

Factual dispute concerning the financial operation of two boarding houses by the parties and the application of section 43 of the Partnership Law 1995.

[2020]GRC039

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

Between:

PAUL JORGE OLIVEIRA

Plaintiff

- And -

LUDOVINA DE JESUS TEIXERA DA SILVA

Defendant

Case heard on: 25th, 26th and 29th June, 2020

Decision handed down on: 3rd August, 2020

Before: John Russell Finch, Esq., OBE, Lieutenant Bailiff and

Jurats: J G Hooley, J M Wyatt and P M Burnard

Counsel for the Plaintiff (“P”): Advocate A M Merrien

Counsel for the Defendant (“D”): Advocate A J Ayres

Statute referred to in Decision:

The Partnership (Guernsey) Law, 1995, Section 43
(No cases were cited by Counsel)

Background

1. This is a dispute between two persons who were involved together in the operation of two boarding-houses in St Peter Port. The matter became more complicated when they also had, for a while, an intimate relationship which has ceased. The financial dispute is aggravated by this element, as the parties are on poor terms, neither believing much good of the other. A further and very difficult problem is that the financial records pertaining to the business are incomplete and inadequate, despite the interposition of a chartered accountant for part of the period in question. This has resulted in the Guernsey Income Tax Department (justifiably) becoming frustrated with the paucity of information received, and imposing penalties.

2. The only witnesses were the parties. Both were born in Portugal and are of mature years. P is a Prison Officer, who also acts as a Court interpreter. His English is therefore excellent. Although D referred to her limited formal education (which is reflected in the written items she was responsible for), she has an excellent English vocabulary and was fluent in her evidence. P and D were represented by very experienced Advocates, who have many years of involvement in all types of litigation. They were able to concentrate on the main issues and not get side-tracked. A helpful bundle was prepared for the trial, which comprised not only a large number of financial documents, but statements from both parties that they adopted in their evidence-in-chief. In addition to P's claim, D made a counter-claim which P defended. The Jurats had to assess the evidence against a background of (as stated) incomplete accounts, cash payments for rents and repairs/maintenance and limited bank account details (see below).
3. Both lodging-houses are in Havilland Street, a run-down area of St Peter Port, Number 3 ("Marisol") was purchased on 15/06/04 after P and D agreed to be partners in a lodging house, sharing any profits arising. This property was bought in undivided one-half shares for the parties. It was funded by a Bond secured on P and D's realty and personalty (though it seems neither party was clear as to the extent of the Bond). The amount was £230,000. Things went well for a while as there was a demand for lets by workers in the hospitality trade, and also ex-prisoners and other people at the less affluent level of Guernsey society. Hence in 2005 another property in the same area was acquired via a corporate vehicle that the parties' set-up called "Marisol Limited". Only P and D were subscribers. On 12/07/05 Dolphin Place, (Number 13 in Havilland Street) was purchased by the company. £198,000 was provided by way of Bond, again, as is customary over P and D's (and the company's) realty and personalty. Confusingly, Marisol Limited did not own Marisol, the first acquisition, but only Dolphin Place. Again neither party seemed fully aware of what was involved, particularly as regards the setting-up of Marisol Limited. The parties' personal relationship was 'on and off' at this time, however in October 2009 a contract for the purchase of a foreign timeshare was entered into by D, registered in her name only. The parties disagreed at the hearing as to what their intentions were and who would get what. This was a further issue to be resolved between the parties who were, with respect, unsophisticated and largely unadvised investors.
4. The parties' personal relationship then broke-down completely and P moved into Dolphin Place. From that time P collected the rents from the tenants at Dolphin Place. The Algarve time-share was the last flickering of any joint activity between P and D. There were further complications when, following a fire at Marisol in 2009, the States of Guernsey Fire Service issued a very negative inspection report on Dolphin Place, requiring a good deal of remedial work and culminating in a successful prosecution of Marisol Limited, the owner. The work has not been done and P moved out of Dolphin Place in 2015. The fire at Marisol necessitated a considerable amount of remedial work and repair, part of which was covered by an insurance payment of £21,000. The dispute has rumbled on since then and would have been resolved by a sale of both properties, the value of which has diminished considerably over the years, mainly due to the state they are in and the need for extensive works to get them up to a reasonable standard. The result is that P and D, who are not possessed of extensive means, have had recourse to the Court to resolve things.
5. An early Court hearing was held in 2018, at the end of which the parties agreed to sell the two properties.

