JUDGMENT : Mr Justice Langley:. High Court. Commercial Div. 25th January 2000.

INTRODUCTION

1. In April 1994 the Administrators of British and Commonwealth Holdings Limited ("B&C") commenced proceedings against Barclays de Zoete Wedd Limited ("BZW") and other parties claiming damages arising out of the circumstances in which B&C acquired Atlantic Computers Plc in 1988. BZW was represented in the proceedings by Lovell White Durrant ("LWD") now named Lovells. An idea of the nature and complexity of the proceedings can be gleaned from the fact that the estimate of the length of a trial exceeded one year.

2. "Barclays", and its subsidiaries such as BZW, was insured against professional indemnity risks by underwriters at Lloyds and various insurance companies. Rupert Villers was the representative Lloyds underwriter. The total cover was for £150 million excess of £50 million in respect of third party liability including costs. The circumstances underlying the B&C claim were notified by Barclays to insurers.

3. The insurers disputed liability for the claim. The dispute was resolved by a Settlement Agreement between Barclays and insurers dated 21 May 1997. In summary, it was agreed that insurers would accept liability for 50% of the amount for which they would otherwise have been liable under the insurance for sums expended by Barclays in respect of liability, liability for costs and Barclays' own costs, less recoveries and the excess of £50 million.

4. Clause 5 of the Settlement Agreement provided that insurers should pay the amount due from them under its terms within 28 days of receipt of one or more sworn claim letters from Barclays in a prescribed form and that these letters *"shall be conclusive proof, for the purposes of this Agreement, that the sums set out therein are due and owing by Barclays to a third party and by Underwriters to Barclays."*

5. Clause 11 of the Settlement Agreement provided for all disputes to be referred to arbitration under the rules of the City Disputes Panel.

6. In January 1999 a number of the parties to the B&C proceedings, including Barclays, entered into a settlement agreement of those proceedings.

7. In February 1999 Barclays submitted a sworn claim to underwriters and insurers in accordance with Clause 5 of the Settlement Agreement dated 21 May 1997. The claim included amounts which had been billed by and paid to LWD in respect of the legal costs incurred by Barclays through LWD in connection with the B&C proceedings.

8. The company insurers have all paid their proportions of the claim in full as presented, except for a small number of overseas insurers from whom payment is still being collected.

9. Equitas is now the reinsurer of much of the Lloyd's market. It has had the conduct of the present dispute on behalf of the Lloyd's market. Equitas has withheld a sum of £1,938,076.54 from the Lloyd's share of the sworn claim. That sum represents half of the amount of the Lloyd's share of the legal costs paid by Barclays to LWD. Equitas contends those costs are excessive.

THE PRESENT PROCEEDINGS

10. On 23 August 1999 Equitas began Part 8 Proceedings against LWD seeking a detailed assessment of LWD's bills pursuant to Section 71(1) of the Solicitors Act 1974. Barclays are not parties to these proceedings.

11. On 3 September 1999 Barclays requested the City Disputes Panel to commence an arbitration between Barclays and Equitas under Clause 11 of the Settlement Agreement dated 21 May 1997. The Panel did so on 6 September.

12. On 10 September Equitas' Part 8 application came before Costs Judge Ellis. Barclays were not on notice of nor represented at the hearing. Costs Judge Ellis gave certain directions for the future conduct of the application and of his own motion ordered a stay of the arbitration commenced by Barclays. It is agreed that the stay order was inappropriate and that it should be lifted and not reimposed.

THE APPLICATION AND ISSUES

13. There are two matters formally before the Court:

(1) An arbitration application by Barclays seeking orders that disputes arising out of Barclays' claim under the Settlement Agreement be referred to arbitration under Clause 11 of the Agreement and an order staying Equitas' Part 8 application on the ground that its prosecution is contrary to the terms of the Settlement Agreement.

(2) A Notice of Appeal dated 16 September by which LWD appeals against the Order of Costs Judge Ellis made on 10 September and seeks a stay of the Part 8 application pending conclusion of the arbitration between Barclays and Equitas.

