JUDGMENT : Mr Justice Mann: Chancery Division. 5th October 2006

1. On 31st July 2006 I handed down judgment in this case. The question of costs and permission to appeal were adjourned to be dealt with on a later occasion. On 3rd October I heard argument on those points and I refused permission to appeal. I reserved my judgment on costs; hence this judgment. In this judgment I use the same abbreviations and terminology as appear in my main judgment, to which reference should be made for the background to the applications dealt with below.

2. The question of the costs of the action is complicated by several factors. First, the parties cannot agree as to who has been successful in the action. Second, each party won on one very substantial issue (liability and causation as to the bulk of the claim respectively). Third, there was a part 36 payment made by the defendants on 16th December 2005. Fourth, the defendants made a "without prejudice save as to costs" drop hands offer on 22nd December 2004. Fifth, the defendants have spent a considerable sum of money (I am told it was over £150,000) in obtaining 2 reports from an accountancy expert, going to the question of causation, and then decided at the trial not to call that expert. The claimant says that those costs should be disallowed. Sixth, on 17th January 2005 Lawrence Collins J reserved the costs of an adjournment of this trial (and the costs of a PTR before him) to the trial judge; I have to determine the fate of those costs.

The costs of the action

3. The main claim in this action was for the sum of £7.75m, being the alleged costs of buying in a right which the claimant says was negligently omitted from the documentation under which the claimant purchased Fulham Football Club. I found that the defendants were negligent but not liable for that loss claimed. There was an additional claim for a little over £100,000 in respect of professional fees allegedly incurred in sorting out the negligence. I allowed £6,750 of that claim. The matter was heard over 25 days. This was a very substantial matter. So far as it is necessary for me to determine who is the "successful party" for the purposes of CPR 44.3, I find that that was the defendants. I was certainly not the claimants. As Mr Croxford QC (who appeared for the claimant) himself accepted, there is no way that this action would have been brought for such a small sum. What his client has recovered was a very small part of a financially subsidiary part of the claim, and which is itself a very very small proportion of the overall claim. The only Part 36 or analogous offer made by the claimant in this case to which my attention has been drawn is one made on 23rd September 2005, when in a fully reasoned letter they offered to settle for £6m plus costs. That shows what this action was really all about. In that context £6,750 on the fees claim is utterly insignificant. Looking at this matter in a realistic way, and in a commercially sensible way, I do not think it is fair to treat the claimant as being the successful party. I return to the significance of that determination this later.

4. The logical way of determining the issues which now arise is first to take the period since, and the effect of, the Part 36 payment, and then to consider the costs relating to the earlier period, putting on one side for the present the question of the expert's costs and the reserved costs.

5. £6,750 was awarded in this action; £500,000 was paid into court under the part 36 agreement. The claimants have not bettered that payment. CPR 36.20 deals with the consequences of that:

   "(2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment … could have been accepted without needing the permission of the court."

   Mr Croxford says that to order his client to pay the costs under that rule would be an unjust result because this is a case where it would be appropriate to make an issue based costs order at and before the trial. The issues were so substantial that it would be unjust to apply the normal rule, and the defendants took the risk of an issue-based costs order because of the time and effort which would have to be (and was) devoted to the question of liability (on which they lost).

6. As will become apparent, I think that an issue-based costs order would be an appropriate order in this case. However, in my view that has no relevance to the application of CPR 36.20(2). I would have to be persuaded that there was something unjust in applying the normal rule. The appropriateness of making an issue-based costs order would only arise once it had been decided not to apply the ordinary Part 36 principle. It is not a reason for not applying that principle in the first place. In my view there is absolutely nothing on the facts which would make it unjust to apply the provisions of rule 36.20(2), and I shall therefore do so. Subject to any fine tuning arising out of the expert evidence point, I shall order that the defendants have all their costs from the last date for acceptance of the payment in.

