Neutral Citation Number: [2024] EWHC 453 (Ch)

Claim No: BL-2021-002290

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL
1 March 2023

Before :

MR NICHOLAS THOMPSELL
sitting as a Deputy Judge of the High Court

- -

Between :

ROBIN STEVE HARRY HOLDEN	**Claimant**
- and –	
(1) DAVID ANDREW HOLDEN **(2) NICHOLAS CHARLES HOLDEN**	**Defendants**

- -

Ms Tiffany Scott KC (instructed by Howes Percival LLP) appeared for the Claimant
Mr Andrew Marsden (instructed by Greene & Greene Solicitors)
appeared for the First Defendant
Mr Simon Redmayne (instructed by Leathes Prior)
appeared for the Second Defendant

Hearing date: 15th February 2024

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JUDGMENT

Mr Nicholas Thompsell:

1. INTRODUCTION

1. This judgment relates to a consequentials hearing which followed the trial of a number of preliminary issues relating to liability concerning the dissolution of a farming partnership (the "**Partnership**") that subsisted among three brothers. My judgment in relation to that trial (the "**October Judgment**") has been reported with the citation *Holden v Holden and Holden* [2023] EWHC 3292 (Ch).

2. I will use here the same definitions as I did in the October Judgment. This includes referring to the three brothers who were partners in the Partnership and who are the parties to this litigation: the Claimant, Mr Robin Holden; the First Defendant, Mr David Holden; and the Second Defendant, Mr Nicholas Holden, by the names they use amongst themselves: "Robin", "David" and "Nick". As before this is purely for convenience and no disrespect is intended to any of these parties.

3. At the trial of the preliminary issues Robin and David were represented and took a full part in the proceedings. Nick did not take part. He wished to remain neutral in relation to these matters, having already entered into a Settlement Agreement with David under which he had sold his partnership interest to David. However, during the progress of this litigation he had incurred legal expenses and (through his counsel, Mr Redmayne) he was taking part in this consequentials hearing in order to seek payment of these costs.

4. The matters before me at the trial of preliminary issues included the following issues as to liability:

   I) Robin's claims for a declaration that the Partnership was a partnership at will and David's counterclaim that the terms governing the Partnership are those set out in a written draft partnership deed (the "**1990 Draft Deed**") (as later amended in manuscript) - which together I defined as the "**governing terms issue**"; and

   II) Robin's claim that he is entitled to an amendment of the revenue accounts of the Partnership and David's counterclaim that Robin is bound by those accounts, which together I defined as the "**reopening accounts issue**". Robin's case in this regard was based on allegations that the Partnership accounts did not reflect the arrangements that had been agreed among the partners in a number of different respects and these have been referred to as the "**subsidiary issues**".

5. In relation to the governing terms issue, I found for Robin, and there is no doubt that he is the successful party in relation to this issue.

6. In relation to the reopening accounts issue (and accordingly each of the subsidiary issues, insofar as I considered it appropriate that they be dealt with at this stage) I found for David.

7. On the first day of the trial, counsel on each side raised arguments as to the extent to which the subsidiary issues should be dealt with at this stage. I gave a short judgment on this at the commencement of the second day of the trial.

8. The principal issue that was discussed at the consequentials hearing related to costs. At this hearing the Claimant (Robin) was represented by Tiffany Scott KC, the First Defendant (David) was represented by Mr Andrew Marsden and the Second Defendant (Nick) was represented by Mr Simon Redmayne. The court is obliged to counsel for their learned and helpful submissions both orally and in writing.

2. SHOULD COSTS BE DEALT WITH NOW?

9. Before turning to the substantive issue of costs, I was obliged to consider an argument which had been raised by Mr Marsden that I should not now make any order for any party to pay the other party's costs at this stage, but I should instead defer the issue of costs until the conclusion of the case as a whole.

10. In his skeleton argument, Mr Marsden made reference to the White Book commentary on CPR rule 44.2 at CPR 44.2.6:

> "If there is a split trial, the court may defer the issue of costs until the conclusion of the case as a whole, especially if it is unclear whether the successful party will ultimately be successful overall, or if an offer has been made which either cannot be communicated to the court at the relevant time, or the effectiveness of which cannot be judged until the conclusion of the litigation as a whole."

11. This is, of course, correct and reflects the broad discretion that a court has under CPR rule 44.2(1) to decide whether costs are payable and the amount of those costs. However, the operative word is that the court "*may*" defer the issue of costs. Whether the court *should* defer the issue of costs is a different matter.

12. The modern approach to costs is that, rather than deferring costs to the end of any litigation costs generally should be dealt with as issues arise and are determined - see my comments and analysis in *McKeown v Langer* [2021] EWHC 451(Ch) at [11] to [18], which were referred to and approved by the Court of Appeal in *McKeown v Langer* [2021] EWCA Civ 1792 ("***McKeown (CA)***") when this matter came to appeal.