14. There is, as Mr Walker submitted and the parties recognised, a danger that these applications might not give rise to a determination of the real issues between the parties. Equitas acknowledges and contends that its dispute with Barclays has been referred to arbitration and must be determined in that arbitration. Equitas also submits that there is no basis on which Barclays can apply for a stay of the Part 8 proceedings, because Barclays is not a party to those proceedings, nor any basis on which LWD itself can seek a stay pending the arbitration, because (to quote from Equitas' Skeleton Argument) *the question of the liability of Equitas to Barclays (which depends upon the construction of the Settlement Agreement) is quite separate from the question of what costs are allowable on a taxation under Section 71.*

15. The real dispute is not difficult to understand. Barclays contends that on the true construction of the Settlement Agreement and in particular Clause 5, Equitas is bound to pay the sum stated in the sworn claim and has no relevant right to an assessment of the costs paid to LWD included in it. Therefore any assessment is otiose, even if (which Barclays submits it is not) Equitas was entitled to one under the provisions of Section 71. LWD contends that any assessment is otiose for the same reasons. LWD also contends that all but the last 7 of the bills included in Barclays' claim are now time-barred for any assessment under the 1974 Act (as the application for an assessment was made only after the expiry of 12 months from the payment of the previous bills) and that, as a matter of discretion, it would in any event be inappropriate to order a detailed assessment of any of the bills.

16. On December 7 LWD wrote to Equitas' solicitors inviting their agreement that at this hearing the court should deal with: "*all issues as to the true construction of the Settlement Agreement and the question of whether, in the light thereof, a detailed assessment can and/or should be ordered pursuant to section 71.*"

17. On December 8 Equitas' solicitors replied: "*We agree that it would be sensible for the Court at the forthcoming hearing to decide whether a detailed assessment can and/or should be ordered under section 71 of the Solicitors Act 1974.*"

18. Whilst Mr Walker contends that this agreement does not extend to *all issues as to the true construction of the Settlement Agreement* (as those issues have been referred to arbitration) he accepts that it is for this court to consider whether Clause 5 of the Settlement Agreement makes a detailed assessment irrelevant or academic because that is an obviously material factor in the exercise of any discretion under Section 71 of the 1974 Act, in addition to deciding whether Equitas is entitled to such an assessment in principle or as a matter of discretion under that Section.

19. THE SETTLEMENT AGREEMENT

20. The Agreement was made on 21st May 1997 between Barclays and insurers. LWD were not parties to it. So far as it is necessary to set out the precise terms they are as follows:

2. The insurance afforded to Barclays by Underwriters ... shall be varied by this agreement, which shall henceforth form the entire agreement between Barclays and Underwriters ....

4. The precise amount of the Indemnity to which Barclays is entitled hereunder in respect of the B&C Claim shall be calculated in accordance with the following formula:

(a)(i) Barclays shall aggregate any liability, including any liability for legal costs ... in respect of the B&C Claim ... and its own legal costs and related disbursements from 29th April 1994, the date of the issue of the proceedings ...

(ii) [deduct recoveries]

(iii) [deduct £50m]

(b) Barclays shall thereafter be entitled to receive from the Indemnity [subject to a maximum of £75m] ... a sum representing one-half of the sum [so] calculated ....

(c) [provision for re-payment of recoveries made after payment by insurers]

5. Underwriters will pay ... the amount of the Indemnity ... to Barclays ... within a period of 28 days from receipt of one or more sworn claim letters from Barclays in the form set out in Schedule 2 hereto. The sworn claim letters from Barclays shall be conclusive proof, for the purposes of this Agreement, that the sums set out therein are due and owing by Barclays to a third party and by Underwriters to Barclays ....

21. [The form of claim letter in Schedule 2 in the event used by Barclays certified that Barclays *has agreed in contemplation of potential liability* to pay a stated sum to a third party and that *the aggregate amounts calculated in accordance with Clause 4 of the Settlement Agreement* is a stated sum which *is due from Underwriters ...*]

6. The defence of the B&C claim shall be conducted by LWD ... in conjunction with Underwriters in the following manner:

Barclays will, to the fullest extent reasonably practicable, keep Underwriters, through Messrs Berwin Leighton ... promptly informed of, and will give them the opportunity to be involved in, all substantial developments irrespective of their nature in relation to the B&C claim and will on request supply copies of any documentation which Underwriters ... consider to be relevant to their consideration of the matter ....

