Neutral Citation Number [2007] EWHC 698 (TCC)

Case No: HT 05 120

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

St Dunstan's House
133-137 Fetter Lane
London, EC4A 1HD

Date: 28th March 2007

Before :

HIS HONOUR JUDGE PETER COULSON QC

- -

Between :

IAN McGLINN	**Claimant**
- and -	
WALTHAM CONTRACTORS LTD	**First Defendant**
- and -	
HUW THOMAS ASSOCIATES	**Second Defendant**
- and -	
DJ HARTIGAN & ASSOCIATES LTD	**Third Defendant**
- and -	
WILSON LARGE & PARTNERS	**Fourth Defendant**

- No. 5 -

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Mr A Williamson QC & Mr J Selby (instructed by **Speechly Bircham**) for the **Claimant**
Mr A Bartlett QC & **Mr G Hamilton** (instructed by **Freeth Cartwright**) for the **Second Defendant**

Hearing dates: 12 & 13 March 2007

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Judgment

His Honour Judge Peter Coulson QC:

A. THE ISSUES

1. On 21 February 2007, I handed down my main Judgment on the defects issues.[1] In summary, I found that, on his overall claim for £3,649,481.34, Mr McGlinn was entitled to recover:

a) £438,850.76 as against HTA;

b) £134,825.61 as against DJH;

c) No damages at all as against WL.

[1] [2007] EWHC 149 (TCC)

2. On 22 February 2007, I decided that WL were entitled to recover their costs of the defects issues, and I ordered an interim payment on account of those costs in the sum of £180,000.[2] At the parties' request, I left over the precise form of the order in respect of WL's costs, and any determination of the dispute as to whether it should be Mr McGlinn or HTA who pay those costs. It has sensibly been agreed that the determination of the costs as between Mr McGlinn and DJH must await the outcome of the further trial on the over-valuation issues, due to take place in September 2007.

3. Accordingly, the following issues arise now for determination:

a) What sum, if any, should be awarded to Mr McGlinn against HTA in respect of his claim for interest (**Section B** below)?

b) Should Mr McGlinn or HTA be liable to pay WL's costs in respect of the defects issues (**Sections C - D** below)?

c) What is the appropriate order as between Mr McGlinn and HTA in respect of the costs incurred by both parties in connection with the defects issues (**Sections E – G** below)?

The second and third issues noted above are of considerable significance. WL's costs of the defects issues are estimated at £880,000 odd. HTA's costs of the defects issues, 75% of which they seek from Mr McGlinn, are estimated at £1.2 million odd. Mr McGlinn's total costs, a high proportion of which he now seeks against HTA, are estimated in the sum of £2.2 million. Thus the total amount at stake in respect of these various costs disputes is in excess of £4 million, which is, of course, more than the amount of Mr McGlinn's substantive claim at the trial.

B. INTEREST AS AGAINST HTA

4. The total sum of £438,850.76, which I have awarded against HTA as damages, breaks down into two component parts. The largest element, in the total sum of £380,225.49, is made up of the cost of individual items of repair work to reflect those defects for which I have found HTA liable. This work has not been carried out and therefore this money has not yet been spent. The smaller of the two sums, namely £58,625.27, represents my assessment of that part of the cost of the so-called 'enabling works', carried out and paid for in 2003 and 2004, which I concluded was recoverable as damages against HTA. Potentially different considerations apply to these two figures.

£380,225.49

5. This sum has not been expended by Mr McGlinn. It was calculated by reference to the rates and prices applicable as at 31 March 2005, which was the date on which I found that the repair works should have been completed (see paragraphs 145, 824 and 875-880 of my main Judgment). I expressly refused to uplift the rates and prices beyond those applicable at that date, because I concluded that the failure to carry out the repair works by 31 March 2005 was Mr McGlinn's responsibility. Mr McGlinn now seeks interest on the £380,225.49 from 31 March 2005 until the date of the handing down of this costs Judgment.

6. Because of my ruling as to the delay to the remedial works, Mr Bartlett QC and Mr Hamilton, on behalf of HTA, submit that it would be inconsistent and illogical to award interest on the sum of £380,225.49 for the period after 31 March

[2] [2007] EWHC 294 (TCC)

2005. They also contend that, because the Claimant has not spent this money, there is no requirement to compensate him by way of an interest payment.

7. As to the delay point, I consider that Mr McGlinn's claim for an uplift to the rates, and his claim for interest on any sums awarded, were not made in the alternative; they were cumulative. In my judgment, the rejection of his uplift claim in respect of the rates has no real connection to his claim for interest. In addition, I consider that the delay in the carrying out of the remedial works in the period between 2003 and 2005 (which prevented the Claimant from recovering the uplift on rates after 31 March 2005) is not to be confused with the period for which interest is claimed, which runs only from 31 March 2005. The period for which interest is claimed is almost entirely concurrent with the lifetime of these proceedings, which were commenced on 4 May 2005. Whilst I accept that HTA might have had a number of delay-related arguments on interest if Mr McGlinn had been seeking interest for a period prior to 31 March 2005, I do not consider that such arguments are relevant to the period for which this interest claim is now being made. Broadly, that claim for interest reflects the period between the commencement of the proceedings in the TCC and the resolution of the defects issues by way of my main Judgment. Nobody suggests there has been any delay, much less any delay on the part of Mr McGlinn, during that period. I therefore regard the delay argument as irrelevant to Mr McGlinn's claim for interest.

8. As to the argument that Mr McGlinn should not have interest because he did not spend the money, I have concluded that the fact that he has not spent the money on the repairs should not lead me to exercise my discretion against awarding him interest on the sum of £380,225.49. It is a fundamental principle that interest is to be awarded to a claimant for being kept out of his money from the date it was established that it was due to him: see **BP Exploration Co (Libya) Ltd v Hunt (No.2)** [1979] 1 WLR 783. In accordance with that principle, actual expenditure is irrelevant, and I conclude that the Claimant is entitled to interest on the sum of £380,225.49.

9. It seems to me that it would be consistent with the points made above if I ordered that the period for which such interest is recoverable is limited to the duration of the litigation itself. Thus, I conclude that Mr McGlinn is entitled to interest on the £380,225.49 from 4 May 2005, the day the proceedings commenced, until today's date, 28 March 2007.

£58,625.27

10. The enabling works were principally carried out between the summer of 2003 and the summer of 2004. The amount of £58,625.27 awarded against HTA as damages represented my best effort at arriving at a fair valuation of that part of this work for which HTA were liable (see paragraphs 901-918 of my main Judgment). It was significantly less than the sums Mr McGlinn claimed. It was, however, money that Mr McGlinn had actually spent. It seems to me that interest is plainly recoverable on the sum of £58,625.27. HTA contend that, because the £58,625.27 is an assessment, it is unclear when the starting point for any calculation of interest might be, particularly given that the relevant invoices were submitted over a lengthy period. However, this point is dealt with by Mr McGlinn's deliberate decision to restrict his interest claim on the £58,625.27 to a three year period. It seems to me that, on any view, the bulk of the sums in respect of the enabling works had been paid by late March 2004. I therefore consider that an interest claim for the three year period between 29 March 2004 and today (28 March 2007) is reasonable and proportionate. For the avoidance of

doubt, I regard my finding concerning the delay to the remedial work as irrelevant to this head of claim. The enabling work (as opposed to the remedial work itself) was not significantly delayed. In any event, such delays as did occur were over prior to March 2004 and are therefore irrelevant to the limited three year period for which interest is now sought.

Rate

11. As to the appropriate rate for interest on these two different sums and for these two different periods, the parties have now agreed that the right rate is 1% over base. I consider that that properly reflects the approach of Forbes J in **Tate & Lyle Food & Distribution PLC v GLC** [1982] 1 WLR 149, 164, where he said that, if it was appropriate to take a commercial rate, he would take 1% over the minimum lending rate as the proper figure. Given Mr McGlinn's financial position, it seems to me that commercial rates are the appropriate yardstick. There is a dispute as to whether 1% over base during the relevant period is the equivalent of 5% or closer to 6%. It seems to me that this is properly a matter for the parties to sort out. I therefore order that the Claimant should recover interest against HTA:

(a) On the £380,225.49, from 5 May 2005 to 28 March 2007, at the rate of one per cent over base;

(b) On the £58,625.27, for three years from 29 March 2004 to 28 March 2007 at one per cent over base.

C. WL'S COSTS/PRINCIPLES

12. Before the introduction of the CPR, a plaintiff who had sued two defendants, and was successful against one (D1) but lost against the other (D2), sought one of two orders: a *Bullock*[3] order, whereby the plaintiff had to pay the costs of D2 but was permitted to add those costs to the costs recoverable against D1; or a *Sanderson*[4] order, pursuant to which D1 was ordered to pay D2's costs direct to D2. In the present case, Mr McGlinn seeks a *Bullock* order against HTA in respect of WL's costs rather than a *Sanderson* order, although there is no significant difference in the principles relevant to the court's approach to the making of these orders.

13. CPR 44.3 is the relevant order relating to the court's consideration of costs orders. The relevant parts of it provide as follows:

" 44.3 (1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

[3] **Bullock v London General Omnibus Co**. [1907] 1 KB 264
[4] **Sanderson v Blyth Theatre Co**. [1903] 2 KB 533

(b) the court may make a different order.

…

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

…

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim in whole or in part, exaggerated his claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

(8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.

(9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either:

(a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or

(b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.

14. There is no doubt that the court's power to make *Bullock/Sanderson* orders is retained by the provisions of CPR 44.3, although the exercise of discretion must now also be guided by the overriding objective (CPR 1.1). There have been a number of decisions of the Court of Appeal to this effect following the introduction of the CPR. In **King v Zurich Insurance Co** [2002] EWCA Civ 598, Keene LJ noted the approach which the courts had adopted prior to the CPR, and which they were continuing to adopt, in these terms:

> "… where a plaintiff had behaved reasonably in suing both defendants he should not normally end up paying costs to either party even though he succeeded only against one of the defendants."

15. In **Irvine v Commissioner of the Police** [2002] EWCA Civ 129, the claimant succeeded against D1 but lost against D2 and D3. The judge at first instance declined to make a *Bullock/Sanderson* order against D1 in respect of D2's and D3's costs and instead required the claimant to pay such costs in the ordinary way. The claimant appealed, arguing that it would have been "crazy, negligent as well as unreasonable" not to sue D2 and D3, and that the judge had failed to make any finding on the reasonableness of that decision. In his judgment, with which Scott Baker and Jacob LJJ agreed, Peter Gibson LJ said this about *Bullock/Sanderson* orders:

> "22 …. The jurisdiction is a useful one. It is designed to avoid the injustice that when a claimant does not know which of two or more defendants should be sued for a wrong done to the claimant, he can join those whom it is reasonable to join and avoid having what he recovers in damages from the unsuccessful defendant eroded or eliminated by the order for costs against the claimant in respect of his action against the successful defendant or defendants. However, it must also be recognised that it is a strong order, capable of working injustice to the defendant against whom the claim has succeeded, to be made liable not only for the claimant's costs of the action against the defendant, but also the costs of the other defendants whom the claimant has chosen to join but against whom the claimant has failed.
>
> 23. The court has a wide discretion over costs, and even where a claimant reasonably brings proceedings against two separate defendants and succeeds against one and fails against the other, there is no rule of law compelling the court to make a *Bullock/Sanderson* order (see **Hong v A & R Brown Ltd** [1948] KB 515). That case demonstrates that the court must also consider whether it would work injustice on an

unsuccessful defendant to make him liable for the costs of another defendant against whom the claimant has failed."