13. There are good policy reasons as to why costs orders should be made as and when issues are determined, and these were further explained by Green LJ in *McKeown (CA)* (see [36] to [39]) as including: encouraging litigants to be selective as to the points that they take in litigation; encouraging professionalism in the conduct of litigation; and promoting the principle of equality of arms. This last point is particularly important in the current circumstances where there is a substantial difference of wealth between David and Robin and a delay to Robin in obtaining costs (if he is entitled to them) could conceivably prejudice his ability to carry on with the litigation.

14. There are circumstances, however, where it is appropriate for the judge to depart from this general approach. One such circumstance is where the court is aware that a Part 36 offer has been made. The effect of a Part 36 offer is to bring into play prescriptive costs consequences relating to the final outcome of the litigation. As a result, it will not usually be appropriate to make an order of costs at the end of an interim hearing after a Part 36 offer has been made (other than a Part 36 offer relating only to the issues dealt with at the interim stage). This is the case even though the judge dealing with an interim trial or hearing usually will not be aware of the terms of a Part 36 offer because CPR rule 36(4) provides that the judge should not be told the contents of a Part 36 offer except in particular circumstances.

15. The position under Part 36 is to be contrasted with that applying to split trials or interim matters where a party has made a without prejudice offer save as to costs (otherwise known as a *Calderbank* offer) and the judge at the interim stage is not made aware of the terms of that offer. In those circumstances, as confirmed by the Court of Appeal in *McKeown (CA)*, the fact that there has been an offer is of no probative value to a judge unless he knows the contents of that offer. Under CPR rule 44.2(4)(c) the judge considering a costs order is enjoined to consider:

> "any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply".

However, a settlement offer which is not before court because one or more parties will not waive privilege in respect of it is not (at this stage) an "admissible offer".

16. Given the different treatment to be made of a Part 36 offer and a *Calderbank* offer in the case of a split trial, if an offer has been made, it is important to know whether or not this is a Part 36 offer.

17. This originally presented a difficulty in the current matter since it was David's case that offers had been made that were Part 36 offers, but it was Robin's case that any offers made were not Part 36 offers. In the absence of seeing the offers, there was an obvious difficulty in determining which position was correct.

18. Originally, I tried to see if this matter could be determined without sight of the offers by running through the characteristics of a Part 36 offer set out in CPR rule 36.5. I also considered that, without breaching the prohibition in CPR rule 36.16 on seeing the terms of the offer, I could be shown how the tick boxes on the form used for the offers (but not the text boxes which set out the terms of the offers) as these boxes *describe* the offer rather than *set out the terms of* the offer. However, in these particular circumstances, this was not sufficient to understand Robin's case as to why the offers did not count as Part 36 offers.

19. The matter was resolved, however, when Ms Scott pointed out that the court could be showed the terms of the offers under CPR rule 36.16(c) if the offeror

and the offeree agreed in writing and, after a short adjournment, such an agreement was produced.

20. This allowed me to peruse the offers. On perusing the offers, I determined that they should not be regarded as Part 36 offers.

21. The offers did take the form of a Part 36 offer. Generally, they complied with the conditions set out in CPR rule 36.5. There was a degree of uncertainty about whether they met the requirement under CPR rule 36.5(e) since the relevant tick-boxes on the form for confirming whether or not the offers took into account any counterclaim had not been completed. However, as it was clear that the offers meant to cover all matters in dispute, I considered this could be disregarded as it was clear from the substance of the offers that they were dealing with counterclaims.

22. Nevertheless, there was a compelling objection to treating them as Part 36 offers. This was that the offers had been made by David, who was a defendant in this matter, but the Part 36 offer form had been completed on the basis that he was the claimant. This was not, in my view, an insuperable objection of itself to the offers being treated as Part 36 offers but, as a defendant was making the offers, this brought into play CPR rule 36.6.

23. CPR rule 36.6(1) provides that a Part 36 offer by a defendant to pay a sum of money in settlement of the claim must be an offer to pay a single sum of money. One of the offers breached this requirement as it envisaged two payments.

24. CPR rule 36.6(2) provides that an offer by a defendant that includes an offer to pay all or part of the sum at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer. Both of the offers envisaged payments at a date later than 14 days following the date of acceptance. They were not accepted, and therefore are not to be treated as a Part 36 offers.

25. Ms Scott argued that there was a further objection to the treatment of the offers as Part 36 offers. Under CPR rule 36.11 a Part 36 offer is accepted by serving written notice of acceptance on the offeror. The offers made by David envisaged that as well as there being acceptance of the terms of the offer there would be a Settlement Agreement in a form similar to that entered into by David with Nick. The fact that there was an agreement to agree as part of the offer creates doubt whether acceptance of the offer created a binding contract. This was another reason not to treat this as a Part 36 offer. I consider that there is substantial force in this argument.

26. Having regard to all these points, it was my determination that the offers should not be regarded as being offers under CPR 36. Now that I had seen the offers, I considered that they should be regarded as admissible *Calderbank* offers for me to take account of under CPR rule 44.2(4)(c).