7. I now turn to the preceding period. In his main submissions Mr Stewart QC, for the defendants, urged on me that on the facts the "drop hands" offer was one that should have been accepted, or which is otherwise conduct which ought to be taken into account in his client's favour, justifying some sort of costs order in their favour. I do not think that the offer can be used in that way. The usual way in which an offer can and should be taken into account is by way of comparing it with the final result. If it is the same as, or better than, the final result then the declining party might well be found to have been wrong in continuing the proceedings beyond the offer, and be required to pay costs that he or she might otherwise not have been obliged to pay. That analysis cannot be so simply applied to the "drop hands" offer in this case. First, the claimant did obtain some monetary award in this case, and second the most material part of the offer was that each side should bear its own costs. Whether that is an offer which ought to have been accepted will depend on whether the claimant has done, or should do, better on costs than that. That is a question which has not yet been determined. The appropriate way of considering the effect of this

offer is to consider what the appropriate costs order would have been absent this letter, and then to compare that position with the offer made and see what effect it should have.

8. I therefore turn to consider how I should deal with the costs of this action other than those incurred after the acceptance date of the Part 36 offer. Mr Stewart's primary position was that his clients had won overall, and were entitled to their costs. A number of other factors were relied on as justifying this result – the unsatisfactory nature of the evidence of some of the claimant's witnesses, the delay in bringing the claim and the failure of the claimant to keep "normal business records", the poverty of the claimant's case on quantum and late disclosure. Alternatively, he proposes a deduction to reflect the fact that they had failed on liability, which he suggested would be around the 20% mark. This figure went up to closer to the 50% mark later in his submissions. This doubtless reflects his position which is that roughly 50% of the costs of the action were attributable to each of the liability and causation questions respectively.

9. Mr Croxford submitted that since the claimant had succeeded on liability and been awarded substantial (ie not nominal) damages it was prima facie entitled to the costs of the action under the general rule in CPR 44.3(2). He accepted a modification of this result because of the Part 36 payment, but subject to that he said his client should have the costs of the action. That was his position in his written skeleton argument. In his oral submissions he put forward a modification of this position in suggesting an issue-based costs approach to reflect the fact that his client won on liability and (mainly) lost on quantum. The order, he said, should reflect the fact that nearly ¾ of the trial time was spent on liability, and probably the same proportion applied to pre-trial activities. I think that he would say that this means that his client should receive 75% of its costs, or some other sum to reflect its success on the liability point. Certainly his client should not be liable to pay the defendants any costs.

10. This is a case in which liability and causation/quantum were each a very significant part of the case. Each will have attracted very significant costs. Having reviewed the position, and having heard the parties, I think it would be appropriate to regard the costs and effort put into this whole action as being roughly equally split between those two areas – a 50/50 split. I am not prepared to treat the claimant as being the successful party, for the reasons appearing above, so the claimant does not have the starting point referred to by Mr Croxford. If anything the defendants are the successful party. However, even if they are I consider that the liability point was such a significant point that it requires a modification of the order which they might otherwise expect. I consider that this is a case in which I should make an order which reflects the fact that each party won and lost on a substantial issue. If I start from the position that the defendants start from the position of being the successful party, then I think that this is a case where the failure on a substantial issue means that the claimant should not have all its costs. Indeed, I consider that this is one of the more exceptional cases (see *Summit Property Ltd v Pitmans* [2001] EWCA] 2020) where the successful party should not only be deprived of the costs to which it might otherwise be entitled (by virtue of having lost on a significant issue) but it should also have to pay the costs of that issue. I do not say that they were unreasonable in defending the case on liability, but nevertheless the liability point was, as it were, half of the case, and since they chose to defend it without any positive evidence of the events which they alleged happened to justify the removal of the relevant wording, I consider it right and fair that they should pay the costs of having failed on the point.