7. Barclays hereby undertakes to supply to Underwriters legal advisers:

(a) before making any offer of settlement of the B&C claim ...; or

(b) as soon as practicable after receipt or communication of any such offer of settlement made by any other party,

details of the proposed settlement. Barclays shall not make or accept any such offer without the prior written consent of the Leading Underwriter which consent shall not be delayed or withheld unreasonably. ....

11. Any and all disputes or differences arising out of or in relation to this Agreement ... shall be referred in the first instance to mediation under the auspices and rules of the City Disputes panel and, if such mediation is unsuccessful, arbitration under the auspices of the City Disputes Panel ....

THE SOLICITORS ACT 1974

22. The relevant provisions of the Act are as follows:

64. Form of bill of costs for contentious business.

(1) *Where the remuneration of a solicitor in respect of contentious business is not the subject of a contentious business agreement then ... the solicitors bill of costs may ... be ... a gross sum bill.*

69. Action to recover solicitors' costs.

(1)... no action shall be brought to recover any costs due to a solicitor before the expiry of one month from the date on which a bill of those costs is delivered in accordance with the requirements mentioned in subsection (2) ....

(2) *The requirements referred to in subsection (1) are that the bill -*

(a) must be signed by the solicitor, or if the costs are due to a firm, by one of the partners of that firm ... in the name of the firm .... and

(b) must be delivered to the party to be charged with the bill ....

and, where a bill is proved to have been delivered in compliance with those requirements, it shall not be necessary in the first instance for the solicitor to prove the contents of the bill and it shall be presumed, until the contrary is shown, to be a bill bona fide complying with this Act.

70. Taxation on application of party chargeable or solicitor.

(1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall ... order that the bill be taxed and that no action be commenced on the bill until the taxation is completed.

(2)Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor, or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit ... order -

(c) that the bill be taxed; ....

(3) *Where an application under subsection (2) is made by the party chargeable with the bill -*

(a) after the expiration of 12 months from the delivery of the bill, or

(b) ... or

(c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill, no order shall be made except in special circumstances ....

(4) The power to order taxation conferred by subsection (2) shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from payment of the bill.

71. Taxation on application of third parties.

(1)Where a person other than the party chargeable with the bill for the purposes of section 70 has paid, or is or was liable to pay, a bill either to the solicitor or to the party chargeable with the bill, that person ... may apply to the High Court for an order for the taxation of the bill as if he were the party chargeable with it, and the court may make the same order (if any) as it might have made if the application had been made by the party chargeable with the bill.

(2) Where the court has no power to make an order by virtue of subsection (1) except in special circumstances it may, in considering whether there are special circumstances sufficient to justify the making of an order, take into account circumstances which affect the applicant but do not affect the party chargeable with the bill.

23. The relevant general effect of these provisions is not, or cannot realistically be, disputed. Granted that LWD's bills complied with the Act as gross sum bills (which they did: see below) and subject to any common law requirements (as to which also see below) at the instance of *"the party chargeable"* (that is Barclays) :

(1) the bills cannot be the subject of a taxation or assessment order at all once 12 months have elapsed following payment of them: s.70(4) and **Harrison v Tew** [1990] 2AC 523.

(2) the bills can only be the subject of such an order once they have been paid but before 12 months has elapsed from payment where "special circumstances" exist to justify such an order: s.70(3).

24. At the instance of a party who is liable to pay a solicitor's bill to the party chargeable with the bill (and Equitas submits it is such a party because it is liable to pay LWD's bills to Barclays under the Settlement Agreement), the same provisions apply {Section 71(1)} subject only to the modification that the "*special circumstances*" may include such circumstances as affect Equitas but not Barclays: Section 71(2). In such a case all orders for taxation are a matter of discretion whereas s.70(1) is mandatory.

25. It should, perhaps, be noted that neither Section 70 nor Section 71 are concerned with party and party costs orders made in the course of litigation. Such orders contain their own authority for taxation or assessment.

LWD's ACCOUNTS

26. Under Clause 4(a)(i) of the Settlement Agreement Barclays' own legal costs and disbursements were payable by insurers from 29th April 1994, the date the Administrators of B&C commenced proceedings.

