JUDGMENT : MR JUSTICE RIMER: Chancery Division. 26th January 2007

Introduction

1. The issue before me is as to the appropriate order to make as to costs in this partnership litigation. An account was conducted before me over four days in June 2005, following which I delivered my reserved judgment on 18 October 2005. Amongst other provisions, my order directed the taking of a further inquiry. By paragraph 5 I reserved to myself the question of the costs of the taking of the account, which was to be answered after that inquiry had been taken. The inquiry has now been completed and so the matter now comes back for a ruling on costs. Mr Jeremy Cousins QC, for the defendant, Steven Montila, submitted that I should order the claimant, Roy Stocking, to pay the costs of the account as well as those consequential on my order of 18 October 2005. He further submitted that the costs should be assessed on the indemnity basis. Mr Richard Christie QC, for Mr Stocking, submitted that that would be wrong and that I should order Mr Montila to pay Mr Stocking's costs of the account and consequential proceedings, although he was content to limit the basis of assessment to the standard basis. But for Mr Christie's relative modesty as to the basis of assessment, the parties could not be farther apart.

2. I need to explain the background but will do so relatively briefly because a full account of it, my findings and conclusions can be found in my judgment of 18 October 2005 (*Stocking v. Montila* [2005] EWHC 2210).

The background

3. Mr Stocking is Mr Montila's uncle. He issued the claim form on 19 June 2001. He asserted in it that he and Mr Montila had formed a partnership in November 1996 for the purposes of developing and selling land and buildings at Cobhambury Barn, which is near Gravesend, Kent ("the Barn"). He claimed they had contributed equally to the cost of the Barn and were entitled equally to its net proceeds of sale. He sought a winding up of the partnership's affairs.

4. Mr Montila's defence disputed that there was or had been any partnership in respect of the Barn. That stance provoked a preliminary issue which was tried in May 2003 by Mr Peter Leaver QC, sitting as a Deputy High Court Judge of the Chancery Division. Its outcome was that on 13 May 2003 Mr Leaver declared that Mr Stocking and Mr Montila were partners in a partnership comprising the purchase, development and resale of the Barn and that the partnership had been dissolved on 6 March 2001. He ordered a winding up of its affairs, with the taking of (i) an account of all dealings and transactions from April 1996 to 6 March 2001, (ii) an account of the assets and liabilities of the partnership as at 6 March 2001 and (iii) an inquiry of what its property now consisted. He ordered Mr Montila to pay Mr Stocking's costs of and occasioned by the trial before him and that the costs of the accounts and inquiry were to be costs therein. The proceedings before me in June 2005 involved the taking of the accounts so ordered. Their object was to determine Mr Stocking's and Mr Montila's respective shares so that the partnership could be wound up.

5. The partners had bought the Barn, then in a derelict state, in late 1996 for £120,000 and contributed equally to that cost. Planning permission for its conversion to a single dwelling was obtained on 3 October 1997. It has since been substantially developed into a five-bedroom house on two floors with a four-bay car port and stables. It is set in about five acres. Since March 2003 Mr Montila and his wife and children have occupied it as their home. There was evidence before me that in April 2003 the Barn, as so developed, had a value of between £925,000 and £950,000. As all the development work had been carried out by Mr Montila alone, a relevant question also arose as to what its undeveloped value was at various times, that is its value with the benefit of planning permission for its conversion. There was, however, no evidence as to that value as at April 2003. As at 5 April 2005 the Barn had an agreed developed value of £795,000, reflecting a material drop from its equivalent April 2003 value; and I found that its then undeveloped value was £237,500.

6. Mr Stocking had sought, inter alia, an order for the sale of the Barn. That claim was still alive at the beginning of the trial in June 2005, but counsel then appearing for him (not Mr Christie) withdrew it and made it clear that Mr Stocking was content to be bought out at whatever figure fairly represented his share of the partnership assets. Amongst other things, that required me to decide what the developed value of the Barn was at whatever was the appropriate date for the determination of his share. Mr Montila argued for the 2005 valuation of £795,000 and Mr Stocking argued for the higher April 2003 valuation of between £925,000 and £950,000. I found that the relevant value was the 2005 valuation of £795,000, which for the purposes of determining the partners' respective shares I treated as notionally representing the net proceeds of the sale of the Barn that I might have ordered had Mr Stocking pressed for a sale. I therefore decided these particular issues in Mr Montila's favour.

7. Further issues I had to decide were as to the extent of the parties' respective contributions to the partnership. There was, first, an issue as to Mr Stocking's contribution over and above his admitted contribution of £60,000 to the purchase price of the Barn. Mr Stocking asserted that he had made further contributions totalling (or which should be valued at) £169,840.63, although that included a claim for an item totalling £124,080 which he had abandoned by the time of the trial. Of his total claim, I found in his favour in respect of £8,160.63 of contributions. Adding that to his admitted contribution of £60,000, I found he had made a financial contribution to the partnership project of £68,160.63.

8. None of Mr Stocking's financial contributions was directly related to the cost of converting the Barn and he admitted that he did and paid nothing towards the conversion work upon which Mr Montila alone embarked in about June 2000. By then relations between the partners were poor and Mr Stocking served his notice dissolving the partnership on 6 March 2001. It has always been Mr Montila's case that he did all the conversion work and a further issue I had to decide was the extent of his contribution to the partnership venture over and above his (also

agreed) initial £60,000 contribution to the purchase price of the Barn and certain other undisputed acquisition costs he incurred.

9. Mr Montila's case, supported by a Scott Schedule occupying four files, was that from 1 June 2000 to 23 May 2003 he spent £589,278.86 in respect of materials, labour, plant hire and other building expenses, the main item being £245,000 paid to a Mr Shave for work done. In his evidence Mr Montila identified further claimed expenditure of just under £24,000. Mr Stocking challenged all those claims but made little effort at the trial to make good his challenge. Mr Montila also claimed reasonable remuneration for carrying on the partnership venture post-dissolution (a claim not disputed in principle), as well as certain further expenses. The total of his various claims in respect of money spent on, or remuneration allowable for, the conversion work exceeded £1m. His case was that his effort and expenditure had been exclusively responsible for increasing the Barn's undeveloped value of £237,500 as at March 2005 (the date by reference to which I fixed the notional sale proceeds) to its then developed value of £795,000, an increase of £557,500.

10. I did not find Mr Montila's evidence as to his expenditure satisfactory but I did find that his case that the value of his expenditure and labour on the conversion at least exceeded £557,500 was supported by the evidence of Mr Burkill, a chartered building and quantity surveyor. Mr Burkill's evidence was that, had the conversion work been put out to tender, the total cost (including professional fees) might have been about £577,000.

