CA on appeal from Ch.Div (Deputy Master Weir) before Arden LJ, Keene LJ, Mr Justice Wilson. 17th June 2005.

**JUDGMENT : MR JUSTICE WILSON:**

1. The claimant appeals against a declaration made by Deputy Master Weir sitting in the Chancery Division of the High Court on 18 January 2005. The declaration was a stage in the process of the court's taking of an account between the claimant and the defendant referable to a claim arising out of a business venture which they had undertaken together.

2. The business venture related to premises at 44-46 Seymour Place, near Marble Arch. In about 1996 the parties agreed that, as partners who would contribute equally to the costs, they would take a lease of the premises, which were dilapidated; would repair them; would convert them into premises at which a language school could be conducted on the lower floors and accommodation could be let to students on the top floor; and would divide the profits equally.

3. In 1996 and 1997 the defendant, on behalf of the partnership, entered into agreements with the freeholder of the premises, including an agreement for a lease. In return for a concession as to the amount of rent, the defendant agreed with the freeholder to effect substantial, specified works of repair. The parties also needed to fund further works in order to achieve their proposed conversion. The works began in August 1997.

4. When the costs of the works began to be payable, the defendant found that the claimant was not making his equal, or any, contribution to them; the defendant had to meet them alone. By letter to the claimant written in October 1997 the defendant told him that his failure to contribute was unacceptable. Even by December 1997 the claimant had made only a nominal contribution of £5000 to the costs; and so, by letter dated 8 December 1997, the defendant indicated that he would pursue the project alone. In a judgment delivered on 3 February 2004 Master Bowman held that the defendant thereby brought the partnership to an end.

5. The matter is complicated by the fact that, in March and April 1998, the claimant paid -- and the defendant accepted that he should pay -- further sums totalling £40,000 towards the cost of the works. Thus the claimant's total contribution to the venture was £45,000. The works were completed on about 5 April 1998 but, within hours of completion, there was a serious flood which necessitated further works of repair. By 31 May 1998 these appear to have been largely accomplished: and in June 1998 the premises began to be used. It had been in about February 1998 that the lease for which there had been an agreement was executed between the freeholder and the defendant.

6. In his judgment dated 3 February 2004 Master Bowman held that the claimant's further payments were not made pursuant to any revival of the partnership or to any fresh partnership. But he determined that, by virtue of a resulting trust, the claimant was entitled to a share of the value of the lease of the premises and of the profits thereby generated in the proportion which £45,000 might bear to the total costs of acquisition of the lease and of the works of development, refurbishment and improvement of the premises.

7. Master Bowman's determination as to the extent of the claimant's entitlement was in line with the defendant's submissions. But, having in June 2004 failed in this court to secure permission to appeal against it, the claimant has had no option but to accept the determination. It was pursuant to it that, also on 3 February 2004, Master Bowman directed that: *"... the [costs of the] works of development, refurbishment and improvement ... are to be determined on the taking of an account between the parties".*

   On 1 June 2004 he gave further directions in relation to the proposed taking of the account.

8. In the event it fell to Deputy Master Weir to take the account over three days, namely 1 December 2004 and 17 and 18 January 2005. Submissions concluded late in the afternoon of the third day. At that time, most unfortunately for him, the deputy master faced imminent surgery and a period of professional inactivity. So he decided to give an impromptu judgment which, as typed, is comprised in ten paragraphs spread across just over two pages. Counsel tell us that he prefaced his judgment by remarking that many arguments would be inadequately treated. It is quite a challenge for an appellate court to find reasons for dismissing an appeal in the teeth of that sort of remark, frank though it was.

In the event his decision, against which this appeal is brought, was to declare that: *"The total of the costs of acquisition of the lease and of the costs of works of development, refurbishment and improvement of the property (referred to in the Order dated the 3rd February 2004) was £151,169."*

9. Even prior to the hearing before Master Bowman on 3 February 2004 the defendant had made clear his contention that the claimant's contribution of £45,000 gave him a 31% share in the value of the lease and of the profits thereby generated. According to the defendant, the claimant's share was 31 per cent because that was the percentage which £45,000 bore to the total relevant cost of acquisition and of the works, namely (here I shall correct a small mathematical error) £145,150. The defendant contended that he and his wife (whose contribution it will be convenient to impute to him) had contributed the balance, namely £100,150.