16. In dealing with a number of authorities in this area of the law, Peter Gibson LJ also addressed the relative significance of D1's attempt to blame D2 for the claimant's claim. At paragraph 31 he said:

> "A significant factor is likely to be whether one defendant puts the blame on another defendant. But as Mr Featherby rightly conceded, the fact that one defendant blames another does not in itself make the joinder of the other reasonable. It must depend on the facts available to the claimant, and in particular whether the claimant can sustain a claim against the other defendant. Defendants frequently blame others when things go wrong, but it does not follow that the claimant is thereby given liberty to sue the others at the expense of the defendant against whom the claimant succeeds."

17. In **Michael Moon v Paul James Garrett and others** [2006] B.L.R.402, Waller LJ referred to both **King** and **Irvine** and concluded:

> "38. It seems to me that the above citation demonstrates that there are no hard and fast rules as to when it is appropriate to make a *Bullock* or *Sanderson* order. The court takes into account the fact that, if a claimant has behaved reasonably in suing two defendants, it will be harsh if he ends up paying the costs of the defendant against whom he has not succeeded. Equally, if it was not reasonable to join one defendant because the cause of action was practically unsustainable, it would be unjust to make a co-defendant pay those defendant's costs. Those costs should be paid by a claimant. It will always be a factor whether one defendant has sought to blame another.
>
> 39. The fact that cases are in the alternative so far as they are made out against two defendants will be material, but the fact that claims were not truly alternative does not mean that the court does not have the power to order one defendant to pay the costs of another. The question of who should pay whose costs is peculiarly one for the discretion of the trial judge."

18. The authorities noted above, along with the extensive commentary in Volume 1 of the White Book at 44.3.8, all proceed on the assumption that the claimant was successful against one defendant but unsuccessful against at least one other defendant.

19. Different considerations will usually apply if the claimant was unsuccessful against both defendants. In **Beoco Ltd v Alfa Laval Co Ltd and another** [1995] 1 QB 137, a case decided before the CPR, the plaintiff's originally pleaded claim against both defendants failed. However, the plaintiff succeeded against D1 on a new case that the judge had allowed by way of amendment on the first day of the trial. He ordered the plaintiff to pay D2's costs and refused to make a *Bullock/Sanderson* order. D1 unsuccessfully appealed the judge's order which allowed the late amendment. The plaintiff cross-appealed on the judge's refusal to make a *Bullock/Sanderson* order against D1 in respect of D2's costs. The cross-appeal was rejected in robust terms by Stuart Smith LJ (with whom both Peter Gibson and Balcombe LJJ agreed):

> "The fallacy of Mr Knight's argument is this: while an unsuccessful defendant, A, will normally be held liable to pay the costs of a successful defendant, B, whether directly or indirectly, whom he had blamed, that does not apply where the plaintiff fails against both. In such circumstances A is not ordered to pay the costs of B, even though he may have blamed him. It is, as the judge said, for the plaintiff to decide whether he is going to succeed against either.
>
> Here the plaintiff failed against both defendants on the only claim pleaded against both, namely for the costs consequent upon the explosion. The second defendant is in no way concerned with the alternative claim raised in the amendment. The cross-appeal is misconceived and I would dismiss it."

20. On behalf of Mr McGlinn, Mr Williamson QC and Mr Selby argued that **Beoco** no longer represents the right approach in law and that the CPR allows the court to take a much more flexible approach to the making of a *Bullock/Sanderson* order. Although Mr Bartlett QC and Mr Hamilton agreed with the general proposition that the CPR allowed the court greater flexibility in making costs orders, they submitted that it was wrong in principle to make a *Bullock* order in circumstances where both defendants had been successful in defeating the claimant's claims. It was therefore their submission that **Beoco** still represented the law.

21. As a statement of general principle, I accept the submissions made by Mr Bartlett QC and Mr Hamilton. It seems to me that it could only be in truly exceptional circumstances that a claimant, who has lost against both defendants, might recover the costs of pursuing one defendant against the other defendant. In my judgment, if the claimant has been unsuccessful against both defendants, the justification for a *Bullock/Sanderson* order simply does not arise. Thus I consider that this principle, succinctly explained by Stuart-Smith LJ in **Beoco**, remains good law, notwithstanding the greater flexibility of the CPR.

22. In all the circumstances, it seems to me that the following questions, derived from the authorities cited above, are relevant to the exercise of my discretion on Mr McGlinn's application for a *Bullock/Sanderson* order against HTA in respect of WL's costs:

> (a) Can Mr McGlinn demonstrate that he has failed against WL but succeeded against HTA? If I conclude that he has failed against both, is a *Bullock/Sanderson* order simply inappropriate or misconceived (**Beoco**)?
>
> (b) Was it reasonable for Mr McGlinn to join WL in respect of the defects issues? This will involve a consideration of whether it can be said that the Mr McGlinn was confused as to which Defendant to pursue (**Irvine**), and the extent (if at all) to which HTA blamed WL for the relevant defects (**Irvine** and **Moon)**. If it was not reasonable to join WL, a *Bullock/Sanderson* order will not be made (see **King** and **Moon**).
>
> (c) Even if it was reasonable for the Claimant to join WL, should the costs of that unsuccessful claim be borne by HTA? That will involve a consideration of whether, in the round, it would work an injustice on HTA to make them liable for such costs (**Irvine** and **Moon**).

I go on to answer each of these questions in turn below.

D. WL COSTS/ANALYSIS

(a) Can Mr McGlinn demonstrate that he has failed against WL but succeeded against HTA?

23. Although it appeared as the last point in their written submissions in response to Mr McGlinn's application for a *Bullock/Sanderson* order, Mr Bartlett QC and Mr Hamilton submit that the necessary requirement of success against HTA has not been fulfilled in the present case. They point out that, in the alternative to his claim against HTA, Mr McGlinn had pursued 16 Items in the Scott Schedule against WL, and that each of those 16 Items against WL failed. Even more significantly, for present purposes, all 16 of those Items also failed against HTA. Thus HTA submit that, in relation to the entirety of the case against WL, Mr McGlinn was unsuccessful against both WL and HTA, and a *Bullock/Sanderson* order is not appropriate. On that basis, they submitted that the judgment of Stuart Smith LJ in **Beoco** is directly in point.

24. As I have already noted, in response to this, Mr Williamson QC and Mr Selby contended that **Beoco** did not set down a principle that should rigidly be followed post-CPR. For the reasons given in paragraph 21 above, I reject that submission. Thus, Mr McGlinn needs to demonstrate that he was successful against HTA in order to argue that HTA should be liable for his costs of pursuing WL. It is submitted on his behalf that, since he has been successful against HTA in respect of the Scott Schedule as a whole, it is appropriate for a *Bullock* order to be made.

25. On that basis, this application turns on whether the fact that Mr McGlinn successfully pursued other Items in the Scott Schedule against HTA, which were not relevant or connected in any way to the unsuccessful claims against WL, means that Mr McGlinn comes within the category of claimant who has succeeded against one defendant but failed against another. I reject such a submission. I am confident that the existence of such other claims (some of which were successful) against HTA is irrelevant to Mr McGlinn's application for a *Bullock/Sanderson* order. When considering such an order in the present case, I conclude that what matters are WL's own costs, and Mr McGlinn's costs of pursuing WL. Those costs were incurred in respect of the 16 Items on which Mr McGlinn failed against both WL and HTA. If the action had been limited to those items, Mr McGlinn would have failed against both Defendants. Accordingly, I find that this is not a proper case for a *Bullock/Sanderson* order in any event.

26. Moreover, it seems to me that such a finding is entirely consistent with the approach to the facts in **Beoco** adopted by the Court of Appeal. There, the plaintiff failed against each of the two defendants on the only claim pleaded against them both. D2 was in no way concerned with the separate claim against D1, which had been added late and which ultimately succeeded. On those facts, the application for a *Bullock/Sanderson* order against D1 in respect of D2's costs was described as "misconceived". The facts here are indistinguishable from those in **Beoco**, and it seems to me that I am bound to reach the same conclusion.

27. On that ground alone, therefore, I decline to make a *Bullock/Sanderson* order in respect of WL's costs. Therefore WL's costs will have to be borne by Mr McGlinn, who will also have to pay his own costs of his unsuccessful pursuit of

WL. Although that is sufficient to deal with this part of the case, out of deference to the lucid submissions made by both parties on this topic, it is appropriate for me to go on to consider the other matters that have arisen on the application for a *Bullock/Sanderson* order. I therefore do so on the assumption that I am wrong on this first point and that somehow Mr McGlinn can demonstrate that he has been successful in a relevant respect against HTA.

(b) <u>Was it reasonable for Mr McGlinn to join WL in respect of the defects issues?</u>

28. I have concluded that, taking all relevant factors into account, it was not reasonable for Mr McGlinn to join WL in respect of the 16 Items. There are a number of separate reasons for that conclusion.

Uncertainty

29. I find that Mr McGlinn and his team were in no real doubt that, on their perception of the detailed allegations, it was HTA who were responsible for the 16 Items. For reasons which are explored in greater detail below, this is particularly obvious in relation to the two principal Scott Schedule Items that were later alleged in the alternative against WL, namely the change from granite to reconstituted stone (Item 1.2.1) and the change from oak to idigbo (Item 2.2.3). The absence of any real doubt, of course, explains why those Items were not pleaded against WL at the outset.

30. I reject the contention that uncertainty or confusion was introduced by HTA's defence or their detailed responses to the 16 Items in the Scott Schedule. As we shall see, although HTA made a number of references to WL in these documents, such references were in general terms and were almost all in respect of matters of fact which, ultimately, proved to be correct.

Blame

31. Did HTA's defence or Scott Schedule responses blame WL for the 16 Items? In my judgment they did not. The references to WL in the HTA pleadings fell into two categories. First, there were the general references to WL fulfilling the role of project managers; secondly, there were the specific references to WL's role in proposing and/or obtaining approval for certain changes to the workscope which were being considered with a view to saving money. At no point did HTA allege that WL had somehow failed to do something which they ought to have done, or that the Item in question arose as a result of a breach by WL of their particular obligations to Mr McGlinn. HTA's pleaded references to WL are a long way removed from the usual case where D1 claims to have a complete defence because of the clear and specific defaults on the part of D2.