The Claims

6. The full details are in the Pleadings at divider A of the bundle. These should be considered in conjunction with the detailed statements of P and D in divider B. In summary (and the details

will be amplified when the Jurats' findings are set out below), P's claim is for (as set-out at paragraph 19 of the Cause):

1. An order that D provides a statement of account in relation to rents, and expenses incurred "by or in the name of the partnership" from 01.01.08. P also claims for rents not accounted for and that rent monies be paid into a joint account.
 2. An order that Marisol is sold via judicial auction as directed by the Court and the proceeds divided equally between P and D.
 3. An order that D purchases P's share in Marisol Limited (which owns Dolphin Place) within such time as directed.
 4. An order that D pays P such sum as the Court deems fit in relation to the Algarve time-share.
 5. Costs.
7. D's counter-claim is at paragraph 21 of *Les Defenses*, and her case is further set-out in the orders sought in paragraph 22. Again, in summary, D seeks:
1. £26,000 in respect of P's alleged failure to pay this amount towards the Dolphin Place mortgage. (This is a specific bone of contention.) D paid this from her bank account and claims P stated he would later pay a similar sum towards the mortgage, or pay for repairs to the roof of the building, which were not effected.
 2. £122,879.13 was a sum to be assessed, to represent the amount D claims she paid to cover mortgage repayments on Dolphin Place and Number 3 and repairs, etc. for Number 3 (Marisol).
 3. A sum to be assessed to represent the decrease in value of Dolphin Place caused by P's "wilful failure or refusal" to invest rents from Dolphin Place or his own funds for repairs and improvements.
 4. A sum to be assessed for loss of rental income from Dolphin Place from 12/07/05 onwards due because of P's "wilful failure or refusal" to invest rents from Dolphin Place or his own funds for repairs and improvements.
 5. Costs

In addition (paragraph 22) D seeks a statement of account from P for rent received and expenses incurred by or in the name of the partnership since 12/07/05 and that the public be permitted to join in the judicial auction referred to by P and for the proceeds of sale of Number 3 (Marisol) to be held in escrow.

Legal Directions

8. This was a factual dispute pre-eminently for the Jurats to resolve, based on the oral and written evidence adduced before them. The only legal matters were the reminder of the nature of the civil burden of proof, which rested on P for the claim and D for the counter-claim. This balance of probabilities burden needed no further elucidation and it was indicated that if the probabilities were equal the burden was not discharged. As it had been touched on, the provisions of Section 43 of the Partnership Law were referred to and read-out. This provision is not complex and indeed is drafted in clear terms. The Jurats then considered their factual findings and when arrived at, whatever assistance was needed to set them out for the judgment was given.