11. That means that the defendants have to pay the claimant its costs of that issue. They should have the costs of the quantum/causation issue. Having decided that as a proper approach, CPR 44.3(7) requires me to make a form of proportionate order if possible. Since it is likely that the costs of each side were roughly equal, and since it is likely that the costs of each issue are likely to have been incurred in similar proportions on each of the major issues, I consider it to be appropriate to net the two orders off one against the other. That means that the appropriate order for the costs of the action (other than those incurred after the payment in acceptance date), would be no order as to costs.

12. That is what the position would be but for the "drop hands" offer. However, that offer now affects the position. Since that letter offers a drop hands settlement and no order as to costs, it is in substance the same as the end result of the litigation. It is true, of course, that the claimant did recover the small amount of £6,750, but that is insignificant for these purposes. In the light of what I say the proper costs would otherwise be, this was an offer that the claimant ought to have accepted. I do not think that the £6,750 makes any difference - this litigation was never about that small sum of money. Since it was an offer which ought to have been accepted, the costs since the date when it should have been accepted ought not to have been incurred. That they were incurred is the responsibility of the claimant. Accordingly the defendants should have their costs from the date when that offer ought to have been accepted (14th January 2005, on the terms of the letter).

13. As to the prior costs, there shall be no order, in accordance with my reasoning above.

The costs of the expert

14. The defendants instructed an expert. He records his instructions as being as follows: *"I have been instructed by Mayer Brown Rowe & Maw, solicitors acting on behalf of the defendant, to prepare a report setting out my opinion on the likely value, at 18 September 2002, of the 25% shareholding in Fulham Football Leisure Limited ("Leisure") held at the time by Ruxley Limited ("Ruxley") and the element of that shareholding (namely 17.5%) which was sold on that date to the claimant. I have been instructed also to consider the possible shareholding structures in Leisure after 18 September 2002 in a variety of circumstances, to consider the commercial circumstances applying to Leisure in September 2002 which I believe would be likely to influence the actions of the claimant at that time and to consider the likely values of the claimant's lending to Leisure were these to take a variety of forms. In addition, I have been*

instructed to provide a brief summary of the main factors which I believe to have been likely to influence the value of Leisure between mid-1997 and the present time."

In a supplemental report he dealt with the following:

- *"the possibilities of Leisure being able to develop and move to a new stadium on a nearby site; and*
- *the value which might be attributed to the existing stadium in September 2002, taking into account then current planning consents, for the purposes of assessing the price which, under certain circumstances, Ruxley may be required to pay in order to acquire the 'A' shares and 75% of the outstanding Loan Notes and other loans. I deal with each of these in turn below."*

His reports were served. The claimant did not prepare or serve any equivalent evidence. At the trial the defendants decided not to call the expert, and I was not invited to read the reports. In the circumstances the claimant maintains that the defendants should not be allowed any part of the costs of and relating to this expert evidence, and indeed say that it should have its own costs of dealing with it.

15. I do not accept that the mere fact that the evidence was not deployed is sufficient to justify my disallowing the costs of the expert. This is wrong in principle and likely to lead to witnesses being called merely so as to enable the calling party to be able to recover the costs relating to that witness. It is wrong in principle because the proper question seems to me to be whether the costs were reasonable. That question is not necessarily determined by whether the witness is called. There may be good reasons for having the evidence available, and then, because of the course that the trial takes, deciding for perfectly good reasons not to call that witness. Were it otherwise then there would be a risk of the relevant party calling someone who has become an unnecessary witness merely so as to be able to claim the costs of that witness at the end of the day (or to resist a submission that he/she should not have those costs).

16. I therefore have to consider whether it was reasonable to instruct that expert. There was a debate in correspondence as to whether permission should be given for the expert. The claimant said that it did not see what expert evidence was required in relation to its loss when its loss was the price it paid. The defendants asserted that the price was not the claimant's loss and that that loss was the amount it overpaid for the shares. It asserted that it must have received something in return for the £7.75m, and the value of that would be a matter of expert evidence. They also asserted other issues which would be appropriately addressed by the expert evidence. The response of the claimant was (in summary) that any additional benefit acquired in the deal with Muddymans was irrelevant, and sought to say that it did not seek to measure its loss by reference to, or to take into account, the sort of things that the expert was apparently to deal with.

