

ENGLAND AND WALES / JUDGMENT

Hopton v Miller

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Neutral Citation Number: [2010] EWHC B20 (Ch) IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION LEEDS DISTRICT REGISTRY Before: His Honour Judge Behrens sitting as a Judge of the High Court in Leeds

- ----- Between: JAN HOPTON

- and - TREVOR WILLIAM MILLER

- -----

- ----- Case No: 6DN04199 The Court House Oxford Row Leeds LS1 3BG

Date: 31 st August 2010 Claimant Defendant Piers Hill (instructed by Christopher J Greaves of 9 – 13 Commercial Street, Rothwell, Leeds LS26 0AX) for the Claimant Mark Blackett-Ord and Paul Morris (instructed by Lawsons of 2nd Floor, Central Buildings, Wakefield, West Yorkshire WF1 1HB) for the Defendant Hearing dates: 12th and 13th August 2010.

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Judgment

Judge Behrens:

1. Introduction

1. This is a partnership dispute. Mr Miller was the owner of The Old Rectory, Boat Lane, Sprotborough, Doncaster DN5 7LU. The Old Rectory was of historic interest in that it was the childhood home of the war time fighter pilot Sir Douglas Bader. It was, however in poor condition. Some time in 2004 Mrs Hopton formed a relationship with Mr Miller. In the autumn of 2004 the parties decided to repair or renovate and then to operate a guest house at The Old Rectory. The renovation works took until April 2005 when the guest house opened. Shortly thereafter the business was awarded a Diamond Rating by the Tourist Board.
2. It is common ground that the renovation works were paid for by Mr Miller. It is also common ground that Mrs Hopton was highly involved in the design of the improvements, and in the selection of the materials and the fixtures and fittings which were used. She was also responsible for some of the physical work in clearing out the flats. It is her case that she insisted on materials of the highest quality. She attributes the Diamond Rating to her efforts.

3. Mrs Hopton says that she was responsible for the majority of the work in running the guest house between April 2005 and the beginning of August 2005. She also contends that she was responsible for generating significant publicity for the Business both nationally and internationally.
4. Although it is common ground that the parties were in partnership at least from April 2005 there was no written partnership between them. There were negotiations as to the terms of the partnership but no agreement between them. Matters came to a head at the beginning of August 2005 when a draft agreement was sent to Mrs Hopton's solicitors.
5. There was an argument between the parties over the terms of the partnership, and over some documents which Mrs Hopton alleges Mr Miller had removed. It appears that there was some violence between them. The police were called. According to Mrs Hopton Mr Miller was arrested and cautioned by the police. She says that the police officer told her to leave. She has not returned. She says she offered to return but initially Mr Miller refused to allow her to return. Later when Mr Miller asked her to return and marry him she refused.
6. Mr Miller carried on running The Old Rectory after Mrs Hopton left. It is her case that the business expanded. When she left there were only 3 guest rooms; she contends that 2 further rooms were used. In addition there was a conference room available for hire. Accounts produced by Bernard Lister & Co indicate that between 30th September 2005 and 31st March 2007 Mr Miller was in partnership with Mr and Mrs Hickman; thereafter he traded in other partnerships. In October 2008 Mr Miller sold The Old Rectory for £800,000 inclusive of fixtures and fittings.
7. In these proceedings Mrs Hopton seeks payment of what is due to her. There are wide differences between the contentions of the parties:
 1. Mr Hill contends that the partnership began in September 2004 and did not terminate until October 2008 when Mr Miller sold The Old Rectory. Mr Blackett-Ord contends that the partnership did not commence until trading began in April 2005. More importantly he contends it came to an end in September 2005 the date when accounts were drawn up to show the position as between the parties.
 2. Mr Hill is highly critical of the accounts drawn up by Bernard Lister & Co. he contends that the amount due to Mrs Hopton can be taken from Mrs Hopton's second witness statement¹.
Profits Assets Goodwill/ Improvements Total 50% of Total 823,732.00 40,000.00 500,000.00
1,363,732.00 681,866.00
 3. Mr Blackett-Ord contends that no sum is due to Mrs Hopton. He submits that the accounts at the date of dissolution show that no sum was due to Mrs Hopton as at that date. After dissolution the position is governed by section 42 of the Partnership Act
1890. If, however, Mrs Hopton had no interest in the partnership assets as at the date of dissolution there is no scope for an award under section 42.

8. My task has been made harder by the convoluted procedural history that this case has taken and the fact that Mr Miller has become debarred from defending as a result of failures by him to give proper disclosure. An attempt by Mr Miller to appeal the debarring order was refused by Judge Bullimore. An application for relief from sanctions was refused by Judge Langan QC. Judge Langan made it clear in his order that Mr Miller was entitled to cross-examine Mrs Hopton and to make submissions but not to present a positive case.
9. In the result Mr Miller has been prevented from giving any evidence or calling any expert evidence in support of his case. In fact no expert evidence was called by Mrs Hopton either. In the result I am being asked to assess the value of Mrs Hopton's claim without the benefit of any expert evidence at all. I do, however, have the benefit of the accounts prepared by Bernard Lister & Co, a number of letters written by Bernard Lister & Co in response to queries raised in the course of the proceedings, and a number of valuations of The Old Rectory obtained by Mr Miller at various times.
10. Before setting out the facts in more detail I must acknowledge with thanks the considerable assistance I received from Counsel in what has been a difficult case.
2. The facts 2.1 The Old Rectory
11. The Old Rectory is a substantial Grade 2 Listed Building built in about 1600 on a site extending to about 1.1 acres. It is situated in the outskirts of Sprotborough some 10 miles west of Doncaster. The village is close to the A1 and has a range of services. Before the renovation work it comprised a four bedroomed main residence, a large breakfast kitchen, 3 reception rooms and study together with two separately accessed self contained flats at first and second floor level.
12. As its name suggests it originally belonged to the Church. As a result there are a number of properly registered covenants in favour of the Church Commissioners. There is a covenant preventing the sale of alcohol and a covenant preventing the carrying on of any trade or business. 1 The figure for profits is higher than the figure in Mrs Hopton's witness statement because Mr Hill has taken the assumed profits up to September 2008 rather than to February 2008, the date of the witness statement.
13. As already noted The Old Rectory was the childhood home of Sir Douglas Bader; presumably his father was the incumbent vicar. In any event it was purchased by Mr Miller from the Church Commissioners in 1984. According to a newspaper article to which I was referred Mr Miller paid £76,000. The subsequent history is described in the article thus: But the dream soon turned into a 10 year nightmare when the maintenance of the former rectory at Sprotborough became too much for the businessman to cope with. The house fell into such disrepair that the council insisted that he board it up and move out or make it safe to live in. Miller refused to move, so for 8 years he lived with Acro props holding up the roof and buckets scattered round the house to catch rainwater pouring through the gaping holes. Mr Miller, 55, then tried to sell it but the council blocked the plans of three prospective buyers who wanted to turn the building into offices or flats. Nobody else would consider it as a