27. In the absence of any requirement arising from Part 36 of the CPRs to await the outcome of the litigation, I consider that, I should follow the approach that costs should be dealt with as and when specific issues are resolved for the reasons explained at [12.] and [13.] above: I should look to make an order relating to costs now and not defer costs to the final determination of the litigation.

3. WHO WAS THE SUCCESSFUL PARTY?

28. The starting point for any determination of costs is the "general rule" in CPR rule 44.2(3), that the unsuccessful party will be ordered to pay the costs of the successful party. This, however, is merely a starting point and may be departed from when the court has regard to all the circumstances including those listed in CPR rule 44.2(4)).

29. Ms Scott argued on behalf of Robin that he was the successful party in that the governing terms issue was decided in his favour, and this was the most important issue to be determined at trial. Whilst it must be admitted that David was successful in relation to the reopening accounts issue, these were less crucial and were of subsidiary importance: his success in these matters could be taken into account in reducing what payment David, as the unsuccessful party in relation to the principal issue, should make, but did not detract from Robin's status as the successful party.

30. Mr Marsden argued that this was not the case. David had comprehensively succeeded in relation to the reopening accounts issue and the subsidiary issues that contributed to it (insofar as these were to be determined at this stage). This success was just as important as the success that Robin had had on the governing terms issue. The court should take the view that there was no overall winner at this stage and either make no order for costs or make an order for the determination of costs to be reserved so that costs could be looked at in the round at the end of the litigation.

31. In relation to these two opposing views, I favour that put forward by Ms Scott. It is clear to me that the governing terms issue was regarded by both David and Robin as being the prime issue being dealt with in the trial of preliminary matters. It was referred to as such by both parties in written and oral argument. I referred to it in my judgement (at [64]) as "the most important issue" in the litigation. The consequences of this issue were substantial. If Robin had lost on this, Robin would definitely lose the opportunity to argue that the partnership property should be sold. He would be obliged to allow David to purchase his partnership share and pay for it over 10 years - which would be a most uninviting outcome for somebody who was already 76 years old. He would lose his rights under section 42 Partnership Act 1890, which is likely to involve very substantial entitlements. Further, I consider that the greater part of the argument at trial and the greater part of my judgment was focused on the governing terms issue.

32. Mr Marsden has sought to minimise the importance of the governing terms issue, pointing out that David can still apply for a *Syers* order to allow him to

buy the partnership assets. However, that misses the point that the governing terms issue was the principal question to be determined at this stage and Robin was the successful party in relation to this issue.

33. That is not to say that the reopening accounts issue was not of importance. Certainly, if it had been resolved in favour of Robin, it would have caused a great deal of difficulty for all parties in reopening accounts and tax submissions. It is difficult to know what reopening the accounts would have led to, but it seems likely that it would have led to substantial payments being made by David and perhaps Nick to Robin if Robin's success had included establishing that interest should not have been paid on their greater capital accounts (as augmented, certainly in David's case, by undrawn profits).

34. Nevertheless, the reopening accounts issue, and the subsidiary issues associated with it do not, in my view, have the same central importance as the governing constitution issue. Also, I note the fact that a number of the subsidiary arguments were not finally resolved by my judgment on these preliminary issues (as they did not go to the liability questions that I was addressing) and so David's success in relation to the subsidiary issues was not complete.

35. For all these reasons, I consider that Robin was the successful party at this stage for the purposes of the general rule in CPR rule 44.2(3).

4. OTHER MATTERS RELEVANT TO THE COSTS DECISION

36. The general rule is however only a starting point. It can be departed from. It is important that I take account of all the circumstances and in particular those listed at CPR rule 44.2(4).

37. The first of these matters is conduct. I do not consider that there is anything in the conduct of these parties that I know of that ought to affect my determination of costs. Mr Marsden at one point suggested that it was a salient fact that should be taken into account that, whilst David had made offers to settle, Robin had made no counteroffers. I do not agree that this was a salient fact that should affect my analysis. There is no evidence before the court that Robin did not take seriously the need to engage with proposals for settlement. Whilst the court cannot know what happens at mediation, the court is aware that he attended mediation. Whilst a stubborn reluctance to entertain any thought of compromise might be something for the court to take into account in appropriate cases, there is no evidence before me that this is the case.

38. The second matter is whether a party has succeeded on part of its case. This is a very relevant point. David has succeeded on a substantial part of his case: the reopening accounts issue. It is appropriate that I take full account of this in my order.

39. The third matter is whether there has been any admissible offer to settle which is not a Part 36 offer.

40. As discussed above David made two such offers (or perhaps they should be regarded as one offer with two alternatives). I am satisfied that each of these offers, if accepted, would have led to a less favourable outcome for Robin than that he has achieved by winning in relation to the governing terms issue. The effect of his winning on this issue is that he knows that the partnership assets will be sold (either to a third party or to David if he is successful in his proposed application for a *Syers* order) on the basis of an up-to-date valuation and he will receive substantial amounts under section 42 Partnership Act 1890. Mr Marsden did not seek to argue that the offers will prove to be more favourable than this to Robin. This being the case I do not think that the offers should have any bearing on the costs that I award.

