Neutral Citation Number: [2019] EWCA Civ 1604

Case No: A3/2018/2482

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr George Bompas QC, sitting as a Deputy High Court Judge
HC-2015-005146

Royal Courts of Justice
Strand, London, WC2A 2LL

3 October 2019

LORD JUSTICE BAKER
and
SIR BERNARD RIX

- -

Between :

TREVOR FORD (1) **SIMON RENOLDI (2)**	**Appellants**
- and -	
SIMONE DOMINIQUE BENNETT (1) **BEN BENNETT (2)**	**Respondent**

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Stuart Hornett (instructed by **LSGA Solicitors**) for the **Appellants**
David Berkley QC (instructed by **Fuglers Solicitors**) for the **Respondents**

Hearing dates : 25 July 2019

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Approved Judgment

SIR BERNARD RIX :

Introduction

1. This is a costs appeal against the imposition of indemnity costs, brought with the leave of Lord Justice Lewison.

2. The appeal is that of the additional parties, Mr Trevor Ford and Mr Simon Renoldi.

3. Following a twelve day trial, Mr George Bompas QC, sitting as a deputy judge of the Chancery Division, found that the defendant, Wayne Bennett, and the additional parties, had failed to prove an oral agreement whereby they alleged that the second claimant, Mr Ben Bennett, had agreed to form a partnership with them to hold the East Thurrock United Football Club and its Ground at Corringham, in Essex, in shares split between 50% for Ben Bennett, 20% for Wayne Bennett and 10% each for the additional parties. The judge's careful judgment following trial, about which no criticism has been made, was handed down on 25 July 2018, [2018] EWHC 1931 (Ch). It is a detailed judgment running to 315 paragraphs, dealing with every aspect of a complicated family dispute extending over many years. Trevor Ford is a nephew of Ben. Simon Renoldi is the only non-family member involved in the dispute.

4. Unfortunately, the Bennett family has long been divided. In particular, the defendant, Wayne Bennett, had fallen out with his father, Ben Bennett, in about 2006. In other proceedings, the "FTT Proceedings", which Wayne Bennett commenced in January 2014, concerning numerous other properties in Essex, he made a collateral allegation that the beneficial interests in the Club as of 2006 were in the proportions stated above. Then, on 5 December 2014, he applied to the Land Registry to have a restriction to support his interest placed on the register for the Ground. That led to these proceedings which Ben Bennett, and his daughter Dominique (the first claimant), in whose name the Ground is registered as the owner of the freehold title of the Ground, commenced on 17 December 2015 against Wayne Bennett. Dominique said she held the Ground on a bare trust for her father, Ben, absolutely.

5. In his defence and counterclaim, filed on 9 February 2016, Wayne Bennett alleged that in a meeting in 2002 between Ben, himself, Ford and Renoldi, it was agreed that they would acquire the Club and its Ground in the proportions stated above. Wayne also pleaded alternative claims to an interest in the property, including an agreement later in 2002 to sell it to him as a result of which he held a beneficial interest on the terms of the alleged partnership. At trial he was to claim that he had signed a TR1 transfer form as transferee, although no transfer form was in evidence.

6. On the same day as his defence and counterclaim, Wayne served a CPR 20 claim form on the additional parties. He did so in order to involve them as parties on the basis, in reliance on extensive parts of his defence, that they were partners in the alleged partnership and thus proper parties to his counterclaim. In this he appears to have been reasonably confident that they would support him in his case, otherwise he would not have involved them. It might be said that he could not afford not to involve them. However, he could have said that that was a matter for the claimants. And what is certain is that to involve parties who would not support him in his account of the alleged agreement would have been disastrous.

7. On 10 March 2016, the additional parties filed both their defence to the additional claim and particulars of their additional claim against the claimants. In essence, while asserting lack of knowledge to aspects of Wayne's case, they endorsed his account of the critical meeting in June 2002. In this connection, they expressly relied on (and attached) a note (subsequently at trial called the "N&Q document", N&Q standing for "Notes & Comments") said to have been made by the Club's accountant, Mr Paul Baker. Mr Baker was called at trial by Wayne.

