



Neutral Citation Number: [2020] EWHC 3407 (QB)

Case No: QB-2019-002589

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11 December 2020

**Before:**

**CHARLES MORRISON**  
(sitting as a Deputy Judge of the High Court)

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**Between:**

**SIVANANDAN AMPALAM**  
**- and -**  
**ARASARATNAM KARTHIK**

**Claimant**

**Defendant**

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**Timothy Deal** (instructed by **Direct Public Access**) for the **Claimant**  
**Mark Tempest** (instructed by **Genga & Co, Solicitors**) for the **Defendant**

Hearing dates: 1-3 December 2020  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**CHARLES MORRISON**  
(sitting as a Deputy Judge of the High Court)

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Court and Tribunals Judiciary website. The date for hand-down is deemed to be on 11th December 2020.*

## **Charles Morrison (sitting as a Deputy of the High Court):**

### *Introduction*

1. This is the trial of a matter involving a claim brought to establish a Partnership. The Claimant (C) says that there was one, the Defendant (D) says there was not. The C says the D breached the terms of the partnership by not accounting to him for the profits of their business venture; the D says he was under no duty to do so because there was no partnership.
2. The C says that sometime in 2015, he and the D agreed to form a partnership to buy and operate a small supermarket business. In due course a shop was purchased, and C says that he assisted with the identification of the site and that he contributed to the purchase price. C expected that in accordance with the partnership agreement that he alleges, the business would be traded as a supermarket for six months and then sold, together with the freehold property, and that the profit arising after the deduction of all expenses incurred by each of the partners, would then be shared equally between the C and the D.
3. Suffice it to say for the moment that matters did not progress in this way. The C was, after some months engaged working in the supermarket, asked to leave the premises by the D; the business and property was not sold after six months; and the C has not had the benefit of an account to him in respect of the profit (if any) arising upon any sale of the partnership assets. The D flatly denies that he is obliged to the C as alleged or in any way whatsoever. On his account, he had merely given his friend a job in his business in a time of need. It had not turned out well and now he regrets ever trying to help him.
4. The trial of this action came before me on the 1 December 2020 and it occupied the time of the court for almost three days. Both parties were represented by counsel. Although it was the trial, by an Order of Tipples J made on 2 November 2020, the court was asked to determine three issues:
  - a) whether there was a partnership between the C and the D;
  - b) what were the terms of the partnership; and
  - c) whether there had been a breach of the partnership terms.

### *Evidence*

5. I heard evidence from the C and his friend Mr Paramasamy Rubeshan. I also heard from the D and three other witnesses who gave evidence seeking to corroborate various elements of the D's case: they were, Mr Nithoorjan Satkunarasan, Mr Murugesu Kuperan and Mr Vijayapalan Vijayaakathan.
6. A paginated bundle of documents was prepared for use at the trial. The bundle contained various documents relevant to the business which was operated by the parties, on the C's case by way of a partnership and on D's account, by him alone as a sole trader.
7. It is a striking feature of this trial that the evidence given by the D and the other witnesses from whom the court heard as part of his case is in direct contradiction to the evidence given by the C. Both cannot be true. There is no midway or innocent explanation for the variance. There is a truthful account of what happened on the one hand, and on the other there is a plain dissembling concoction. It is unfortunate to say the least that it is in these disagreeable circumstances that I am called upon to decide upon this dispute.

*The Law*

8. There was happily no disagreement between counsel as to the law that I must apply to the questions before me. It is a straightforward application of an objective test as to whether there was the oral agreement for a partnership as pleaded at paragraphs four and five of the Particulars of Claim. Those paragraphs read as follows:
4. The Claimant and the Defendant are the said partners pursuant to an oral partnership agreement made in 2015.
  5. The following were inter alia express terms of the agreement:
    - The Claimant would pay £50,000 to the Defendant towards the freehold purchase by the Defendant of the Property;
    - The Defendant would buy the property, which was to be registered in his sole name;
    - The Claimant would pay £10,000 to the Defendant towards renovations at the property and installation of CCTV in the Property;
    - The Business and the Property would be sold after 6 months purchase and the profit being calculated by deducting all expenses including the Claimant's moving and living costs would be divided equally;
    - The Property was to be named 'Downham Supermarket'.
    - The Claimant would leave his position as Manager at Shell Patrol Station and work full time as the Manager at the Business.
    - The Claimant would move from his residence in Hampshire to Bromley for eight months, so as to be available to manage the business.
9. A partnership comes in effect as a matter of law, when two or more '*persons carry[ing] on a business in common with a view of profit*'. This is the classic definition to be found in section 1 of the Partnership Act 1890.
10. How then is the existence of a partnership to be established? Halsburys Laws of England, 5<sup>th</sup> Ed. Vol 79, Says this at [11]