27. In June and July 1992 LWD had been engaged in advising Barclays in connection with a DTI investigation in relation to B&C. At that time LWD was submitting monthly accounts for their charges and disbursements with a narrative description of the work concerned. Barclays considered the narrative to give more detail than they wanted "to be available on the files of our Finance and Accounts Department" and asked if the bills could be re-issued with a narrative such as "To our professional charges for continuing to advise and assist you in this matter" or something similar. LWD agreed to this and thereafter the bills used the suggested language albeit the disbursements were still stated and described as were the charging rates of and hours worked by the LWD personnel concerned.

28. On 18th May 1994 LWD wrote to Barclays setting out their proposals for advising and assisting Barclays in connection with the B&C proceedings including how they proposed to charge for the work.

29. The letter stated:

I understand that the existing arrangements for billing have proved broadly successful and have met your needs. I therefore propose that we continue to provide you with quarterly estimates of costs, setting out assumptions as to the likely hours to be worked by the relevant team members, the broad heads of work to be carried out and identification of key variables which may affect the actual hours incurred during the period ....

We propose to continue to calculate our fees principally by reference to the number of hours worked .... Current rates are as follows ....

We propose to discuss with you significant disbursements, such as unusually large Counsel fees and expert fees before including these items in bills to you.
We propose to continue to bill on a monthly basis and to include with our bills, details of the actual hours worked by the relevant team members.

30. Thereafter the bills were rendered as set out in this letter. The first relevant bill was dated 29th June 1994. It set out a total figure for "Professional charges" and itemised disbursements. The description read "Matter: Atlantic Computers PLC, for continuing to advise and assist you in this matter during the period. Period 01.05.94 to 31.05.94 (31st Interim Bill)." The hours worked and rates charged for those concerned were set out on a separate sheet. The bill was signed and had a "Payment Slip" attached to it. Payment of the entire bill was sought. All subsequent bills were in the same form.

31. Also, as stated in their letter, LWD provided Barclays with costs estimates for three monthly periods which included a narrative description of the work expected to be done in the period.

32. There is a Schedule which sets out in summary form the LWD bills which were included in Barclays sworn claim letter. The Schedule shows that separate bills were submitted to Barclays for each of the 50 months from May 1994 to the end of June 1998 and that, usually within a matter of two or three months, Barclays had paid each of the bills in full. All of these 50 bills had been paid by August 10, 1998. Equitas began the Part 8 Proceedings over 12 months later on August 23, 1999. The last 7 bills (for the months of July 1998 to January 1999) were paid between September 1998 and April 1999, and thus were all paid before the Part 8 proceedings were commenced but within 12 months of their commencement.

THE SUBMISSIONS AND CONCLUSIONS

APPLICATION OF THE SETTLEMENT AGREEMENT

33. Mr Walker submitted that on the true construction of Clause 5 of the Settlement Agreement Equitas was not bound to treat Barclays sworn claim letter as conclusive proof of the sums claimed by Barclays in respect of the Bank's legal costs incurred through LWD. That submission was based on two propositions. First that the costs were not due and owing to "a third party" and second that they were not "due and owing" because they had in fact been paid at the date of the claim letter.

34. I do not accept either of these submissions. There is no doubt that "*the Indemnity"* to which Barclays was entitled under the Settlement Agreement included *"its own legal costs and related disbursements"* : Clause 4(a)(i). Clause 5 required insurers to pay the amount of the indemnity within 28 days of receipt of a sworn claim letter. The purpose of this provision and the "*conclusive proof*" provision is not hard to divine: it was to ensure both prompt payment and to preclude disputes about it. It was intended to achieve finality within a short timescale.

35. LWD is capable of meeting the description "*a third party*". In context, in my judgment, it is rightly to be treated as such. There would be no finality if LWD's bills were excluded from the operation of the clause and, as part of the amount of the indemnity, I think they were plainly intended to be included. The words "a third party" are, I think, simply used in contrast to Barclays itself. The clause also makes the sworn claim conclusive proof of sums due from insurers to Barclays which sums include the amounts charged by LWD.