41. Having seen the offers I offered to recuse myself from any further stages of this litigation. All parties declined this offer and indicated that they would consider it helpful for me to continue. Given how unlikely it was that the content of the offers would affect any substantive ruling at a later stage, I agree that there is no need for me to stand down in the absence of any request from any party for me to do so.

42. I need to consider one further argument. Mr Marsden made a case that I should deal separately with the costs of the first day of trial when I dealt with various objections that he had raised as to the Claimant's case on what should be the scope of the trial as to liability. I do not accept that I should deal with this differently. First, I consider that the points that were discussed on the first day would have been discussed in the course of the trial anyway. Secondly, I do not consider there was any clear winner emerging out of this debate.

43. Having taken account of all matters set out above, I consider that it is appropriate that I should make an order for David to pay a proportion of Robin's costs, assessed on the standard basis. This proportion should be substantially reduced having regard to David's success in relation to the reopening accounts issue. Having regard to what seems to me the relative importance of these issues objectively and as far as I can tell subjectively to the parties, I am going to set that proportion at 50%.

5. NICK'S CLAIM FOR COSTS

44. Nick has attempted to remain neutral in these proceedings. However, as he was formally made a defendant in these proceedings, he has inevitably incurred legal costs. He considers that he should be entitled to those costs from one or both of Robin or David, although he does not have strong views as to whether these costs should be paid by David or by Robin, or by them both in some proportion. He has been dragged into this litigation against his will. He considers that he has done his best to minimise legal costs, but he does not see why he should be left bearing the entirety of costs in relation to a matter where he was an unwilling litigant.

45. As far as I can tell neither Robin nor David disagree that Nick should have an entitlement to costs.

46. Robin does not contest that Nick might in principle have an entitlement to costs but considers that that entitlement should be pursued against David, as the (overall) unsuccessful party.

47. David equally does not disagree that Nick might in principle have an entitlement to costs. However, he considers that the terms of the Settlement Agreement that he entered into with Nick preclude him from pursuing David in relation to any such entitlement. Further, David argues that Nick had no interest in the Partnership following the Settlement Agreement and therefore could only be interested in the reopening of accounts issue, which was a matter on which David had won. It was therefore for Robin to pay Nick's costs

48. My approach to this question is as follows. It is necessary to understand who has caused Nick to be obliged to incur legal expenses in relation to this matter. This in my view requires consideration of two issues.

6. WAS NICK A NECESSARY PARTY?

49. The first issue is to consider whether it was necessary or reasonably necessary for Robin to join Nick into these proceedings. If it was not necessary, then there is a good argument that Robin should be the party responsible for Nick's costs on the basis that Robin unnecessarily caused him to bear those costs.

50. Mr Marsden argued that Nick was not a necessary party as he no longer had any interest in the Partnership, having sold his partnership share to David, The governing terms constitution issue therefore was no longer of any interest to Nick. If the reopening accounts issue required new accounts, he had a complete indemnity against David. Whilst his evidence had been of some importance in one regard (in relation to the use of the Draft 1990 Partnership Agreement in his divorce proceedings) he could have just been called as a witness and did not need to be a party.

51. Mr Redmayne's original skeleton argument on behalf of Nick had accepted that Nick was a necessary party, but he later revisited this point after I gave the parties a further chance to address me in writing after the hearing.

52. Ms Scott had put forward in her original skeleton argument the view that Nick was obviously a proper party as one of the partners and therefore interested in both the governing terms issue and the reopening accounts issue. She noted further that Robin had become aware of the terms of the Settlement Agreement only after the claim had been made and it was not considered that this affected the necessity for Nick to be involved, particularly as the facts concerning his divorce were being treated by David as a very important part of his defence.

53. As the necessary party issue arose late in the day, I gave counsel an opportunity to address me further in writing on the point.

54. From counsel's further written submissions my attention was drawn to the following.

55. First *Halsbury's Laws of England (Volume 79, paragraph 142)* where it is stated

> "The rights and liabilities of partners between themselves have been established in accordance with equitable principles. In a claim for dissolution of partnership it is a general rule that all the partners who are within the jurisdiction must be before the court, especially where questions affecting the rights of the partners between themselves, or the construction of the partnership agreement, are raised."

56. The authorities cited by *Halsbury* in support of this proposition were.

i) ***Ireton v Lewes*** Cas temp Finch (1673) 96, where the Court of Chancery allowed that it was a good plea by way of defence to a bill (claim) requiring a defendant to give an account to a plaintiff (claimant) in relation to an "adventure" (an early form of partnership) that other parties to the "adventure" had not been made parties to the bill.

II) ***Hills v Nash*** [1845] 1 Ph 594 and (1845) 41 ER 759. In this case the defendant objected that he was not bound by any arrangement between the claimant and the other partners. Lyndhurst LC stated (or restated) the general rule:

> "According to the general rule, therefore, the bill being filed for an account of the partnership transactions by one of the partners against some of the other partners all the rest ought to have been joined as parties to the suit."