*"If two persons jointly export their individual goods for sale as a joint adventure, dividing the profits of the transaction in specified shares, there is no partnership as regards the separate parcel of goods provided by each until they are brought into the common stock. Conversely, if they are jointly concerned in the purchase, they are not partners unless they are also jointly concerned in the future sale. Where, however, they agree to embark in a joint adventure for the purchase and sale of goods, there is a partnership as regards all the goods bought in pursuance of the agreement, and each is liable for the price of the goods bought by the other; and, if goods bought for a joint adventure by two persons are wholly paid for by one of them,*

*while the other contributes skill and labour in return for a share of the profits, there may be a partnership between them of such a nature that the goods are partnership property”.*

11. As to the question of whether there might be a partnership even if the business venture is operated otherwise than entirely upon the basis of jointly owned property, *Halsburys Laws* say this at 12:

*“Persons may be partners, either generally or in some particular business or isolated transaction, even though all or part of the property used for the purposes of that business transaction may not be the subject of joint ownership but may belong to some or one of them individually.”*

12. And in regard to proving the existence of a partnership where, as in this case, there exists no written partnership agreement, *Halsburys Laws* say this at 24:

*“The existence of a partnership may be established by oral evidence even when a written partnership agreement is in existence. Admissions made by a person in a former claim, or in an income tax return, that he is a partner, or a verdict on an issue directed to try whether a person is a partner, or even the advertisement of a dissolution may be used as evidence to establish a partnership. A partnership agreement may probably be proved by oral evidence, even if the partnership is to deal with land, but such an agreement, for example an alleged agreement of partnership in the profits of land alone, when the parties have not acted as partners so that the existence of a partnership is in doubt, is probably subject to the general statutory provisions relating to contracts for the sale or other disposition of an interest in land.... As to whether there is or is not a partnership, the court will look at the statements of the parties as one factor in order to consider the substance of the agreement, but the use by the parties of the word ‘partner’ is not conclusive evidence of partnership.”*

13. In seeking to construe an alleged agreement for partnership, at 10-02 in the 20<sup>th</sup> Edition of *Lindley & Banks on Partnership*, the following guidance is to be found:

*“A partnership agreement, like any other agreement, must be construed according to the normal rules of construction, although these have not remained static over the years. Formerly, greater reliance was, perhaps, placed on a number of so-called “canons of construction”, but the courts increasingly proved unwilling to develop unnecessarily rigid rules or to apply those canons in a wholly mechanical way. Thus, as long ago as 1928, it was held that there was no general principle that the same meaning had to be assigned to a particular expression wherever it occurred in a partnership agreement, and that resort to such a device was only justifiable in cases of particular difficulty or ambiguity. Use of the contra proferentem rule has been similarly restricted.*

*The modern approach, which has, inevitably, seen a steady move away from mechanical rules in favour of a more purposive interpretation of documents, has now culminated in what might be styled the “commonsense” rule of construction. Although this new liberal attitude has swept away much of the baggage of the past, there are still limits to the court’s power to look at the parties’ intentions and, more importantly, to use a point of construction to circumvent the need for rectification of an agreement.”*

14. And whilst it might be the case that I can take into account the “matrix of fact” in which the parties found themselves (as explained by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society (No 1)* [1998] 1 W.L.R. 896 at [912], and also Lord Neuberger in *Arnold v Britton* [2015] Ac 1619 at [15]), there are limits to how far the court can go. In the context of construing agreements for partnership *Lindley & Banks* says this at 10.04:

*“This principle does not, however, enable the court to enquire into the negotiations which preceded the agreement or the subjective intentions of the parties. It naturally follows that an earlier draft of the agreement will not be admitted into evidence as an aid to construction, even though regard may be had to the partners’ conduct under a previous agreement and, where appropriate, to “without prejudice” exchanges prior to the agreement in question. The deletion of words or clauses in the course of negotiations are unlikely to be relevant to the construction of the agreement as executed, save in a case of ambiguity when they may be indicative of what has not been agreed.*

*What the court also cannot do is take into account subsequent conduct as an aid to construction, although that conduct may assist the court to reach a view as to whether agreement on a certain point had in fact been reached. However, a subsequent change in the factual matrix which was not anticipated by the parties and was, on a true analysis, “unthinkable” at the time they concluded their contract, can be taken into account and may justify construing that contract so as to accord with their original (assumed) intentions rather than conferring a wholly unjustified and fortuitous benefit on one of them.”*

15. As can be seen from the passage above to which I have added emphasis, I am able to look at what the parties subsequently did in order to decide what was in their agreement, but I cannot rely on that conduct to assist in understanding what the particular provision meant: that must be construed objectively.

### *The Evidential Conflict*

16. There is no escaping the fact that the C and D gave contradictory evidence on the essential question of whether they had agreed to enter into a partnership: C says they did agree to go into

business together and that is why when he sold his house, he sent £50,000 to the D as a contribution towards the property that the D would purchase and which would be the site of their supermarket (the **Supermarket**) that they would together operate. It was simple plan which involved building up the trading operations of the Supermarket and then, after an agreed period of six months, selling the undertaking with the freehold.

17. The C explained to the court that he had known the D for a very long time. They had been classmates in their school in Sri Lanka. Both had found themselves in later years living in Britain. The C had admired the business acumen of the D and had for some time he said wanted to go into some form of business with him. The notion of starting a business together in partnership had he said, been discussed on many occasions.
18. The C knew that the D would be contributing a larger share of the purchase price and taking a greater hand in the business because of the experience he had in running shops however anything extra that the D contributed would be deducted from the sale proceeds before the profit was shared.
19. The D says that none of this is true. There was no agreement to go into business together. The money that the C sent to him was a fund from which the D was to arrange the settlement of certain of the C's debts and any balance was to be returned to the C when he needed the money. The D told the court that he did use the fund to repay the C's debts and as we will learn, Mr Vijayapalan says that he was a creditor of the C and that his debt was repaid through moneys sent to him by the D.
20. The C however was clear in his account. He left his Shell garage job which provided him with secure employment and a steady income, in order to begin working at the Supermarket. Although it turns out that the accountant for the business appears to have treated the payments as income for PAYE purposes, the C explained that the regular £910 payments he received each month from the D, were by way of reimbursement of his expenses only, and were to be taken into the reckoning when the partnership profits were known.
21. There were further financial contributions to the partnership made by the C. He said in evidence that he had spent some £10,000 in acquiring a new CCTV system for the Supermarket and in arranging for necessary renovations. He also purchased a number of shopping trolleys. Whilst not gainsaying these facts, the D was firmly of the view that these expenditures were not called for or necessary. There had certainly been no need for additional shopping trolleys as all that the shop needed had come along with the purchase of the Supermarket.
22. In a somewhat difficult passage of evidence, the C alleged that he had been invited to execute a tenancy agreement for the D so that the D could proffer the document to his bank to demonstrate an income stream from his property. The C had no intention of living at the property and when questioned by the court about the matter offered the view that on reflection he had been involved in a fraud because the whole suggestion of a tenancy was dishonest. He now regretted what he had done.
23. On the C's evidence he was left to run the shop with the D only attending intermittently. It was the C who arranged the stock and also the staff rota. Whilst he did arrange the BT phone line and demonstrate his commitment to the venture by sleeping in the shop overnight when the alarm was not working, the C had to concede that most of the necessary licences and contracts for the business were taken in the name of the D, including the licence from the Co-operative Group; the Nisa Retail food supply account, and the Paypoint cash machine. All of these accounts taken with the fact that it was the D that bought the premises pointed on the D's evidence to the fact that the Supermarket was in fact his sole business. The C was a mere employee. The C on the other hand explained that the way the business was set up merely reflected the D's experience in such matters and did not detract from the agreement that had been reached for a partnership.