private house in the state it was in. 2.2 Mr Miller and Mrs Hopton.

14. Mr Miller and Mrs Hopton met in late 2003. Amongst other businesses Mr Miller owned an electrical shop. Mrs Hopton was employed by Direct Line as a salvage clerk team leader. It is not clear when the relationship between the parties started. Plainly, however, they were in a relationship by September 2004.
15. Mrs Hopton told me that she earned about £1,000 per month. She continued to be employed by Direct Line until April 2005 although she was on sick leave from November 2004 when she had a small operation on one of her feet. Although she was on sick leave she was able to move around on crutches and in a wheelchair.
16. In the course of cross-examination Mrs Hopton was shown a psychiatric report from Dr Ali dated 19th September 2008. That report suggests that Mr Miller suffers from a panic disorder and Asperger's syndrome. Mrs Hopton did not accept that Mr Miller was suffering from either of these problems. Certainly she was not aware of them during the period when the parties were cohabiting. 2.3 The Works
17. It is not clear precisely when the works commenced. In her fourth witness statement Mrs Hopton states that in or about July 2004 she helped to move out of the family area of The Old Rectory into the second flat. She says that she devoted the whole of her spare time to the project. She was involved in the physical work in clearing the flat; she took a lead in the choice of the furnishings and arranging the decorations.
18. Work on the roof started in about September 2004. At or about that time there were negotiations between Kerrigans on behalf of Mr Miller and Christopher Greaves on behalf of Mrs Hopton as to a possible investment of £80,000 by Mrs Hopton in The Old Rectory to assist in the cost of the improvements. In a letter dated 3rd September 2004 Christopher Greaves sought some form of security to protect Mrs Hopton's investment. Nothing came of the proposal and Mrs Hopton did not in fact invest any money into the project. In evidence Mrs Hopton explained that that she had her house on the market and Mr Miller had his shop on the market. Mr Miller's shop sold first and so his money was used to fund the improvements.
19. On 12th October 2004 Mr Miller obtained planning permission for the change of use of The Old Rectory from residential use to "bed and breakfast accommodation (3 rooms)". On 30th December 2004 he obtained listed building consent in connections with the formation of 3 en-suite bathrooms to existing bedrooms. At some time around that date Mr Miller requested and obtained permission from the diocese to use the property for bed and breakfast for not more than six people.
20. In paragraph 6 of her witness statement Mrs Hopton summarised the work carried out. 3 new en-suite bedrooms were created from the existing rooms known as the Bader, Hurricane and Spitfire Rooms. The downstairs remained the same but the morning room was to be converted to a conference facility. A more detailed list of improvements was

prepared by Mrs Hopton in November 2005. For completeness I have included the list in the Appendix. Mrs Hopton was not cross-examined on this list and it can be taken as an accurate summary of the work carried out.

21. In her witness statement Mrs Hopton makes the point that Mr Miller was still running a wedding car business and renovating a cinema at Elsecar. She, however, was on sick leave and could devote her time to the project. She was primarily responsible for the selection of the redecoration and fixtures and fittings which were all to a high standard. Almost all of the furniture placed in the business areas was new.
22. There is no detailed evidence of the moneys spent by Mr Miller. One of the complaints made by Mrs Hopton is that the invoices have not been disclosed. Mrs Hopton did however accept that the moneys from the sale of Mr Miller's shop went into the project and that he took out a loan. In the notes to the accounts prepared by Bernard Lister & Co it is recorded that the profit from the sale of the shop amounted to £80,000 and that there were additional bank borrowings of £100,000. In evidence Mrs Hopton did not seriously disagree with an estimate of £180,000 spent by Mr Miller on the repairs, improvements, redecorations and purchase of fixtures and fittings. 2.4 Marketing
23. Mrs Hopton had a vision of attracting world wide visitors. As a result she hired a top quality marketing manager – Mel Hewitt who was responsible for much of the publicity including articles in the Sunday Times and Look North. In addition there was a website for The Old Rectory. 2.5 The running of the business
24. As already noted The Old Rectory opened for business in April 2005. There was an opening ceremony attended by Lady Bader which also achieved some publicity. Initially the rooms were priced at £70 each per night. However in July 2005 the Business was awarded a Diamond rating by the tourist board with the result that the price of the rooms was increased to between £85 and £95 per night.
25. Mrs Hopton says that she was responsible for much of the day to day work in running the guest house. She was responsible for the bookings, much of the cleaning; the preparation of the breakfasts, the laundry. She kept the books and records of the business. Indeed she accepted that Mr Miller was for the most part unable to operate a computer. She says that Mr Miller played little or no part in the business. He sometimes helped with the cooking, went to wholesalers for stock and occasionally received late arrivals. Otherwise he devoted his time to his other interests.
26. Mr Hill on behalf of Mrs Hopton was keen to emphasise that this was not an ordinary bed and breakfast business. He relied on passages from the favourable publicity that was generated, the Diamond Tourist Board rating and the fact that trade was building up. According to Mrs Hopton the publicity was attracting considerable interest both nationally and internationally. Trade was already increasing and there were a number of advance bookings.