He went on to consider whether in the case before him there was anything to take the matter outside the general rule. He recited various settlements made between certain of the partners but considered that:

> "none of these transactions are binding upon Nash or his representatives, or can in any way affect their rights. It does not appear to me that they take the case out of the ordinary rule. If a decree should be obtained upon this record it will not have any force against those who are not parties to the record. It would not be binding upon them if any dispute should arise between these parties or any of them and Nash's executors as to the proportion of their contributions, or of their obligation to contribute to the loss, or respecting any other matter arising out of this transaction. I think, therefore, the objection for want of parties ought in this case to have been allowed."

iii) ***Simpson v Chapman*** [1853] 4 De G.M. & G. [154] at [167] and [1853] 43 ER 466. This case appeared to accept the general principle but is too dependent on its facts to be of much use beyond that in the present case.

57. Secondly Ms Scott referred me to *Lindley & Banks on Partnership* (21st Edition). This at [23.06] points out that:

> "The Civil Procedure Rules introduced a completely new regime governing the conduct of proceedings and the courts have been at pains to point out that the old rules of procedure developed under the Rules of the Supreme Court are now of little, if any, assistance. In all cases, regard must now be had to the overriding objective set out in the Rules and the court in any event has a wide discretion with regard to the addition, substitution and removal of parties. Nevertheless, there is retained in the following paragraphs a summary of the traditional approach towards the joinder of parties in partnership actions, since, in many instances, it is hard to see how a court could now reach a fundamentally different conclusion as to the parties who ought properly to be before it.

58. At [23-07] *Lindley and Banks* again refers to the general rule I have mentioned above which would apply where the proceedings materially affect all partners. At [23-16] it is said:

> "All the partners should normally be joined as parties to a dissolution action."

59. However, *Lindley and Banks* goes on in the same paragraph to say:

> "However, it is unnecessary to join any person who, though nominated as a partner, is not legally in a position to assert his rights as such".

60. *Ehrmann v Ehrmann* [1896] 2 Ch. 611 and *Page v Cox* (1852) 10 Hare 163; 68 E.R. 882, are cited as authority for this proposition. The proposition is perhaps self-evident but having reviewed both cases, I confess that I cannot see how either case supports it.

61. At [23-17] *Lindley and Banks* states:

> "an assignee of a partnership share has a statutory right to an account following a dissolution. If that right is exercised, all the partners, including the assignor, should properly be joined as parties to the proceedings, since the assignment does not affect their rights and obligations inter se. Indeed, it would seem that the assignor will be regarded as a necessary party even if he is out of the jurisdiction: the assignee's personal undertaking to pay whatever may be found due to the other partners will not, in such a case, be sufficient"

62. The citation supporting that proposition was *Public Trustee v Elder* [1926] Ch 776, which was another of the authorities drawn to my attention. In this case the Public Trustee was the assignee of the interests of German partners in a former partnership that was dissolved by the declaration of war and brought an action against the estate of the only other (English) partner for winding up the

partnership. The Court of Appeal held that reciprocity of personal obligation was necessary not only during a partnership but also on liquidation of the firm's affairs and as a result the German partners were held to be necessary parties to the action. The case cited *Hills v Nash* with approval.

63. I agree with Ms Scott that the case is authority for the proposition that where there has been an assignment of a partnership share, joinder of the assignor is usually necessary and that accounts should not be taken without the involvement of the assignor. The assignment does not affect the rights and obligations of the partners between themselves which include reciprocal personal obligations to account to each other. Any personal undertaking of an assignee to pay whatever may be found due to the other partners will not be sufficient.

64. Thirdly, counsel discussed my decision in the case of *Freed and Anor v Saffron Management Limited and ors* [2023] EWHC 1919 (Ch) where I had considered the question of who is a "necessary party" in another context. In that case the context was whether an action could continue after there were procedural difficulties that meant that a number of the original parties could not be further proceeded against. I discussed this issue at [45] and [46]. At [45] I noted that I had not been offered a statutory or judicially approved definition of "necessary party". At [46] I set out my view that

> "the question is to be approached by taking a holistic view of the question whether it would be impossible, improper or unjust for the claim to proceed without the involvement of the putative necessary party".

65. At [56] to [75] I made some rulings as to who were the necessary parties in that case, but this was in a very specialised context of trust law, and I do not think that analysis has much bearing on the case now before me.

66. Applying the yardstick, whether it would be "*impossible improper or unjust*" for Robin to have pursued his claims without involving Nick, I think the answer would be yes, for the reasons given in *Public Trustee v Elder*. In my view that case involves very similar considerations to those relating to the case currently before the court. The court is being asked to make determinations and arrangements for the winding up of partnership affairs and Nick, as an erstwhile partner remains a necessary party to this, notwithstanding any assignment of his partnership interest or any indemnity that he may have received from David. Notwithstanding the Settlement Agreement, Nick was a partner at the times under consideration and would in principle be affected by any findings resulting from the litigation. As a matter of justice, he should be a party to proceedings which might affect him.

