JUDGMENT : District Judge Harrison : QBD. Manchester. 23 January 2003

1. The hearing before me in these two matters related to the vexed questions of:
   (a) whether conditional fee agreements and their related risk assessment documents are documents which attract privilege, and
   (b) the continued place of the concept of privilege generally where such right is claimed in proceedings for the assessment of costs, where those documents are the best evidence by reference to which the claim for costs can be determined.

2. In order to understand the context in which the parties come before me for consideration of the above issues, it is necessary to review the background to the management of detailed cost assessment proceedings generally together with the specific background in respect of these instant cases.

3. In each of the cases, the Claimant is represented by Messrs John Pickering & Partners, Solicitors of Oldham; the Defendants are represented by Messrs Ricksons, Solicitors of Manchester.

General background

4. I deal first with the general background. Parties who have been unable to resolve issues as to costs between them engage in the process of detailed assessment. In brief, the process is commenced without the initial involvement of the court. The receiving party, whom I shall call the Claimant, delivers to the paying party, the Defendant, a notice of commencement and a copy of the bill of costs. The Defendant may then dispute the bill in whole or in part by serving points of dispute. There is no obligation placed upon the Claimant to reply to the points of dispute.

5. Thereafter, it is hoped that the parties will negotiate and reach settlement in full - or, if settlement in full is not possible, will at least resolve as many issues as can reasonably be resolved by open and frank negotiation conducted in good faith, thus leaving to the court the task only of resolving those issues which truly are incapable of resolution in such a manner. In the event that a full settlement proves impossible, the Claimant lodges the bill and supporting documents at court with a request for a detailed assessment hearing and thus the matter comes before the court for determination.

6. Such, then, is the theory. What in fact has the court found to be the reality? I can speak here only for my own court. The experience of this court has been that points of dispute are served which comprise "pro forma" disputes as to retainer, proportionality and a vast raft of "time challenges" (being assertions that the Solicitor has taken too long to draft a statement or consider an advice etc.). The introduction of conditional fee agreements and the concept of recoverability of additional liabilities has given rise to further "pro forma" points of dispute directed towards imagined breaches of the regulations relating to conditional fee agreements and additional liabilities. I state "imagined breaches" because in the vast majority of cases the Defendant will not have had the opportunity to consider the conditional fee agreement nor will the Defendant have had the opportunity of investigating the circumstances in which such an agreement was entered into.

7. Let us however go back a little way in time to consider the position which prevailed before the additional complexities introduced by conditional fee agreements and the concept of recoverability of additional liabilities. It was clear to this court that points of dispute were being raised without any consideration whatsoever of the file of the Claimant's Solicitor. The representatives on both sides, steeped in the concept of privilege, were neither asking for the opportunity to inspect the Claimant's Solicitor's file nor considering whether inspection of the file should be offered to the Defendant. Put simply, the parties were not addressing their minds at all to the simplest means of reducing the issues between them - that is, by reference to the very documents which were the evidence of the reasonableness or otherwise of the costs being claimed- the file notes, memoranda, correspondence, Counsel's papers.

8. Accordingly, in a number of cases I to enquire of the Claimant's Solicitors whether in fact any request for inspection of the file had been received. In by far the vast majority of cases the answer was that no such request had been received. When I asked whether such a request, if received, would have been granted, in a very significant majority of cases, the answer was in the affirmative. It was clear that in by far the majority of cases the principal litigation being at an end, the Claimant had no wish to claim

privilege and was content to disclose all of the Solicitor's file to assist the open and frank negotiation required.

9. All of this, however, only became clear upon the hearing for assessment of costs. By this time the parties had gone through the time-honoured and very largely unthinking ritual of delivery of points of dispute (pro forma challenges, time challenges) and thereafter unfocused negotiations. Specific issues were not being addressed. How could they be? The parties were not going through any process of disclosure to inform proper negotiation.

10. In a minority of cases, the Claimant would serve a schedule in reply to the points of dispute. Few if any concessions were made. Battle lines had been drawn up. Neither party would move towards the other.

11. Thus, the parties were propelled to the next stage of the process. No agreement having been reached, a request for a detailed assessment hearing was lodged. Not surprisingly, lengthy estimates of time for such hearings were lodged. The parties had not narrowed issues at all. If there had been any negotiation, it had not been by reference to issues but by reference to bottom line figures. In short, the parties were doing nothing at all to reduce and define issues - nothing at all to discharge their absolute obligation to conduct the costs process in accordance with the overriding objective.