10. In what has been called "***the core document***" the defendant had set out the computation of his figure of £145,150 as follows:

| | |
|---|---|
| (1) Costs to 31 March 1998: | £118,877 |
| (2) Costs in year to 31 March 1999: | £61,647 |
| (3) Further costs in year to 31 March: | £10,888 |
| TOTAL COSTS | £191,412 |
| LESS: | |
| (4) Rents received by defendant | |
| July 1998 to March 1999: | £21,422; |
| (5) Insurance claims paid to Defendant: | £24,840 |
| | £46,262 |
| SUBTOTAL: | (£46,262) |
| Net costs: | £145,150 |

11. In support of his first figure of £118,877, and pursuant to the directions of Master Bowman, the defendant produced a typed breakdown, which in the event totalled only £118,105. In support of his second and third figures of £61,647 and £10,888, he produced hand-written breakdowns. The fourth and fifth figures are also important. It was clearly appropriate to identify the defendant's contribution after deducting from what he had paid the sum of £24,840 which he had received pursuant to insurance claims referable to the flood and to some stolen fireplaces. It was also clearly appropriate that, within one part of his accounting with the claimant, he should give credit for rents received by him from subtenants. I personally would have expected such an allowance to be made in an account of profits rather than in this account of capital contributions. But, by his schedule, the defendant conceded -- in a manner which seems to me to be favourable to the claimant -- that the rent thus received by him should be deducted from his capital expenditure before computing their respective contributions; and both parties and the deputy master seem to have proceeded on that basis. Although the wording of the deputy master's declaration does not make it clear, both counsel have proceeded on the basis that his figure of £151,169 is intended to represent a figure net of the sums totalling £46,262. I will return later to the deduction of this total.

12. Pursuant to the directions of Master Bowman the claimant lodged objections to the defendant's typed account totalling £118,877 for the period to 31 March 1998. The claimant identified 20 objections to items, or groups of items, in that account. By way only of examples, he contended that a payment of £6,987 for carpets had been included twice; he objected, perhaps not surprisingly, to a figure for rent paid by the defendant as being not a payment of capital relevant to this account but rather a payment relevant to the account of profits and losses which will follow; and he objected, validly as Mr Devlin on the defendant's behalf today concedes, that legal costs of about £4,000 had also been included twice. In respect of a mass of items, the claimant sought documentary, or further documentary, proof.

I say "further" proof because, even at the hearing on 3 February 2004, Master Bowman had been in possession of nine bundles of documents, which, according to him, provided: "a wealth of material ... in relation to costs of refurbishment".

13. In due course the defendant replied to the claimant's objections. The text of the replies was supported by further documents. Among these documents were accounts which Mr Chelepis, the defendant's chartered accountant, had prepared for him, and had certified, in respect of, among other things, his embryonic business at the premises for the period to 31 March 1998 and the year to 31 March 1999. In fact it seems that the claimant may have already been served with these accounts prior to their inclusion with the replies to the objections. At all events the balance sheet as at 31 March 1998 included the value of the premises, as being at cost, in the figure of £118,637, which was broken down between the cost of the lease at £3,760 (being in respect of legal costs) and the cost of improvements at £114,877. The balance sheet as at 31 March 1999 again included the value of the premises at cost. The figure given for that date was £151,169, which was broken down between the cost of the lease again at £3,760 and the cost of improvements at £147,409.

14. It will immediately be apparent that, in making his declaration, the deputy master adopted the figure in Mr Chelepis' accounts for the cost of the premises as at 31 March 1999. It will also be noted that he thereby adopted a slightly higher figure for the defendant's contribution than that for which the defendant himself was contending. The defendant was contending that the total cost was £145,150; that his contribution was £100,150; and that the claimant's interest was 31%. The deputy master found that the total cost was £151,169; and it would follow that the defendant's contribution was £106,169 and that the claimant's interest was 29.77%.

15. Mr Chelepis had no duty to conduct an audit in relation to the cost of the premises and did not purport to do so. The dates when he prepared the figures for insertion into the two balance sheets and, in particular, the degree to which, in including those figures, he relied upon calculations given to him by the defendant or had before him independent evidence to justify them, were important factors in any analysis of the weight to be attached to them. In attaching the accounts to 31 March 1998 to his replies to the objection, the defendant had stated "... the defendant asserts that this is correct but, if you have doubt, he proposes to call the accountant in the witness box who prepared the accounts". In the event nothing more was said in that regard until the morning of the third and final day of the hearing, when the defendant filed and served a formal witness statement signed by Mr Chelepis, to which the accounts were attached, and sought permission to tender Mr Chelepis for cross-examination in respect thereof. Counsel then appearing for the claimant objected to this belated application; and the deputy master upheld his objection.