36. The words "*are due and owing*", despite the use of the present tense, are in my judgment capable of including debts which exist whether or not they have been paid and in context I think they were intended to do so. There could be no good commercial reason for limiting the conclusive effect of the certificate only to sums not paid until after its date particularly where the Settlement Agreement expressly contemplated that the Indemnity would include costs and disbursements incurred since April 1994 some 3 years before it was made. In any event, again, the words are apposite to the sums "due" from insurers to Barclays.

37. It follows in my judgment, and as Mr Walker accepted on this basis, that Equitas' liability to Barclays for the sums paid by Barclays to LWD cannot be affected by any detailed assessment under the 1974 Act even if one were to be ordered. Between Barclays and Equitas the certificate is effective at least to that extent. If Equitas is entitled to an assessment therefore it can only, if at all, be against LWD and can only (if at all) give rise to rights between Equitas and LWD.

38. Indeed Mr Sumption and Mr Hirst submitted that, properly construed, the Settlement Agreement precluded any assessment of the costs even as against LWD because such an assessment would be inconsistent with the Agreement. Whilst I see the force of this submission I am not persuaded by it. If, as Equitas contends, the 1974 Act gives a party in the position of Equitas a right to seek an assessment as against LWD without affecting the rights of Barclays then I do not think the Settlement Agreement precludes such an assessment even assuming (as Mr Walker accepted) that it is possible in law to contract out of the Act. LWD was not a party to the Settlement Agreement. Nor was the Agreement made by Barclays as trustee or as agent of LWD. Mr Sumption submitted that Barclays and LWD could rely upon it as an agreement made for the benefit of LWD, citing **Snelling v John G. Snelling** [1973] 1 QB 87. But the Agreement was made for the benefit of Barclays not LWD. Whilst Barclays is concerned that what it sees as unwarranted attempts should not be made to question its solicitors' accounts that is not in my judgment a sufficient basis to provide Barclays with any remedy against insurers. I think Mr Walker is right in his submission that Equitas is not seeking to derogate from the Settlement Agreement by applying for an assessment against LWD because he acknowledges that as regards Barclays the Agreement is effective to require payment regardless of any assessment.

39. APPLICATION OF THE 1974 ACT

(1) Mr Sumption submitted that Section 71 of the Act does not apply to Equitas at all because Equitas' liability does not depend on the LWD bill or bills but arises only under and is wholly determined by the terms of the Settlement Agreement. This submission was founded on authority to the effect that a settlement agreement under which a party agrees to pay a fixed sum of or towards the costs of another party disentitles the first party to any order for an assessment of the actual costs involved: see **Re Morris(**1872) 27 LT 554**; Re Heritage (**1878) 3 QBD 726; and **Ingrams v Sykes** CA 11.11.1987 Unreported. The last two of these decisions were decided on discretion, but it was also said that such a case fell outside the provisions of the 1974 Act or its predecessor Act. However that may be, in this case Equitas (or insurers) agreed to indemnify Barclays for "*its own legal costs"* ((Clauses 4(a)(i) and 5 of the Settlement Agreement) and in my judgment thus became liable to pay to Barclays the sums payable by Barclays on the bills LWD delivered to Barclays for such costs. There was no agreement to pay a fixed sum whether by way of settlement or otherwise. Insurers did agree to pay the amount certified by Barclays but that amount itself was referable to the costs chargeable to Barclays. In my judgment that is sufficient to bring the liability of insurers within the meaning of subsection 71(1) of the 1974 Act. I see no reason to construe that subsection so as to limit it to agreements to pay a solicitor's bill as such.

(2) The second question that arises is whether or not the time provisions in sections 71 and 70 of the Act apply to LWD's bills. Mr Walker, on behalf of Equitas, submits that they do not because the bills were only "*on account*" bills and there was insufficient narrative explaining what the bills were for and so, at common law, they were not due until the final bill was delivered on February 25, 1999. Mr Hirst, for LWD, submits they were "*statute"* bills, albeit interim ones.