32. That conclusion (that HTA were not blaming WL in the conventional sense) can conveniently be tested by reference to WL's complaints when, in early 2006, Mr McGlinn first indicated a desire to join WL in to the action on the purported basis of what HTA had said in their pleadings. WL's counsel produced a Skeleton Argument for the relevant Case Management Conference on 3 February 2006 which demonstrated eloquently WL's view that HTA's pleadings disclosed no discernible case of professional negligence in respect of the 16 Items. He said, amongst other things:

> "6a. It is impossible to discern from some of the matters raised by HTA even the merest suggestion of a breach of duty on the

> part of WL, still less the essentials of a case in professional negligence …
>
> c. In respect of other allegations such criticisms as may be apparent from HTA's defence are so general as to be worthless as the basis of a claim against WL …
>
> e. The fact that a defendant may assert that WL was involved in a decision does not constitute the elements of a properly pleaded case against it. Take for example item 2.2.2 … HTA say, amongst other things, that WL prepared the specification; they do not say that the specification was incorrect (to the contrary, they deny the premise upon which Mr McGlinn appears to suggest that the specification was incorrect). Moreover, it is entirely unclear whether Mr McGlinn accepts or denies Waltham's argument that the specification was changed by HTA. What is the breach of duty alleged against WL? What is the causation alleged against WL? …"

33. In my judgment, these contemporaneous criticisms make clear the lack of a link between HTA's pleadings and the separate claim made by Mr McGlinn against WL. Although that did not mean that WL could not be joined into the proceedings, they demonstrated that Mr McGlinn's team had to pursue a credible case of their own against WL which was wholly unconnected to and separate from any pleadings produced by HTA. In the event, this is what Mr McGlinn's team endeavoured to do.

34. I have referred above to the two general categories of references to WL in the HTA pleadings. As to the first category, namely HTA's general references to WL's role as project managers, this point stemmed from the fact that Mr Hardcastle, one of Mr McGlinn's agents, had written to all parties, including HTA, on 29 January 1999, to say that WL had been appointed "Project Manager for the development". At paragraph 757 of my Judgment, I found that Mr Hardcastle wrote that letter because he had been instructed in those terms by Mr McGlinn. Thus the fact that HTA referred in their pleadings to WL's role as project managers can hardly be the subject of criticism; nor can it, on its own, support the suggestion that HTA were 'blaming' WL for the 16 Items. Even if it did amount to blame, given Mr McGlinn's unequivocal evidence that he did not ask WL to fulfil any such function, it is unclear why HTA's references to WL's role as project managers should have caused Mr McGlinn to join WL into the proceedings on what he maintained was an erroneous basis.

35. The second category of references by HTA to WL, namely the references to WL's approval of various changes, was largely made out on the facts. The first of the two principal Items alleged against WL was the change from granite to reconstituted stone (Item 1.2.1). HTA alleged in their responses to the Scott Schedule that this potential change had been identified by WL as a potential cost saving; that it had been evidenced in documents that were circulated by WL to Mr McGlinn; and that there had been no objection to the proposed change. They also alleged that WL had quantified the relevant cost saving thereby achieved. Each of those matters of fact was made out in the evidence (see Sections C7.1 and F2.6 of the main Judgment). Similarly, in respect of the change from oak to idigbo (Item 2.2.3), HTA again pleaded that this change had come about as a result of WL's attempt to make costs savings and had again been approved by Mr McGlinn. Again those facts were proved to be correct (see Sections C7.2 and F2.23 of the

main Judgment). Thus, I conclude that, in their responses to the Scott Schedule, HTA were not seeking to blame WL for the Items in question, but were instead seeking to demonstrate that, by reference to the involvement of WL and others in the sequence of events that led to these changes, there was no case against them (HTA) in professional negligence. At Sections F2.6 and F2.23 of my Judgment, I concluded that HTA were right about that in respect of both of these Items.

Subsequent Events

36. Once WL were joined into the defects action, the case against them was developed and pursued by Mr McGlinn's team. It was not dependent at all upon HTA. Indeed, on a number of occasions, HTA expressly distanced themselves from the ongoing pursuit of WL. Examples of that process can be found at paragraphs 29-32 of HTA's written opening, and the separate Note prepared by Mr Bartlett QC and Mr Hamilton dated 17.10.06 (day 2 of the trial) which explained and reiterated that "HTA has made no allegations that WL has failed in its duties in any respect".

37. The lack of a link between the case advanced by Mr McGlinn's team against WL at the trial, and HTA's position, was also apparent in the Claimant's written opening and closing submissions, which advanced a case that was unconnected to any pleading or other document prepared and served on behalf of HTA. It was for all these reasons that, at paragraph 769 of my Judgment, I concluded that many of the allegations against WL were "in reality, pursued independently by the Claimant, regardless of what HTA said in their pleadings". These allegations were then determined on the facts, again irrespective of any input from HTA.

Reasonableness Generally

38. Standing back from the history for a moment, and just concentrating on the individual allegations, I conclude that it was unreasonable for Mr McGlinn to join WL, because the vast bulk of the 16 Items were concerned with architectural/aesthetic matters for which WL, as quantity surveyors (and even as project managers) could simply never have been liable. Again I explain my reasons for this conclusion by reference to the two principal items alleged against WL, namely the change to reconstituted stone and the change to idigbo. The original allegations against HTA were that these changes were unauthorised by Mr McGlinn. As a result of HTA's clear response to this claim, to the effect that Mr McGlinn knew and approved the changes (which he later admitted in cross-examination), Mr McGlinn's position shifted, and the focus of these two allegations then became the alleged failure on the part of HTA to give full advice about the effect of the changes (see, by way of example, paragraphs 340-342 and 462 of the main Judgment). The allegations therefore became concerned with architectural/aesthetic matters and, since nobody ever suggested that these were matters in respect of which WL had any input at all, it was always very difficult to see how or why WL could ever be liable for either Item. Moreover, Mr McGlinn cannot have thought that, in some way, this alleged liability stemmed from WL's role as project managers, given that it was his case that he had not given WL any greater obligations than their original role as quantity surveyors.

Summary

39. For all these reasons, therefore, I conclude that it was unreasonable for Mr McGlinn to pursue the 16 Items against WL. That therefore constitutes a second

reason why it would be inappropriate to make a *Bullock/Sanderson* order in this case.

(c) Even if it was reasonable for Mr McGlinn to join WL, should the costs of that unsuccessful claim be borne by HTA?

40. Even if I was wrong in my analysis set out above, and it was reasonable for Mr McGlinn to join WL in respect of the 16 Items, I consider that it would still be unjust if I ordered that HTA pay the costs of that failed exercise. The injustice arises principally out of the same matters identified at paragraphs 29-38 above, in particular:

> (a) HTA did not blame WL for the items in the Scott Schedule in the usual sense. The references to WL were general, and part of HTA's defence, rather than a separate attack on WL.
>
> (b) HTA did not encourage any pursuit of WL on the part of Mr McGlinn. If anything, they actively tried to discourage the ongoing pursuit of WL.

41. In my judgment, the most significant matter that demonstrates the injustice of making a *Bullock/Sanderson* order against HTA in relation to WL's costs, is that the allegations which are said to have led to the joinder of WL were very largely proved right on the facts. The points that HTA made in their responses in respect of the two main Items, as to WL's involvement in the process by which these changes came about, were demonstrated on the evidence and found as facts in the body of the Judgment. Another example of the same process were the references made by HTA to the preparation by WL of the Bills of Quantity (the closest anyone got to a specification), a point which was allegedly "passed on" by Mr McGlinn against WL, but about which there was again no dispute.

42. Accordingly, it would be quite unjust to make HTA pay the costs of the unsuccessful pursuit of allegations against WL in circumstances where, even if Mr McGlinn was right, and his allegations had their root in the HTA responses to the Scott Schedule, those responses have been demonstrated to be largely correct as a matter of fact. That would mean that, effectively, the court would be penalising HTA in costs for being proved right. Such a result could not possibly arise out of the proper exercise of the court's discretion.

43. Accordingly, taking all the relevant facts and matters into account, I consider that, even if Mr McGlinn had acted reasonably by joining WL into the proceedings on the defects issues, it would be unjust in any event to visit the costs of those unsuccessful claims upon HTA.

Conclusion on Mr McGlinn's application for a *Bullock/Sanderson* order in respect of WL's costs

44. For the reasons set out above, I have concluded that it would be wrong as a matter of principle to make a *Bullock/Sanderson* order in respect of WL's costs because, in respect of the relevant 16 Items in the Scott Schedule, Mr McGlinn was unsuccessful against both WL and HTA (**Beoco**). In any event, on the material set out above, I decline to exercise my discretion in favour of such an order because I do not consider that Mr McGlinn acted reasonably in joining WL. Even if I were wrong about that, I have no hesitation in concluding that it would be quite unjust to make a *Bullock/Sanderson* order, in circumstances where the vast bulk of HTL's pleaded references to WL have been made out on the facts.

Thus Mr McGlinn is liable to pay WL's costs of the defects issues; this will include the interim payment of £180,000. He will also have to pay his own costs of the unsuccessful pursuit of WL.

E. THE COSTS AS BETWEEN MR McGLINN AND HTA/ RELEVANT FACTS

Introduction

45. It is submitted on behalf of Mr McGlinn that he has recovered money as against HTA as a result of the litigation, in the total sum of £438,850.76. In addition, there will be a further sum due (which I calculate will be in excess of £40,000) by way of interest, following my findings in **Section B** above. It is said, therefore, that Mr McGlinn is the successful party. It is further submitted on his behalf that his status as the victor of this litigation is confirmed by the fact that HTA's payment into court was only £300,000, which was significantly less than the amount recovered at the trial. Thus it is submitted that Mr McGlinn is entitled to an order pursuant to which HTA should pay a high proportion of his costs of his claim against them.

46. HTA make almost the exact mirror-image submission. HTA submit that they were the successful party because they were successful on a large number of the issues and disputes which were resolved at the trial, particularly those concerned with causation and quantum. They submit that they were so successful that Mr McGlinn recovered just 14% of the huge sum (in excess of £3.5 million) that he had claimed against HTA. In addition, HTA submit that, although their payment into court was insufficient, it was much closer to the sum to which Mr McGlinn was entitled than the claim of over £3.5 million that was pursued against HTA up to and during the trial. HTA also take various points as to Mr McGlinn's conduct which, they say, should be reflected in the costs order made and confirms their position as the ultimate winners of this litigation.

47. Accordingly, in order to address these submissions, I must outline the facts which I consider to be of particular relevance to the costs issues as between Mr McGlinn and HTA. I do that below. I then set out the principles relevant to the proper operation of CPR 44.3 and the exercise of my discretion (**Section F** below) before setting out my analysis of the appropriate costs order as between Mr McGlinn and HTA (**Section G** below).

48. It would be unnecessarily wearisome to set out in this Judgment all the matters of fact to which I have had regard in coming to my conclusions on costs. This was an action that I case managed from the outset and in which I conducted a seven week trial. There are a range of matters, many of which are recorded in my lengthy Judgment referred to in paragraph 1 above, which are of direct and indirect relevance to my conclusions on costs. Thus, I limit myself to setting out below those matters of fact which I consider to be of particular significance in my consideration of the costs arguments.

Payment In/Part 36 Offers

49. The original claim against HTA was commenced on 4 May 2005. The damages claim was in the sum of £4 million. On 18 October 2005, HTA paid into court £300,000. I consider that this payment into court was made as early as was reasonably possible, given the detailed nature of the allegations in the Particulars of Claim and the Scott Schedule. The payment into court was made at about the same time as the service of HTA's defence and their responses to the Scott Schedule.

50. At no time did the Claimant, Mr McGlinn, respond to the payment into court. He made no Part 36 offer himself. I regard that omission as unfortunate. However, it cannot be said that Mr McGlinn turned his back entirely on any sort of attempt at negotiation because I am told that, in the summer of 2006, there was an unsuccessful mediation between the parties.