24. Upon the expiry of the six-month agreed period, on the C's account, the D changed the plan. He no longer wanted to sell up and divide the profit. The D now advocated leasing out the property with an expectation of subsequent further capital appreciation on the freehold value. He asked the C to be patient but "as a sweetener" he said he would arrange for the C to operate his shop business in Hainault on a lease. Whilst the C initially was persuaded to go along with this new plan his relationship with the D soon after broke down. When the stock take for the transfer of the Supermarket to the new leaseholder was being carried out, the C told the court that he was called to the back of the shop by the D and informed that as the business had not gone well, he should leave the shop and not come back. The C says that he argued with the D and asked for the partnership to be honoured. Eventually as some form of compromise, C says that D offered him £50,000 to be paid immediately with a further £50,000 to follow when the Supermarket was eventually sold.
25. The D denied all of this. To him it was a fantastic and extraordinary suggestion that he would ever treat the C as anything other than an employee. The C had needed a new job as he was not "getting on well" with his boss. The D had agreed to help him out, nothing more. The idea that the D needed funding from the C or that he would give him a property in Hainault to run were to the D the stuff of fantasy. He also explained that the C had not worked the long hours in the business as he had claimed, rather he worked some four days a week and was always at home from Friday to Monday morning.
26. The D also denied the allegations concerning the fraudulent tenancy. His evidence was that he had offered a flat to the C who was coming to work nearby at the Supermarket. The C would also have the opportunity to sub-let it and that is why the rent, as high as it was, could have been afforded by the C. In the event he said, the C simply did not take up the tenancy despite having signed the agreement. The D just let the matter drop.
27. So far as the D was concerned, the Supermarket had been a bad business investment. He decided to lease it out as he had been losing money on it. He did not agree to pay anything to the C as there was no basis for doing so. The C was not entitled to anything.
28. Mr Rubeshan who gave evidence to the court, confirmed that he had passed a banker's draft for £50,000 to the D on behalf of C; that had been told by C that he was in a partnership with D; that he had been in the shop on the day of the major argument; and that he had heard the D offer to make payments to the C more or less in the terms alleged by the C. He also passed £10,000 to the D so that the D could pass the money to a Mr Jehan in repayment of a debt due to him by the C.
29. The D was clear in his evidence that the £50,000 he had received from the C was used to repay the C's creditors and that £25,000 had been returned to the C in two cash payments. It was however not (or not well) explained why Mr Vijayapalan had received his repayment in three separate tranches and also many months after it had been received by the D, despite the D's own evidence that the creditor had been desperate for repayment for many years. It was also not clear why the C would want the D to hold onto £25,000 of his money, only to have to repaid in cash instalments.
30. Mr Vijayapalan gave evidence chiefly about a £15,000 loan he had advanced to the C in 2009. He confirmed that he had received repayment through three payments passed to him by the D. For some reason, never made clear, rather than repaying him directly, the C had first given the money to the D as a conduit for the repayment. Being a friend of both the C and the D, Mr Vijayapalan felt able to offer his absolute certainty that the Supermarket was not run as a partnership and that the C had never mentioned to him that it had been. Despite their frosty relations over the unpaid debt (as confirmed by both the D and Mr Vijayapalan himself), Mr Vijayapalan also asserted that the C would have told him if his venture with the D had been by way of partnership.

31. The new lessee of the Supermarket was Mr Kuperan who also gave evidence to the court. There was some conflict between the parties in respect of how Mr Kuperan came to learn of the Supermarket, but his evidence was that when he came down from Liverpool to visit the premises he first met the C. He discussed the possibility of lease with the C and also the possible rental value. He was told that he would need to discuss this with the D and eventually, through his daughter, he obtained the D's telephone number and made contact.
32. The final witness was Mr Satkunarasan. Desirous of experience running shops, he had approached his acquaintance the D and asked for some work during his summer break from university. He started working in the shop and gradually took on more and more responsibility. His evidence was that the C did work at the Supermarket but not in a position of special status and not in the manner of a partner. He also said that the C often left on a Thursday and was typically not at the Supermarket during weekends. If anyone had responsibility at the Supermarket, it was not the C, but him. It was Mr Satkunarasan who had the key to the cigarettes and alcohol; and it was him who had reorganised the important supply of packed fruit and vegetables. When working at the Supermarket he had often checked with the D as to how something should be done but he had never asked the C for any approvals or permission.
33. Mr Satkunarasan also corroborated the D's evidence that he had repaid an amount of the C's £50,000 by way of a £10,000 cash payment. Mr Satkunarasan told the court that he had witnessed the D counting out the money and handing it to the C. This account had of course been emphatically denied by the C who claimed that the whole story surrounding the repayment of debts was a fabrication.