8. In his comprehensive judgment, the judge entirely rejected the cases of Wayne and the additional parties. For convenience he called them the "Defendants", when it was relevant to do so, ie when he did not have to distinguish between them. I shall adopt the same expression. Although there were aspects of Wayne's case which did not concern the additional parties, the judge later (in his costs judgment) referred to the allegation as to the June 2002 meeting as being "the core issue raised by the Defendants together", a description which Mr Stuart Hornett, who appeared on behalf of the additional parties at trial, and on the costs hearing, and on this appeal, accepted. The judge was very critical of both Wayne (and his primary witnesses) and the additional parties, but particularly of the former. He expressly regarded Wayne (and his witnesses) as dishonest. He did not use such strong language about the additional parties (or their witnesses), but he plainly regarded them as having joined themselves, speculatively and, to say the least, on an unreasonable basis, to Wayne's coat-tails.

9. In his costs judgment, the judge made the following dispositions: (i) he deducted a sum of £17,900 (reflecting pre-action costs) from the costs for which the Defendants were otherwise liable; (ii) he found the Defendants jointly and severally liable for 80% of the claimants' costs, and Wayne alone for the balance of 20%, to reflect Wayne's responsibility as being the greater; (iii) as

between the Defendants, he allocated the shared costs 50%/50% to Wayne and the additional parties respectively; (iv) costs were to be on the indemnity basis.

10. On this appeal, the additional parties complain only of disposition (iv). They do so by raising three grounds of appeal: (1) the judge was wrong to award costs against the additional parties on an indemnity basis when there had been no express findings of dishonesty against them, or of collusion with Wayne, or of being responsible for knowing, even if not dishonestly so, that their claim was bad; (2) in the circumstances, the additional parties' claim was not "out of the norm", and the judge was wrong to hold that it was "far out of the norm and is not a case of just witnesses not being believed"; and (3) the judge failed to identify any circumstances about the additional parties' conduct which could properly justify indemnity costs. At the hearing of this appeal, Mr Hornett also submitted that the judge had made a series of errors of fact in his costs judgment (concerning his own findings at trial) which gave to this court a new discretion.

The judge's substantive judgment

11. The judge's substantive judgment is too long and too rich to be reproduced in synopsis here. However, the Court was taken through it in some detail by Mr Hornett, and I have considered it carefully.

12. In brief, the judge found as follows:
(i) The June 2002 agreement alleged was not made, "and nothing was said to the Defendants to lead them to the conclusion that they were to be partners with Ben and each other, or that Ben was proposing to give them any beneficial interest in the Football Club or its property" (para [236]).
(ii) As for Wayne's evidence, it was "contrived", and he had "[no] memory of the events which he described" (para [237]). The judge also rejected Wayne's case about the purchase of the Ground or having signed a transfer form as buyer.
(iii) Mr Ford "was not a satisfactory witness". The judge gave numerous examples to support that verdict (at paras [241]-[244]), concluding with the significant remark that "the most accurate evidence Mr Ford gave was when, in cross-examination he said "*I would not know about time and dates and things like that*"" in relation to the alleged agreement. The judge also found that Mr Ford had "exaggerated his contributions to the Football Club" (at para [279]).
(iv) As for Mr Renoldi, the judge gave detailed reasons why his alleged belief in the June 2002 agreement was implausible (at paras [245]-[248]). In doing so, the judge was calling into question the honesty of that belief.