51. It is, I think, self-evident that the sum which Mr McGlinn has recovered is much closer, in real terms, to the amount paid into court by HTA than the sums which he was claiming before and at the trial. Both that point, and the early nature of the payment into court, constitute factors in favour of HTA. On the other hand, it should also be noted that, taking into account interest, the payment into court was about £180,000 too low. That is not an insignificant shortfall. That is plainly a point in favour of Mr McGlinn.

Result on Liability

52. My Judgment on the defects issues as between Mr McGlinn and HTA can be summarised as follows:

(a) There were 77 Items in the Scott Schedule that were alleged against HTA. Of these, Mr McGlinn failed on 55 and was successful, in whole or in part, on 22 of them. Many of those Items on which he failed were relatively modest in value.

(b) By the time of the trial, I consider that the five most important Items, or groups of Items, alleged in the Scott Schedule against HTA were the external walls (Items 1.1 and 1.2); the glazing and timber (Item 2); the roof (Item 4.1); the internal joinery (Item 5.1); and the floors at ground floor level (Item 5.4). These were the Items that took up the bulk of the time at trial, and in particular the cross-examination of Mr Jowett and Mr Salisbury, the parties' respective architectural experts. Of those five Items, Mr McGlinn was successful against HTA in respect of Items 4.1, 5.1 and 5.4; he was successful on only relatively small aspects of Items 1.1 and 1.2, and he failed on Item 2.

(c) Certain categories of Items that were alleged against HTA failed completely. Those included the allegations that HTA were responsible for certain civil/structural defects, and certain mechanical and electrical items. In addition, as noted above, all the 16 Items alleged against HTA which were also alleged against WL failed in their entirety.

53. There were, of course, a raft of issues which lay behind the outcome on the individual Items in the Scott Schedule against HTA, such as arguments concerning the nature and extent of HTA's contractual obligations, their duty to make periodic inspections, the absence of a specification, and the overall standard of work required. Theses were the matters I dealt with in some detail at Section E of my main Judgment. It would be right to say that these issues were resolved largely in Mr McGlinn's favour, and paved the way for his success on the 22 Items listed at paragraph 679 of that Judgment.

Result on Causation/Quantum

54. Mr McGlinn's primary case on causation/quantum was that he was entitled to demolish the house and rebuild it at HTA's cost. He failed entirely on that issue. His secondary case was based on the repair costs. His original claim in respect of direct repair costs for the architectural Items (excluding preliminaries,

fees, enabling costs etc) was £1.2 million odd. At the time of the commencement of the trial, that claim was in the sum of about £1 million. During the trial, and following agreements between the experts, the estimated costs of the repairs came down considerably with the result that, at the end of the trial, the full value of the repair items was claimed at a maximum of £680,000 odd. Of that total figure, partly as a result of the failure of Mr McGlinn's case on liability in respect of many of the Items, and partly because, even on the Items on which he was successful (such as Item 1.2.3), I was obliged to make significant reductions for causation/quantum reasons, he only recovered £292,523.73

55. Numerous other elements of Mr McGlinn's case on quantum either failed altogether or led to recovery of figures that were far less than had been claimed. The relevant percentage for the contingency fee was reduced by half and the professional fees were reduced from the 26% claimed to less than 10%. The preliminaries claim, which was originally put at £673,000, and at the trial was claimed at £475,000 (both figures which I considered to be wholly excessive) led to a recovery of just £38,000 odd, about 5% of that which had been originally claimed. Similarly, the huge claim of over £1 million, in respect of the enabling works and the professional fees thereon, resulted in a net recovery of £58,000 odd, much less than 10% of the sum originally claimed. The claim for storage costs failed completely.

56. In the round, therefore, it would be impossible to say that the causation/quantum issues resulted in any real measure of success on the part of Mr McGlinn. In addition, his attempt to open up the agreed settlement of HTA's fee claim also failed.

Result/Summary

57. At the time of my original Judgment I was conscious that Mr McGlinn's recovery as against HTA was so much less than the amount sought. At paragraph 874 of my Judgment I explained that difference by reference to four key elements of the case, the first two of which were not seriously in issue at the trial. They were:

> • "Mr McGlinn's decision in January 2002 not to let Waltham back to complete the contract, which meant that there were many allegations in the Scott Schedule which could never have been sustained against any defendant, because they were simply the result of unfinished work. I consider that this was an entirely foreseeable consequence of Mr McGlinn's decision to accept Waltham's technical repudiation and to refuse their offer to complete (see paragraph 108 above).
>
> • The subsequent administration of Waltham, which had the consequence that they played no part in the trial. Waltham would probably have been liable for Items which were not alleged against any other defendant, such as Item 1.1.5, and many other Items, such as Items 2.2.1 and 4.1.1, which, although alleged against other Defendants, were not the responsibility of anyone else but Waltham.
>
> • The relatively few important Items for which, on the evidence, HTA were liable in fact or in law.

> • My finding that, in all the circumstances set out in **Section K** above, the proper and reasonable measure of damage against HTA and DJH was the agreed cost of repair, not an arbitrary allocation of the (higher) cost of demolition and rebuilding."

58. It would be right to say that that paragraph was designed to explain to the parties how it was that Mr McGlinn had been so much less successful than he might have hoped.

Conduct Before/At Trial

59. On behalf of HTA, Mr Bartlett QC and Mr Hamilton make a number of criticisms of Mr McGlinn's conduct, which I am invited to take into account under CPR 44.3(4)(a) and (5). I deal briefly with each of them below.

(a) Mr McGlinn's ability to take an 'uncommercial' approach to litigation.

Mr McGlinn's wealth may have allowed him to take decisions which others could not have contemplated, but I am of the view that there were no such decisions which had a significant bearing on costs, or which are relevant to wider considerations of conduct.

(b) The hunt for defects.

I have already found that the opening up exercise was excessive and caused unnecessary damage to the property. I have also found that the sums spent on this exercise were absurdly large. These views might lead, in appropriate circumstances, to an order that either excluded or reduced the legal costs recoverable in respect of this exercise. Beyond that, however, I do not think that this is conduct relevant under CPR 44.3(5).

(c) Demolition/rebuild

Mr McGlinn's failure on the demolition/rebuild case is obviously a matter of particular relevance to the issue of partial success/failure and the question of whether an issue-based costs order is appropriate in this case (CPR 44.3(4)(b) and (6)). That is something I consider in some detail below. I do not consider that, of itself, the fact that Mr Jowett did not himself give advice as to the demolition/rebuild option is a relevant matter in respect of costs.

(d) The attempt to make HTA responsible for unfinished work.

(e) The attempt to make HTA responsible for matters which were the responsibility of Waltham.

Both of these matters are taken direct from paragraph 874 of my main Judgment, repeated at the first two bullet points at paragraph 57 above. They are again relevant to questions of success, either overall or on particular issues. As to conduct, the most that can be said about them is that they reflect the fact that Mr McGlinn pursued a whole range of Items against HTA, some of which succeeded,

some of which failed, and some of which, in my view, should never have been raised.

(f) Persisting in allegations.

The same point applies again. I accept HTA's submission that there were some Items which should have been abandoned long before the end of the trial. By the same token, of course, there were some Items which, on the basis of the oral evidence of their own expert, HTA should never have fought, and instead should have admitted before trial.

(g) The pursuit of unfair, unreasonable, unrealistic or exaggerated allegations.

Again, I consider that there is some force in this criticism of Mr McGlinn, particularly in respect of causation and quantum (see sub-paragraph (h) below). However, it is important that the court should not embark on a second lengthy investigation into the Items which failed (either wholly or in part), to see precisely how and why they failed and whether or not each Item was properly alleged in the first place. It is almost inevitable in litigation of this sort that some Items will succeed and some will fail. With some exceptions, I am satisfied that, where Mr McGlinn lost on a particular Item, it was because I preferred HTA's evidence on the point, rather than because the Item should never have been alleged.

(h) The gross exaggeration of quantum.

I have dealt in paragraphs 54-56 with the marked lack of success which Mr McGlinn achieved on quantum. I consider that this might have stemmed, in part, from the fact that Mr McGlinn adopted a tough line on the repair versus demolition debate from the outset (see the main Judgment at paragraphs 811-812), However, I remain of the view that this lack of success was principally due to the failure, in law and in fact, of the demolition/rebuild case, and the significant reductions in the claims for the repair costs which arose because of the (possibly belated) realism which Mr Fitch brought to his attempts to agree the figures with Mr Linnett. Whilst it is obviously right that, in the TCC, experts are encouraged to agree figures wherever possible, the reductions in the present case, from the sorts of figures in Mr Fitch's report to the sorts of figures that he eventually agreed, were very significant, and demonstrated to me that the original figures were unjustifiably inflated.

(i) Payments in/Offers

I have dealt with this at paragraphs 49-51 above. Whilst it is never compulsory for a claimant in the position of Mr McGlinn to make a counter-proposal to a payment into court, or to provide his own Part 36 offer, it does seem to me that, in a complex case like this, a claimant is well-advised to indicate the sort of sum which he is looking to recover in the action. The absence of such a counter-proposal here seems particularly stark, given that the Defendant's payment into court was far less than the amount claimed, but was much closer to Mr McGlinn's actual entitlement.

(j) The evidence on the video application

I accept the point that it was unfortunate that Mr McGlinn's application in September 2006 to give evidence by way of video conference suggested that he

personally owned the shares in the Body Shop Group, when, as it subsequently transpired at the trial, they were owned by a company registered in the British Virgin Islands. That might have had an effect on the success or otherwise of that application. However, I consider that, not only is that dispute now in the past, but the fact that Mr McGlinn gave evidence by way of videolink did not in the event cause any discernible detriment to HTA at all. In the round, I would be unwilling to allow that conduct, of itself, to be reflected in any costs order that I might make.

HTA's Conduct

60. At paragraphs 45-49 of their written submissions, Mr Williamson QC and Mr Selby make various points about the conduct of HTA which they say are relevant pursuant to CPR 44.3(4)(a) and (5). I deal with those briefly as follows:

(a) The range of points.

HTA are criticised for taking every conceivable point in defence of the claim and making very few concessions. There is some force in that point: HTA plainly should have made some concessions earlier, particularly as to their contractual obligations, an issue which, in the absence of any evidence from Mr Thomas himself, was always going to be resolved against HTA. However, there is also much in Mr Bartlett QC's response to this criticism, to the effect that many of the points taken by HTA were proved to be right.

(b) The contract terms.

HTA are criticised because they relied on the incorrect contract conditions until shortly before trial, when they changed their case completely. However, it seems to me that precisely the same point can be made about Mr McGlinn. Mr Williamson QC and Mr Selby are right to say that HTA's new case on the contract terms failed but, again, that is an issue which I will need to consider in the exercise of my discretion under CPR 44.3(4)(b) and (6) because it goes to relative success and failure. I do not consider that, beyond that, HTA's late amendment constitutes relevant conduct for the purposes of CPR 44.3(4)(a).

(c) Blaming WL.

I reject absolutely the suggestion that HTA relied on as part of their defence an attempt to blame WL. My reasons for this conclusion have already been set out at **Sections C and D** above.

(d) Aggressive conduct.