### *Discussion*

34. As I mentioned earlier in this judgment, this is a case where the court has been placed in the unfortunate position where two parties have come before it giving accounts of facts and matters which are in direct contradiction. Both of their stories cannot be correct, but it could be that one party failed to appreciate the true consequences of what was being discussed and agreed. It is not in dispute that the litigants were, prior to this dispute, good friends and that they had been so since their school days in Sri Lanka. As the evidence revealed, it was not uncommon for commercial activity in their community to be conducted on an informal basis with an absence of documentation. There was nothing unusual in the fact that this important agreement as alleged by the C, was not documented or set out in writing to any extent.
35. There is though no scope for a misunderstanding on the £50,000 payment from the C to the D and the use to which it was put. As counsel for the D submitted, it was either a down-payment on the partnership property or it was used to repay debts: it could not be both. If, he contended, I was persuaded that the money had been paid as a contribution towards the acquisition of partnership assets and *had not* been advanced for nor used the repayment of debts then such would be powerful evidence in support of there having been a partnership.
36. It is for me to arrive at a view upon this fundamental conflict of evidence and I have come to the conclusion, on a balance of probabilities, being the civil standard which I must apply, that the C did believe that he was entering into a partnership and that is why he transferred the £50,000. He had arrived at this belief as a result of his discussions with the D and it was in reliance upon them that he made the funds transfer.
37. I found the C to be the more credible witness. His answers to questions appeared to me to be honest and straightforward. He did not attempt to avoid difficult issues and he did not seek to hide his naivety in commercial matters. The C came across as saddened by the treatment he had received at the hands of his long-time childhood friend and ultimately I take the view that



his evidence was honest even if it was mistaken on any particular point.

38. It follows that I reject the account given by the D. I do not accept his evidence as to the use to which the £50,000 payment was put and not do I accept the evidence of Mr Vijayapalan. The payment in three tranches to Mr Vijayapalan, many months after receipt of the funds from the C just did not ring true to me.
39. It seems to me that the C did work as he claimed in the Supermarket and the only realistic reason for him receiving the derisory payment that he did for his labour was not that he worked a four day week but that he was in fact, and in law, a partner in a joint undertaking.
40. I also accept the C's evidence that he was asked to consent to the decision not to sell the Supermarket but to lease it to Mr Kuperan. There probably was some discussion about the C being able to take on the running of the D's shop in Hainault though I don't see this point as crucial to his case.
41. Applying an objective test to the construction, I find that there was at the outset an oral agreement between C and D to establish a partnership with the aim of running a supermarket business together. It might have been that the D contributed substantially more than the C in terms of money and indeed experience, but as a matter of law that does not preclude the coming into effect of an agreement for partnership.
42. I now turn to the evidence of Mr Satkunarasan. I found this witness to lack credibility and his evidence to be on the whole tendentious. He claimed to have been taken on to gain experience for a few hours a week, but that role seemed very quickly to metamorphose into a senior managerial position whereupon he was running the Supermarket on a full-time basis. No tenable explanation was offered for this change in status or how it had developed. Mr Satkunarasan's reaction to cross-examination on his account of the supposed repayment of £10,000 in cash to the C, to my mind demonstrated the partial nature of his version of events and I was driven to the view that his evidence could not be accepted.

### *Deciding the Issues*

43. I have been asked to determine three issues. As to the first, I find that there was a partnership between the C and the D.
44. On issue number two I find that the terms of the partnership were as pleaded by the C at paragraph five of the Particulars of Claim.
45. On issue number three I find that there was a breach of the partnership terms in that the D has avoided any account to the C in respect of the proceeds arising from the partnership and in particular, in regard to the trading of the Supermarket, the lease of the premises and the later sale of the freehold site. In my judgment the C is due an account and that shall be dealt with in proceedings before a Judge sitting in the County Court, as directed by the Order of Tipples J.
46. The C shall have his costs of this trial to be assessed if not agreed.