11. In determining the extent of Mr Montila's allowable contribution in the partnership accounts to the developed value of the Barn, I rejected a submission from Mr Stocking that there had been a partners' agreement that no more than £300,000 was to be spent on the conversion and that therefore Mr Montila could be allowed no more than £300,000 in taking the accounts. The case advanced at the trial by Mr Cousins for Mr Montila was that I should find that Mr Montila's contributions to the conversion at least exceeded the increase in value of £557,500 and that he should therefore be allowed that figure in taking the accounts. Mr Stocking's counsel did not challenge that approach, provided only I was satisfied that Mr Montila's expenditure and allowable remuneration at least equalled £557,500. I found that they did.

12. The result was that in taking the partnership accounts I found that, as to the division of the Barn's undeveloped value of £237,500, Mr Stocking was entitled to credit for a figure of £68,160.63 and that Mr Montila was entitled to credit in respect of unchallenged contributions totalling £72,841.40. The balance of the undeveloped value was to be divided between them equally. I found that Mr Montila was further entitled to credit in a figure equal to the whole value of the improvement to the Barn, or £557,500. I also found that he was accountable to the partnership for a fair occupation rent for the Barn from March 2003 to 18 October 2005, the date of judgment.

13. My order of 18 October 2005 reflected these findings and required Mr Montila to account to the partnership for the occupation rent, the amount to be determined by the Master (the evidence before me was insufficient to enable me to determine it). Paragraphs 5 to 7 of my order provided:

> *"5. The issue of costs shall be is [sic] reserved to Mr Justice Rimer, to be decided after the issue as to occupation rent has been determined by the Master.*
>
> *6. Upon the determination of costs due from the Defendant to the Claimant, and costs due from the Claimant to the Defendant, those costs shall be set off against each other in order to ascertain the costs balance. Should the costs balance be due to the Defendant then the Defendant may set off the same in diminution or extinction of any sum payable under paragraph 7 herein.*
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> *7. The Defendant shall pay to the Claimant such sum, if any, as is due to the Claimant under paragraph 3 herein, after adjusting the same in respect of any costs balance arising under paragraph 6 herein. Such payment shall be made within 14 days of the determination of the costs balance. If the costs balance exceeds the sum which otherwise would be due to the Claimant under paragraph 3, then the Defendant's liability to pay that sum shall be extinguished, and the Defendant may recover from the Claimant such excess."*

The determination of the occupation rent

14. On 10 March 2006 Deputy Master Arkush directed the parties to agree joint instructions to a single joint expert, with default provisions in case of disagreement. The expert's function was to assess the occupation rent I had ordered. The parties jointly instructed Michael Rogers, a chartered surveyor, and he produced his report on 26 May 2006. His assessment was that the conversion work both at March 2003 and the time of his inspection was too incomplete for the Barn to be capable of being let on the open market at any time between those dates. His view was that, had the conversion been completed to the high standard to be expected for a building of its nature, it could have been let unfurnished for £2,400 per calendar month. His further opinion was that the fixing of the occupation rent I had ordered was therefore a "hypothetical and academic exercise" which required a significant discount to be applied to that notional market rent. So approaching the task, he assessed the rent at £1,100 per calendar month from March to September 2003, when it would have risen to, and remained at, £1,400 per month during the rest of the relevant period.

15. Following that report, Mr Montila's solicitors, Hughmans, proposed to Mr Stocking's solicitors, Dzimitrowicz York ("DY"), on 19 June 2006 that the occupation rent for which Mr Montila was accountable was £42,412.90, an arithmetical calculation arrived at by reference to Mr Rogers's figures and my order of 18 October 2005. DY initially declined to agree the figure, raising points that further rent was due in respect of (i) the stabling, sand school and tack room and (ii) the period since 18 October 2005. Hughmans's answer on 28 June was that (i) Mr Rogers's figure took account of these features; and (ii) as my order only ordered a rent down to 18 October

2005 the fixing of a rent for a subsequent period would involve going behind it. DY responded on 6 July that Mr Stocking would climb down on both points but added that he would "of course, be pursuing interest at the judgment rate of 8% from the date of judgment until the date of payment, as is his right." They did not identify the judgment debt upon which such interest was regarded as running.

16. The result was that the parties agreed a figure of £42,412.90 for the occupation rent payable during the relevant period and that amount was formally ordered against Mr Montila by a consent order that Master Price made on 10 July 2006. The Master also ordered that the costs of the application to him were to be costs in the case.

17. I now have to decide what the costs in the case are to be. As a first step I must go back in time and summarise the settlement proposals made in the run-up to the June 2005 trial. These are relevant to the submissions on costs.

Settlement proposals

18. On 29 November 2002 Hughmans wrote to DY with a settlement proposal. It was expressed as being under CPR Part 36 and "*without prejudice save as to costs*". The letter asserted that Mr Montila had spent between £500,000 and £600,000 on the Barn, the value of which he estimated to be £800,000 (a figure at least £125,000 less than the 2005 evidence as to the April 2003 value). Mr Montila offered to pay Mr Stocking £125,000 in final settlement of all claims he had in respect of the Barn. He also offered to release Mr Stocking from an alleged unrelated liability of £27,000 in respect of building materials, so making the offer worth £152,000. DY's response on 2 December 2002 was that the offer did not comply with Part 36.5. Nor did it, if only because it was not expressed to be open for acceptance for 21 days (see Part 36.5(6)). They also indicated that they believed it would be unacceptable to Mr Stocking. Their further response on 23 December 2002 was that, without inspection of Mr Montila's documents or a proper valuation of the Barn, Mr Stocking could not take a view on the offer. He thereby impliedly rejected it.

19. On 6 May 2003 (shortly before the trial before Mr Leaver) Hughmans made a revised offer that was also "without prejudice save as to costs." It was of the reduced sum of £110,000 plus the waiver of the £27,000 liability (£137,000 in all). There was to be no order as to costs. Mr Stocking rejected that offer on 9 May 2003, when Ormerods (by then acting in place of DY) came back with a counter-proposal of a total payment of £377,000 plus costs. That counter-proposal was not accepted by Mr Montila and so the trial of the preliminary issue took place, with Mr Leaver giving his judgment on 13 May 2003.

20. Following that judgment Hughmans proposed to Ormerods that the further differences between the parties should be referred to mediation by Mr Roger Joyce, an architect who had given evidence before Mr Leaver (Mr Stocking had called him). Ormerods rejected that proposal on the grounds that Mr Joyce was not an appropriate mediator. They did not indicate that Mr Stocking was in principle willing to mediate.

21. On 29 May 2003 Hughmans wrote to Ormerods on a similar without prejudice basis as before, offering Mr Stocking £140,000 plus his costs to be assessed if not agreed. Mr Leaver had ordered Mr Montila to pay the costs of the trial before him, so the costs offer covered the rest of Mr Stocking's costs to date. Hughmans closed by saying "Bearing in mind the date for dissolution, the condition of the property at that time and the amount spent on it by our client, this is a generous offer and we look forward to hearing from you." Mr Cousins submitted that this was the key offer governing the disposal of the current issue as to costs.