There is no dispute that a solicitor is entitled in law to bill his client on a final basis for work undertaken prior to the conclusion of the retainer provided either that there is an agreement with the client that he may do so or, even without agreement, where there is a "*natural break*" in the proceedings: **Re Romer & Haslam** [1893] 2QB 286; **Davidsons v Jones Fenleigh** (1980) Costs Law Reports Cases (Core Vol) 65; **Chamberlain v Boodle & King** [1982] 3 All ER 188. Mr Hirst submits that the correspondence which I have summarised constitutes such an agreement between LWD and Barclays. I agree. Whilst such a submission must be approached with caution, because the effect is to deprive the client of a right to assessment once 12 months elapses following payment, I see no reason to seek to qualify the method of billing agreed and executed between LWD and Barclays. Rather the contrary. The proceedings were known to be complex and long-lasting. The client was sophisticated and able to assess from the quarterly estimates and otherwise the reasonableness of the fees charged. The bills contained no "*carry forward*". They were self contained. They sought payment in full. Barclays paid them in full. The lack of narrative was the result of a request from Barclays. The purpose of a narrative is to enable the client to consider the reasonableness of the bill. If the client chooses to forego a narrative it does not in my judgment have the effect of making the bill an "on account" or other than final bill and in any event

Barclays had the information they needed through the estimates. Insofar, therefore, as a bill should normally contain a summary of the work done to which it relates (**Re A Solicitor** [1955] 2 QB 252) the purpose is to enable the client to know what it is for which he is being asked to pay and that purpose was fully achieved in this case; see also **Re A Solicitor**, 10th May 1994, Unreported. The common law "rule" is for the benefit of the client and in my judgment the client can forego it if he so chooses.

(3) The third issue arising with reference to the Act is whether or not there is power to order repayment by a solicitor of payments made to him in the event that on a taxation or assessment it be held that the bill or bills should be taxed or assessed at some lower amount. The question arises because it was submitted that as Barclays was entitled under the terms of the Settlement Agreement to be paid the sum "*certified*" regardless of any taxation or assessment and Barclays (not Equitas) had paid the sum to LWD there was no legal basis on which Equitas could recover any "overpayment" direct from LWD nor, ex hypothesi, from Barclays. That, it was submitted, made any assessment otiose even if there were otherwise jurisdiction to order one on Equitas' application.

40. This problem was touched upon by Ralph Gibson LJ in **Ingrams v Sykes** towards the end of his judgment. He "*inclined to the view*" that there was inherent jurisdiction to order repayment by the solicitor of any excess in a case where on settlement of a claim one party had agreed to and in fact had paid a sum to the solicitors for the other party in "*reimbursement*" of the other party's costs. I see no reason in principle why a different conclusion should be reached in a case such as this where it is the client (Barclays) which has paid the bill but the third party which is liable to indemnify the client. Indeed as the Act expressly contemplates that taxations may be ordered in circumstances in which bills have been paid by the third party both to the solicitor and to the client it would be surprising if there was no effective remedy in the event that the bills were taxed down in such cases.

41. If therefore it was otherwise right to order an assessment I do not think it would be a pointless exercise to do so.

DISCRETION

42. The consequence of the conclusions which I have already expressed is that the question whether or not a detailed assessment should be ordered is a matter of discretion limited to the last 7 bills and subject to the need for "*special circumstances*" to be found to justify such an order. The discretion also has to be considered in the context where insurers agreed to indemnify Barclays against the costs in terms which are unaffected by the outcome of any assessment if one were to be ordered, where insurers contracted for and received the information they sought about the progress of the B&C proceedings including the costs incurred (Clause 6 of the Settlement Agreement), where Barclays itself remained liable for (at least) 50% of the costs and disbursements payable to or through LWD and where, on the evidence and as one would in any event expect, Barclays carefully monitored the costs and disbursements in its own interests and was satisfied that they were reasonable and appropriate before paying them. If the B&C proceedings settled within the Excess of £50 million or for a sum in excess of the total cover Barclays would have been exposed to its own costs in full.

43. I have been referred to some authority on the meaning of "*special circumstances*". In **Re Hirst and Capes** [1908] 1 KB 987 it was decided that such circumstances were not limited to *"pressure, overcharge or fraud, but include any circumstances of an exceptional nature which a judge in the exercise of a judicial discretion may consider to justify such taxation"*. In that case it appears (pages 995 and 996) that the Court thought certain items in the bill in question plainly called for investigation. The other authority is to the same effect.