27. The partnership had a joint account with NatWest which was opened in March 2005. Mrs Hopton and Mr Miller were each authorised to sign cheques. Between April and the beginning of August 2005 Mrs Hopton and Mr Miller each took £100 per week from the joint account by way of drawings from the partnership. In addition on 6th May 2005 Mrs Hopton was paid £5,000 out of the joint account. On the cheque stub Mr Miller wrote: "JAN/WAGES/PAYOUT"
28. Mrs Hopton did not see the cheque stub before the issue of proceedings and certainly did not accept that it was intended to pay her out for all her work. On the first day of the hearing Mrs Hopton made the point that in February 2005 she had used her credit card to buy a 3 piece suite for about £2,500 and a carpet for about £350. She thought that part of the £5,000 might have been a re-imbursement of those sums. However on the second day of the hearing after Mr Blackett-Ord had taken instructions it was suggested to Mrs Hopton that she had in fact been reimbursed in February shortly after she purchased the two items. At this stage she said she could not really remember whether any part of the £5,000 was for reimbursement of the items. 2.6 The Fall out between Mrs Hopton and Mr Miller.
29. It is not possible to form a full picture of why the relationship between Mrs Hopton and Mr Miller broke down. This is especially so as the effect of the debarring order was to prevent Mr Miller from explaining his side of the story.
30. On 1st August 2005 Mr Miller consulted Mr Thomas an Associate Director of Colliers Robert Barry about the possibility of placing The Old Rectory on the market. Mrs Hopton knew nothing about this or about the letter written by Mr Thomas to them both on 4 th August 2005.
31. According to Mrs Hopton the fall-out occurred on or about 6th August 2005. She says that she had been trying to sort out the terms of the partnership since September 2004. As already noted there is correspondence between Kerrigans and Christopher Greaves at that time. She says that Mr Miller repeatedly promised that he would have a document approved by his solicitors but he never did. Indeed when the document had not materialised when the business was due to open in April 2005 she threatened to walk out. She was persuaded not to do so. Eventually a draft partnership agreement arrived on the day of the bust up. I was told by Counsel that the document was in fact prepared by an accountant and did not represent either side's wishes. In any event Mrs Hopton faxed it to her solicitor and sought his advice. She received the advice by phone later that day. It was to the effect that it was not what had been agreed and that she ought not to sign.
32. There then followed an argument. Mrs Hopton's version of the argument is that it was about the terms of the proposed partnership and also about some box files which Mr Miller had removed. She says that she said she was going to her solicitor to get some advice. She tried to take some papers but Mr Miller assaulted her to prevent her removing them. Mr Miller called the police. They were put in separate rooms. Mr Miller was arrested and placed in the cells for a few hours. She was told by the police that she had to leave. She left as a result of

what she was told. She left a note indicating that she had taken some money to tide her over. She agreed that she took £500.

33. She rang Mr Miller the following day and asked if she could return to run the business. He refused. Somewhat later he rang her and asked her to come back to marry him and run the business. She refused. She has taken no part in the business after the beginning of August 2005.
34. The parties consulted their solicitors and I have been referred to a number of documents in the bundle relevant to the question of dissolution of the partnership:
 1. On 28th October 2005 Mr Jackson (of Christopher Greaves) wrote to Mr Kerrigan (of Kerrigans) a letter which included: Your client's proposal that the partnership's accountants should prepare a final account for the business is agreed in order that the parties can then know the value of the agreed assets and profits which have been made. No doubt you will contact the partnership accountants in this respect.
 2. On 2nd November 2005 Mr Kerrigan wrote to NatWest Bank informing them that the partnership had been dissolved.
 3. On 21st December 2005 Mr Jackson wrote to Mr Kerrigan. The letter enclosed a number of receipts which were required by the Accountant to finalise the Accounts. It also contained the following paragraph. I understand from my client that your client is still promoting the business indicating that my client still has some involvement, which is not the case. Would you please request your client to refrain from this practice and to remove my client's name from any promotional material?
- 2.7 The Final Partnership Account
35. There was some delay in the production of the final partnership account. There are in fact 2 versions – one dated 1st March 2006 and the other dated 20th July 2006. Both are signed by Bernard Lister & Co as accountants and not by either Mrs Hopton or Mr Miller. The figures in each of the two sets of accounts are identical. The only difference between the two sets is that the later version contains 3 Notes which are not included in the earlier version. There is no explanation for the delay or as to why there are 2 versions or why the notes were included later.
36. It is not clear when Mr Miller first saw the accounts. Mrs Hopton first saw the 20 th July 2006 version on 6th November 2006 when they were produced to the Court by Mr Miller. She saw the 1st March 2006 version somewhat later during the disclosure process.
37. The accounts comprise a Balance Sheet as at 30 th September 2005 and a Profit and Loss Account for the period from 10th April 2005 to 30th September 2005. The Profit and Loss Account is uncontroversial. It is taken largely from figures collated into a spreadsheet by Mrs Hopton between April and August 2005. In a letter dated 7th May 2009 Bernard Lister & Co stated that they had to rely solely on the bank statements for the period between 6 th August 2005 and 30th September 2005. The Profit and Loss Account may be summarised: Net fees received Expenses Net Profit for Period 14,306 9,587 4,719