16. Over the three days of the hearing before the deputy master, counsel for the claimant argued the case on the basis of the numerous specified objections to the defendant's typed account; in that regard he mounted a protracted cross-examination of the defendant and made detailed submissions. In relation to the two manuscript accounts of alleged expenditure after 31 March 1998, he apparently relied on a ruling made by the deputy master on the first day of the hearing that it was for the defendant to establish that such expenditure had been incurred and, if so, related to works of development, refurbishment and improvement; and he submitted that in numerous respects the defendant had not so established it. Reference was made to the nine bundles which had been before Master Bowman in addition, of course, to the tenth bundle, which comprised the defendant's account and the material which it had generated.

17. At the start of his short judgment the deputy master lamented the way in which the matter had been prepared for his determination. In that regard I have considerable sympathy for him. His task was most unenviable. He observed that an accountant should have been instructed, preferably jointly, to synthesise the various contentions and to identify the points at issue in a user-friendly format. At the very least there should in my view have been a Scott Schedule to ease the deputy master's burden.

18. Then the deputy master expressed his reasoning as follows:
*(a) the expenditure had been incurred more than six years ago;*
*(b) many of the original documents relating thereto had been mislaid;*

*(c) it would be wrong to leap to conclusions adverse to the defendant in that regard;*
*(d) the documents had originally been produced to Mr Chelepis, who had "produced an account substantially in accordance with that which the court now has to take";*
*(e) the claimant had not objected to Mr Chelepis' account for some two years after it had been produced to him;*
*(f) the defendant had given unsatisfactory answers to questions on irrelevant matters but his evidence on relevant matters was generally reliable;*
*(g) the defendant's evidence on relevant matters was unreliable only where he lacked a necessary understanding of accountancy principles, for example in relation to the cost of the carpets, which had been double-counted;*
*(h) he (the deputy master) had been taken at length through a number of detailed objections but had decided to approach his decision in rather a different way;*
*(i) what was interesting was that the figures in the defendant's core document compared very closely indeed with the figures in the accounts prepared by Mr Chelepis; and*
*(j) in the light in particular of the closeness with which they approximated to the figures of the defendant himself, the figures in Mr Chelepis' accounts were more likely to be accurate than any other figures which could be arrived at.*

19. Thus in the end the decision of the deputy master turned entirely on two total figures (namely £118,637 at 31 March 1998 and in particular the enlarged figure of £151,169 at 31 March 1999) at which, somehow, Mr Chelepis had arrived. There, on the final day, was Mr Chelepis, ready to give oral evidence and to seek to explain those figures. But the deputy master upheld an objection to his doing so. Had he given counsel for the claimant any indication that his entire decision might turn on Mr Chelepis' accounts, and in this regard it is common ground that it was only in the course of counsel's final submissions that he give any such indication, I cannot conceive that counsel would have continued to argue that Mr Chelepis should not give oral evidence.

20. The deputy master was much struck with what he thought was a close similarity between the figures in the defendant's core document and those of Mr Chelepis. In that regard I make three points.

21. First, while any alleged similarity between two computations will sometimes be of great significance, it will sometimes be of no significance. Everything will depend on the circumstances in which the two computations are made. If they are made wholly independently of each other and are based on reliable documentary material, their similarity will be likely to be significant. But if one is based in whole or in part upon the other, their similarity will probably be insignificant. Before placing such weight on the alleged similarity, the deputy master had to explain, if he could, why the circumstances in which the two computations were made rendered it significant.

22. Second, the deputy master found that the figures in the defendant's core document conferred particular credibility on those of Mr Chelepis. But the figures which lay behind the core document were subject to detailed challenge. In effect the claimant was contending that, upon proper analysis of the figures which lay behind it, the core document conferred credibility on nothing. The deputy master had to deal, however summarily, with the individual challenges to the defendant's account, as summarised in the core document, before relying on it for the purpose of his comparison with the accounts of Mr Chelepis. The deputy master never addressed any of the claimant's objections, apart from making the one ruling in his favour in relation to the carpets. Indeed, notwithstanding that ruling, the defendant was found to have contributed more, rather than less, than what he was contending.