22. Ormerods rejected that offer on 11 June 2003 as being one, so they said, that appeared "to have taken no account of the value of the property." They repeated the counter-offer earlier made on 9 May 2003. On 11 June 2003 Hughmans explained that the offer of 29 May 2003 had been made "*on the basis of the value of the property at the time of dissolution and the amount our client had expended on it at that time*." They did not attempt to explain their calculation but asserted that it was regarded as generous "*which will be borne out as such when the accounts and inquiries have been finalised. You will no doubt have informed your client of the costs consequences*." That letter reflected that Mr Montila regarded Mr Stocking's entitlement as being determined by the circumstances prevailing at the date of dissolution, which had happened over two years earlier on 6 March 2001.

23. There was then a gap in negotiation attempts and the litigation proceeded. The case came before Master Price on 5 September 2003 when it appeared that, despite Mr Leaver's judgment and order, Mr Montila was asserting that the Barn was not a partnership asset at all. A transcript of Mr Leaver's judgment was regarded as necessary for the purpose of assessing that assertion but as none was then available the hearing was adjourned to 28 November 2003 so as to enable one to be obtained.

24. Following the argument on that adjourned hearing Master Price gave a judgment on Mr Montila's assertion. The Master referred to Mr Leaver's judgment and explained that Mr Montila's position was that, at least since the dissolution on 6 March 2001, the Barn was no longer a partnership asset but belonged exclusively to him, so entitling him to the entirety of the enhancement in value that his subsequent work on it had achieved. His further position was that all that Mr Stocking was entitled to was the capital he had invested in the partnership plus interest on it down to the date of final winding up. Master Price rejected these assertions, saying in paragraphs 7 and 10:

> *"7. In my view the position of the defendant is misconceived. The judge decided in terms that there was a partnership in respect of the acquisition and development of the Barn. In consequence as a result of the fiduciary relationship between partners there is no question of one partner being in a position to make a profit as against another partner, without of course express agreement, until the affairs of the partnership are finally wound up and settled.*

To the extent that the value of the Barn may have been enhanced by expenditure and work done by the defendant in the period since the agreed date of dissolution, then that expenditure and work is to be brought into account as between the partners. In so far as work has been done which should be remunerated then the defendant will be entitled to an equitable allowance for that work on the well known: principles of **Boardman v. Phipps** *[1967] 2 AC 46*

10. The consequence is that in accordance with paragraph 7 of the judgment of Mr Leaver QC and this judgment the account will be drawn on the basis that the claimant and defendant are entitled to the value of the Barn in equal shares, subject to matters of accounting. That is to say that expenditure by the defendant will be brought into account, and he will be entitled to an equitable allowance in respect of work he has done on the property. He is not however entitled to the profit by way of any enhancement in value of the property as a matter of right. The profit must be shared equally, but he must have his proper expenditure and an equitable allowance for work done out of it."

25. Those last observations highlighted the importance to the parties of knowing (a) the developed value of the Barn and (b) the value of Mr Montila's efforts in improving it. Paragraph 1 of Master Price's order of 28 November 2003 included a declaration reflecting his conclusions. He also gave directions as to the taking of the accounts. They included: (i) the obtaining of reports from a jointly instructed accountant (to prepare dissolution accounts), a jointly instructed quantity surveyor (to value Mr Montila's conversion work) and a jointly instructed valuer (to value the Barn); and (ii) the production by Mr Montila by 31 March 2004 of a Scott Schedule in relation to work he had done on the Barn. Mr Montila was ordered to pay the costs of 28 November 2003.

26. On 2 December 2003 Hughmans made another "without prejudice save as to costs" proposal to Ormerods. It was that Cluttons should be appointed to produce a current valuation for the Barn and also their estimate of "a reasonable build cost" to put it in its present condition. Hughmans proposed that Cluttons's figures could then be used as the basis for negotiations, whose outcome might save the expense of instructing the three experts the subject of the Master's directions of 28 November 2003. DY (by then again instructed for Mr Stocking) responded on 15 December 2003. Whilst they agreed that Cluttons could value the Barn, they rejected the idea that Cluttons could also produce a reasonable "build" cost estimate, which they said was beyond their expertise. Their stance was that the directions of 28 November 2003, including the appointment of three experts, would have to take their course. They raised the point that Mr Montila would also have to account to the partnership for rent for his occupation of the Barn, although in the event Mr Stocking came to the trial in 2005 unprepared to prove what that rent might be, which is why I had to direct the inquiry I did. They made no settlement proposals themselves but said the forward progress of the litigation would not prevent Mr Montila making "an offer for the settlement of this matter, nor does it rule out mediation. However it must be borne in mind that any mediation must be from the point of view that both parties know the value of the property, the value of the works and the value of the rental income."

27. On 18 March 2004 Hughmans wrote to DY repeating the offer they said Mr Montila had made "on previous occasions" but which Mr Stocking had rejected. It is not clear what the offer referred to was. With a view to trying to achieve a settlement, they proposed that a mutually agreed valuer would value the Barn, that a mutually agreed quantity surveyor would provide his view of the cost of putting it into its present condition (so meeting the point raised by DY's letter of 15 December 2003) and that an acceptable basis for a settlement would be the equal division of the difference. They said this approach would provide a good starting point for negotiations or mediation. They made the point that the merit of obtaining the views of a quantity surveyor was that Mr Stocking would not have to rely on anything said by Mr Montila, experience having apparently displayed Mr Stocking as unprepared to do so. Hughmans accused Mr Stocking of being irrational and motivated in his intransigence by a desire to cause as much cost and inconvenience as possible to Mr Montila.

28. DY replied on 19 March 2004 advancing defensive points on behalf of Mr Stocking, but not agreeing to the proposal. Nor did they make any practical counter-proposal towards achieving a settlement. Hughmans repeated their proposal on 15 April 2004. By then Mr Montila had defaulted in complying with his obligation to produce the Scott Schedule ordered on 28 November 2003. In that letter Hughmans disagreed with DY's suggestion in their letter of 15 December 2003 that Mr Montila was accountable for an occupation rent, a stance which proved to be wrong. DY's response on 20 April 2004 advanced no constructive proposal but did say that it "would be of great help if your client were to at least give some idea as to what he thinks he has spent on the property."

29. Hughmans responded to that on 22 April 2004, reminding DY of the figures provided on 29 November 2002, which they said Mr Stocking had chosen to disbelieve (figures which were no more precise than to assert that Mr Montila claimed to have spent between £500,000 and £600,000). That is why they had subsequently proposed, first, that Mr Joyce should mediate (he being an architect who was familiar with the property and the works done to it); second, that Cluttons alone should value the Barn and the works; and, now, that a quantity surveyor should be instructed to value the works. They complained that Mr Stocking had made no constructive suggestions of his own. DY responded on the same day by a letter upon which Mr Christie placed some reliance, saying that it indicated Mr Stocking's willingness to mediate. All that DY said on that topic was that if Mr Montila "truly wants to have real mediation, then we are sure that our client will consider this favourably." It is unclear from that remark to what extent DY had even discussed the question of mediation with Mr Stocking.