38. The Balance Sheet is more controversial. It too can be summarised: FIXED ASSETS Soft Furnishings less Depreciation Fixtures less Depreciation Furniture Property Expenditure NET CURRENT ASSETS NET ASSETS CAPITAL ACCOUNTS J. Hopton - share of profit less Drawings T. W Miller - share of profit Cash Introduced less Drawings 2,226 1,000 2,832 1,500 7,558 2,124 9,682 2,360 6,100 -3,740 2,359 12,775 1,712 13,422
39. Mrs Hopton is highly critical of the amounts recorded for fixed assets. She makes the point that the amount expended was far in excess of the figures contained in the account. For example the amount spent on the furniture for the conference room was about £9,000.
40. In fact there is an explanation for the methodology in the accounts. Note 2 reads: Property improvements paid prior to the opening of the establishment have also been excluded as these were borne personally by Mr Miller. These costs were funded by the net sale of an investment profit of £80,000 and additional bank borrowings of £100,000.
41. There is a further explanation in a letter dated 7 th May 2009 from Bernard Lister & Co to Lawsons: ...it would appear that the profits shown in the accounts were inflated especially in view of there being no mortgage interest charged on the 3 bedrooms, no personal loan on the acquisition of expenditure on furniture and soft furnishings for the conference room which we are led to believe cost approximately £9,000 all financed by a NatWest personal loan to Mr Miller of £15,000. This information was not produced before the preparation of the accounts.
- 2.8 Valuations of The Old Rectory
42. As I have noted there is no expert evidence as to the value of The Old Rectory at any particular time or as to the value or increase in value attributable to the improvements that were carried out. However my attention has been drawn to a number of valuations obtained by Mr Miller for The Old Rectory at various times:
1. Mrs Hopton told me that when she met Mr Miller in late 2003 The Old Rectory was for sale at a price of £500,000. Mr Miller had recently been offered £400,000 which he had been minded to accept. However part of the purchase price was to be deferred and he was advised to refuse the offer. There are no documents relating to any of this. However I am invited to infer that the pre-improvement value of The Old Rectory in 2004 was £400,000.
 2. On 7th December 2004 Andrew McBeath a partner in Hunters Commercial sent to Mr Miller some marketing proposals for The Old Rectory. In the report Mr McBeath acknowledged the then recently acquired planning consent. The report makes no reference to the condition of The Old Rectory. As was pointed out works to the roof had commenced by December 2004 but listed building consent had not yet been achieved. In the report Mr McBeath refers to the fact that Mr Miller had suggested a figure of £650,000. His feeling was that if offers close to or in excess of £600,000 could be achieved Mr Miller should give serious thought to a sale.
 3. On 12th May 2005 Alan Powell, a Director of Powell & Co Ltd(?) supplied Mr Miller with a Surveyors valuation and Report. In the report he commented that the property had been recently renovated to a reasonable standard following quite severe deterioration. He

commented that it would be difficult if not impossible to bring it up to completely modern standard. He commented on the historical interest of the property, its character and the planning consent. The comments include the following: The planning consent has only recently been provided for a 3 bedroom bed and breakfast, and we understand that conference facilities have also now been agreed at least informally by the planning authority. We also understand that civil weddings may be possible in the future. It is too soon to tell how successful the business will be in terms of Bed and Breakfast use, although it is probably fairly safe to assume that there will be a strong demand due to the historical nature of the building and the very attractive gardens in which it is situated. Mr Powell went on to value The Old Rectory at a figure in the region of £750,000. 4.. In January 2008 Mr Miller placed The Old Rectory on the market. According to two newspaper reports and the sales particulars the asking price was £900,000. I am asked to infer that the value of The Old Rectory in 2008 was £900,000.

5. Mr Miller did in fact sell The Old Rectory in October 2008. The best evidence of the sale price is a document described as an amended provisional statement dated 20 th October 2008. In the course of the hearing Mr Blackett-Ord informed me that this document was also the final completion statement. In any event this document suggests that the sale price was £750,000 with a further £50,000 for the fixtures and fittings. The sale costs amounted to £1,171.25 2.9 Trading after 30th September 2005.
43. It is not in dispute that Mr Miller continued to run The Old Rectory as a guest house between September 2005 and September 2008. There is, however, some doubt as to the extent of the use in that Mrs Hopton contends that there was extensive use of the conference room facilities and of the fourth and possibly fifth bedroom. As will appear below there is significant evidence that both the conference room and the fourth bedroom were used from time to time.
44. As far as is known there has been no variation of the planning consent which permitted the use of 3 bedrooms. Furthermore in September 2006 solicitors for the Sheffield Diocesan Board of Finance wrote complaining about the use for commercial purposes in breach of covenant. Specific reference was made of the web site which referred to wedding functions and the use of the conference facilities. The letter invited Mr Miller either to restrict the use to that permitted by the covenants and the 2004 permission or to apply for a further relaxation of the covenants. There is no evidence of what happened following the receipt of this letter. The Accounts
45. Five sets of accounts have been prepared by Bernard Lister & Co. A summary of the profit and loss accounts is as follows: Period Net Income Expenditure Profit 30/9/2005 - 31/3/2006 1/4/2006 - 31/8/2006 1/9/2006 - 31/3/2007 1/4/2007 - 31/3/2008 1/4/2008 - 12/9/2008 30,117 18,506 30,783 42,382 17,156 20,794 9,323 7,572 10,934 19,440 11,343 23,439 18,943 3,133 14,023

46. According to the accounts Mr Miller traded in partnership with Mr and Mrs Hickman until 31st March 2007. According to the letter 5th March 2008 from Bernard Lister & Co there were a number of different partnerships – one from 1st April 2006 to 31st August 2006, one from September 2006 to January 2007 and a third from 1st February 2007 to 28th February 2008. Mrs Hopton's views
47. Mrs Hopton is of the opinion that the accounts grossly understate the true income and the true profit of the business. She relies on a number of matters:
 1. She drew my attention to The Old Rectory web site which advertised the conference facility. She drew my attention to the sales particulars in 2008 which suggest that the 4 th Bedroom is available for use.
 2. In March 2006 Mrs Hopton employed the services of an enquiry agent – Two Cities – to investigate. Mr Farnell phoned The Old Rectory and was told that the conference room was available at £100 per day. When he visited a few days later he was told that there were 3 bedrooms. He was told that Mr Miller was not registered for VAT, he was told that the conference room was booked for 2 week-ends in June and 2 week-ends in July.
 3. In November 2007 Mrs Hopton telephoned The Old Rectory from France using an assumed name and asked for a quotation for an event on 12th January 2008. She attempted to book 5 rooms and the conference room. On 26 th November 2007 she received an e-mail offering 4 rooms for £370, the hire of the conference room for £150 and a separate quote of £180 for catering.
 4. She relies on an e-mail dated 9th August 2007 from a Mr Taylor to Mr Miller relating to an insurance claim in relation to a house belonging to Mr Murray which had been flooded. Mrs Hopton believes that Mr Murray occupied the fifth bedroom from August 2007 till November 2007.
 5. Mrs Hopton has spoken to Sandra Cunningham the Head of Department at the Tourist Board in Doncaster. Mrs Cunningham apparently advised that a business such as this could expect higher than average occupancy because of the historical interest in the property. With good management and networking it could expect occupancy of 80- 85% Mrs Hopton's calculation
48. Mrs Hopton's calculation of the annual profit is set out in paragraphs 33 to 35 of her second witness statement. It may be summarised thus: Accommodation 80% of £370 x 365 108,040
Conference Catering Drinks TOTAL PROFIT 100% of £150 x £180 x 365 £180 x 365 80% OF
TOTAL 54,750 65,700 65,700 294,190 235,352
49. It will be seen that Mrs Hopton has taken the price of the rooms from the November 2007 e-mail to her. She has assumed 80% occupancy rate for all four rooms over the whole year. She has assumed 100% occupancy of the conference room over the whole year. She has assumed that catering is provided notwithstanding a letter from Bernard Lister & Co which suggests that any catering was subcontracted. She has assumed a further sum in respect of drinks notwithstanding the fact that there is no alcohol licence and a covenant against the supply of