The final complaint is the aggressive conduct on the part of HTA during the trial, putting every conceivable difficulty in the Claimant's path. There is also a criticism that, due to HTA, a good deal of time was spent in procedural wrangling. I do not accept these criticisms. I consider that, certainly as a proportion of the total trial time, the amount of court time spent on procedural issues was properly limited. I consider that both parties ran cases which were relatively extreme and that it is perhaps unsurprising that my Judgment

endeavoured to plot a path through those extreme positions to a result which was, in one sense at least, somewhere between the two.

61. In summary therefore, I do not believe that there is anything much in the conduct points on either side. Ultimately, it seems to me that what matters is that Mr McGlinn recovered money from HTA and beat the payment into court, whilst HTA defeated his primary case on causation and quantum in its entirety, and, for a variety of reasons, including the exaggeration of the damages claimed, were found liable for a sum that was much closer to their payment in than the claim against them.

F. THE COSTS AS BETWEEN MR McGLINN AND HTA/PRINCIPLES

General Approach

62. CPR 44.3 has already been set out in full at paragraph 13 above. In **Johnsey Estates (1990) Ltd v The Secretary of State for the Environment** [2001] EWCA Civ 535, Chadwick LJ, at paragraph 21 of his judgment, set out the proper approach of the court to the making of costs orders:

> "The principles applicable in the present case may, I think, be summarised as follows:
>
> (i) Costs cannot be recovered except under an order of the court;
>
> (ii) the question whether to make any order as to costs – and, if so, what order – is a matter entrusted to the discretion of the trial judge;
>
> (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless,
>
> (iv) the judge may make different orders for costs in relation to discrete issues – and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation; and
>
> (v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue;
>
> (vi) an appellate court should not interfere with a judge's exercise of discretion merely because it takes the view that it would have exercised that discretion differently."

Those are the general principles which I must follow in this case.

Success and Failure: General Considerations

63. In **Roache v News Group Newspapers Ltd** [1998] EML 191 (a decision of the Court of Appeal delivered on 19 November 1992, many years before the CPR), the plaintiff recovered £50,000 at his libel trial, which was precisely the figure that the defendants had paid into court. The judge at first instance awarded

the plaintiff his costs, on the basis that he had also obtained an injunction against re-publication. The Court of Appeal overturned that decision on the basis that, if the plaintiff had indicated a willingness to accept the money in court, the "overwhelming probability" was that the defendants would have given him an undertaking equivalent in effect to the injunction. Sir Thomas Bingham MR (as he then was) referred to a number of the authorities and said:

> "The upshot of these cases is in my judgment clear. The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?"

He concluded that the plaintiff had won nothing of value and that the defendant had substantially denied the plaintiff the prize he had fought the action to win and he made a costs order accordingly.

64. In his concurring judgment in that case, Simon Brown LJ (as he then was) dealt more generally with the concepts of success and failure. He said:

> "It is, I think, necessary to be a little wary about how precisely one determines which party in proceedings is successful. In the first place it is important to adopt an approach which does not dilute the important certainties inherent in the payment in machinery. Assume, for instance (a) that a plaintiff makes plain in correspondence and perhaps in evidence too that he is intent on damages of £150,000, (b) that £50,000 is paid into court and (c) that the plaintiff then recovers £51,000 (or, indeed, £50,050). Surely no-one could doubt the plaintiff's entitlement to his costs. The defendants could not in those circumstances assert that, in denying the plaintiff the prize he sought, they and not he were the substantial winners. Nor would it avail them to establish that the plaintiff would not have accepted the money in court even had it been increased to £51,000. It would have been for them to increase the payment in to put the plaintiff on risk to that extent.
>
> Secondly, it seems to me important to recognise that on occasion it will be impossible to regard either party as the substantial winner … In circumstances such as those one would not rule out the possibility of making no order or making a partial order as to costs."

65. As noted above, **Roache** was decided before the CPR. Although the decision was expressly referred to by Lindsay J in **Douglas v Hello! Ltd** [2004] EWHC 63 (Ch) it is clear that what was being referred to there was the general approach of Sir Thomas Bingham MR referred to at paragraph 63 above. There is no post-CPR authority in which the approach of Simon Brown LJ in **Roache** has been applied, and I would respectfully suggest that the 'winner-take-all' principle which he there discusses has now been expressly modified by the CPR.

66. A post-CPR case in which the Court of Appeal dealt generally with the issue of success and failure was **A L Barnes Ltd v Timetalk (UK) Ltd** [2003] EWCA Civ 402; [2003] B.L.R. 331. There, although the claimant was successful

on his quantum meruit claim, in a sum which was in excess of that which had been offered by the defendant, the judge at first instance held that no order for costs should be made in respect of the costs of experts, which costs were substantially related to that successful quantum meruit claim. He did this because of what he called the "highly unorthodox" basis on which the parties contracted, which, he said, made a dispute inevitable. He also decided that, because much of the trial had been taken up with an allegation of dishonesty which had successfully been pursued by the defendant against the claimant, the defendant should be seen as the successful party and should recover one half of his other costs.

67. The Court of Appeal overturned that order, holding that, in all the circumstances, the claimant was the successful party and that it was entitled to 25 per cent of its costs. Longmore LJ said:

> "28. … In what may generally be called commercial litigation … the disputes are ultimately about money. In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure …
>
> 30. … If he [the judge] had asked himself who was the successful party, before segregation of the effective costs of proving the quantum meruit claim, he would in my judgment have had to answer that it was the claimants who had recovered more than the defendants had ever offered and thus it must be the claimants who were the successful party."

Defendant's Failure To Do Better Than The Offer

68. I have been referred to a large number of cases in which it was argued that, although the defendant failed to do better than the offer/payment into court that it had made, the offer or payment in was still a relevant factor in determining success or failure. Many of these were decisions by the Court of Appeal. Given that, in the present case, it is an integral part of Mr McGlinn's case that he should be regarded as the successful party because HTA had made a payment into court which they failed to beat, it is important to identify these authorities and the principles that can be discerned from them. I deal with them below in chronological order.

69. In **Bajwa v British Airways** [1999] PIQR 152, the claimant recovered slightly more than the payment into court, although a direct comparison was made more complicated by the relevant Social Security legislation. The judge's costs order reflected that success and gave the claimant her costs. The Court of Appeal disagreed, saying that whilst the fact that the judgment sum was worth more than the payment in was a consideration, "when set against all the other factors … it pales into insignificance". The defendant obtained all its costs after the date of the payment in because its assessment of the overall damages was right; the claimant's assessment was extravagantly wrong; and the claimant lost on every issue in the four day trial.

70. **Amber v Stacey** [2000] EWCA Civ 286, was another case decided very shortly after the CPR came into effect. The claimant claimed £7,500 odd and recovered judgment for just £2,321. There had been an offer to pay £4,700 at the outset of the litigation. A first payment in of £2,000 was made and a second payment in five months later of another £1,000. The judge at first instance

deprived the claimant of all his costs from the date of the offer to pay £4,700, and also ordered the claimant to pay the defendant's costs. The Court of Appeal considered this to be wrong in principle and the order was varied so that the claimant paid one half of the defendant's costs for the period up to the second payment in. Thereafter, the claimant had to pay the entirety of the defendant's costs.

71. It appears that the Court of Appeal's approach in **Amber v Stacey** was chiefly concerned with an argument as to whether an offer had the same status and effect as a payment into court (which does not arise in the present case). It was also based on the principle set out in **In re Elgindata** [1992] I WLR 1207, which reiterated the old pre-CPR position that it generally required unreasonable or improper conduct on the part of a successful party to make him a paying party. As explained below, the Court of Appeal has made plain in a number of subsequent cases that this approach is no longer good law. For these reasons, I do not consider that the decision in **Amber v Stacey** is of any great assistance, either generally, or on the facts of the present case. However, at paragraph 40 of his judgment, Simon Brown LJ made the general point that payments into court "are not themselves necessarily decisive". He went on to say that defendants who pay in too little or too late "may nevertheless be able to establish that it was their opponent's unreasonable conduct which prevented them from making a properly informed decision about their prospects in the litigation, and thus avoid what in a part 36 case would be the usual costs order".

72. In **Johnsey**, referred to above, the claimant pursued a dilapidations claim, based on an alleged diminution in value of £1.25 million. On 25.9.96, the defendant paid £200,000 into court. Following the exchange of experts' reports on 19.2.99 the defendant paid a further £250,000 into court. The judge awarded the claimant £200,000 together with interest in the sum of £36,000, but he ordered that the claimant should pay the defendant's costs of the diminution in value claim from the date of the first payment into court. The Court of Appeal varied that order, agreeing that the claimant should pay the defendant's costs from the date of the second payment into court but concluding that the defendant should pay the claimant's costs up to that date, because the first payment in was too low. Chadwick LJ said:

> "27…. It cannot be said that the outcome of the trial was that the Secretary of State succeeded in defending the position which had been adopted on his behalf prior to 11.2.99. The most that can be said is that the outcome was much closer to that position than it was to the position which had been adopted on behalf of the landlord.
>
> 28. On a proper understanding of the position, the first payment in, on 25.9.96, was irrelevant to a consideration as to where the costs of the litigation should lie. It was irrelevant because it fell short of the amount (£236,000) to which the claimant has been entitled as at that date by a margin (some 15%) which cannot be dismissed as *de minimis* ...
>
> 29. It follows, in my view, that the judge's approach was flawed. He ought to have recognised that in relation to costs incurred before 19.2.99, the landlord was the successful party; and that, accordingly, the starting point from which to approach the exercise of discretion in which he was engaged was that the

> landlord should have its costs down to that date. I accept, of course, that a party that has been successful overall may, nevertheless, be deprived of his costs – and may be ordered to pay the costs of the other party – in respect of issues which he has fought unsuccessfully. But an exercise of discretion on that basis cannot lead, in the present case, to an order that the claimant pay the defendant's costs of the diminution in value issue in respect of any period prior to 11 February 1999 (the date of the exchange of revised experts' reports); nor to an order that the claimant should be deprived of its costs of that issue prior to that date. That is because it cannot be said that the claimant failed to establish what, as matters stood prior to 11.2.99, it had to establish in order to succeed on that issue – namely that the diminution in the value of the reversion as at 21 June 1994 was greater than the equivalent value, as at that date, of the payment in."

73. The decision in **Johnsey** is also instructive because of the defendant's alternative argument that the landlord was throughout seeking damages in amounts that were far in excess of the amount to which it was ultimately entitled, and that it was the landlord's inflated and unrealistic valuation of its claims which had made it impossible to dispose of the action by agreement in 1996. It was said that the fact that the defendant did not beat the first payment in was ultimately immaterial because, even when the amount of that payment in was increased to £450,000, the landlord still would not take it. This argument too was rejected by the Court of Appeal. At paragraph 32 of his judgment, Chadwick LJ said:

> "The submission has some superficial attraction on the facts of the present case; but, for my part, I would reject it. It seems to me that a court should resist invitations to speculate whether offers to settle litigation which were not in fact made might or might not have been accepted if they had been made. There are, I think, at least two reasons why a court should not allow itself to be led down that road. First, the rules of court provide the means by which a party who thinks that its opponent is not open to reason can protect himself from costs. He can make a payment in; he can make a *Calderbank* offer; now under the CPR, he can make a payment or an offer under CPR Part 36. The advantage of the courses open under the Rules is that they remove speculation. The court can see what offer was made, when it was made, and whether it was accepted. Second, speculation is likely to be a most unsatisfactory tool by which to determine questions of costs at the end of a trial. It is not, I think, suggested that each party would be required to disclose, at that stage, what advice it had received, from time to time, as to the strengths and weaknesses of its claim or defence. But without knowing that – and without a detailed knowledge of the financial and other pressures to which each party was subject from time to time – speculation would be hopelessly ill-informed. If Mr Gaunt's submission were to be accepted generally, there would, I think, be a serious danger that at the end of each trial, the court (in order to decide what order for costs it should make) would be led into another potentially lengthy inquiry on incomplete material into 'what would have happened if …?' I am not persuaded that that could be

compatible with the overriding objective to deal with cases justly."