30. Hughmans wrote back on 23 April 2004 and DY responded on 30 April 2004. They noted that Mr Montila claimed to have spent between £500,000 and £600,000 on the Barn and assumed he could not give a precise

figure. Their letter may have reflected that they still regarded the £140,000 offer as on the table. They wrote: "*Our client does not have enough information to decide whether or not to accept your client's offer, on the simple basis that he has no evidential proof from your client as to what he alleges he has spent. How your client can honestly think that our client could make a value decision without actually knowing what your client is claiming he has spent is beyond us. Furthermore, the offer made on the 29th November [2002] was before the Court had made a determination of the partnership and was at a time when your client was still alleging that there was no partnership.*"

31. Hughmans responded on 4 May 2004. They made the point that Mr Stocking had rejected the proposal that Mr Joyce should have been the mediator, but had not proposed an alternative mediator. They said Mr Montila had given an estimate of the cost of the development work and said that: "*It is axiomatic that the actual figure cannot be ascertained precisely until the accounts are taken, at great expense. This is why we have suggested various methods of independently determining a reasonable figure, all of which you have rejected. ... the offer remains open that a joint valuation and quantity surveyor's opinion be obtained and negotiations take place on those figures, as we have suggested. Indeed a mediation could take place with a mutually agreeable mediator, once those figures are available.*"

32. Two comments on that. First, Hughmans did not meet DY's point that DY at least wanted to know how much Mr Montila claimed he had spent: Mr Montila's position was, apparently, that he could not do that even to the nearest £100,000. That does not surprise me because, as I observed in paragraph 13 of my judgment of 18 October 2005, both parties specialise in cash transactions and it was obvious at the trial that Mr Montila had kept no proper records of what he had spent. Secondly, their proposal as to the way forward to either a round of negotiations or a mediation involved incurring a material part of the expense which was anyway going to be necessary in order to comply with the Master's directions as to expert evidence. It could be said that the more sensible way forward was to proceed with an early obtaining of the expert reports that the Master had directed and then attempt either a settlement negotiation or a mediation.

33. Mr Montila failed to serve his Scott Schedule by 31 March 2004. On 9 July 2004 Master Price varied his order of 28 November 2003 by requiring its service by 1 October 2004. He further extended the time for the service of the three expert reports to 1 September 2004 (accountant), 1 October 2004 (valuer) and 1 January 2005 (quantity surveyor). He made no order as to costs.

34. On 8 September 2004 Hughmans made a revised offer of £60,000, with a proposal of no order as to the costs of the account. By then material costs had been incurred since May 2003. That offer was open for 14 days but was rejected. In the event Mr Stocking "beat" the offer at the subsequent trial.

35. The accountant's report was served on 1 September 2004. The valuer's report was not served by 1 October 2004, nor was Mr Montila's Scott Schedule. On 15 November 2004 Master Price ordered Mr Montila to disclose his and his wife's tax returns for certain years; he gave renewed directions for the obtaining of expert reports from a valuer and a quantity surveyor; he directed Mr Montila to serve his Scott Schedule by 10 January 2005; and he directed costs to be in the case.

36. Mr Montila did not serve his Scott Schedule by 10 January 2005 and on 28 January 2005 Deputy Master Nurse made an "unless" order debarring him from taking any further part in the account unless he served it by 4 February 2005. Mr Montila was ordered to pay the costs of that application. He did not comply with that time limit either but did then belatedly serve his Scott Schedule on 7 February 2005. On 16 February 2005 Master Price made an order deeming it to have been properly served under the January order. He directed the production of the quantity surveyor's report by 3 June 2005.

37. On 1 June 2005, shortly before the taking of the account before me, DY wrote that Mr Stocking would settle for £350,000 plus his costs of the account. That offer was rejected and bore no relation to what Mr Stocking achieved at the trial. In June 2005 the account was taken before me, my order of 18 October 2005 followed and by July 2006 the amount of the occupation rent payable to the partnership by Mr Montila had been determined.

Recent correspondence: interest rears its head

38. On 14 August 2006 Hughmans wrote to DY setting out their proposal for the division between the parties of the unimproved value of £237,500 plus the occupation rent of £42,417.90, which totalled £279,917.90 (in fact the occupation rent was £42,412.90). Under my findings, Mr Stocking was entitled to £68,160.03 and Mr Montila was entitled to £72,841.40. On Hughmans's figures, that left a balance of £138,916.47 to be divided equally, giving them £69,458.23 each. Mr Stocking's share was therefore £137,618.26, which in principle (but subject to the set-off mechanics of my order of 18 October 2005) Mr Montila was liable to pay him. Hughmans added, however, that they were seeking indemnity costs of the proceedings as from 29 May 2003, that being the date on which they had made what they called a Part 36 offer, which Mr Stocking had rejected but which gave him more than he subsequently achieved in the litigation. That offer had been a payment of £140,000 in full settlement plus his costs to date.

39. DY's response on 28 September was that (questions of interest apart) they agreed Hughmans's arithmetic. But they said that it was Mr Leaver QC's judgment of 13 May 2003 which, having declared the existence of the partnership, entitled Mr Stocking to his £137,618.26, even though that figure was only determined over three years later. They said it followed that he was entitled to interest at the judgment rate of 8% on that sum from 13 May 2003. Such interest down to 28 September 2006 totalled £39,419.12 which, when added to his basic

entitlement of £137,618.26, amounted to £177,037.38. Therefore, said DY, Mr Stocking's ultimate entitlement, including interest, roundly beat Mr Montila's offer of 29 May 2003. They added that there were also other reasons why Mr Montila could not rely on that offer, which remained to be argued by Mr Christie.

40. Hughmans's letter of 2 October in reply set out various points as to why DY's argument as to the running of interest from 13 May 2003 was mistaken, as it obviously was; and Mr Christie made no attempt in argument to support the point. DY remained unimpressed, responding on 16 October with the following assertion: "Our client is entitled to interest on the judgment. We are, of course, in a Court of Equity. Is your client seriously suggesting that our client should not have recompense at all for either interest, rent or profit since the date of judgment? We cannot see how a Court of Equity could possibly decide that our client entitled to none of the above." That appeared to overlook that entitlement to interest under the Judgments Act 1838 is a statutory right, not an equitable one.

The arguments

41. Mr Cousins submitted that DY's claim that Mr Stocking is entitled to interest from 13 May 2003 on the £137,618.26 to which he has become entitled as a result of my order of 18 October 2005 was mistaken. All that happened on 13 May 2003 was that Mr Leaver QC declared that the parties had been in a (by then dissolved) partnership and directed the taking of the necessary accounts and inquiries for its winding up. That particular battle was one that Mr Stocking had won and so he was awarded his costs to date. No judgment was then made in favour of Mr Stocking for any sum and so there was no amount on which interest could run under the Judgments Act 1838. Moreover, under paragraphs 6 and 7 of my order of 18 October 2005 there is (a) first a set-off of costs against costs before any final costs balance either way is ascertained, and neither side can enforce any costs payment before that exercise has been performed, which it cannot be until the costs reserved under paragraph 5 of the order have been determined; and (b) once the costs balance has been determined, the amount of any payment due from Mr Montila to Mr Stocking is still only calculated by taking the costs balance into account, with the payment only being due within 14 days after its calculation. Thus, said Mr Cousins, there can be no question of any entitlement to Judgments Act interest accruing on anything ultimately due to Mr Stocking until the expiry of the 14-day period and the ascertainment of whatever (if anything) is then due to him.