alcohol. She gives no basis for the assumption that the profit would be 80% of turnover as opposed to the 34% ratio in the accounts for April to September 2005.

50. One of the points made by Bernard Lister & Co in a letter of 2 nd June 2009 is that this business was not registered for VAT. In the year to March 2006 the turnover level for registration was £58,000 and this was increased in the following year to £59,000.
 51. In any event Mr Hill has taken the figure of £235,352 and multiplied it by 3½ to arrive at the figure £823,732 for the profits for the period up to September 2008.
 52. In paragraph 37 of her second statement Mrs Hopton goes on to state that £500,000 is not an exaggerated figure for the goodwill for a business with a turnover of approximately £300,000 generating a profit of 80%.
 53. As already noted Mr Hill has adopted this figure of £500,000 although he has put the claim on a slightly different basis. 2.10 Mr Hill's analysis of the disclosed documents
 54. As already noted Judge Langan QC refused relief from sanctions following a contested hearing in April 2010. At that hearing Mr Hill relied on a skeleton argument in which he had carried out a detailed analysis of the desk diaries, the simplex account book and the weekly records. Part of Mr Hill's complaint was that the entries in the weekly records and the desk diaries were not always consistent, and that it was not possible to reconcile the weekly records with the figures in the Bernard Lister & Co accounts. A summary of his conclusions can be seen in the following 2 tables: Period 30/9/2005 - 31/3/2006 1/4/2006 - 31/8/2006
1/9/2006 - 31/3/2007 Accounts Weekly Records 25,899 21,849 31,977 33,042 19,929 32,655
Period 2/4/06 - 27/8/06 Diary 26,368 Weekly Records 21,849
 55. Whilst Mr Hill may well be right that there are differences between the turnover figures in the accounts, the figures derived from the diaries and the weekly records, they are all of the same order of magnitude. One might, for example, expect the figure in the diary to be somewhat higher than the figures in the weekly records because of cancellations. There is nothing in these documents to suggest the sort of level of turnover suggested by Mrs Hopton. The diaries suggest that only 3 rooms are available for rent.
3. The History of the Proceedings
56. These proceedings were commenced in the Doncaster County Court on 19 th September 2006 by means of a Part 8 Claim Form. As Mr Blackett-Ord points out one might have expected this to be a Part 7 Claim which would then have resulted in proper pleadings. He also pointed out that the County Court jurisdiction in partnership disputes is still limited to £30,000. The Claim form seeks 3 heads of relief including an account for the period from September 2004 to date, an order that Mr Miller should pay Mrs Hopton one half the value of business and any profits of the business to which she is entitled from July 2005 to the date when he buys out her share of the business. Finally it asks for an account of any funds of the business that have been used to improve those parts of The Old Rectory that were used exclusively for the purpose of the business. In the course of his submissions Mr Hill made it

clear that he was not pursuing this part of the claim.

57. In the details of the claim there was an allegation that the whole of the cost of renovation represented capital introduced by Mr Miller as a gift. It was also alleged that the partnership was not dissolved.
58. The matter came before DDJ Hodgson on 6th November 2006. He ordered Mr Miller to file a reply. At that hearing Mr Miller produced the accounts referred to above. Mr Miller duly filed a response to the Part 8 Claim in the form of a witness statement.
59. The matter came before DDJ Monroe on 27th February 2007. Apart from an order for standard disclosure he made an order for one joint expert (if possible) to value the property, to report on any increase in the property attributable to the work carried out since 2004, and the value of the respective shares in the partnership. The order made provision for a second joint valuer if one valuer could not value both the property and the share.
60. The matter came back before DJ Stocken on 13th September 2007. She required Mr Miller to provide a further disclosure statement relating to large number of categories of documents and made a further order for a joint expert report.
61. On 6th March 2008 the matter came before DDJ Roebuck. Shortly before Mrs Hopton filed her second witness statement making it clear that she was claiming over half a million pounds. The hearing appears to have concentrated on defects in disclosure because detailed orders were made including an unless order with a sanction debarring Mr Miller from defending in the event of default.
62. Mr Miller attempted to comply with the order of 6 th March 2008. However on 16th September 2008 DJ Stocken found that Mr Miller had failed to comply with the order and he was accordingly debarred from defending. An application for permission to appeal was dismissed on paper and after an oral hearing by Judge Bullimore.
63. An application for relief from sanctions eventually came before Judge Langan and was dismissed on 16th April 2010. Judge Langan's reasons are set out in a full written judgment. In summary he held:
 1. That there was a breach of the disclosure order in relation to the letting of the room to Mr Murray, the flood victim. It was simply not believable that there were no documents other than the one e-mail to which I have referred. 2 There was a failure by Mr Miller to approach the reservation companies to see if they had a copy of any reservation e-mails.
 3. There was no breach in respect of the computer generated weekly record.
 4. There was a breach in a failure to produce invoices from active.hotels.com, and two other internet companies for 2007 and 2008.
 5. The discrepancies between the weekly records and the figures in the accounts were startling and unexplained.