23. Third, I have grave doubts as to whether the deputy master was right to conclude that the defendant's figures were similar to those of Mr Chelepis. Although he did not spell it out, it seems obvious that the figures which, in particular, struck the deputy master as significantly similar were the final figures of £145,150 in the defendant's core document and of £151,169 in Mr Chelepis' accounts as at 31 March 1999. Here I return to the deduction of £46,262. The defendant's figure of £145,150 was reached following the making of such a deduction. But my view, from which Mr Devlin does not dissent, is that it is highly unlikely that, in presenting the value of the lease at cost in the accounts, Mr Chelepis would have made a deduction in respect of the fact that some of the cost had been defrayed out of insurance monies or out of rents received from subtenants. For the purposes of Mr Chelepis, unlike

those of the defendant, the source of the funds deployed to meet the cost was irrelevant; and the value of the premises which Mr Chelepis would wish to present would equate with their total cost. In my view the true comparison with Mr Chelepis' figure of £151,169 falls to be made with the defendant's gross figure of £191,412. Thus in fact the figures were markedly dissimilar. At one point I wondered whether this point led logically to the conclusion that, in that the deputy master took Mr Chelepis' figure, the sum of £46,262 now falls to be deducted from it. That would reduce the relevant cost to £104,907, of which the contribution of the claimant, being £45,000, would be 43% and that of the defendant, being £59,907, would be 57%. On that basis the claimant would have secured a substantial victory -- and no doubt would not be appealing. In fact, as I have observed, the appeal proceeds on the agreed basis that the deputy master intended the figure in his declaration to be net of the £46,262. The trouble is that he imported a figure which was not net of it.

24. In the light of the substantial criticisms which fall to be levelled at the central reasoning adopted by the deputy master, Mr Devlin has today attempted to rescue the decision by reference in particular to the generally positive finding made by the deputy master about his client's credibility. In effect Mr Devlin switches away from the deputy master's reliance on Mr Chelepis' accounts to reliance on the defendant's own tripartite account. But, when so many detailed criticisms are made of the accuracy of the defendant's account, a generalised conclusion about its credibility would be an insufficiently reasoned despatch of it. A second difficulty for Mr Devlin is that the deputy Master did not in terms reject the claimant's objections. On the contrary, he said that he proposed to approach the decision differently, ie in effect to sidestep them. The third difficulty is that, as my Lord, Lord Justice Keene pointed out in argument, the substantial discrepancy at last noticed between the defendant's account and the accounts of Mr Chelepis itself raises questions about the accuracy of the former; and these will have to be answered in the proper place.

25. With a heavy heart I consider that the appeal should be allowed, the declaration set aside and the account remitted to be taken by a full master of the Division. The costs of the litigation are surely becoming out of proportion to the sums in issue; but clearly there is some impediment to sensible, commercially driven settlement, to which this court is of course not privy. Counsel who drafted the notice of appeal suggested that this court might itself see fit to take the account. Speaking for myself, I would have been happy that this court should attempt to do, had I considered that it had the requisite material. Today, however, Mr Blaker, on the claimant's behalf, accepts that patently it does not to so.

26. Led by my Lady's expression of wish, if possible, to spare the parties the costs of a second full-scale account-taking, we have today sought to discern whether we could limit the exercise by excising small objections made by the claimant or such of his objections as are clearly valid or indeed invalid. Speaking for myself, and particularly in the absence of the transcript of the defendant's oral evidence and of any of the nine initial bundles, the fog is almost impenetrable. That a grip needed to be taken on the ambit of the account is only too plain; but my own view is that it is the master to whom this matter is remitted who alone can take it.

**LADY JUSTICE ARDEN:**

27. I agree with the judgment given my Lord Mr Justice Wilson, subject to a minor point of emphasis which I will make in a moment. The masters of the Chancery Division are of course extremely experienced in the taking of accounts and when this matter is remitted to the Master, the Master will be able to see through the fog to which Wilson J has referred without the difficulty that has attended this court.

28. The comment of the Master in this case cited by Wilson J to the effect that the reasons would be short and would not be adequate does not form part of his approved transcript that I can see and I approach the question whether the reasons which he gave were adequate by examining what was said in the approved transcript. Nonetheless, I have come to the same conclusions as my Lords for the reasons given by my Lord, Mr Justice Wilson, with the minor qualification that I will now mention.

29. The Deputy Master relied on the figures in the accounts produced to him. In a way this was understandable because very often the taking of accounts proceeds in the Chancery Division on the basis of an accountant's report, accountants' reports on behalf of both parties. Here there were none

and so the Master relied on the accounts that he did find within the bundles. However, they were the accounts of a partnership between Mr Pelagias and Mr Christodoulou, not Mr Nakhjavani, and the Master proceeded to take these accounts into consideration without any inquiry into the basis upon which they had been prepared. As my Lord said, they had not been audited, nor were they statutory accounts. So, for example, there was no statutory restriction on offsetting items within the accounts. Nor was there any indication on the face of the accounts as to the conventions on the basis of which they had been prepared. There was no obligation on the part of the person preparing these accounts to show a true and fair view and that point would affect what could be within the items under any particular entry or label. There is no separate entry in these accounts for the insurance proceeds of £24,000 approximately. However, these could have been included in the accounts within some other entry not marked insurance proceeds. Accordingly this court cannot assume, without evidence, that the insurance proceeds were not taken into account in drawing up the accounts.