(v) Wayne called three witnesses, each of whom was strongly criticised by the judge. The three were Mr Baker, an accountant, who gave evidence inter alia about the N&Q document, and two conveyancers, Mr Robert Stonebrook and Mr Paul Reader, who gave evidence about Wayne's allegation about a sale of the Ground to him and a signed transfer form. Mr Baker's evidence was dealt with at length (at paras [109]ff). The judge concluded about the N&Q document that he was not satisfied that it was genuine (at para [117]); and otherwise that "Mr Baker's evidence was simply made up" (at para [126]). As for Mr Stonebrook (who had received a lifetime ban from the Solicitors Regulatory Authority) and Mr Reader (who had served a prison sentence after being convicted in 2012 of money laundering and conspiracy to defraud), the judge said that he did not regard either of them as reliable, or as having any genuine memory of the conveyancing transaction they purported to give evidence about (at para [185]). The judge also said their evidence "had no genuine foundation" (at para [237]).
(vi) In sum, as to the alleged June 2002 agreement, the judge said (at para [226]): "I observe that for reasons discussed elsewhere none of the three individuals [ie the Defendants] who gave evidence about the supposed meeting at which the 2002 Agreement was made can be relied upon as a truthful and accurate witness."

The judge's costs judgment

13. The judge accepted that there were two points which made him hesitate about making an order for indemnity costs against the Defendants, directing himself that his order must be fair and reasonable in that respect (to borrow the language of May LJ in *Reid Minty v. Taylor* [2002] 1 WLR 2800 at para [20]). The first was that he had had much to criticise in his main judgment about the evidence and methods of business of the claimant Ben himself. The second was concerned with proportionality. Under the modern regime of indemnity costs, there is no test of proportionality: see *Easyair Ltd (t/a Openair v. Opal Telecom Ltd* [2009] EWHC 779 (Ch), [2009] 6 Costs LR 882 at para [7]) and *Rawlinson & Hunter Trustees S v. ITG Ltd* [2015] EWHC 1924 (Ch) at para [11]. Under the standard basis of costs, the claimants would have been curtailed by their costs budget of £339,000, whereas under the indemnity regime they would not be, and their latest indication of costs had been £750,000 (and since then the figure has risen still further to £866,806).

14. The judge accepted that both these considerations favoured the Defendants' submission that costs should be assessed on the standard basis. Nevertheless,

the judge reached the clear conclusion that costs should be on an indemnity basis. He said:

> 31. …I think the present case is far away from the norm. It is not a case in which witnesses have been found merely to be mistaken or of poor memory. On the contrary, it is a case in which plainly unreliable evidence was advanced to support a case founded ultimately on a fiction, namely that at a meeting many, many, years ago a partnership in the football club (or ground) was agreed upon. Given the prolonged period of time which elapsed after the early years of this century, before any claim was intimated concerning the Defendants' putative interest in the ground, when the Defendants came to consider making and seeking to vindicate the claim it would have been obvious that their case, and the evidence to support it, was clearly such as to require careful attention and testing. It is impossible to see how this can have been done. To support the Defendants' case, two professionals, Messrs Stonebrook and Reader, whose backgrounds alone must have invited misgiving about the value of any testimony they could give, put forward transparently flawed evidence without genuine foundation. Mr Baker, another professional relied upon to support the Defendants' case, also put forward evidence which differed from his evidence in previous proceedings and was tailored to support the Defendants' case.

15. In these remarks the judge had spoken of the Defendants as a whole. He then turned to address specifically Mr Hornett's submission on behalf of the additional parties. He said:

> 32. I accept that, as pointed out by Mr Hornett in his submissions, the most serious criticisms in my judgment made of evidence from the Defendants' side were directed at the Defendant and witnesses called by the Defendant, rather than at those called by the Additional Parties. However, in my judgment Mr Berkley [counsel for the Claimants at the costs hearing] is correct in submitting that the Defendants made common cause, the Additional Parties relied on evidence produced by and witnesses called by the Defendants [*sic, sc* Defendant] and ultimately they cannot avoid being treated along with the Defendant in terms of the basis of assessment of costs…

16. That was the judge's conclusion, but he had also, earlier in his judgment, highlighted aspects of the case which bore on his decision that the Defendants would be treated alike in the matter of the basis of assessment of costs. Thus the judge said:

> 7. I have also had submissions about the basis of assessment of the Claimants' costs, the Claimants seeking their costs on an indemnity basis against all the Defendants. For reasons explained later, I have accepted the Claimants' application on this issue, which means that there is no distinction to be drawn between the Defendants as regards the basis on which the Claimants' recoverable costs are to be assessed…
>
> 10. …The large majority of the time at trial, the large majority of the evidence presented at the trial, along with the bulk of the disclosure and of the argument at the

trial, was directed to the core issue raised by the Defendants together, namely whether or not there had been a partnership agreement, a joint venture agreement, or some other arrangement made in 2002 which had resulted in the Defendants having along with the Second Claimant, beneficial interests in the football ground.

11. Further, the case advanced by the Additional Parties included claims, among which was a claim for estoppel, which required consideration of financial records and transactions from years after 2002, overlapping in this respect with what might be termed the Defendant's own separate claim to an interest in the football ground. And this separate claim required consideration of evidence and argument which was relevant to, and insofar as dispositive would have advanced materially, the Additional Parties' claims. The intimate connection between the Defendants' claims and those of the Additional Parties was plain as early as January 2014, when the Defendant served his statement of case in the FTT proceedings referred to in my judgment of 25 July 2018…

15. …my conclusion is that the Defendant should have responsibility for 60% of the Claimants' costs, as Mr Hornett has submitted, with the Additional Parties together having responsibility for 40%. In my judgment, the Defendant did the heavy lifting in the Defendants' claims to a beneficial interest in the ground, and did also seek to maintain his own separate claim to a beneficial interest.

16. On the other hand, I think it is right that the Defendants together should have exposure for the Claimants' costs; that is to say, in principle the claimants should not be concerned with the particular individuals from among the Defendants from whom they should recover their costs. In the first instance, and subject to what I say below, any of the Defendants may be called upon by the Claimants, the Defendants each being jointly and severally liable with the others to the Claimants; this is because, fundamentally, the Defendants together made common cause in advancing the case that springing from events of 2002 they together were beneficially interested in the football ground.

17. In particular, I reject any suggestion that the Additional Parties had distanced themselves from the case presented on behalf of the Defendant to assert a claim to a beneficial interest in the Ground, any more than the Defendant could distance himself from the case presented on behalf of the Additional Parties.

Submissions on behalf of the additional parties

17. On this appeal, Mr Hornett has returned to the theme which he had put before the judge below, and which had been rejected, namely that a clear and real distinction should be made between the additional parties and the defendant Wayne in the matter of the basis of assessment of costs.

18. Thus Mr Hornett submitted that the additional parties were not implicated in the particularly severe criticisms that the judge had made of Wayne and his three professional witnesses; that much of that criticism was directed to a separate aspect of the trial which concerned Wayne alone, namely his case about his purchase and the transfer form; that the additional parties had distanced themselves from Wayne and his witnesses; and that the judge had not made express findings in his judgment which had impugned the additional parties' honesty.

19. In developing these submissions, Mr Hornett took us efficiently through the main judgment, and also directed our attention to aspects of his closing written and oral submissions before the judge at trial. The written submissions contained a "Witness Critique", in which no substantive comment was made on the substance of Wayne's evidence "as he is separately represented"; Mr Stonebrook and Mr Reader were said to have given "no relevant evidence" on the additional parties' claim; and Mr Baker was said to be "not an impressive or reliable witness on a number of important issues". The oral submissions were prefaced with the following disclaimer (transcript at 2086):

> …the case of the additional parties has always been and remains on one level very straightforward. There was an oral agreement, there was detrimental reliance and/or consideration given for it and then there was an exclusion. That case, in my submission, stands or falls on its own evidence. There is of course a commonality of interest with the defendant, and there is, to some extent, a commonality of evidence. But the evidence is not coextensive and the defendant's case is in many ways more complicated and more cluttered with matters that simply do not concern the additional parties at all. I say that because I ask your Lordship to focus on their case. Of course, Wayne Bennett is a material witness to it, but their case would succeed without him.