64. Accordingly Judge Langan refused relief from sanctions. He did, however, make it clear that Mr Miller was entitled to cross-examine Mrs Hopton and to make submissions. He was not, however, allowed to call any evidence.
65. There was no appeal from Judge Langan's order and it is accordingly not appropriate for me to comment on it in any detail. I would however comment that I do not share his view in relation to the discrepancies between the figures in the accounts and the weekly records. It may not have been drawn to Judge Langan's attention and he may not have appreciated that Mr Hill's figures from September 2006 did not cover the same period as the figures in the accounts and required adjustment. This was, after all an application for disclosure. For my part I would not have thought it necessary for Mr Miller to go to the expense of obtaining evidence reconciling the two sets of figures. More importantly the differences between the two sets of figures are comparatively trivial when compared with the figures that Mrs Hopton is asking the Court to adopt.
66. Mr Blackett-Ord was critical of the course that the action has taken. He submitted that the action should never have been in the County Court at all. He submitted that it should have proceeded by way of a Part 7 Claim. Then there would have been proper pleadings. He submitted that there should have been a two stage process. First it should have been determined whether there was a partnership and whether and if so when it dissolved. When this was determined there should have been an order for appropriate accounts and enquiries (including if necessary an order for an account of post dissolution profits under section 42 of the Act). Until the existence of the partnership and its dissolution is determined the Court cannot know what accounts are required. If the proceedings had taken that course the question of the disclosure would not have arisen until the second stage. He also submitted that a debarring order was highly unusual in Part 8 proceedings where there are no formal pleadings. The more usual course where there has been a failure to give proper disclosure is for the court to make adverse assumptions against the defaulting party.
67. As already noted the only evidence called at the hearing was that of Mrs Hopton. No expert evidence of any description was called despite the orders to which I have referred. Mr Hill sought to attribute this to Mr Miller's failure to give disclosure. He submitted that it was not possible to get expert evidence until the discovery process was complete. As this had not occurred before October 2008 when Mr Miller sold The Old Rectory it was not possible to obtain expert evidence. In my view this is not an acceptable explanation. There was nothing to prevent Mrs Hopton or her advisors seeking to get a valuer to make any relevant valuations of The Old Rectory at any time between September 2006 and October 2008 when it was sold. Equally I cannot see why some form of expert could not have been asked to value the business based on the documents that have in fact been disclosed making appropriate assumptions in the light of apparent disclosure failures. It has been done in other cases in which I have been involved.

4. Comments

68. Before turning to the issues that arise I wish to make the following comments:

1. I agree with Mr Blackett-Ord that this case has gone off the rails. It is unfortunate that it was commenced in the County Court and that it has been dealt with by a number of Deputy District Judges. If it had been commenced in the High Court it would have been transferred to the Leeds District Registry at an early stage and would have been dealt with by experienced Chancery District Judges. Whilst I transferred the case to the High Court at the beginning of the hearing I could not, in effect, undo the orders that have been made.
2. The effect of the debarring order was, to say the least, unfortunate. The only person who could give direct evidence of the trading after August 2005 was Mr Miller. Yet he was prevented by the order from giving evidence and being cross-examined. If he had been permitted to give evidence he could have been cross-examined on the apparent problems with the disclosure and the Court could have been asked to draw adverse inferences.
3. I regret that I cannot attach any weight to the opinion of Mrs Hopton as to the level of trade after August 2005 or as to the profitability of the trade or the value of the goodwill. There are a number of reasons for this. First and most important, Mrs Hopton is not and does not purport to be an expert. She is not entitled to give expert evidence of the sort that she purports to do in her second witness statement. It is simply inadmissible. Second, Mrs Hopton appears to have based her opinion on the level of trade on a conversation with Sandra Cunningham. Sandra Cunningham was not called to give evidence. I have no idea what qualifications she has or whether she would qualify as an expert. In any event I am concerned with the actual profits of this business; not the profits it might have made if it had been well run and there had been appropriate marketing. Third, Mrs Hopton's opinions are quite simply wholly unrealistic. Whilst I could accept that the turnover was somewhat higher than the turnover in the accounts Mrs Hopton's suggestions are, in my view, in cloud cuckoo land. It is wholly unrealistic to suggest that a Bed and Breakfast Business with an admitted turnover of less than £50,000 per annum in fact had a turnover of nearly £300,000 per annum. This is especially so as the records disclosed broadly support the admitted turnover. It is totally unrealistic to suggest that the conference room was used for 365 days a year. It was totally unrealistic to suggest a turnover of £130,000 per annum for food and drink. There is no basis for the suggestion that the profitability was 80%. It is a figure which has all the appearances of being plucked from the air.

5. Issues 5.1 Commencement and termination of the Partnership

69. It was common ground between the parties that there was a partnership between Mrs Hopton and Mr Miller. In his closing submissions Mr Hill did not seek an account for any period earlier than April 2005 when The Old Rectory opened for business. In those circumstances it is not necessary for me to determine whether the partnership in fact commenced in April 2005 or on some earlier date.