12. I began at detailed assessment hearings to raise the above issues. Many Claimants offered immediate inspection without limitation. Others offered disclosure subject to some limitations in respect of sensitive documents. In all cases where disclosure was offered (limited or not), it became my practice to send the parties out from my chambers to provide disclosure and to negotiate against a background of such information. I found, not surprisingly, that in such circumstances a very high percentage of previously contested detailed assessment proceedings settled. I would estimate that of the matters which were listed before me for a contested detailed assessment hearing and where I proceeded in the above manner, no less than 80% settled in full without further judicial involvement. In the balance 20%, issues were narrowed very considerably so that the remaining matters could be resolved in very short order.

13. Against this background, the District Judges at Manchester, consulting also with the Designated Civil Judge, arrived at a menu of directions which were appropriate in the more complicated detailed assessment proceedings. Such directions commonly call for:
    (a) The delivery of a response to the points of dispute.
    (b) Disclosure of the documents on which the Claimant will rely, requiring the Claimant to identify the documents in respect of which the right to claim privilege will be claimed.
    (c) A conference between the parties' representatives to endeavour to reach settlement or to narrow issues, with provision for a memorandum to be drawn and lodged to confirm the conference has taken place, the issues agreed and those remaining in dispute.
    (d) Provision for an interim sum to be paid in respect of the costs claimed.

14. The staff of the court, having identified appropriate cases by reference to certain criteria, would refer those cases to a District Judge for directions to be given.

15. The District Judge would consider each individual case upon its merits on the documents then on file and direct as appropriate. As I have said, the above represent the common directions then given.

16. When, and only when, those steps had been properly concluded, the parties would be listed for hearing. The objective was clear - to require the parties to discharge their obligation in accordance with the overriding objective and to limit for determination by the court only those issues which could not be compromised by informed negotiation between the parties.

17. It is right to say that some in the Profession complained of delay - an aspect to some extent addressed by the provision of an interim award of costs. Wherever possible, having regard to the nature and extent of the objections raised, the District Judge upon giving directions would make an award of costs in a sum being a reasonable proportion of that which he would expect the Claimant to recover on the basis of the information then before him and in the light of his experience.

18. After some initial resistance, the new ethos of openness which was encouraged by the directions being given was embraced. Aware that in the more difficult cases the court would indeed give directions as outlined above, both Claimants and Defendants in their negotiations voluntarily adopted this open approach. The consequence of all of this from the court's point of view has been considerable. The parties in the main were discharging their obligations to negotiate on an informed basis and in good faith. Requests for detailed assessment hearings reduced. Of those cases where a hearing was requested, and where the Judge had given directions along the above lines, the statistics available indicated a rate of settlement above 80% without the need ever to set a hearing date.

19. In the period from 6 July until 8 November 2001 the court office monitored some 34 bills in cases chosen at random from those which satisfied the criteria to be referred for directions. These bills were subject to directions as outlined above. As at February of 2002 of those 34 cases, 27 had settled without a hearing date being set, 4 had been listed for final hearing and 3 had been given extensions of time to comply with the directions. The total of the court's time which had been requested for these final hearings originally amounted to 23 days. Of that 23 days, 16 days 3 hours had been saved by settlement. Still further time may have been saved upon settlement of the 3 outstanding cases. It will be appreciated that the actual saving of court time has of course been far greater as the control sample is but a small portion of the number of cases in which a request is made for a detailed assessment of costs between the parties.

20. Of course, some cynics may say that the actual drive behind the directions given in this court has been nothing other than to save court time. First, is not the proper use of court resources an essential factor in the overriding objective? Secondly, if that saving is achieved by nothing other than encouraging the parties to discharge their obligations, how can the process be criticised? Of course, all of the court time which is saved is available to the court to allocate to the time consuming tasks of effective case management, made available for other court users. Accordingly, waiting time is reduced and the court is better able to provide a more efficient overall service to litigants by the simple expedient of requiring the parties to discharge their obligation under the overrriding objective.

21. With the arrival of conditional fee agreements and the concept of recovery of additional liabilities, new difficulties arose.