20. In particular, Mr Hornett submitted that, in coming to his conclusion, the judge had made a number of factual errors which destroyed the exercise of his discretion, affording to this court a new discretion. He listed these errors as follows: (i) the judge was wrong to say at his para [11] that there had been an intimate connection between the Defendants' claims ever since Wayne's involvement in the 2014 FTT proceedings, in which the additional parties had after all not themselves been involved; (ii) the judge was wrong to say at his para [16] and again at his para [32] that the Defendants had made "common cause" together; (iii) the judge was wrong to say at his para [17] that the additional parties had not distanced themselves from Wayne; (iv) the judge was wrong to say at his para [31] that the additional parties had relied on the three professional witnesses called by Wayne; and (v) the judge was therefore wrong to say again at his para [31] that the additional parties' case required "careful attention and testing".

21. In sum, Mr Hornett submitted that the additional parties, unlike Wayne and his professional witnesses, had not been criticised for any dishonesty; that they were in the standard position of parties who had merely advanced a case which had failed or witnesses whose evidence had not been accepted; and that in their case there was nothing out of the norm arising from their failure.

Submissions on behalf of the claimants

22. On behalf of the claimants, Mr David Berkley QC, who had appeared at the costs hearing but not at trial, submitted that the judge had been entitled to his conclusion as to the basis of assessment, and his exercise of discretion could not be faulted.

23. Mr Berkley submitted that the judge's comments which had been criticised by Mr Hornett as wrong were ones that he was justified in making. He had directed himself by the correct test, as to whether the case was out of the norm from the point of view of the additional parties as well as Wayne. He had been justified in regarding the additional parties as joining with Wayne in the pursuit of a common objective, to establish the validity of the alleged June 2002 agreement. There was little to distinguish between them. Although separately represented, they had relied on each other and each other's witnesses to discredit the claimants and their witnesses. The judge was in the best position to evaluate the factors which he had had to consider. He had plainly considered the additional parties' case against the imposition on them of indemnity costs, but had rejected it in his evaluation and from the advantage of having conducted the trial and heard the witnesses concerned.

24. Moreover, in the light of the judge's main judgment, it was relevant that the Civil Procedure (White Book) 2018 in its commentary on Rule 44.3 (basis of assessment) had this to say (at page 1642):

> When considering whether to make an order for costs on the indemnity basis the trial judge has a wide discretion but it is critical that there be some conduct or circumstance that takes a case out of the norm. Such factors include the high-risk situation where a claim is speculative, weak, opportunistic or thin…

Mr Berkley described this description as being apt for the present case.

25. In any event the judge was right to consider that the additional parties could not be relevantly or sufficiently distinguished from Wayne.

The jurisprudence

26. It was common ground on this appeal that the leading modern authority was *Excelsior Commercial & Industrial Holdings Limited v. Salisbury Hammer Aspden & Johnson* [2002] EWCA 879, [2002] CP Rep 67, with its test that, for indemnity costs to be ordered, there had to be some conduct or circumstance taking the case out of the norm. That was the test applied by the judge.

27. On this appeal, the court was not taken to any other decision, although others were collected together in a small bundle of authorities.

28. In *Excelsior*, the trial judge had made an order for indemnity costs, and this court did not interfere with that decision. Lord Woolf CJ said (at [32]):

> In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement.

29. In the circumstances, litigants are discouraged from citation of authority in what, particularly at first instance, is a well-travelled road, depending in each case on its particular circumstances and the discretion of the trial judge.

30. I would only add that Mr Berkley's citation from the 2018 White Book can be traced back to what Tomlinson J (as he then was) said in *Three Rivers District Council v. Bank of England* [2006] EWHC 816 (Comm), [2006] 5 Costs LR 714 at para [25], where among a longer list he highlighted as a possible ground for indemnity costs –

> (5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

Tomlinson J's list continues to be cited in the 2019 White Book at 4.3.10.