70. I agree with Mr Blackett-Ord that it is necessary to determine whether the partnership has come to an end and, if so, when. It is common ground that this was a partnership at will. It is equally common ground that no formal notice of dissolution was served by either Mrs Hopton or Mr Miller.
71. The matter does not end there because in appropriate circumstances the Court can infer that a partnership has come to an end². In my view the evidence in this case points overwhelmingly to the fact that the partnership had come to an end by the end of September 2005 and I would so infer. I would rely on the following matters in support of the inference:
1. The quarrel that took place on 6th August 2005 over the terms of the proposed partnership.
 2. The attempts at reconciliation after the quarrel which were rebuffed on both sides. In consequence Mrs Hopton has in fact had nothing to do with The Old Rectory since August 2005.
 3. The new partnerships formed by Mr Miller to run The Old Rectory after September 2005.
 4. The agreement by the parties' solicitors for "final" partnership accounts to be drawn up to the end of September 2005.
 5. Mr Kerrigan's letter to the bank of 2nd November 2005 and Mr Jackson's letter to Mr Kerrigan of 21st December 2005.
72. All of these matters point to the conclusion that the partnership was dissolved some time fairly soon after the quarrel in August 2005. The 30th September 2005 is a convenient date as it is the date to which Bernard Lister & Co (with the agreement of both parties) has drawn up the accounts. Accordingly I propose to adopt 30th September as the date the partnership terminated. I do not overlook the assertion in the Part 8 Claim that the partnership was still in existence. In my view that assertion can be tested by considering what the position would have been if there had been a disastrous flood or fire at The Old Rectory after Mrs Hopton left and the business had started making losses. It seems pretty plain that Mrs Hopton would not have had to contribute to those losses.
- ### 5.2 Improvements
73. The question of whether the making of improvements gives rise to any or any altered interest in property depends on the same principles as *Lloyds Bank v Rossett*. There must be a common intention to alter the interest coupled with detriment. This can be seen from the judgment of Griffiths LJ in *Bernard v Joseph* [1982] 3 AER 162, 171. It might in exceptional circumstances be inferred that the parties agreed to alter their beneficial interests after the house was bought; an example would be if the man bought the house in the first place and the woman years later used a legacy to build an extra floor to make more room for the children. In such circumstances the obvious inference would be that the parties agreed that the woman should acquire a share in the greatly increased value of the house produced by her money. But this depends on the court being able to infer an intention to alter the share in which the beneficial interest was previously held; the mere fact that one party has spent time and money on improving the property will not normally be sufficient to draw such an

inference. 2 See Lindley on Partnership – 18th Ed paragraph 24-25 and the further comments in paragraph 24-45.

74. In 2 cases - James v Thomas [2007] EWCA 1212 and Morris v Morris [2008] EWCA 257 both decided after the decision of the House of Lords in Stack v Dowden the Court of Appeal has emphasised that “in the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition.”
75. Mr Miller was the owner of The Old Rectory. There is no suggestion that there was any express agreement that Mrs Hopton should have any beneficial interest in it. In one of her witness statements Mrs Hopton expressly disclaimed such an interest. All of the improvements/repairs were paid for by Mr Miller. Although each of the parties had solicitors acting for them the negotiations as to the terms of any partnership never reached a conclusion. In those circumstances it seems to me to be clear that Mrs Hopton did not acquire any beneficial interest in The Old Rectory. It is equally difficult to see why any part of The Old Rectory should be treated as a partnership asset. 5.3 Value of Mrs Hopton's interest in the partnership as at 30th September 2005.
76. The starting point must be the accounts drawn up by Bernard Lister & Co in March/July 2006. Most of the figures in the accounts are taken from a spreadsheet prepared by Mrs Hopton. Furthermore, as already noted Mrs Hopton accepts that the profit and loss account prepared by Bernard Lister & Co is broadly accurate. I can thus take it as reliable that for the period between April and the end of September (a period of approximately 6 months) the partnership had a turnover of £14,306 and net profits of £4,719.
77. As already noted Mrs Hopton is critical of the figures in the balance sheet. She is, of course, right that far more than £2,226, £1,000 and £2,832 was spent on Soft Furnishings, Fixtures and Furniture. The furniture in the conference room alone cost £9,000.
78. However all of the initial purchase of the Furnishings, Fixtures and Furniture was funded by Mr Miller. In those circumstances Bernard Lister & Co have treated them as belonging to Mr Miller and not being partnership assets. If they had treated them as partnership assets they would also have had to credit Mr Miller's capital account with the cost and would have had to have depreciated the value in the accounts. Unless it could be shown that their value exceeded the cost this would not have benefited Mrs Hopton³.
79. Mr Hill sought to get round this difficulty by suggesting that Mr Miller had given the money to purchase these assets to the partnership. There is, however, no evidence at all to support such a gift either in the witness statements or in the documents before the court. At one time during her oral evidence Mrs Hopton suggested that there was such a gift but in the end she retracted that evidence.

80. In any event I do not accept that Mr Miller ever gave or intended to give the monies to fund the improvements or to purchase the Furnishings, Fixtures and Furniture to the partnership. The arrangements between the parties were in a state of negotiation and there was no concluded agreement between them.
81. In those circumstances it was in my view open to Bernard Lister & Co to treat the acquisition of the Furnishings, Fixtures and Furniture in the way that they have done. ³ See section 44(b) of the Act which sets out the order of distribution of assets. Capital is repaid to the partners before a distribution of assets in proportion to profit share.
82. Equally, as it seems to me, Bernard Lister & Co's treatment of the parties drawings is not open to challenge. Mrs Hopton accepted that she had received £100 per week, a cheque for £5,000 and that she took £500 when she left. Bernard Lister & Co treated her drawings as £6,100. As already noted there was some doubt at the hearing as to whether Bernard Lister & Co were right to treat the whole of the £5,000 as drawings. In the end Mrs Hopton could not be sure that any part of it was used for reimbursement for the rug or 3 piece suite and did not pursue the challenge.
83. There remains the question of goodwill. Bernard Lister & Co's account makes no allowance for the goodwill of the business as at 30th September 2005. In my view there was some goodwill at that time. The business had been trading for 6 months and was making modest profits. It had achieved the Diamond award which had enabled it to increase the price of its rooms. It had had considerable publicity which had attracted national and international interest. It had some advance bookings. On the other hand the business was trading from premises wholly owned by Mr Miller. There was limited scope for expansion in that the planning permission was limited and there were covenants in favour of the Church Commissioners. These problems appear not to have been completely insurmountable in that Mr Miller appears to have used the conference room and the other bedrooms; however they would in my view have affected what someone would have been willing to pay for the business in September 2005.
84. The assessment of goodwill is notoriously difficult even with the assistance of expert evidence. In this case I have no such assistance. I am conscious that I, too, may be accused of plucking a figure out of the air but doing the best I can I propose to value the goodwill as at 30th September 2005 in the sum of £20,000. That is a figure which is just over 4 times the profit made in the first 6 months and is designed to take into account the factors I have set out above.
85. On that basis I would value Mrs Hopton's share of the business as at the date of dissolution in the sum of £6,260 (£10,000 - £3,740). 5.4 Section 42 of the Partnership Act 1890. Section 42 provides: "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or

his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5% per annum on the amount of his share of the partnership assets."