The Jurats' Findings

9. The Jurats were unanimous in respect of their findings on the facts. These must be seen against the backdrop of incomplete, inadequate and unsatisfactory records provided by the parties, having the effect of greatly increasing the difficulty of the Court's task. The parties themselves, as stated, are wholly at odds about almost every aspect of the dispute and readily ascribe a bad faith to each other. The available records, despite the considerable limitations and omissions, have had to be carefully scrutinized and, where possible, evaluated and given appropriate weight.
10. Despite the assistance (for a limited time) of Mr Birley, a chartered accountant, the records present a considerable challenge for those seeking to make factual findings in this case. This means that detailed amounts and transactions are not at all easy to reconstruct, and therefore many of the Jurats' conclusions have to be in much more general terms than they are used to in financial disputes. The Jurats have done what they can on the basis of the evidence before them:
- (i) Missing/incomplete records
None of the records supplied can be relied upon to provide an accurate picture of the overall position. The rents were paid largely in cash (to both P and D), and much of the "one-off" expenditure seems to have been settled in cash. Problems also exist in relation to the bank statements produced in evidence. P's Lloyds Bank statements are not numbered, it cannot be shown whether or not they are complete. There is nothing before the Court to demonstrate that the Lloyds account was the only one maintained by P. The most complete record is the statements from Barclays Bank, but this, of course, only covers the bankings made and expenses paid out from that account.
 - (ii) Partnership
At best, P can be characterized as a "sleeping partner" on the facts put forward. However, if nothing else, Marisol was jointly owned, and P and D each held one share in Marisol Limited (which owned Dolphin Place). Any net proceeds from the sale of these properties should be split evenly. On the evidence it is apparent that a £26,000 adjustment should be made in relation to D's contribution towards the purchase of Dolphin Place.
 - (iii) Profit/Losses
No evidence has been provided to demonstrate to the required standard that the partnership (if it existed) made a profit. Indeed, it may very well have made a loss. The Court should therefore not attempt to quantify the trading result – and indeed, due to the evidential deficiencies already mentioned, would find it nigh on impossible to do so. It is evident that since 2017, D has paid any rents received from Marisol into her own bank account. She justified this in evidence because she stated she had paid partnership expenses of £122,000 from her own funds at various times. During this period and later, all Dolphin Place expenditure (including mortgage interest) was paid from the Marisol account at Barclays Bank. Again, it is emphasized that no more detailed or firmer conclusions can be made here due to the deficiencies already referred to more than once.
 - (iv) Algarve Time-Share
The evidence shows that this was an asset acquired by D personally. It would appear that this "white elephant" is no longer in existence.
 - (v) Resolution
This case has been a running sore for both parties and this has been compounded by the present litigation, the costs of which are obviously substantial, especially for the

parties, neither of whom are individuals of high net worth. It would have been much more realistic for the losses to be capped earlier and an offer for the two properties accepted, so P and D could move on. Hence, the Jurats seek to achieve a satisfactory and final resolution of this dispute, which will avoid any further expensive and very adversarial litigation. Therefore:

- (a) Marisol Limited was struck-off the Register on 16/05/17 for failing to provide its annual validation or pay the fees. It will be necessary to restore it to the Register. In the experience of the Court this should take a relatively short time, so a period of one month from the date this judgment is made final is given. In all the circumstances, the requisite fees should be split evenly between P and D. P and D are thereafter given 3 months, from the date of the restoration, to sell the two properties in question.
- (b) During that 3 month period, P and D will be responsible for the removal of their personal possessions from the properties. This should be done on separate days, by arrangement between the Advocates representing the properties.
- (c) If at the end of that 3 month period either asset remains unsold then the situation will need to be resolved. Accordingly, Dolphin Place, which is owned by Marisol Limited, will be subject to judicial auction; and Marisol subject to licitation. The Jurats regard this as a last resort, as it is much more desirable that the properties are disposed of in the normal manner.
- (d) In the event of an offer/offers acceptable to both parties being received during the said 3 month period, provided the offer/offers are not less than 90% of the total valuation produced by a Guernsey Estate Agent agreed between the parties, the higher offer, or offer, if only one, shall be accepted.
- (e) The net proceeds from the sale shall be split evenly between the parties, after D is reimbursed in the sum of £26,000 that she provided in respect of the purchase of Dolphin Place (see paragraph (ii) above).
- (f) The proceeds of sale are to be held by one or both of the Advocates then acting for the parties, as agreed between the Advocates (the Court would not welcome being involved in this aspect of the case should agreement prove a problem).
- (g) D must account for any rents received from lodgers at Marisol (Number 3) after the deduction of reasonable expenses, including an administration fee, which fee shall not exceed 25% of gross rents received, from the date of the final judgment until the property is sold.
- (h) The Court, in making these orders, stipulates that they represent a final settlement of all aspects of the claim and the counterclaim made by the parties in relation to the properties that were the subject of the action, and the partnership.

Costs

11. Having carefully considered the Jurats' findings, it is apparent that neither party can be regarded as a clear "winner" in this litigation. It has gone on for a long time and resulted in a full hearing. It is in the parties' interests that it is now resolved, so they can get on with their normal pursuits. In all the circumstances, no order for costs is made.

J R Finch, O.B.E., Lieutenant Bailiff
Jurats: J G Hooley, J M Wyatt and P M Burnard
3rd August 2020

[It is now noted that Marisol was sold in the Conveyancing Court on 23rd July, 2020, so the directions given when this judgment was drafted need to be modified accordingly].