Conditional Fee Agreements

22. A Solicitor may agree to conduct litigation on behalf of his client on the basis of a conditional fee agreement. Likewise, Counsel may agree to advise or appear in a case upon the basis of a conditional fee agreement. The conditional fee agreements may, and often do, provide for a success fee - that is, a percentage uplift, calculated by reference to certain risks, by which the normal, or base, costs of the Solicitor or the fees of Counsel are increased in the event of success. The success fee, in addition to the base costs, is recoverable from the paying party.

23. The advice to be given and the investigations to be undertaken before entering into a conditional fee agreement, together with matters of form of the agreement, are subject to regulation. Breach of the regulatory requirements may or may not render the conditional fee agreement unenforceable. Certainly, the regulations themselves provide that any agreement which is entered into in breach of the regulations is not enforceable. Whether such provisions in the regulations are to be strictly interpreted so that any minor breach of the regulations renders all costs irrecoverable between the parties remains a matter which is yet to be resolved by the courts. I am aware of some first instance and first level appeal decisions where the consequence of various different breaches of the regulations has been the principal issue. In such cases, the decisions are split upon whether the particular breach in question makes the conditional fee agreement unenforceable. So far as I am aware, in those cases where the conditional fee agreement has been held to be unenforceable, the consequence has been held to be that the totality of the costs incurred on the part of the party who entered into such an agreement is not recoverable from the paying party. Necessarily in such circumstances the solicitors acting for Claimants face a worrying prospect if any flaw can be shown to exist in the agreements they have entered into with their clients. Naturally, given the potential consequence of the conditional fee agreements being proven to be unenforceable, there is considerable resistance to the same being made

available for inspection by the Defendant. One has to wonder whether in fact this resistance truly arises from the Claimants themselves as opposed to arising from the desire of the Claimants' Solicitors to protect their own interests.

24. As we will see a little later, in fact in the "Ward" litigation all issues of a pre-final hearing nature appear now to have been resolved (subject to the potential for further skirmishing on the question of disclosure/inspection of other documentation outside the conditional fee agreements) and that matter has now been listed for a final hearing. Nevertheless, an account of the particulars of both the "Ward" and the "McCreery" costs litigation is required fully to understand the stance of each of the parties.

The Ward Litigation

25. In this litigation the Claimant's Solicitors entered into a CFA Agreement with a success fee of 60%. The bill presented for assessment was also certified showing that Counsel had been engaged under conditional fee agreements which provided for a success fee. As we shall see, this latter statement is not in fact correct, but the bill was indeed certified as being correct by the Solicitor involved. This is a circumstance which of course causes great concern both to the court and the Defendant - particularly bearing in mind the decision in Bailey -v- I.R.C. Vehicles Limited to the effect that the certificate of a Solicitor verifying the contents of a bill should in normal circumstances be viewed as conclusive. This is an aspect of the conduct of the particular Solicitor which in due course may have to be taken further.

26. The assessment process in respect of the Claimant's bill commenced in the usual manner. The parties having been unable to agree, they sought a hearing. The bill was sent up to me for directions and directions were given very much in the form outlined in paragraph above. Provision was included for an interim payment on account of costs in the sum of £17,500.

27. In September 2001, the Defendant issued to vary the directions order, seeking also specific directions with regard to disclosure and revocation of the order for interim payment.

28. That application came before me on the 29th October 2001. By this time, the parties between them had agreed to transfer the matter to the SCCO with further directions by consent for disclosure/further information to be provided by the Claimant. The hearing was attended only by the Defendant's Solicitor. In fact, I declined to transfer to the SCCO and gave directions. The terms of the order made were as follows:

    (i) Application for transfer of assessment to the Supreme Court's Costs Office is refused.

    (ii) The Claimant do by 4.00 p.m. on 16th November 2001 file at court and serve on the Defendant the further information specified in the Defendant's request for further information from the Claimant pursuant to CPR Part 18 and Section 35.7 of the Costs Practice Direction dated 27th July 2001.