67. Mr Marsden argues that the effect of the Settlement Agreement is that the action does not affect Nick as he has assigned away his legal interest in the proceeds of the partnership and is indemnified for any matter that may arise out of any account of profits. He argues further that these points provide an important distinction with the cases cited above and a reason to depart from the "general

rule" enunciated above. The court should have been invited to use its discretion under the Civil Procedure Rules to sanction such a departure.

68. In particular Mr Marsden has suggested that the circumstances in the current case are different to those in *Public Trustee v Elder* as in that case:

I) it was the assignee, the Public Trustee, who was claiming as plaintiff; and

II) there was a recognised liability to account by the three excluded partners (whose interests had been assigned to the Public Trustee) to the defendant.

He notes that, by contrast, in the current case David has been in control of the partnership assets since dissolution, and there was no prospect of any liability to account by Nick.

69. I disagree. The litigation does affect Nick and the Settlement Agreement is not, in my view, a complete answer to that point, even if the agreement was followed by a legal assignment of the partnership interest (which we still do not know).

70. To give an example, had I determined to reopen the partnership accounts, it is possible that Nick may have been obliged to return to the partnership any interest on capital that he had received. The answer that he may have been indemnified for this by David under the terms of the Settlement Agreement does not mean that it would have been right for the court to make an order that could have had this effect without his being a party to the action. This becomes obvious if one considers that it is entirely possible to conceive of circumstances where he might be unable to enforce the Settlement Agreement (for example because David had entered into bankruptcy).

71. From Robin's viewpoint, if Nick was not made a party to the litigation, there remained a risk that after the litigation had been concluded Nick could start separate proceedings to obtain a different result.

72. Further, it must be remembered that at the point that Robin brought his action, whilst he may have been aware that there were settlement discussions between David and Nick, he was not aware of the terms of any settlement agreement. He learnt of the terms of the Settlement Agreement only after commencing the action. At the point the action was commenced there can be no question at all that Robin would have been correct in regarding it as necessary for Nick to be joined as a party.

73. Nick has not (until now) made any claim by the court to be released from the action, although at an early stage he had indicated his preference to resolve matters amicably and at one point, through his solicitors, had asked informally if he could be permitted not file a defence and take no other part in the action.

74. In my view, it was natural and necessary that he would be joined into a dispute which went to the governing constitution and settlement of accounts where he was a partner.

75. In view of the decision in *Public Trustee v Elder* I agree with Ms Scott that even though Nick definitively now does not want to take any further part in the litigation, it is appropriate that Nick should remain a party to the proceedings (rather than proceedings against him being dismissed, as David has advocated) for the purposes of the remaining steps to be taken in winding up the Partnership including the taking of all necessary accounts and inquiries (as sought in the Prayer for Relief), including finalising the accounts for the year to 2018 which have yet to be agreed.

76. I understand that Nick and Robin propose instead that the claim against Nick should be stayed but the parties should be given permission to lift the stay. I agree that this appears to me to be the appropriate way forward.

7. WHO SHOULD PAY NICK'S COSTS?

77. If it was necessary for Nick to be a party (notwithstanding that he expected to be compensated for any financial consequences of the litigation), then it is logical that Nick's costs should be determined according to the relative success of the parties in relation to the litigation. If one party had been entirely successful in the litigation, then the argument would be that the unsuccessful party should pay Nick's costs, as it was his taking of an unmeritorious point that caused Nick's costs.

78. In the current case, as we have seen Robin was overall the successful party, but his success was only partial. It related only to the governing terms issue. I have reflected this partial success by reducing to 50% the costs that Robin may claim from David. I think it is appropriate also that I take this partial success into account in determining who should be responsible for Nick's costs. It seems to me that it is fair that Robin should pay 50% of Nick's costs and David should pay the other 50%. In truth, Robin incurred the costs because his brothers could not agree between them. It is just that they each contribute to his costs.

8. IS DAVID RELEASED FROM NICK'S COSTS BY THE SETTLEMENT AGREEMENT?

79. I need, however, to deal with the points made on David behalf regarding the Settlement Agreement.

80. Mr Marsden has pointed out that the Settlement Agreement states (at clause 2) that its terms are in full and final settlement of (amongst other things):

> "(1) The Disputes [defined by reference to recitals which cited disputes between Nick and David referring broadly to the governing terms issue and issues between them concerning the accuracy of partnership accounts]; and
> (2) all and any other claims or cross claims (of any nature) which either Party may have against the other Party in regard to the Partnership".

81. Mr Marsden argues that the second sub-paragraph is deliberately widely worded and in particular the words "*of any nature*" and the use of the words "*may have*" suggest that this also settles future costs claims in relation to Partnership matters which arise after the date of the agreement.