42. Mr Cousins submitted further that, whatever complaint Mr Stocking may now have about the machinery of the order of 18 October 2005 (and it appears he has some), it is too late to make it now. The time to do so was when the proposed form of the order was discussed on 18 October 2005. My recollection is that that form was produced in draft by Mr Cousins following the handing down of my draft judgment and that little, if any, argument upon it was then advanced by counsel for Mr Stocking. I add that it is easy to see why Mr Montila was anxious that the order should be in the form it is. He was going to have to make a payment to Mr Stocking for his partnership share but also regarded himself as having a good arguable case for a costs order against Mr Stocking. It is obvious that he would have wanted any cross-liabilities to be set off against each other.

43. Mr Cousins then turned to the critical question I have to decide, namely as to the appropriate costs order in relation to the taking of the account. He referred to Mr Montila's offer on 29 May 2003 of £140,000 plus costs. That offer was refused, with Mr Stocking making a counter-offer for a payment of £377,000 plus costs. Mr Cousins made the point that (ignoring the set-off arrangements in paragraphs 6 and 7 of the order of 18 October 2005) Mr Stocking's pursuit of the litigation for a further three years has entitled him at best to a payment of £137,618.26, which is over £2,000 less than he was offered in May 2003. Mr Cousins further pointed out that that £2,000 difference does not in fact reflect the true margin by which Mr Montila ultimately "beat" the £140,000 offer. His point was that the final figure of £137,618.26 included Mr Stocking's share of the occupation rent for the period March 2003 to 18 October 2005, whereas as at May 2003 only two months of such rent had accrued due. It followed that an offer of £140,000 in May 2003 was materially more generous than it might appear from an arithmetical comparison with the figure of £137,618.26 ascertained three years later. If Mr Stocking's entitlement as at May 2003 is calculated on the same basis as was later reflected in my judgment, but bringing into account only two months' occupation rent, his share would have been only £117,509.32.

44. In these circumstances Mr Cousins submitted that, as Mr Montila had materially beaten an offer made as long ago as 29 May 2003, the just result was that Mr Montila should have the whole of the subsequent costs of the litigation. The outcome of the litigation shows, he said, that Mr Stocking was wrong not to have accepted the offer. Mr Cousins further submitted that these costs should be assessed on the indemnity basis.

45. Mr Christie's submission was that, when the matter is properly analysed, Mr Montila has not beaten his May 2003 settlement offer, either by £20,000 (or even £2,000) or at all, although he did not develop that submission to a point that enabled me to understand it, let alone accept it. He further said that Mr Montila's conduct of the case was such that he should pay Mr Stocking's costs, albeit only on the standard basis. Alternatively, he submitted that if Mr Montila's settlement offers were to be given any weight, they at most have a neutralising effect resulting in the right costs order being no order.

46. Mr Christie said that none of Mr Montila's offers, including that of 29 May 2003, was in proper Part 36 form, so that none entitled Mr Montila to invoke Part 36 on the question of costs. With the provisions of Part 36.5 in mind, he pointed out that no offer took account of, or made any reference to, interest; and that the offer of 29 May 2003 did not state the period within which it was open for acceptance. He said it was also moot whether it was even a genuine offer, his point being that Mr Montila either was not, or may not have been, good for the money

at the time. He said the only way he could have raised the money was by way of a re-mortgage but that at the time he was claiming benefits and had no income. He further pointed out that (as Hughmans had said in their letter of 11 June 2003) the offer was made "on the basis of the value of the property at the time of dissolution" whereas that was not the basis on which I later assessed the parties' respective entitlements. Even accepting, as he did, that the court can take account of non-Part 36 offers in considering the appropriate costs order, he submitted that the offer of 29 May 2003 was anyway not one which Mr Stocking ought to have accepted and that therefore it should not be regarded as governing the disposal of the costs issue.

47. Mr Christie criticised the subsequent proposal in Hughmans's letter of 2 December 2003 as being inappropriate, pointing out that on 28 November 2003 Master Price had already directed the appointment of a quantity surveyor. He further submitted that the general circumstances of the case point against any costs order being made in favour of Mr Montila. He referred, first, to Mr Montila's persistence - even after Mr Leaver's order of May 2003 - in denying that the Barn was partnership property. As regards the substance of the accounting dispute between the parties, that largely turned upon the extent of Mr Montila's work on the Barn after June 2000. Absent proper disclosure, this was a matter wholly within Mr Montila's own knowledge. Mr Christie said that Mr Stocking was thus reliant on the production by Mr Montila of a proper Scott Schedule, and he referred to Mr Montila's defaults in producing one, leading to the "unless" order of 28 January 2005.

48. Mr Christie further submitted that the Scott Schedule, when eventually produced, was anyway not up to much. I recorded in paragraph 36 of my judgment of 18 October 2005 that Mr Burkill (the quantity surveyor) dismissed it as serving no useful purpose. Mr Christie submitted, with some force, that the determinative evidence supporting Mr Montila's claim that he had spent material amounts on the conversion was Mr Burkill's report, not the Schedule. He also said that that report was only produced mid-way through the trial before me. I do not recall that as being entirely accurate (of course Mr Christie was not counsel at the trial): my recollection, which Mr Cousins confirmed, is that Mr Burkill's main report was produced shortly before the trial and was then supplemented by a further report produced during the trial. Mr Christie also submitted that, but for Mr Montila's delaying tactics in the run-up to the June 2005 trial, the matter might have come to trial before the value of the Barn had declined from the value it had in 2003.

Discussion

49. The focus of the court's consideration of issues as to costs will generally be on the guidelines set out in CPR Part 44.3. They are too familiar to need repeating in full here. Their approach is that the court has a discretion as to whether to make a hostile costs order but that, if it decides to do so, the general rule is that the unsuccessful party must pay the successful party's costs (Part 44.3(1) and (2)). That general rule does not apply in the types of case (immaterial for present purposes) described in Part 44.3(3). Part 44.3(2)(b) also provides that the court can anyway make a costs order which departs from the general rule; and Part 44.3(4) provides that, in deciding what order to make, the court must have regard to all the circumstances, including three particular matters, namely:

"*(a) the conduct of the parties;*
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

(Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part).