30. That would still leave the balance of the £46,262 to which my Lord has referred, namely the £21,422 rent which does amount to a material sum which was not included within the item "***improvements***" and could not be included. That, as my Lord has explained, meant that there is a substantial difference between the figures in the accounts in evidence before the master and those put forward by Mr Pelagias for the purposes of the account.

31. For my part, I would, like my Lord, Mr Justice Wilson, encourage the parties to endeavour to settle these proceedings. They are extremely expensive, I have no doubt, and the sums actually in issue may not be that great. Accordingly, those who are presenting Mr Nakhjavani and Mr Pelagias should consider very carefully to which items objections could be sustained and to which items objections should accordingly be maintained. I have had an exchange with Mr Blaker in the course of the hearing of this appeal and he was candid enough to accept that the insurance proceeds, £24,840, were indeed credited in the account prepared by Mr Pelagias. Moreover, it is clear from the documents that the appellant did not challenge the fact that there was a second set of carpets as a matter of fact, because the carpet originally laid was damaged as a result of a flood. The appellant's point is simply that the instalments towards the cost of the new carpets should have been deducted from the rental account under a second account ordered by Master Bowman, see in particular paragraph 24.7 of the appellant's skeleton argument. The appellant's skeleton argument for this appeal was prepared by counsel who is now indisposed and who thus has not been able to assist in the preparation or presentation of this appeal.

32. Likewise, the Deputy Master ruled that expenditure was not objectionable for the purposes of the account by reason only that it was not incurred prior to 1st May 1998. He gave that ruling at the hearing of the account. Neither party has appealed, and thus the parties are bound by that ruling. Accordingly no objection can now be maintained to an item simply on the ground that it was incurred after 1st May 1998.

33. I would actively encourage both parties to think very hard about what points they really need to take into any further account. Provisionally, and subject always to further submissions, the parties should not go beyond the objections already entered and if they can reduce them, so much the better.

34. Next, Mummery LJ, when giving permission to appeal, encouraged the parties to use Alternative Dispute Resolution. The parties were not able to employ it before the hearing of this appeal but, as this appeal is not the end of the matter, ADR remains in my judgment a very sensible course. Indeed, I would ask the parties to consider whether the draft form of order used in the commercial courts should not be used at any disposition of this appeal. This form of order is set out at page 260 of Volume 2 of the White Book and it provides that the parties should exchange lists of three neutral individuals who are available to conduct ADR procedures in the case. Second, it is provided that the parties must in good faith endeavour to agree a neutral individual and, third, that, failing such agreement, a Case Management Conference will be restored to enable the court to facilitate agreement. Fourth, it is provided that the parties should take such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual chosen by them, not later than the agreed date as specified by the court and, fifth, and importantly, if the case is not finally settled, the

parties shall inform the court by letter prior to, in this case, the hearing before the Master, what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed. If the parties have had failed to initiate ADR procedures, the Case Management Conference is to be restored for further consideration of this case.

35. For my part, I would like the parties to consider a period of time within which an opportunity can be given for taking advantage of ADR and avoiding the cost of a further account.

36. That matter can be dealt with in the submissions after this judgment.

37. The last matter which I wish to deal with is that, for my part, I express no view on whether the rent paid by Mr Pelagias to the head lessor of the subject property during the period of refurbishment falls within the second or the third account ordered by Master Bowman. This was not fully argued and, for myself, I would prefer to express no view thereon and to leave it to the Master. With those observations, I agree with the judgments already given.

**Order:** Appeal allowed. Account to be remitted to a full Master of the Chancery Division. Order that objections be limited to those made in writing. ADR proceedings ordered. Costs awarded to the appellant and reserved to the Master of the Chancery Division.

MR GARY BLAKER (instructed by ABS LAW, CRAWLEY, RH10 1AS) appeared on behalf of the Appellant
MR BERNARD DEVLIN (instructed by MESSRS DHAMA DOUGLAS, LONDON NW1 2NJ) appeared on behalf of the Respondent