Discussion

31. Mr Hornett has made a decent and attractive case that the judge erred in failing to distinguish the additional parties from the defendant Wayne in his

order for indemnity costs. In the end, however, I was not persuaded by his submissions. I would put my reasons in essence as follows.

32. There is no complaint about the test which the judge applied, and no other jurisprudence which has been called into play. The appeal has been argued on the basis of the facts and circumstances and conduct of this case.

33. The additional parties had based their claim on an agreement which the judge described as a "fiction" (costs judgment at para [31]). He was entitled so to describe it. In his main judgment he had found that the alleged agreement was not made and that nothing had been said to lead the Defendants to think that it had been (main judgment at para [236]). Wayne's evidence was "contrived". None of the Defendants could be relied upon as "truthful" (*ibid* at para [226]). They gave evidence about matters 16 years earlier which "they could not possibly have remembered" (*ibid*). It was "not a case in which witnesses have been found merely to be mistaken or of poor memory" (costs judgment at para [31]).

34. In this connection, the judge emphasised the flimsiness of the claim to the agreement of partnership. The agreement was supposed to have been made in June 2002. Wayne said that later in that year he had purchased the ground in support of the partnership, and had signed a transfer as transferee (although no such document could be produced). The additional parties relied on Mr Baker having written the N&Q document (a copy document produced by Mr Renoldi during the proceedings as having been recently discovered by him) giving details of the partnership split, and purporting to be dated 8 February 2005 (main judgment at para [109]), but of which no original version could be found. The judge rejected all such claims. He said in terms that "After careful reflection, I am not satisfied that the photocopy document produced at the trial is a true copy of a document produced on 8 February 2008" (at main judgment [117]). The judge emphasised at the outset of his main judgment (at para [9]) that "until about January 2014 none [of the Defendants] took any step to assert any claim to any proprietary or other interest in the Ground or the football club business", despite their exclusion from the business beginning with Mr Renoldi in 2004, Wayne in 2006 and Mr Ford in 2006 or 2007. The reference to January 2014 was the assertion of the partnership agreement by Wayne in the FTT proceedings. It took another two years, and what might be described as an invitation by Wayne, to bring in the additional parties to these proceedings.

35. In such circumstances, the judge was fully entitled to say that, given the prolonged period of inactivity, it was obvious that the Defendants' case was "clearly such as to require careful attention and testing" which it had not received (costs judgment at para [31]). Mr Hornett submitted that the judge's

comment, while it may have been fairly made of Wayne, was not justified in the case of the additional parties in suggesting that they ought at least to have known that the case was bad "from the outset" (to cite Mr Hornett's skeleton). But the point was that the case had not been made "from the outset", but after more than a decade of silence. Moreover, even if the additional parties are given the benefit of the doubt as to whether they had honestly persuaded themselves that an agreement which the judge said had never taken place (and the judge stated in terms that it was not a case of witnesses found merely to be mistaken or of poor memory, costs judgment at para [31]), the judge's point that their claim still required "careful attention and testing" was in my judgment completely justified. Parties who effectively join themselves, or allow themselves to be joined, to litigation on the basis of the assertion of a shared oral agreement, so long after the event, are clearly taking the risk of a speculative enterprise in litigation, which should only reasonably be pursued after careful evaluation.

36. Mr Hornett submitted that the judge was wrong to have regarded the additional parties as having made "common cause" with Wayne. In my judgment, however, the judge's remark was again wholly justified. That was exactly what had happened. In their pleadings and again in their evidence at trial, they adopted Wayne's case as to the June 2002 agreement. Indeed, neither Wayne nor the additional parties could effectively have run their case without the other. If Wayne had not put down the gauntlet, the additional parties would not have flourished it for themselves. The Defendants were therefore in it together, for better or worse, and, as it transpired, for worse.