50. Part 44.3(5) provides that the "conduct" of the parties includes:

"*(a) conduct before, as well as during the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;*
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

51. I consider that I should first ask myself "*who, as a matter of substance and reality, had won*" (see ***Locksley Brown v. Mcasso Music Productions*** [2005] EWCA Civ 1546, per Neuberger LJ at paragraph 18). I take the view that the answer to that question is probably Mr Montila overall, although not on all issues or by much.

52. As to the issue over Mr Stocking's contribution to the partnership, Mr Stocking ultimately proved some £8,000 of expenditure in addition to his undisputed £60,000 contribution. I have referred to the relatively enormous - indeed, I consider, exaggerated - contribution he had originally sought to establish and he therefore only achieved modest success on this front. Since, however, even that degree of success exceeded what Mr Montila was prepared to concede, I regard Mr Stocking as having been the successful party on this issue, although the measure of his success was small. I also regard him as having been the winner on the occupation rent issue, although that issue occupied very little trial time.

53. Turning to Mr Montila's contribution, his case was that it was worth over £1m, but I found his evidence unsatisfactory, I made no such finding and was prepared only to find that it at least exceeded £557,500. A finding of this more limited nature was in fact all that Mr Montila needed me to make for the purposes of the primary case which Mr Cousins advanced at the trial. In connection with this issue, I also found in Mr Montila's favour on Mr Stocking's case that there had been an agreement that the partners would spend no more than

£300,000 on the conversion work. Mr Stocking also withdrew his claim for a sale of the Barn, and so Mr Montila can be regarded as having succeeded on that issue, although it is one that occupied very little trial time; and I found in Mr Montila's favour as to the relevant valuation date and valuations, which occupied a little more. The outcome was that I found that Mr Montila was entitled to the whole value of the improvement to the Barn that his conversion work had achieved; and he also succeeded in retaining the Barn for continued occupation by himself and his family. I would therefore regard Mr Montila as having, overall, had the better of the arguments at the trial than did Mr Stocking, but the success was not all one way.

54. That conclusion does not by itself entitle Mr Montila to the (or any) costs of the account. Part 44.3(4) requires me to consider all the circumstances of the case. At the very least I consider that any costs order that I might provisionally be disposed to make in favour of Mr Montila should reflect that Mr Stocking proved a greater personal contribution than Mr Montila was prepared to concede; that Mr Montila lost on the occupation rent point; and that I was unimpressed with the quality of his own evidence as to the value of his expenditure and labour on the Barn conversion. The first two considerations might be said to point towards the making of an issue-based costs order, with Mr Montila paying Mr Stocking the costs of the issues on which Mr Stocking can be regarded as the winner, and with Mr Stocking paying Mr Montila the costs of the issues which Mr Montila can be said to have won; and the third consideration can be said to point to the imposing of a discount on any costs that might in principle be recoverable by Mr Montila.

55. Before focusing more closely on these considerations, there is a further point to bear in mind. ***Hamer v. Giles*** (1879) 11 Ch. D. 942 is authority for the proposition that, in cases where the court's assistance is required for the winding up of a partnership's affairs, the costs are ordinarily borne by the partnership's assets before the final division of them between the partners, although this is not an invariable principle. Sir George Jessel MR said, at 944: *"... It appears to me that where there is no fault on either side, but the partnership accounts have to be taken in this Court, the costs of the action for taking the accounts from the beginning ought to be dealt with as all other costs of necessary administration, that is, they must come out of the partnership assets. Of course, where an action for dissolution is rendered necessary by the misconduct of a partner - as, for instance, where a partner whose duty it is to keep the accounts has neglected to do so - the Court not only has jurisdiction, but is bound to exercise it, by making that partner pay so much of the costs as are occasioned by his misconduct. But in all other cases there is no difference between the costs of the action for taking the accounts prior to the trial and the subsequent costs, and I have always acted on that rule."*

56. I had no argument on whether the general approach reflected in that passage is still, since the inception of the CPR, to be regarded as a valuable guide to the disposition of costs issues in relation to the taking of partnership accounts. In principle, however, I consider that it ought to be. Principles such as those summarised by Sir George Jessel were developed by the courts as likely to provide a good practical guide to the just disposal of costs issues in the type of case to which he was referring. Such an approach cannot have become unjust since the CPR. In my view the fact that the present dispute involves the incidence of costs in the taking of accounts in partnership litigation is a circumstance which, under Part 44.3(4), entitles the court to have regard to the longstanding practice of the courts with regard to such costs. In *Sahota and another v. Sohi* [2006] EWHC 344 (Ch), to which counsel referred me, Park J appears to have taken a like view: he does not appear to have viewed the CPR as requiring ***Hamer v. Giles*** to be regarded as kept in a locked drawer.

57. As to how the ***Hamer v. Giles*** principle might be said to impact on the present case, it can be said by Mr Stocking that the need for the taking of the account before me was very largely caused by Mr Montila's failure to keep proper accounts of his expenditure on the conversion, when it was obvious that he ought to have done. Whilst Mr Christie did not put it quite like this, he did emphasise that a material issue in the taking of the account turned on the extent of that expenditure, being a matter exclusively within Mr Montila's knowledge; and I have related the time and trouble it took to require Mr Montila to produce the Scott Schedule that Master Price originally ordered on 28 November 2003. In my view the approach reflected in *Hamer v. Giles* entitles Mr Stocking to say (a) that Mr Montila should pay his costs (so far as not already dealt with by prior orders) of his prolonged efforts to compel the production by Mr Montila of his Scott Schedule and (b) that Mr Montila should not be entitled to recover from Mr Stocking any part of his costs of and relating to the production of that Schedule.

58. Where - subject always to the all-important matter on which Mr Cousins placed major reliance, and to which I shall come, namely the effect of the offer of 29 May 2003 - does all this lead? In my view it leads to a set of cross-considerations which make for a difficult decision as to the right order as to costs. I summarise them as follows. Looking at the matter first from Mr Stocking's viewpoint, he is, I consider, in principle entitled to: (i) his costs of the issue as to his own contribution to the purchase of the Barn, save that I consider that he should suffer an appropriate discount in respect of them to reflect the manner in which he exaggerated his claim; (ii) his costs of the issue at the trial as to the payment of an occupation rent, although those costs must have been minimal; (iii) save in so far as they are the subject of prior orders, his costs of obtaining Mr Montila's Scott Schedule.

59. Looking at the matter now from Mr Montila's viewpoint, I consider that he is in principle entitled to: (i) his trial costs of proving that his expenditure and allowable remuneration at least equalled £557,500: Mr Stocking had received the Scott Schedule the previous February but even then made no concession on that claim and put up only a feeble challenge to it at the trial. For the avoidance of doubt this head of costs cannot, however, include any part of the costs of producing the Scott Schedule; (ii) his costs of defeating Mr Stocking's assertion as to the £300,000 spending limit, (iii) his costs of defeating the claim that the Barn should be sold (which must have been

minimal); and (iv) his costs incurred in making good his claims as to the relevant valuations (basically 2005 versus 2003).