74. In **Firle v Datapoint** [2001] EWCA Civ 1106, the defendant paid £35,000 into court on 17.12.99. The claimant made a Part 36 offer of £135,000 on 1.3.00. The defendant made a further payment in of £15,000 on 10.3.00. The claimant recovered £53,695.25. The trial judge awarded the claimant 33.3 per cent of his costs up to 10.3.00 and 15 per cent of his costs thereafter. The Court of Appeal overturned that order and ordered the defendant to pay all of the claimant's costs up to 10.3.00 (the date of the second payment in) and 70 per cent of the claimant's costs thereafter. At paragraph 17 of his judgment, Schiemann LJ said, in respect of the period prior to the second payment into court, that:

> "The claimant succeeded by a substantial amount so far as the offers which were on the table were concerned. The defendant could have made a payment in and therefore in principle the claimant is entitled to its costs. This is not a case where there were clear separate issues on some of which the claimant won and on others lost if issues be taken as matters which had to be proved by one side or the other in detail for the points to succeed. As it seems to me up to 10 March the position ought to be that the claimant gets his costs in full as opposed merely to one-third of its costs which was the view of the judge."

It is therefore important to note that **Firle**, like **Johnsey**, was expressly said to be a case in which it was not appropriate for an issue-based costs order to be made.

75. There are three other Court of Appeal decisions in which a rather different conclusion was reached as to the status of a defendant who had not beaten his own payment into court. In **Molloy v Shell UK Ltd** [2001] Civ 1272, the claim was for over £300,000. The defendant's Part 36 payment was £15,000 and the claimant eventually recovered £18,897. The claimant had not only exaggerated his claim but, until his dishonesty was exposed a few days before the trial, had advanced a dishonest case about loss of earnings and employment. The judge ordered the claimant to pay 75% of the defendant's costs but the Court of Appeal increased that to 100%. Laws LJ described the claimant's conduct as "a cynical and dishonest abuse of the court's process". He considered that, on those facts, it was doubtful whether the court should have entertained the case at all, save to make the dishonest claimant pay the defendant's costs, and there was no defence to an order that the claimant pay 100% of the defendant's costs after the date of the payment in.

76. In **Islam v Ali** [2003] EWCA Civ 612, the claimant recovered £12,000. He was also awarded his costs. The Court of Appeal considered that result against the final negotiation positions before trial, which were that Mr Islam would have settled for £45,000, whereas Mrs Ali sought a withdrawal of the claim and the payment of her costs. The amount ordered by the judge was, as Auld LJ pointed out, somewhat closer to Mr Islam's Part 36 offer than the offer or proposal of Mrs Ali "but they were both significantly distant in their opposite ways from the sum awarded". He concluded that, on an investigation of the issues and their resolution by the judge, the reality of the case was that Mrs Ali was the winner and that Mr Islam had lost the case on principle in relation to the main issues. The Court of Appeal therefore varied the judge's order on costs because, in the exercise of his discretion, he failed to have due regard to the fact that Mrs Ali had won the case in principle. In agreeing, Mummery LJ said there were "special

circumstances in this case" which justified such an order, including in particular the question of the basis on which Mr Islam claimed that he should be remunerated, on which Mrs Ali was the successful party. The Court of Appeal concluded that the appropriate action in all the circumstances was to make no order as to costs.

77. Both of these decisions were considered in **Yvonne Painting v University of Oxford** [2005] EWCA Civ 161. There the claimant was seeking £400,000 for a back injury sustained at work. The defendant admitted liability and paid into court £10,000. At the assessment hearing the principal issue was exaggeration. The defendant was successful on that issue and the claimant recovered £25,321.78. The judge at first instance ruled that the defendant should pay all the costs because the £10,000 paid in was a figure that the claimant could in no circumstances have been expected to accept. The Court of Appeal overturned that order, substituting it for an order that the claimant pay the defendant's costs after the date of the payment in.

78. Maurice Kay LJ concluded that the winner in the litigation was the defendant, who won on the issue of exaggeration, which was the overwhelming issue at the heart of the two day hearing. The defendant, he said, "was in real terms the winner". He also found that, but for the exaggeration, the claim would have been settled at an early stage and with modest costs. He also held that it was relevant that the claimant had failed to negotiate or put forward a counter-proposal. He said:

> "… At no stage did Mrs Painting manifest any willingness to negotiate or to put forward a counter-proposal to the Part 36 payment. No-one can compel a claimant to take such steps. However to contest and lose an issue of exaggeration without having made ever a counter-proposal is a matter of some significance in this kind of litigation. It must not be assumed that beating a Part 36 payment is conclusive. It is a factor and will often be conclusive, but one has to have regard to all the circumstances of the case."

79. In giving a concurring judgment, Longmore LJ also picked up on the defendant's failure to negotiate. He said:

> "The second matter is that I agree with My Lord that it is relevant that Mrs Painting herself made no attempt to negotiate, made no offer of her own and made no response to the offers of the University. That would not have mattered in pre-CPR days, but to my mind that now matters very much. Negotiation is supposed to be a two-way street, and a claimant who makes no attempt to negotiate can expect, and should expect, the court to take that into account when making the appropriate order as to costs."

Longmore LJ's short judgment is also significant because he expressly referred to CPR 44.3(4)(a)(Conduct) and 44.3(5)(d)(Exaggeration). He made plain that a court must have regard to questions of exaggeration when dealing with the appropriate costs order to be made, and that exaggeration could take many forms. He explained that the CPR made no distinction between intentional exaggeration and unintentional exaggeration.

80. The final case in this series is **Jackson v The Ministry of Defence** [2006] EWCA Civ 46. In that case the claim was for about £1 million. On 24.2.05, £150,000 was paid into court. The claimant recovered £155,000. The judge awarded the claimant 75 per cent of his costs on the ground that he had beaten the payment into court. This ruling was undisturbed by the Court of Appeal. Tuckey LJ did not accept the defendant's submissions which were based, at least in part, on **Painting**. He said:

> "The claimant was successful in the sense that he established a claim for substantial damages and beat the payment into court, albeit by a small margin. The defendant was perfectly able to protect itself against the fact that it faced an exaggerated claim. As most defendants do in such circumstances, it had access to experienced lawyers and (if necessary) experts to evaluate the strength of the claim it faced. It could with the benefit of such advice – and perhaps with the benefit of hindsight in this case should – have made an earlier Part 36 payment into court, and certainly could have increased that payment into court by making a further payment after the unsuccessful settlement meeting. The judge took into account the fact that the claimant had only just beaten the payment in which had been made, as I have already said …. The reduction which the judge made – and the reduction which we can anticipate the costs judge is likely to make – must act as a considerable disincentive to claimants and their advisers against making exaggerated claims. The case of **Painting** is, as Ms Griffiths accepted, an exceptional case where the claimant persisted in a claim for £400,000 at trial and was awarded about £25,000 at the end of the process. The basis upon which the court was persuaded to interfere with the judge's discretion was that the Recorder had not addressed the question as to who was the overall winner or given appropriate weight to that fact. Here there is no basis upon which it can be said that the judge failed to take into account who had been the overall winner, because he noted how close to the payment into court his ultimate award had been and did, unlike the Recorder in the case of **Painting**, make an appropriate reduction to reflect that fact."

Issue-Based Costs Orders

81. The CPR encourages the court to consider making orders which reflect a more detailed analysis of success and failure and, in particular, to make costs orders in respect of certain periods, or by reference to certain issues, or by way of percentages. I shall refer to these types of orders generically below as "issue-based costs orders". Such issue-based costs orders were identified by Lord Woolf MR at the time that the CPR was coming into force in **A.E.I. Rediffusion Music Ltd v Photographic Performance Ltd** [1999] 1 WLR 1507. He said, by reference to the CPR, that:

> "… The 'follow the event principle' will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new Rules coming into force. The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues.

> In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the 'follow the event' principle encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

He also made the point, by reference to the earlier decision in **In re Elgindata Ltd (No.2)** that it was no longer necessary for a party to have acted unreasonably or improperly to be deprived of its costs of a particular issue on which it has failed.

82. In **Summit Property Ltd v Pitmans (A firm)** [2001] EWCA Civ 2020, the defendant lost on the major issue of liability but won on causation/loss. As a result of this, the judge considered that an issue-based costs order was appropriate. He ordered the unsuccessful claimant to pay 30% of the successful defendant's costs, and the defendant to pay 65% of the claimant's costs. The judge arrived at these percentages on the basis that, since this was a case in which it was appropriate to make an issue-based costs order, the attribution of percentages to each party was a way in which this could be done to achieve "practical convenience". His order was upheld on appeal. Longmore LJ referred to **Johnsey** and said:

> "17. It is thus a matter of ordinary commonsense that if it is appropriate to consider costs on an issue basis at all, it may be appropriate, in a suitably exceptional case, to make an order which not only deprives the successful party of his costs of a particular issue, but also an order which requires him to pay the otherwise unsuccessful party's costs of that issue, without it being necessary for the court to decide that allegations have been made improperly or unreasonably."

As to the approach required in making issue-based costs order, Chadwick LJ said:

> "27 … An issue-based approach requires a judge to consider, issue by issue in relation to those issues to which that approach is to be applied, where the costs on each distinct or discrete issue should fall. If, in relation to any issue in the case before it the court considers that it should adopt an issue-based approach to costs, the court must ask itself which party has been successful on that issue. Then, if the costs are to follow the event on that issue, the party who has been unsuccessful on that issue must expect to pay the costs of that issue to the party who has succeeded on that issue. That is the effect of applying the general principle on an issue-by-issue based approach to costs. Further, there will be cases (of which this is not one) where, on an issue-by-issue approach, a party who has been successful on an issue may still be denied his costs of that issue because, in the view of the court, he has pursued it unreasonably."

83. It should be noted that the judge's approach at first instance in **Summit** was entirely in accordance with CPR 44.3(7). That is the rule which requires a court, if it was considering making an order relating to "a distinct part of the proceedings" to make instead, if practicable, an order in respect of a proportion of

another party's costs or costs from a certain date. The purpose of this particular rule is to create costs orders which are capable of straightforward application by the costs judge. It is much easier to enforce a percentage-based order than one which seeks to separate out the costs incurred on particular issues.

84. I have been referred to two recent authorities in which an issue-based costs order was made. In **Fulham Leisure Holdings Ltd v Nicholson Graham & Jones** [2006] EWHC 2428 (Ch), the claimant was seeking £7.75 million in a professional negligence action against its former solicitors. The claimant recovered just £6,750. On the dispute as to costs, Mann J was concerned only with the period up to the payment into court of £500,000 because, of course, the defendants were entitled to all of their costs from the date of that payment in. As to that earlier period, Mann J said this:

> "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 fifty-fifty 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 [defendants] should not have all its costs. Indeed, I consider that this is one of the more exceptional cases (see **Summit**) 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.
>
> 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."