44. Mr Walker submitted, on the basis of the evidence served on behalf of Equitas, that there were four features of LWD's bills which called for investigation. In the course of submissions each of the matters relied upon was however readily shown not to be exceptional or special. The first matter related to the VAT charge made by LWD. But VAT was properly charged by LWD and insofar as Barclays ought not to have claimed the full VAT payment from Equitas there is no dispute that it will be credited by Barclays to Equitas. In any event VAT has nothing to do with any assessment of LWD's bills. The second matter related only to the very first bill (which on my judgment is in any event time-barred from taxation or assessment) and the fact that it shows the charges split 30%/70% between the DTI inquiry and the B&C proceedings. But that, again, is an issue between Barclays and Equitas; it also has nothing

to do with LWD's charges as such. The third matter relates to a fee payable to counsel. On the evidence, the complaints about this fee are misplaced and unsustainable. The fourth matter is a suggestion that time spent by para-legals and trainees should not have been charged by LWD but included in or absorbed as an overhead of the firm. I see no basis at all for this suggestion. Charges were agreed by Barclays and in litigation of the magnitude of the B&C proceedings the use of such staff, in particular for the discovery process, is commonplace and inevitably a matter of charge to the client.

45. In the event Mr Walker accepted that all four matters were no more than ones which he said might lead to a reduction in the bills on an assessment but were not "*wrong*" or matters to arouse suspicion or concern about the bills. He was right to do so. Nor do I, on the evidence, have any feeling of concern about the bills or the amounts charged in them.

46. Equitas has in my judgment failed to establish anything of an exceptional or special nature in LWD's bills. Nor can it reasonably be said that Equitas has not had an adequate opportunity to consider the bills. Equitas, or those advising Equitas, have had copies of the bills since July 1998 for the first 49, since February 1999 for the next 7, and since April 1999 for the final bill. It is also, I think, of some relevance that it is only Equitas amongst Barclays insurers which has sought to question LWD's bills. Other insurers have paid.

47. Mr Walker also submitted that it was a "*special circumstance*" that the only protection for Equitas lay in its rights under section 71 of the 1974 Act, as it had no control over the costs incurred in the litigation. But that would normally be the case with any third party applicant under section 71 and cannot of itself amount to a special circumstance. Moreover the want of control was qualified by insurers' rights under Clause 6 of the Settlement Agreement and was itself the consequence of the terms which insurers accepted in return for the settlement of their liability under the insurance at 50% of the agreed level of cover. Insurers could have negotiated for control of the costs or the right to conduct the B&C proceedings.

48. Further, there are in my judgment a number of factors which militate against the exercise of discretion to order an assessment. This is not the perhaps more likely case where the third party liable for the bills has no control over the circumstances which give rise to them or the client can fairly be said to have little concern in controlling the level of costs because he is indemnified against them. Equitas and insurers were in a position to monitor the B&C proceedings and Barclays had a real exposure to and interest in containing the costs. Whilst, as I have said, I do not think the Settlement Agreement precludes the application for an assessment against LWD, it is the case that Equitas agreed to pay Barclays the costs paid by Barclays to LWD without qualification on Barclays' certification. That is, I think, at the least some measure of Equitas' confidence in the figures and Barclays ability to control them. The underlying rationale of the requirement for special circumstances to justify an assessment of costs after payment (and of the time-bar after 12 months) must be or at least include the fact that payment may indicate a waiver of or acknowledgement of a lack of any ground for complaint about the bill. That may have less force in the case of a third party liable to meet the bill, but in this case in my judgment it does not for these reasons.

49. As a matter both of general discretion, and because I can see no special circumstances in this case within Section 70(3) of the 1974 Act, therefore in my judgment it would be wrong to order an assessment of any of LWD's bills and I decline to do so.

50. Because of the nature of the applications before the Court, I will give the parties an opportunity to make submissions as to the form of any orders which should be made as a result of this judgment and any other matters which arise.

Mr J. Sumption QC and Miss H. Davies ...instructed by Messrs Lovells for Barclays)
Mr J. Hirst QC and Mr N. Bacon ...instructed by Messrs Lovells for Lovells)
Mr R. Walker QC and Mr A. Hutton ...instructed by Messrs Squire & Co for Rupert Villers and Equitas)