82. Mr Redmayne argued that the decision in *BCCI v Ali* [2002] 1 AC 20 should be taken into account in interpreting these apparently wide words. He referred me in particular to Lord Bingham's speech at [8] where Lord Bingham said that

> "the object of the court is to give effect to what the contracting parties intended"

and that to do this the court should give

> "the words used their natural and ordinary meaning in the context of the agreement, parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties"

but he continued at [10] to state that

> "a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware."

83. Mr Redmayne invited me to conclude that it would not have been the intention of the parties to waive future rights as to any costs that might be ordered relating to this litigation. He gives the example that had Nick been the subject of an order sought from David to provide evidence, he could not have resisted this by reference to the Settlement Agreement, and as a corollary David could not have resisted him claiming costs for complying with such an order.

84. Mr Redmayne sought to fortify this argument on the basis that clause 20 of the Agreement included a provision that each party would bear his own fees and costs, and that this suggested that costs were not covered by the wide wording in clause 2(2). However, I agree with Mr Marsden that the existence of clause 20 can be otherwise explained as its most important provision being the exception at the end of it.

85. Mr Redmayne raised another argument that Nick had the benefit of an indemnity under clause 18 of the Settlement Agreement which might be construed to cover costs, but I was not satisfied that the costs of this action would be covered by the wording of that provision.

86. Countering Mr Redmayne's main argument, Mr Marsden took me again to the same paragraphs within *BCCI v Ali.* He argued that the agreement is clear and there is no ambiguity that the court needs to clarify. Further it must have been in the contemplation of the parties, that Robin might not settle with David, and there would be litigation. If they had intended to exclude costs in that litigation, they could have done so.

87. I disagree with Mr Marsden that there is no ambiguity in applying the agreement to the present facts. If I make an order for Nick's costs (in relation to a dispute that was in substance between David and Robin, but into which Nick was joined as a necessary party) think there is an ambiguity in construing whether, Nick's seeking to enforce that order would be covered by clause 2(2) of the Settlement Agreement.

88. The Settlement Agreement does not of itself constrain the court against making an order which it considers to be just. For Mr Marsden's argument to succeed, he has to show that the Settlement Agreement prevents Nick from enforcing the order if the court were to make such an order. The question then arises whether that claim would be a claim "*in regard to the Partnership*". At this point an ambiguity does arise because the claim is at one stage removed from being a claim related to the Partnership. It is more aptly described as being claim to enforce a court order. If it is not a claim related to the Partnership, certainly it is not a claim made in relation to the "Disputes" as it does not relate to a dispute between Nick and David – they are co-defendants, not claimant and defendant.

89. Given that there is an ambiguity, I consider that the court should take account of what Lord Bingham referred to as the "*very salutary line of authority*" and I should ask myself whether the parties, when they entered into the Settlement Agreement, meant to settle liability under future orders of the court where those orders had some connection to the Partnership, but not to the Disputes. In my view this was not what the parties intended, as is illustrated by the scenarios Mr Redmayne described. I do not think it is correct that they contemplated that Robin would join Nick into an action that he might bring against David (especially as both David and Nick now argue that it was not necessary for Nick to be joined into this action). If they had contemplated this, and had wanted to provide that Nick would bear his own costs in relation to such an eventuality, I think they would have dealt with the point specifically and more clearly.

90. Having considered all the arguments, I consider that the better view is that Nick is not precluded by the Settlement Agreement from receiving payment of his costs in this action form or partly from David.

91. I would stress, however, that this decision is based on very specific wording of the Settlement Agreement and the very particular facts in play in this case.

92. However, even if the Settlement Agreement is capable of the wider interpretation argued for on behalf of David, the Settlement Agreement does not affect my view of the justice of this case, having regard to all the circumstances and in particular those listed at CPR rule 44.2(4). The court should seek to make an order that effects the justice of the matter before it.

93. To avoid any further argument concerning the enforceability of my order based on the Settlement Agreement I propose ordering that Robin will be responsible for Nick's costs (assessed on the standard basis) but that this payment will be regarded as a component of Robin's costs in the action so that in addition to

paying 50% of Robin's other costs David must make a payment equal to 50% of this amount to Robin.

9. IS MY PROPOSED COSTS ORDER APPROPRIATE?

94. This sort of order, where the court makes an order for costs in favour of one defendant against a claimant but then requires another defendant to make payment to the claimant to reimburse it for all or part of those costs is often referred to as a "*Bullock*" order, following *Bullock v. London General Omnibus Company* [1907] 1 KB 264.

95. Mr Marsden has raised the question whether this is a proper action for the court to take having regard to the White Book, Volume 1 at 44.2.28. Overall, the discussion there emphasises the breadth of the court's discretion as to costs and comments that there are "*no hard and fast rules*". However, Mr Marsden draws my attention to two passages.

96. The first is as follows:

> "If the joinder was unreasonable C cannot seek to pass costs payable by him to D2 over to D1. Where it was reasonable that of itself does not entitle C to an order that D1 should pay D2's costs, either directly (as a *Sanderson* order) or indirectly (as a *Bullock* order). But the reasonableness of the original joinder is certainly a relevant factor. Even if the joinder was reasonable at the outset, the position must also be looked at from the point of view of D1. If D1 has done nothing to cause or contribute to the joinder of D2, that will be a point in D1's favour..."

