendant was oral and by way of conduct from 2005 to 2007 but the dismissal on 31<sup>st</sup> July 2007 was written.”* (page A2); and

*“The Plaintiff had been paid at the rate of £625 per month in 2001, but in 2005 the Defendant told the Plaintiff that she that (sic) the profits of the Company were “for the common good”, meaning the good of the Defendant, the Plaintiff and their sons”.* (page A3)
5. The claim is for remuneration for administrative and other tasks C states she carried out. She had been a director of D until late 2001 and shareholder. In 2005 it is alleged she had, in effect, to sort out the Company’s books and tax affairs for the years 2001 – 2005. She seeks “*redress by way of payment for the many hours of work put into D*”. (page A4)

6. It was submitted by Advocate Fooks, on behalf of D, that there is no positive agreement on remuneration pleaded and that the proper forum for dealing with contributions is the Matrimonial Causes Division, where there are indeed parallel proceedings. There is no detail given of any oral contract and the only specific reference is the quote on the “*common good*”, (already referred to), which goes the other way. Assisting the Court, Advocate White suggested that the factual evidence needs to be heard to determine the matter. Lack of particularization is an Exception de Forme not Fond and can be cured by “*further and better particulars*”.

## The Test

7. This is conveniently set out in a recent decision of the Guernsey Court of Appeal (Smith, Beloff and Carey JJA) *Yaddehige v Credit Suisse Trust Limited and Others [2007-2008] GLR 282* at paras 11 and 12 of the main judgment of Smith JA:

### *“The test*

11 *It was accepted by the parties that the correct test to be applied by a court considering exceptions is that expressed by Hoffmann, J.A. in Cherub Invs. Ltd. v. Channel Islands Aero Club (Guernsey) Ltd. (4) (“the Cherub test”) in the following terms (Guernsey C.A. Judgments 1964-1989, at 241):*

*“Now it seems to us that the test of whether an Exception de Fonds can succeed or not is whether there are no facts which might be proved at the trial which would allow the Plaintiff – no admissible facts consistently with the pleadings which could be proved at the trial – which would allow the Plaintiff to succeed in the action ....”*

12 *Thus, in considering this appeal we must take the plaintiff’s pleaded case at its height. However, in the instant case and by agreement between the parties, a number of documents were placed before the Lieutenant Bailiff and they are before us. In my opinion, and consistent with Hoffmann, J.A.’s remarks, where we are required to consider any of these documents we must construe them in a way as favourable to the plaintiff as we reasonably can.”*

8. The observations at para 13 are also, in my view, apposite:

*“13 In the arguments on the issues other than prescription, the defendants focused on the allegations of negligence and breach of contract set out in the plaintiff’s cause. While this is perhaps understandable, I consider it to have been misconceived. In my view the correct focus must be on the factual assertions made by the plaintiff. Although it is not for the court to assist him in developing his case against the defendants, I do not believe that it can be right to ignore allegations that can properly be extrapolated from the plaintiff’s case as pleaded simply because he has not set out particulars of negligence or breach of contract as clearly or accurately as he might have done. Defects of this sort, as distinct from omissions of substance, can be cured in due course in the appropriate manner.”*

I respectfully propose to follow this approach, which is not only clear, but binding upon me.

9. Taking C's pleaded case "*at its height*" there is a factual assertion that a contract existed. This may be right or may be wrong, but the issue falls for determination by the Court. A considerable practical difficulty may remain. In the words of Chitty on Contract (28<sup>th</sup> Edition) at para 2-028:

*"Where an offer or an acceptance or both are alleged to have been made by conduct, the terms of the agreement are obviously more difficult to ascertain than where the agreement was negotiated by express words. The difficulty may be so great as to force the court to conclude that no agreement was reached at all."*

10. This is a situation where the lay party, C, has not particularized the details to the same extent as a professional pleader. I make no criticism of this, but it is only right D knows in detail what specific points are averred. I share Advocate White's view that this can be cured by providing more details, and that, in essence, this is an Exception de Forme. I shall therefore give C the opportunity to remedy this. The words of Smith JA regarding the corrections of "*defects of this sort*" are applicable. Nevertheless, C needs to bear in mind that the burden lies on her to establish her case in due course, on the balance of probabilities; there is no burden here on D (either the Company, or in practice, [its beneficial owner]).

## **Order**

11. C is therefore ordered, within fourteen days from the date of this decision, to furnish in writing to Advocate Fooks and HM Greffier, details of the following:-
- (i) details of any contract concluded orally between C and D, relied upon in the claim, with, as far as can be set out, references to conversations and any negotiations;
  - (ii) details of how D agreed by conduct to the formation of any contract between C and D relied upon in the claim, with, as far as can be set out, references to conversations and any negotiations;
  - (iii) for the avoidance of doubt, any details provided should, where possible, refer to dates, places and documents. If any further documents are relied upon they are also to be produced to D and HM Greffier.
12. Within fourteen days of the furnishing of any such information as aforesaid I order D to respond in writing with any further submissions thought appropriate on Exceptions. I make this Order by virtue of Rule 60 of the Royal Court Civil Rules 2007, as applied by Rule 16(7) thereof. I will deal with the matter on the basis of written representations in accordance with Rule 50(2)(1). Once the material is to hand, I will prepare a timely further written decision on this aspect of the case.

## **Costs**

13. Reserved.

**J R Finch**