86. Mr Blackett-Ord referred me to the decision of the Court of Appeal in *Sandhu v Gill*

[2006] Ch 456 . The decision contains a detailed discussion of section 42 and of the rival possible interpretations of the section with extensive citation from both the post and pre Partnership Act decisions. It repays careful reading. However I do not intend to lengthen this judgment by extensive quotations from the judgments. The conclusion of the Court of Appeal (and thus binding on me) is best expressed in paragraph 99 of the judgment of Black J: I have reached the conclusion that the correct interpretation of section 42(1) is that which vis the partnership and not the reflects the reality of the outgoing partner's position vis interpretation adopted in the courts below. I am quite satisfied that the phrase "share of the partnership assets" has the same meaning on both occasions when it is used in the section. In - - à my judgment, the section contemplates that a figure will be ascertained, as at the date of dissolution, for the assets after payment of third party liabilities in accordance with section 44(b)1 and thereafter a calculation carried out as to what is due to the outgoing partner by way of advances, capital and share in any surplus. For the 5% interest option in section 42, no further calculation is necessary (except possibly in relation to a management allowance); the outgoing partner can claim 5% per annum on the figure calculated to be due to him. For the profit option, it will be necessary to work out the proportion that that figure bears to the total of the assets after discharge of third party liabilities; subject to arguments as to other factors that have contributed to the making of profit, the outgoing partner can claim the proportion of profit that his figure bears to the total assets. I have referred in this judgment to the accounting exercise as set out in section 44. As that section makes clear, however, contrary agreement will displace its provisions. Post Dissolution Profits.

87. I have summarised the figures in the accounts above. The total of the profit as shown in the accounts amounts to £50,314. However Mrs Hopton does not accept the figures in the accounts as being reliable. Furthermore Judge Langan QC and a number of other District Judges accepted that there had been inadequate disclosure in the respects set out above.

88. I am prepared to assume there has been some under disclosure of the income by Mr Miller. However for reasons already given I derive no assistance at all from the income suggested by Mrs Hopton. Mr Hill's analysis of the weekly records does to my mind show that the declared income is of the right order of magnitude. Furthermore the Diary Entries show that the booking was – at least ordinarily – for 3 bedrooms and not for the four or five suggested by Mrs Hopton. It may well be that exceptionally Mr Miller had 4 or even 5 rooms occupied but this seems to me to have been the exception rather than the rule. It has to be remembered that Bernard Lister & Co did have the benefit of Mr Miller's source documents when he prepared the accounts. Equally (as is pointed out in one of Bernard Lister & Co's

letters) Doncaster is not a major tourist centre.

89. Doing the best I can I propose to assume (in the light of Mr Miller's inadequate disclosure) that he has under declared the income by 10% without any increase in the declared expenditure. On that basis the post dissolution profit of the business for the period from 30th September 2005 – 12th September 2008 would amount to £64,208 as set out in the following table. Period Net Income Income + 10% Expenditure Profit Adjusted 30/9/2005 - 31/3/2006 1/4/2006 - 31/8/2006 1/9/2006 - 31/3/2007 1/4/2007 - 31/3/2008 1/4/2008 - 12/9/2008
TOTAL 30,117 18,506 30,783 42,382 17,156 33,129 20,357 33,861 46,620 18,872 9,323 20,794 10,934 7,572 19,440 11,343 23,439 18,943 3,133 14,023 50,314 12,335 9,423 14,421 23,181 4,849 64,208
90. In my view it would not be right to award Mrs Hopton 50% of the adjusted net profit of £64,208 as suggested by Mr Hill. As at the date of dissolution I have valued her capital at £6,260 out of total assets of £29,682 (£9,682 + Goodwill of £20,000). This represents 21.09% of the assets of the partnership. In those circumstances I propose to award Mrs Hopton 21.09% of the adjusted post dissolution profits or £13,542. That seems to me to be in accordance with the guidance of Black J in the passage cited above and ignores any possible arguments that other factors might have contributed to the profits.
91. It follows that the total award to Mrs Hopton is the sum of £19,808 which I propose to round up to £20,000. APPENDIX MRS HOPTON'S LIST OF IMPROVEMENTS
1. Extensive works to roof and exterior of the building prior to repainting, including removal of Acro props once roof repairs were complete.
 2. Douglas Bader Room – New coving, repairs to cracked walls, full redecorating programme, including lining of walls, all new furnishings, including carpets and curtains, new en suite built as per council specification, plus all additional extras.
 3. Hurricane Room – new en-suite full redecoration, carpets, curtains, new furnishings and extras.
 4. Spitfire Room – New coving, repairs to severe cracked walls, rebuilding of one defective wall, redesign of doors on built in wardrobes, new en-suite, all carpets curtains fitting and extras.
 5. Hallway – repairs to coving and walls, handrail grained in mahogany, full decoration and recarpeting, repairs to cracked walls.
 6. Dining Room – Removed tiled fireplace and tiled back 70's style pine surround, open up fire grate made to specification, full decoration, curtains, furnishings to include all tables chairs, linen crockery cutlery etc

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7. Lounge – Repair to coving, severely cracked walls and ceiling, new French doors, full redecoration, including artwork and woodwork and fireplace, all carpets, rugs, curtains and soft furnishings.
 8. Conference Room – All decorations and furnishings, fireplace opened up.
 9. Outside Gardens – Extensive work to remove 20 years of neglect, creation of woodland garden and rockery.
 10. Additional work improvement to Kitchen, all new appliances and tiling to floor and walls, including new worktops.
 11. Installation of disabled toilet and creation of utility room.
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