37. Mr Hornett, who had been present at the trial and no doubt had formed his own views of Wayne's (or his witnesses') discomfiture during their evidence, may, in his closing submissions, have sought to distance the additional parties as far as possible from being tainted by that evidence. However, in my judgment he could not effectively do so. It was, after all, so far at any rate as the alleged oral agreement was concerned, a form of joint enterprise. As it was, Mr Hornett was forced to submit in his closing written submissions that "the Defendant gave his evidence in a measured matter" and leave it to Wayne's counsel to put the best gloss on his evidence, which there is no sign of Mr Hornett rejecting. How could he? He could ask the judge to focus on the additional parties' case, but he had to accept that Wayne was "a material witness to it". Therefore the judge was entitled to treat the three litigants, who were all putting forward the same case as to the same oral agreement, an agreement which the judge found had never taken place, as in a common place, and making common cause. And if that agreement was a "fiction" so far as Wayne was concerned, how could it not be as far as the additional parties as well? At best, they might plead that that they had honestly persuaded

themselves of the truth of their evidence, but the judge never acquitted them on that basis, and they had adopted Wayne's pleaded case on the oral agreement for better or worse.

38. Mr Hornett submits that Wayne's three professional witnesses were his witnesses, not called by the additional parties. He submits that at any rate Mr Stonebrook and Mr Reader gave evidence about an entirely separate matter (Wayne's case about his purchase and signed transfer form). However, Mr Ford was involved in the case about the alleged partnership agreement of June 2002 by virtue of his manuscript on the N&Q document, which was relied on by the additional parties. And Messrs Stonebrook and Reader, in supporting Wayne's purchase and transfer form case, were supporting a case which Wayne was advancing in part in support of the partnership case itself. As the judge observed at para [11] of his costs judgment, that "separate claim required consideration of evidence and argument which was relevant to, and insofar as dispositive would have advanced materially, the Additional Parties' claims". It is not for this court on appeal to fault that evaluation of the trial judge.

39. Mr Hornett submitted that the judge had made a series of errors of fact, but I do not accept that this was so. In effect, the matters complained of by Mr Hornett are evaluations, not findings of fact, and in my judgment they were justified. To go through them briefly (see para 20 above): (i) the judge was entitled to refer to Wayne's pleading of the oral partnership agreement in his FTT defence as an "intimate connection" with the Defendants' claim herein, even if the additional parties were not themselves litigants in the FTT proceeding; (ii) the judge was entitled, as I have already dealt with above, to describe the Defendants' case in these proceedings as making common cause between them; (iii) Mr Hornett might have sought to distance his clients from Wayne, but he could not even seek to do so completely, and he could not in my judgment succeed in doing so materially, so that the judge was entitled to "reject any suggestion" that the additional parties had managed to distance themselves from Wayne; (iv) while it may be questionable quite to what extent the three professional witnesses had given evidence "to support" the Defendants' case or the additional parties had relied on their evidence, the additional parties had relied (to some material extent) at least on Mr Baker's alleged involvement in the N&Q document, and they relied on Wayne's evidence which itself involved reliance on his three witnesses, however much Mr Hornett may have tried to distance his clients from them. I therefore reject the submission that the judge erred on a matter of fact which undermined his discretion to an extent which gives this court a new discretion of its own.

40. At the end of the day, this is an appeal on a matter of discretion from a trial judge who applied the correct test, and, after a most careful and comprehensive

substantive judgment which is subject to no criticism whatsoever from the additional parties, made a careful evaluation of the various arguments put forward to him on the matter of costs. To some extent, he favoured the arguments advanced on behalf of the additional parties at the costs stage, and made dispositions to take account of their role as compared with Wayne's. He was expressly conscious and took account of two factors which he said had given him pause as to the correct basis of assessment. He also expressly took account of the fact, relied on by Mr Hornett below, that his "most serious criticisms" had been made of Wayne and his witnesses rather than of the additional parties' witnesses. In all this, in a complex case of which he had showed himself the master, the judge steered a careful and thoughtful course. In his ultimate judgment that the additional parties had made common cause with the defendant Wayne, the judge was not only entitled to come to the conclusion that he did, but was in my view right to do so.

41. I would therefore dismiss this appeal.

LORD JUSTICE BAKER

42. I agree.