85. In **National Westminster Bank plc v Angeli Kotonou** [2006] EWHC 1785 (Ch), Mr Kotonou was successful in guarantee proceedings, although he lost on 4 of the 5 issues which he had raised. For this reason, the judge at first

instance concluded that an order that the bank should pay his costs would be grossly unjust to the bank. In deciding that "this is a classic case justifying departure from the normal rule", the judge pointed to the fact that Mr Kotonou had fought the case on a number of distinct bases, all but one of which he had lost. Thus he made a split order, with the bank paying 50 per cent of Mr Kotonou's costs and Mr Kotonou paying 50 per cent of the bank's costs, with the result that, on a detailed assessment, it was likely that there would be a net payment by Mr Kotonou. This decision was upheld in the Court of Appeal on 26.2.07.

86. One of the principal submissions made by Mr Williamson QC and Mr Selby was to the effect that it would be truly exceptional to require a successful party to pay any part of the costs of an unsuccessful party, even on an issue-based costs order. Of course, in general terms, it is right that it will be unusual for the court to make an order which has that effect. However, a certain degree of caution is needed when labelling particular orders as 'unusual' or 'exceptional'. These words do not appear in the CPR. In my judgment, the position is analogous to the power to order costs against a non-party pursuant to Section 51 of the Supreme Court Act 1981. Although it is often said that such a power will only be exercised in exceptional cases, as Morritt LJ pointed out in **Globe Equities Ltd v Globe Legal Services Ltd** [1999] BLR 232, there is no pre-condition to that effect; such an order will be 'exceptional' simply by comparison with the ordinary run of cases.

87. In my judgment precisely the same point applies here. Ultimately the test is whether, in all the circumstances, an issue-based costs order should be made and, if so, what the appropriate and just apportionment might be. If, in all the circumstances, it is just to make orders which result in the successful party paying a large part of the unsuccessful party's costs (as happened, for example, in **Summit**), then that is a function of the CPR and the deliberate move away from the rigid application of the 'costs-follow-the-event' policy. Thus, for the avoidance of doubt, I reject the submission made by Mr Williamson QC and Mr Selby that there is, in some way, a "line in the sand" across which a judge cannot pass when making costs orders against an otherwise successful party.

88. In general terms, I consider that issue-based costs orders can provide a way of making appropriate costs orders in circumstances where a claimant's claim has largely failed, but where his recovery could not be regarded as *de minimis*. Even pre-CPR, a claimant who recovered next to nothing would have to pay the defendant's costs: see, for example, **Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd** [1951] 1 All E R 873; **Alltrans Express Ltd v C V Holdings Ltd** [1984] l WLR 394; and **Lipkin Gorman v Carpnale Ltd** [1989] 1 WLR 1340. If, on the other hand, the claimant made some small recovery, even if it was far less than the amount claimed, then, prior to the CPR, the obstruction to justice was that identified by Lord Woolf MR in **A.E.I. Ltd**, namely the rigid application of the 'follow the event principle'. For the reasons outlined below, I conclude that the instant case is a classic example of one where an issue-based costs order is appropriate.

Summary as to Applicable Principles

89. I consider that the following principles can be derived from the authorities cited above:

> (a) The starting point for the exercise of the court's discretion is that costs follow the event (CPR 44.3(2) (**Johnsey**). To work out who is the

successful party, the court has to ask: 'Who, as a matter of substance and reality, has won?' (**Roache**; **Painting)**

(b) In a commercial case, it is important to identify which party is to pay money to the other **(A L Barnes)**. Where there has been a payment into court, it is important to see whether or not that payment into court has been beaten (**Johnsey)**.

(c) A defendant's failure to beat a payment into court will usually mean that he is treated by the court as the losing party, particularly if the case is not appropriate for an issue-based costs order (**Johnsey**; **Firle**; **Jackson**). However, such failure may not always be regarded as decisive (**Bajwa**).

(d) Depending on the facts, the court may treat a defendant who has failed to beat the payment into court as the successful party, or make no order as to costs; although it is not possible to list all the circumstances in which this may be appropriate, they might include the situation where the claimant has only just beaten the payment into court; where the payment into court reflected much more closely the amount eventually recovered, as compared to the amount claimed; where the claimant's conduct made it difficult or even impossible to make an effective payment in; and where the trial was largely devoted to the failure of the claimant's exaggerated case (**Bajwa**; **Molloy**; **Islam**; **Painting**).

(e) It may not always be possible for the court to say, when considering the action as a whole, that one party should be regarded as the overall winner (**Roache**). Indeed, even if it is possible to identify one party as the successful party, it may still be appropriate, depending on the circumstances, to make an issue-based costs order, so as to give effect to the substance of the result and to move away from too rigid an application of the 'follow the event principle' (**A.E.I.**; **Summit**; **Fulham Leisure**; **Kotonou**).

(f) In making an issue-based costs order, the court will generally endeavour to translate success/failure on particular issues into percentage terms (**Summit**; **Fulham Leisure**; **Kotonou**). In an exceptional case (namely, as compared to the general run of cases) such orders may result in an otherwise successful party paying the otherwise unsuccessful party's costs of a particular issue (as in **Summit**).

(g) Conduct must also be taken into account pursuant to CPR 44.3(4)(a) and (5). This will include questions of exaggeration, whether intentional or unintentional, and whether the parties demonstrated a willingness to negotiate and/or make offers and counter-offers (**Painting**).

90. I now turn to apply those principles to the relevant facts set out in **Section E** above.

G. THE COSTS AS BETWEEN MR McGLINN AND HTA/ANALYSIS AND CONCLUSIONS

Overall Winner?

91. It will, I think, be apparent from the preceding paragraphs that I am reluctant, in all the circumstances of this case, to identify either Mr McGlinn or HTA as the overall successful party. That is because, for each point that one side

can make to demonstrate their success, the other can counter with an almost complete answer. Thus, Mr McGlinn claims that he is the winner because he is going to be paid a sum of money by HTA and that amount is more than the payment into court. HTA, for their part, counter this by saying that the amount in court is far closer to their ultimate liability and that the Judgment gave Mr McGlinn just 14% of that which he claimed. Mr McGlinn claims that he won across the board, because he won a number of the items on liability and those translated into damages. HTA counter that by saying that he lost many more Items than he won and that the result on causation/quantum was disastrous for him. Mr McGlinn's best point is that he beat the payment in; HTA's best point is that, on his own figures, it has cost Mr McGlinn in excess of £1.5 million in costs to recover just £470,000 odd against them, and that their payment in of £300,000 has been shown to be far more realistic than his claim of £3.5 million.

92. However, if I am able to make an issue-based costs order, I consider that these difficulties will fall away. An issue-based costs order, translated into percentages, is likely to be a much fairer and more appropriate way to do justice between these parties on costs. The question then becomes: is an issue-based costs order appropriate here on the facts? For the reasons set out in greater detail in paragraphs 94-112 below, I conclude that it is.

93. Subject to this vital caveat, I would venture the view that, to the extent that it matters at all, Mr McGlinn could be regarded (just about) as the overall winner of this case. I say that because of the principles outlined at paragraph 89(b) and (c) above, namely that he was the net payee and he beat the payment into court (as per **Johnsey** and **Jackson**). Furthermore, although there was significant exaggeration of his damages claim, it is not possible to say that the entirety of the trial was given over to dishonest or wholly exaggerated claims made on his behalf, of the sort that were ultimately fatal to the claimants in **Molloy** and **Painting**.

Should an Issue-Based Costs Order be Made?

94. I am in no doubt whatsoever that an issue-based costs order must be made in this case. As explained below, I consider that Mr McGlinn can be regarded as the successful party (subject to certain qualifications) on liability, and that HTA can be regarded as the successful party (subject to fewer qualifications) on causation/quantum. In accordance with the principles outlined at paragraph 89(d)-(f) above, this is precisely the sort of situation which was designed for an issue-based costs order. Indeed, in the absence of such an order, I consider that any other result on costs would be manifestly unfair to one of the parties.

95. I acknowledge, of course, that issue-based costs orders are not that common, and there are good reasons for that. In the ordinary run of litigation, it is almost always correct to award the payee his costs against the payer without further ado. But this is a very different sort of case, with a myriad of issues on both liability and quantum, which took some seven weeks to try out. The parties' respective success and failure on the separate issues was markedly different. It is therefore a case that is similar to **Summit** and **Fulham Leisure** (where issue-based costs orders were made), and a long way from the sort of 'one issue' cases like **Johnsey** and **Jackson** (where such orders were not considered to be appropriate). **Summit** and **Fulham Leisure** were some way removed from the ordinary run of litigation, and, like them, I consider that this case is also singularly appropriate for an issue-based costs order.

Costs Split

96. For reasons which will become apparent later, it is, I think, important for me to identify, in general terms, what the parties have spent their time and their money doing in this case. It is appropriate to make a broad division between the liability issues and the causation/quantum issues in this case (a division which, I note, was also made in both **Summit** and **Fulham Leisure**). I think it overwhelmingly likely, from what I know about this case, that each of the parties spent about twice the time/money on the HTA liability issues as they did on the HTA causation/quantum issues. How do I arrive at that assessment?

97. The first point is to consider the trial itself, since that is such a large element of the costs of both Mr McGlinn and HTA. I would conclude that, at the trial, all issues concerning liability took about 18 days in total. The issues concerned with causation and quantum took about 5 days. However, that gives a slightly misleading impression of the costs overall that would have been spent on the causation/quantum issues. One of the reasons that less of the time at the trial was taken up with quantum issues than might otherwise have been the case was because of the large measure of agreement reached between the experts, during the course of the trial, on repair rates and cost items. Thus, by the time the oral evidence on quantum came to be called, most of the relevant figures had been agreed, and the expert quantity surveyors were not required to give extensive oral evidence. But they had been closely involved, both before and during the trial, in endeavouring to agree the relevant figures in an attempt to save time and money, and the extent of their efforts in this regard (and the time and costs expended) should not be underestimated. Indeed, I note that the fees paid by Mr McGlinn to Mr Jowett, his architectural liability expert, were almost precisely the same as the amount that he paid to Mr Fitch, his quantum expert. Both men were paid in excess of £270,000.

98. I am also conscious that, whilst, in the usual way, the lawyers on both sides would have been concentrating their efforts on the liability issues, this was a case in which the causation and quantum disputes took up more than their usual share of time and effort. This was particularly so given the argument pursued by Mr McGlinn to the effect that he was entitled, as a matter of principle, and as a matter of fact, to claim the costs of demolition and rebuilding as against HTA. This argument, which was of course ultimately unsuccessful, depended on a certain amount of factual evidence and a certain amount of legal analysis. Again, the time involved in both these aspects of this element of Mr McGlinn's case should not be underestimated.

99. In all those circumstances, therefore, I conclude that the parties spent 65% of their HTA-related time and costs in dealing with the liability issues both before and at trial. I consider that the remaining 35% of HTA-related time and costs can safely be apportioned to the causation/quantum issues. This therefore constitutes an apportionment of the total of HTA's costs of the action; for Mr McGlinn, it apportions all his costs incurred as against HTA. I turn to consider the question of the precise issue-based costs order which I should make with this broad 65%/35% split in mind.