17. The dispute at this point reflected a difference in approach to loss. The claimant was trying to keep its case on loss simple, whereas the defendants were indicating that that approach was not accepted, that other matters had to be taken into account and that an expert was necessary to deal with those matters.

18. When the expert evidence was forthcoming it dealt with some, but not all, of the matters foreshadowed in correspondence, but it also went further. I have set out the instructions received by the expert. Mr Stewart sought to justify the instruction of the expert by saying that the points addressed were relevant to "any proper assessment of damages". He says that if the claimant had suffered the loss alleged, it should have been able to prove it by the use of valuation evidence, the defendants were entitled to assume that at some stage they would be entitled to rebut such a case, and that that justifies their having expert evidence in place. As a result of the "poor evidence" given by the claimant's witnesses, and its failure to lead any kind of a "conventional case", the decision not to call the expert was justified.

19. I do not think that this line of reasoning works. It was always plain that the claimant was not advancing a case based on valuation. It was advancing the simple case that it had paid £7.75m and that is what it was entitled to recover. It is, I think, implicit in its case that the shares purchased in the deal with the Muddymans were of no real value, and had the defendants wished to challenge that then expert evidence would have been appropriate if not necessary. However, the defendants did not challenge that, or at least not in that way. It was never part of their pleaded case that credit had to be given for some positive value of the shares. In other words, they did not mount a pleaded case that one of the things that the claimant got in return for its money was a shareholding with an actual value. In fact their pleading suggests that that case would not be run - in paragraph 96(3) (added by amendment in January 2005) it was pleaded that any additional shares taken by Mr Al Fayed by way of allotment would have been "valueless or of little value". That is not quite the same point as whether or not the Muddymans' shares had value, but it certainly does not presage a case that the Muddymans had a shareholding which had a measurable value which had to be deducted. Accordingly it appeared from the pleadings that the defendants were not seeking to run a positive case of quantifiable value. In those circumstances it is not easy to see why it was reasonable for them to have an expert's report up their sleeve which dealt with that point. In litigation costs terms, I do not think it was reasonable to have a stand-by expert's report on that point in case the claimant changed tack.

20. So far as the other points on which the expert was instructed are concerned, my findings are as follows:

    (i) The second of the points of instruction (possible shareholdings) turns out to be some calculations as to the number of shares necessary to achieve dilution below 75% on various assumptions. It is merely mathematics and did not require expert evidence.

(iii) The third point (commercial circumstances) contains a hypothetical discussion and is something whose relevance is not clear to me, and whose factors were not developed at the trial by some other means. It does not fall within Mr Stewart's justification of this evidence, and I do not see that it can be justified by some other reasonable anticipation of a case which did materialise. I do not see why the claimant should pay for this part of the report either.

(iv) The last part of the instructions (factors affecting valuation) falls into the same category as the general valuation exercise.

(v) The first of the points in the supplemental report is not something appropriate for this expert (and indeed he does not seem to come to any useful view anyway). The second point is an aspect of the valuation point referred to above.

21. In the circumstances the defendants' expert evidence cannot, in my view, be justified as being something which the defendants can claim to have been reasonable in obtaining notwithstanding that they did not call him. I do not think it fair that the claimant should pay for this evidence as part of the costs for which they would otherwise be liable and accordingly these costs should be excluded from the costs orders made against them.

22. The claimant seeks its own costs of considering this evidence, themselves running to several tens of thousands of pounds, apparently. Although I have disallowed the defendants' costs of the evidence, I do not consider it right to allow the claimant its costs of this exercise as against the defendants. Bearing in mind the claimant's attitude to this evidence, if it chose to spend that sort of money meeting evidence of this nature, then that is a matter for the claimant. I do not think it right that the defendants should pay those costs.