60. There is, however, also another set of costs to consider, namely the costs of the obtaining of the various expert reports directed by the Master. As to those costs, I consider that the fair order would be no order, on the basis that they were required anyway in order to determine the manner in which the partnership was finally to be wound up. This includes the costs of the report on the occupation rent.

61. These various considerations might be said to point to a complicated issue-based order (with orders both ways) of the nature contemplated by Part 44.3(6)(f). Were Ito make such an order that would be likely to lead to yet more expense and delay since I have no expectation that the parties would be able to reach agreement on any of the issues to which that such an order would give rise and so the matter would have to be resolved by a costs judge. That exercise would be likely to be lengthy and expensive.

62. Part 43.3(7) recognises the potential for difficulty arising from issue-based costs orders, and so, in any case in which the court "would otherwise consider" making such an order, it requires the court "instead, if practicable, [to] make an order under" CPR 43.6(a) or (c). The former is an order requiring a party to pay a proportion of another party's costs. The latter is an order requiring a party to pay costs from or until a certain date only. I do not regard the latter alternative as providing a helpful solution to the difficulties of this case. If I were in principle minded to make an order reflecting the considerations just summarised, it would be likely to be one directing that in respect of various classes of costs there should be no order; that, subject to this, Mr Montila should pay Mr Stocking x% of his costs; and that, subject likewise, Mr Stocking should pay Mr Montila y% of his costs. Arriving at the right percentages would, however, be a difficult exercise, which would be likely ultimately to owe more to guesswork than to logical analysis;

63. I do not, however, propose to embark upon such an exercise. I have not found the issue of costs in this case easy, but the more I have thought about it the more I have come to the conviction that this is a case in which - subject always again to Mr Cousins's point based on the May 2003 offer - the various cross- considerations I have explained, coupled with my view as to the costs of the expert reports, point to the conclusion that, overall, the just disposal of the issue as to costs is to make no order. Subject to the next point, that is the order I am in principle disposed to make.

64. That all-important matter, upon which Mr Cousins placed major reliance, is Mr Montila's offer of 29 May 2003, being an offer which he said - and I agree - Mr Montila had substantially beaten. Mr Cousins conceded that the offer was not in form a Part 36 offer. He also made no submission to the effect that I should exercise my jurisdiction under Part 36.1 to direct that, even though the offer was not- made in accordance with Part 36, it should nevertheless have the consequences specified in Part 36. His point was simply that the offer was a clear, fair and unambiguous one which, if accepted, would have given Mr Stocking more than he ultimately recovered; and that justice demands that I should take account of it in deciding the costs issue. There is no dispute that Part 44.3(4)(c) entitles me to take account of it even though it was not made in accordance with Part 36. He said it followed that Mr Montila should have all his costs since the making of the offer, and on the indemnity basis.

65. That submission is, at least at first sight, an attractive one. But Mr Christie's submission was that its force is dependent on the court also being satisfied that the offer was one that Mr Stocking "clearly ought to have accepted". The quoted words are those of Neuberger LJ in ***Locksley Brown v. Mcasso Music Productions*** [2005] EWCA Civ 1546, at paragraph 12, the context there, as here, being one in which the court was considering the impact of a defendant's offer to settle. The Court of Appeal concluded that the relevant offer in that case was not one that the claimant "clearly ought to have accepted" and so held that it was not conclusive as to the costs issue, although they did not dismiss it as wholly irrelevant. In ***Sahota and another v. Sohi*** [2006] EWHC 344 (Ch), also a decision on costs in partnership litigation, Park J adopted Neuberger LJ's language as posing "the real question" in relation to a non-Part 36 offer when considering its impact upon the question of costs.

66. Mr Christie made, first, a weak point to the effect that Mr Montila's offer was not one which Mr Stocking ought clearly to have been accepted since there was, he said, a real question as to whether Mr Montila's financial circumstances were such as to enable him to satisfy the offer. There is nothing in that. First, if Mr Montila did not have the ready cash with which to pay in full immediately, he could have given Mr Stocking a charge over the Barn by way of security, and it is difficult to see how he could have refused to do so. Secondly, if Mr Stocking really did have concerns of this sort at the time, why did he counter-propose a settlement requiring a payment of £377,000 plus costs? Was that mere posturing?

67. The rather better point open to Mr Stocking, which Mr Christie also made, was that anyway it cannot be said that, at the time it was made, the offer was one which ought clearly to have been accepted. DY's immediate response to the offer was that it was one that appeared *"to have taken no account of the value of the property"* and I interpret that as a reference to its then current value. Hughmans's response to that was that the offer was made *"on the basis of the value of the property at the time of dissolution and the amount our client had expended on it at that time."* The dissolution had, of course, happened in March 2001, so Hughmans were telling DY that the offer (whose calculation they made no attempt to explain) had been fixed by reference to the Barn's value (also unidentified) two years before and by reference to Mr Montila's expenditure which he could not himself fix even to the nearest £100,000.

68. There is no evidence before me as to what the Ham's value was in March 2001, but I infer that it was likely to have been less than its value in May 2003 (Mr Montila's Scott Schedule covered items of expense allegedly incurred between 1 June 2000 and 23 May 2003, and so the conversion was unlikely to have been all that advanced by March 2001). The evidence at the trial in June 2005 was that the Barn's value in April 2003 was between £925,000 and £950,000, and its agreed value as at April 2005 was the rather lower figure of £795,000. There is no evidence as to what Mr Stocking believed the value of the Barn to be as at May 2003, and he was probably not in a position to make any reliable self-assessment of that for the purpose of measuring the reasonableness of Mr Montila's offer. But what he was entitled to conclude was that, however Mr Montila might have arrived at his offered figure, he had done so by adopting an irrelevant valuation date. Its irrelevance was shown, first, by Master Price's judgment delivered following the 28 November 2003 hearing; and, secondly, by the basis on which I later decided the rights of the parties in June 2005, a basis which neither side has sought to challenge by way of an appeal. In addition, in so far as it was relevant to take account of the extent of Mr Montila's expenditure on the conversion work, Mr Stocking had no idea what that was. Nor, even to the nearest £100,000, did Mr Montila. Mr Stocking had, at the time of the offer, no means of knowing or of ascertaining what Mr Montila had spent. Overall, he had no means of knowing whether the offer was a fair one or not. To find out what his claim was worth he needed to know what the Barn was currently worth and what Mr Montila had spent. Master Price's later directions of 28 November 2003 were aimed at providing that information.

69. For these reasons Mr Christie submitted that Mr Montila's May 2003 offer was not one that Mr Stocking "clearly ought to have accepted." Whilst it may be that subsequent events - including in particular the reduced value of the Barn in April 2005 as compared with its value in April 2003 - show that Mr Stocking would have done better to take the money on offer in May 2003, he was simply in no position in May 2003 to assess the offer.