Liability Issues

100. In my judgment, when considering the liability issues, it is appropriate to regard Mr McGlinn as the successful party. There are a number of reasons for that, which I have summarised at paragraphs 52-53 above.

101. First, there were a number of important items on which Mr McGlinn was largely successful. I have in mind here Item 4.1.3 (which required the relaying of the roof); Item 5.1.1 (the replacement of almost all the internal joinery which had been the catalyst for Mr McGlinn's dissatisfaction with the house in the first place); and Item 5.4.3 (the need for new floors downstairs). There were a number of other important Items on which Mr McGlinn was also successful, even if the quantum recovered did not match the amount of the claim. These included Items 1.2.3 and 10.3.2.

102. Secondly, as I have pointed out in Paragraph 53 above, Mr McGlinn was also successful on most of the wider issues which underlined the liability Items in the Scott Schedule. For example, he was successful on his analysis of HTA's contractual position which gave rise to their liability; he was successful in his case that the standard of finish had to be high; he was successful in his contention that HTA should have, but failed, to provide a specification; and he was successful in arguing that HTA were not somehow prevented from issuing instructions to Waltham, the contractor. I also upheld his general criticisms of HTA's inspection regime.

103. Thirdly, it is right to note that HTA made no concessions in respect of the Items in the Scott Schedule. Of course, in relation to many of them, they were right not to do so because they defeated them, but there were some, including one or two of the larger Items such as Items 4.1.3 and 5.4.3, where, in view of their own evidence, HTA should have conceded liability. There were other Items which, although Mr Salisbury in his report suggested were not HTA's responsibility, he was unable to defend when he came to give oral evidence, and where he described the work in question as 'shocking' or HTA's defence as 'a non-argument'.

104. Finally, of course, Mr McGlinn is to be regarded as the successful party because he succeeded in proving liability on sufficient Items to ensure that he beat the payment into court. Mr Bartlett QC and Mr Hamilton made the point that, had they defeated one of the larger Items (such as Item 5.1), they would have beaten the payment in; in my view, that rather makes Mr McGlinn's point that, on the basis of the findings in the main Judgment, he was the successful party because he won enough of the Items to beat the payment into court.

105. For all these reasons, therefore, I consider that Mr McGlinn is properly regarded as the successful party in respect of the liability issues. In principle, he should therefore get his costs of those issues.

106. However, it would plainly be wrong to regard Mr McGlinn as the unqualified victor in relation to the liability issues. He plainly was not. He lost a large number of the Items (55 out of 77), including many which were trivial and which he had been invited to withdraw at the outset of the trial. There were also other Items which should never have been pursued, such as those based on an assertion that changes had been made without his knowledge, when the documents plainly demonstrated the contrary. Mr McGlinn's failure to win on more of the Items, and his failure on one or two of the larger Items, such as the majority of Items 1.1 and 1.2 (aspects of the external walls) and Item 10.1.1 (the swimming pool cover) provided at least one of the reasons why the amount he recovered was so much less than the amount he claimed (see the first bullet point at paragraph 57 above). That therefore also explains, at least in part, why, although Mr McGlinn beat the payment in, the payment into court was so much closer to the amount recovered than the amount claimed. In addition, I must take into account Mr

McGlinn's failure to open up the settlement of the fee claim. Further still, there is also the point that, in my view, Mr McGlinn should have made a counter-proposal to the payment into court.

107. For all those reasons, therefore, I am of the view that a significant reduction is required in respect of Mr McGlinn's costs on liability, to reflect these failures and HTA's partial success. I have already said that, in my judgment, Mr McGlinn spent about 65% of his costs as against HTA in pursuing liability. To reflect the matters referred to in paragraph 106 above, a substantial reduction from that percentage is necessary. I assess that reduction at 20% of the costs that Mr McGlinn incurred against HTA. In the round, therefore, I consider that it would be appropriate to make an issue-based costs order which entitled Mr McGlinn to be paid 45% of his total costs incurred as against HTA, to reflect his (qualified) success on the liability issues.

Causation/Quantum

108. When we turn to consider the outcome of the causation/quantum issues, the outcome is also very clear, and completely the other way. In my judgment, for the reasons summarised at paragraphs 54-56 and 59(h) above, there can be no doubt that HTA were the successful party in respect of these issues. Indeed, on any analysis, Mr McGlinn did very badly indeed in relation to this important element of the proceedings. His primary case on causation/quantum, namely the claim for demolition and rebuilding, failed in its entirety. A significant amount of costs were attributable to this issue, and Mr McGlinn lost it completely. It was, in many ways, the one clear-cut 'result' in the whole case. His secondary case, in respect of repair costs, was partially successful, but the amount recovered was far less than the amount originally claimed (25% odd). In part, this reflected the failure of some of the Items in the Scott Schedule, particularly some of the larger Items. But it was chiefly explained by the fact that Mr Fitch eventually agreed figures for the repair items that were far less than the amount claimed. It is difficult not to conclude that the original damages claimed in respect of the repair costs, which were generally supported in Mr Fitch's first report, were greatly exaggerated, and that the figures that were eventually agreed were much more realistic and ought, therefore, to have formed the basis of the original claim.

109. Nor does an analysis of the nature and extent of Mr McGlinn's failure on causation/quantum end there. The claims for professional fees and contingencies were much too high. More importantly, I consider that the claim for preliminaries at £475,000 odd was wildly exaggerated. Whilst it is right that I took a percentage based assessment for the preliminaries rather than utilise the specific items/sums calculated by Mr Fitch, I observed in the main Judgment that Mr Fitch's calculations led to on-costs of about 50 per cent of the value of the works themselves, which could not possibly have constituted a sensible or commercial approach. I ultimately awarded a sum that was less than 10% of the sum claimed for preliminaries.

110. Similarly, I found that the scope of the enabling works was excessive and that the sums claimed in respect of those enabling works were "absurdly large". I had to do my own assessment of the amount in respect of the enabling works that was recoverable. As set out in paragraph 55 above, it was a small fraction of the amount claimed.

111. For all those reasons, HTA can properly be regarded as the winners on the causation/quantum issues. I also consider that the quantum of the damages claim

was exaggerated (see paragraphs 59(h), and 108-110 above) which must be reflected in the costs order I make pursuant to CPR 44.3(4)(a). Should HTA therefore be awarded 35% of their costs to reflect their victory on this part of the case, or should there by a deduction?

112. I have concluded that there should be a deduction. HTA lost some important quantum arguments, including those in respect of Items 4.1.3 and 5.1.1. They were also liable for a substantial sum in respect of Item 1.2.3, even though its proper calculation gave rise to a figure that was not nearly as much as Mr McGlinn wanted. Moreover, I must bear in mind that it was always open to HTA to protect themselves on the costs of causation/quantum issues by making a payment into court that was higher than the £300,000 which they chose to pay in, although I recognise that this can be a difficult thing to gauge in a case like this. In all those circumstances, I would make a 10% reduction in HTA's costs to reflect these points. That would leave HTA with an order that Mr McGlinn pays 25% of their costs, to reflect their overall success on the causation/quantum issues.

Summary/Netting-Off

113. On the analysis which I have carried out above, the parties are left with a result whereby HTA pays 45% of Mr McGlinn's costs incurred as against HTA, and Mr McGlinn pays 25% of HTA's costs of the action. This would therefore mean that, in relation to costs generally, Mr McGlinn comes out modestly ahead. I am in no doubt that this result reflects all of the circumstances set out above, is consistent with my finding at paragraph 93 above and, more generally, does overall justice as between Mr McGlinn and HTA.

114. I should add that, in my judgment, this issue-based costs order constitutes a much fairer resolution of the costs issues than either of the orders proposed by the parties themselves. Mr McGlinn sought what was described as 'a high proportion' of his costs, despite the fact that his recovery of damages was just 14% of what he claimed, and that the money in court was much closer to his entitlement than the claim pursued at trial. I consider that such an outcome would have reflected a pre-CPR approach, and, in the words of Lord Woolf MR, would have comprised much too rigid an application of the 'costs-follow-the-event principle'. HTA, for their part, sought 75% of their costs from Mr McGlinn, which would have all but ignored the fact that they did not pay sufficient sums into court, and that the amount that they did pay in was exceeded by a not insignificant amount.

115. In one or two of the reported cases, including **Fulham Leisure**, the judge went on to undertake a netting-off exercise as between the two percentages. It seems to me that, if I was confident that the parties' expenditure was broadly similar, that would be an appropriate thing for me to do in the present case. However, there is no material before me that would allow me to reach such a conclusion. I note that in **Kotonou**, the judge did not undertake the netting-off exercise precisely because he thought that the bank's costs were likely to be higher than those of Mr Kotonou. It may well be that Mr McGlinn's costs are higher than those of HTA; the evidence before me certainly suggests that that might be the case. There is also the complication introduced by the fact that HTA only incurred costs in defending the claims brought against them, whilst Mr McGlinn's 45% has to be calculated as a proportion only of those costs referable to HTA, and excluding those costs which he incurred as against WL and DJH. I therefore decline to net off the percentages referred to above because, at present, I simply do not have the information that would allow me to conclude that such an exercise was fair.

H. CONCLUSIONS

116. As to interest, the parties are to draw up an order to reflect paragraph 12 above. The claimant is entitled to interest at 1 per cent over base on the £380,225.49 from 4 May 2005 to today's date. In addition, the claimant is entitled to 1 per cent over base on the £58,625.27 for three years from 29 March 2004 to today's date.

117. For the reasons set out in **Sections C and D,** I reject Mr McGlinn's application for a *Bullock/Sanderson* order in respect of WL's costs. It would be wrong in principle, and wrong on the facts, to make HTA pay any part of those costs. Thus Mr McGlinn will be liable for WL's costs of the defects issues, and liable for his own costs of pursuing WL on those defects issues.

118. I consider that this is precisely the sort of case in which an issue-based costs order should be made. In all the circumstances, no other type of costs order would do justice between the parties.

119. As between Mr McGlinn and HTA, I have concluded that the parties each spent 65% of their HTA-related time/costs on the liability issues and 35% of their HTA-related time/costs on the causation/quantum issues. For the reasons set out above, I have concluded that Mr McGlinn is to be regarded as the (qualified) winner on the liability issues, and HTA are to be regarded as the (rather less qualified) winners on the causation/quantum issues. Taking into account the appropriate deductions to reflect a more detailed analysis of their respective success and failure, I have concluded that HTA should pay Mr McGlinn 45% of his costs incurred as against them, and that Mr McGlinn should pay 25% of HTA's costs of the action. I decline, at least at this stage, to net off these percentages.

120. I consider that, in the round, the orders that I have made as between HTA and Mr McGlinn reflect the broad justice of their respective positions. Whilst Mr McGlinn should be regarded as (just about) the winner, his recovery of about 14% of his overall claim, and his large scale failure on the causation/quantum issues, must count against him significantly in costs. I believe that my issue-based costs order achieves the necessary justice as between the parties. And although I have not ultimately made the order for which either set of counsel contended so eloquently, I am, as ever, grateful to all four of them for their detailed research and careful submissions.