97. I do not consider this passage advances David's case that my proposed order is inappropriate. As I have decided that the joinder of Nick to this litigation was necessary, it is clear that I think it was reasonable. Furthermore, it is clear that I consider that David (through counterclaim and the nature of his defence) has contributed to the issues in the litigation in which Nick has been obliged to participate.

98. The second passage states as follows:

> "It has been stated at first instance that, nowadays *Bullock* orders and *Sanderson* orders are appropriate only where D1 and D2 are joined in the proceedings on the ground that C did not know which party was at fault: *Whitehead v Searle* [2007] EWHC 2046."

99. Whilst Griffith Williams J in *Whitehead v Searle* did make such a statement (as part of a judgment which was not a reserved judgment), it is not appropriate that I treat this case as a binding authority limiting the court's discretion to make what are described as *Bullock* orders or *Sanderson* orders to such circumstances.

100. The reasoning in *Whitehead v Searle* was focused on the question of which parties had properly brought proceedings against other parties and, in the

particular circumstances of that case, the learned judge considered, in relation to a complicated fact matrix, that it would be contrary to the objective of CPR rule 44.2 to make a *Bullock* or *Sanderson* order.

101. In the case before me, I similarly have thought carefully about who has been responsible for Nick having to bear costs. Having found him to be a necessary party, I consider that David and Robin have each been responsible for Nick having to bear those costs and should share those costs equally. I do so having regard to the broad powers afforded to me under CPR 44 and having had regard to all matters I am enjoined to consider under CPR rule 44.2(4). Despite my respect for the learned judge in *Whitehead v Searle,* I do not think I should be swayed against making the order that I consider to be just by a comment that may not have been deeply considered.

10. COSTS OF THIS CONSEQUENTIALS HEARING

102. As regards the costs of this consequentials hearing, my view is that as between David and Robin there has been no clear winner – neither party has obtained the result that he was seeking.

103. The only party that has had undoubted success in relation to the costs matters, has been Nick, and I consider that it is appropriate that he should be awarded his costs. For the same reasons as I have already explained, I do not think that the Settlement Agreement should prevent him receiving a proportion of his costs from David. However, to avoid any further argument on this point, I propose to order that Nick's costs will be borne by Robin, but that David should be obliged to pay a proportion of the costs borne by Robin. The starting point for this is that he should bear 50% of Nick's costs.

104. However, this is only the starting point and I consider that David should face a penalty in costs for having wasted the morning of the hearing in what turned out to be a fruitless consideration of whether or not the offers that had been made were Part 36 offers. Not only did he not succeed in establishing that these were Part 36 offers, but, if David had agreed at the beginning of the day that these offers could be seen by the court, as he later did agree, this time could have been saved.

105. As a rough estimate, I consider that this distraction wasted at least 25% of the overall cost of the hearing (including the cost of supplemental submissions).

106. I consider, therefore, that David should bear 25% of the costs of Robin and Nick in relation to this consequentials hearing plus 50% of the remaining 75% of Nick's costs.

107. Accordingly, I should order that:

I) Robin should pay Nick's costs of the consequentials hearing;

II) David should pay Robin 25% of his costs relating to the consequentials hearing and should pay him an amount equal to 62.5% of the costs that Robin is obliged to pay to Nick in respect of this hearing.

11. CONCLUSION

108. In summary, for the reasons I have already given:

I) Robin should pay Nick's costs of the preliminary trial;

II) David should pay 50% of Robin's costs of the preliminary trial and should pay Robin an amount equal to 50% of the amount that Robin is obliged to pay in respect of Nick's costs thereof;

III) Robin should pay Nick's costs of the consequentials hearing; and

IV) David should pay Robin 25% of his costs relating to the consequentials hearing and should pay him an amount equal to 62.5% of the costs that Robin is obliged to pay to Nick in respect of that hearing.

109. All the costs I propose ordering should be assessed on the standard basis. The question whether they were necessarily incurred will bear special scrutiny in the case of Nick's costs in relation to the preliminary trial, given Nick's stated stance of being indifferent to the outcome in this case.

110. As a result of the constraints of time we were not during the course of the consequentials hearing able to deal with other issues that were due to be dealt with at that hearing. However, it is understood that, subject to the court determining the main issue concerning costs, which I have now done, the parties are in substantial agreement on these other matters, such that I should be able to deal with the other matters on the basis of an agreed or substantially agreed form of order that I can finalise without a further hearing – i.e. any remaining disputes on the form of order can be dealt with on the papers.

111. As a preliminary steer, however, I will just mention that, given how I am dealing with Nick's claims for costs, I think it is appropriate that there should be a small timing difference between David's obligations to make payments (whether on account of costs or in relation to the final determination of costs) to Robin, and Robin's obligations to make such payments to Nick, so as avoid Robin having to make payment to Nick before he has received cleared payment of the amounts that David is obliged to pay to Robin.