70. Mr Cousins's response to this was that Mr Christie's submission takes Neuberger LJ's observations out of context and attaches to them a weight that they were not intended to bear. The point about the ***Locksley Brown*** case was that the claimant was asserting an interest in the copyright of the lyrics for a rap number and was also claiming damages. The defendant's offer merely offered him £450 in full settlement. It did not deal with his copyright claim, save in the sense that it made no concession in respect of it. In fact, at the trial the claimant recovered £180 damages and a declaration that he had a 10% joint ownership of the copyright. Neuberger LJ's explanation as to why the settlement offer was not one which Mr Brown clearly ought to have accepted was because "*in light of what the judge decided, he was being forced to give [up] his 10 per cent joint ownership of the copyright and any costs for a figure, namely the difference between £450 and £150 [sic: should that be £180?], which may or may not have been substantially more or less than what it was worth.*" Mr Cousins's submission was that the essence of what Neuberger LJ was saying was that the claimant's success at the trial in relation to the copyright claim (in respect of which nothing had been offered) meant that the case was not one in which the defendant could say that he had beaten the offer at the trial - and even though the defendant had made a larger monetary offer than the claimant eventually recovered in damages. In short, said Mr Cousins, all that Neuberger LJ was doing was comparing the claimant's success at the trial with what had earlier been offered. Mr Cousins said that the application of a like exercise in the present case shows that Mr Stocking ought clearly to have accepted the May 2003, offer. Even if Mr Stocking faced a difficulty in evaluating the offer, this is a fact of life in litigation: a party to litigation may often be faced with an offer which is not easy to evaluate but if, for that reason, he rejects it he must also take the risk of the costs consequences that that rejection may carry.

71. I regard Mr Cousins's submission as to the basis on which Neuberger LJ decided the point in the ***Locksley Brown*** case as probably a fair one. I am also sensitive to the danger of taking Neuberger LJ's chosen language out of the context in which he used it, treating it as if it were akin to a statute and purporting to derive from it a wider meaning than I can be confident he may have intended. Having said that, my own instinct is, however, that the way in which Neuberger LJ approached the matter - namely, by considering whether the offer was one that clearly ought to have been accepted - was, if I may respectfully say so, a thoroughly sound approach in the context of a consideration of its impact upon the costs of subsequent litigation. I recognise that the *Locksley Brown* case was one in which the claimant was entitled to say the offer was not one which he ought to have accepted because it did not meet his claim to an interest in the copyright, being an interest he established at the trial. But there may also be other reasons why it would be reasonable for a claimant not to accept an offer made to him; and, if those reasons are sound, then - in a case in which the claimant does not in the event beat the offer - they may well have a relevant impact upon the court's assessment of the effect of the rejected offer on any subsequent issue as to costs.

72. I find support for this approach in Park J's observations in ***Sahota and another v. Sohi,*** supra. At paragraph 31, in dealing with non-Part 36 offers, he said: "*...In having regard to the offer the court will normally deny an order for costs to the party (A) who declined to accept it and then failed to beat it at trial. But that will not always be so. It is not a simple matter of mathematics: was the financial outcome to A worth less than the value of B's offer? The real question, as it seems to me is not 'Did A beat B's offer?', but rather 'Was B's offer one which A ought clearly to have accepted?'*

73. As Park J went on to show, he was there drawing on Neuberger LJ's language in the ***Locksley Brown*** case. And in paragraph 34(i) he once more made clear that he regarded the "real question" just quoted as justifying a rather broader inquiry than Mr Cousins submitted was permissible. He there referred to the offers made in that case, which he described as: "*... complicated, and not easy to evaluate at the times when they were made. For that reason alone I do not think it can be said that the Sahota interest clearly ought to have accepted them. At the very least the*

offers required further clarification and discussion between the two parties' solicitors before the Sahota interest could realistically have been expected to make a definitive decision to accept any of them. ... If the offers were too complicated it cannot be said that the Sahota interest clearly ought to have accepted them."

74. I respectfully regard that as reflecting the correct approach to a non-Part 36 offer when considering its impact upon the question of costs. Mr Cousins's suggested approach is, in my judgment, overly rigid and does not chime comfortably with the flexible and discretionary considerations that are the essence of the way in which the court exercises its discretion under Part 44.3.

75. Turning then to the May 2003 offer, it is my view that, for the reasons given, it was not one that clearly ought to have been accepted at the time it was made. The method (if any) in its calculation was unexplained; it was apparently fixed by reference to an unstated valuation as at an irrelevant date over two years earlier; Mr Stocking had no means of knowing with even approximate precision what Mr Montila had spent on the conversion because it appears that not even Mr Montila knew that; and the valuation basis of the calculation was one that even Mr Montila had disclaimed by the time of the June 2005 trial. There was, therefore, no sensible basis on which Mr Stocking could assess the offer. He could only do so with the benefit of up to date valuations and accurate information of Mr Montila's claimed expenditure whereas it appears that at the time no-one had that information. Whilst, as I have indicated, Mr Stocking does not appear to have made any very immediate or positive running towards trying to engage in negotiations with Mr Montila, he did in due course make it plain that he regarded this information as critical to any settlement discussions: and Master Price made directions on 28 November 2003 directed at providing that information. In the event it was not available until long after the £140,000 offer had been replaced with the revised £60,000 offer, which of course Mr Stocking subsequently beat.

76. In the circumstances, whilst I have taken account of the May 2003 offer, I am not satisfied that it requires me to depart from my provisional conclusion that the just costs order in this case is no order. I therefore make no order.

Interest

77. During the argument a question arose as to the accruing of interest under the Judgments Act 1938 on whatever is ultimately due from Mr Montila to Mr Stocking under my order of 18 October 2005. Mr Christie's stance was that whatever sum was ultimately calculated as so due would carry interest retrospectively from 18 October 2005. Mr Cousins's position was that this was not an issue that was formally before me - and he invited me not to decide it - but said that the correct position was that interest would only begin to accrue as from the expiration of the 14-day period referred to in paragraph 7 of my order, and then only on whatever sum was by then calculated as due.

78. I do not propose to rule on this question. Subsequent reflection has satisfied me that I had insufficient argument on it to enable me to do so, the rival positions being advanced by little more than assertion. Neither counsel referred to section 17 of the Judgments Act 1838 itself, or to any authorities decided under it. I did myself subsequently consider that section, and also ***Hunt v. R.M. Douglas (Roofing) Ltd*** [1990] 1 AC 398, but having done so, and having regard to the unusual form of the order of 18 October 2005, I still found myself less than confident as to the right answer. The result is that I feel insufficiently equipped to rule on what I do not regard as a straightforward point. In saying this I make clear that I am neither making nor suggesting any criticism of counsel. The question of interest was not formally on the agenda at the hearing, which was limited to the issue of costs. If the parties are unable to agree the issue of interest, the matter can be restored to me for full argument.

Result

79. I make no order as to the costs of the account and of the proceedings consequential upon my order of 18 October 2005. The parties have liberty to restore the matter to me on the question of interest.

Richard Christie QC (instructed by Dzimitrowicz York, Croydon) for the claimant.
Jeremy Cousins QC (instructed by Hughmans) for the defendant.