The costs of the adjournment and other reserved costs

23. On 17th January 2005 Lawrence Collins J heard a PTR in this case. The case was due to start next month. The defendants made an application to amend their defence, and they sought extensive disclosure. A significant amount of the further disclosure was ordered, and the amendments were allowed. However, it was apparently said that both required work to be done that could not be done whilst maintaining the forthcoming trial date. Lawrence Collins J said:

"The trial date is fixed for 7 February and has been for some time, for three weeks, and there is no reason at all to doubt the assertion on behalf of the claimant that if these documents do have to be disclosed, and also the matter to which I will come that witnesses will have to be proofed on the amendments, there is no reasonable possibility that the trial date can be met.

... I do not think it is necessary for me to rule on whether the disclosure in all respects should have been given, since it is common ground that the disclosure would be necessary under the amended pleading and the objections to the amendments seem to me to go mainly to the question of convenience for a trial ..."

The trial date was vacated. The costs of the adjournment were reserved to the trial judge.

24. Mr Stewart said that the adjournment was necessitated by late disclosure of documents which should have been disclosed before, so his clients should have the costs thrown away. Mr Croxford says that the disclosure was required by the late amendments of the defendants, and what caused the adjournment was the amendment, so his client should have the costs.

25. It is not easy to get to the bottom of this dispute on the material that I have been given, since I do not have a full picture of what documents had been disclosed and what documents had not. It is, however, clear that a very significant part of the documentation sought in relation to the period from 1998 to 2003 had not been disclosed. The following additional facts are apparent:

(a) The unamended pleadings disclosed an issue as to whether or not it had become clear by mid-2002 that the Craven Cottage stadium could not be redeveloped on a commercial basis. Some disclosure had been given or relevant documents but by no means all.

(b) The defendants made an application for specific disclosure of, inter alia, documents going to that issue by an application made In December 2004 (which was the application that came before Lawrence Collins J). It was, or ought to have been, apparent to them some time before then that the disclosure was inadequate.

(c) The claimant's witness statements served up to that time, for the purposes of the then forthcoming trial, did not contain much detail as to what had happened in the period between the breach and the deal with Muddymans and which was ultimately said to be part of the overall chain of causation.

(d) The amendments proposed by the defendants raised questions which would, on any footing, require additional disclosure and additional witness statements. In particular there was an allegation (subsequently abandoned) that the Muddymans would have been entitled to rely on a breach of the Shareholders' Agreement in respect of planning.

(e) Other parts of the amendments did not require additional disclosure beyond that which had been given or which ought to have been given.

(f) The claimant took the opportunity of the adjournment which resulted in order to put in witness statements which contained important material which would have been relevant to, if not central to, the pre-amendment case, particularly in relation to the events from 1998 to 2002.

26. Looking at the matter overall, and in particular at the matters referred to in the preceding paragraph, it seems to me that the adjournment was occasioned principally by three things – a failure by the claimant to give proper disclosure, a failure by the defendants to make an application for further disclosure earlier (which is not

necessarily culpable, but which is nevertheless a fact) and the amendments. Both parties therefore contributed to it. In addition, the claimant benefited from it very materially by getting its witness evidence into much better shape. Bearing all that in mind I consider that the fair order in relation to the costs thrown away by the adjournment is that each side should bear its own costs.

27. Lawrence Collins J also reserved the costs of the PTR and of the applications made to him. As to those costs (on which I was not separately addressed), the proper course is that the defendants should have the costs of the disclosure application, the claimants should have the costs of and occasioned by the amendment of the Defence and of the application for permission to amend, and that the remainder of the costs of the PTR (if any) should be costs in the case.

MR. I. CROXFORD Q.C. and MR. M. CANNON (instructed by Kendall Freeman) for the Claimant.
MR. R. STEWART Q.C. and MR. H. EVANS (instructed by Mayer, Brown, Rowe & Maw LLP) for the Defendant.