    (iii) Paragraph 1 of the directions issued by the District Judge on 23rd August 2001 be varied and the Claimants do by 4.00 p.m. on 16th November 2001 file and serve on the Defendants supplementary replies to the points of dispute dealing fully with the matters set out in paragraphs A, B, C and D of the points of dispute dated 27th July 2001 and disclose to the Defendants copies of any documents upon which reliance will be placed. If privilege is to be claimed in respect of any such document, the Claimants must identify with full particulars the character of the documents concerned.

    (iv) Paragraph 4 of the directions issued by the District Judge on 23rd August 2001 be set aside. The balance of the directions issued on 23rd August 2001 are suspended pending further order.

    (v) The matter be listed for directions in the assessment process reserved to District Judge Harrison on the first available date after 21 days.

    (vi) Whilst recognising the Claimant's right in appropriate circumstances to claim privilege in respect of the documentation falling within that right, the Claimant must consider whether the claiming of such obstructs a proper negotiation of points in issue and comes into conflict with his obligations under Part 1 CPR. The court is strongly of the opinion that disclosure of documentation between the parties will considerably assist the process and will not prejudice the Claimant's position.

(vii) At the next directions appointment the court will in particular consider:(a) the issue of disclosure/privilege; (b) the definition of issues; (c) interim costs provision.

(viii) Costs in the assessment.

29. Paragraph (vi) was unusual, I accept, but it was designed to express a true concern that unthinking claims for privilege stymie the negotiation process.

30. The matter was next before me on the 11th December 2001. 1 was attended by costs draftsmen on both sides and the Defendant's Solicitor. The Claimant's Solicitor was not in attendance, having been involved in a road traffic incident.

31. A transcript of this hearing is available as subsequently the Claimant sought permission to appeal the order which emanated from the hearing. That appeal was subsequently withdrawn. In fact the orders which I made on this occasion were made by consent.

32. From the outset the Defendant had been pressing for disclosure of further information to enable it to test the enforceability of the conditional fee agreements. The order of the 29th October 2001 (incorrectly dated by the court 1st November 2001) had dealt with this aspect at paragraphs 2 and 3. By 11/12/02 replies had been served to the request for information, though the replies had been served very late in the day. The Defendant was unhappy with the replies. There were still outstanding issues arising from the Claimant's continued assertion of the right of privilege.

33. 1 was at this point concerned that the claim for privilege was being advanced by the Claimant's Solicitor without instruction. It is regrettably the case that on a number of occasions in the course of assessment hearings when I have asked for confirmation that privilege, which is the right of the Claimant and not of his Solicitors, is being claimed after proper instruction, I have been advised that the Claimant has not been consulted at all on the point. The suspicion in the mind of the Defendant is that privilege is claimed to protect the Solicitor and not for any purpose of the Claimant. In this instant case, the Claimant's representative was unable to confirm the position. It will be recalled that the Claimant's representative before me was the costs draftsman.

34. In that context, I endeavoured to move the matter forward by way of an agreed route and in such a manner as would satisfy my own concerns as to the claim for privilege, whilst at the same time providing to the Defendant that information with regard to the conditional fee agreements involved that the Defendant sought.

35. And thus the rather unusual order of that day came about. The order was made in the following terms:

(i) The Claimant shall, with the benefit of all necessary advice from his Solicitors, reconsider his claim to date for privilege in respect of various documents relevant to the issue of costs - but in particular in respect of the conditional fee agreement and the risk assessment with his Solicitor and the two conditional fee agreements and risk assessments with the two Counsel instructed.

(ii) The Claimant's Solicitor shall advise the Claimant in this respect and receive the Claimant's instruction by 21st December 2001.

(iii) The Solicitor shall confirm in writing to District Judge Harrison by way of statement duly verified confirming (a) the advice given (in general terms), (b) the instruction received (in specific terms), (c) the Claimant's justification for the instruction if privilege is still to be claimed.

(iv) The said statement is for the information only of District Judge Harrison.

(v) The statement is to be filed by 4.00 p.m. on 8th January 2002. Upon receipt, the Judge will review the file without hearing and consider further directions.

(vi) In any event by 4.00 p.m. on 21st December 2001, the Claimant must file and serve a statement setting out the detail required under Costs PD 325(b).

(vii) Costs reserved.

36. In response to that order, a statement from Mr Paul Glanville, the Claimant's Solicitor, was lodged dated 4th January 2002. That statement gave the information required by paragraph (vi) of the above order. It did not however address paragraphs i ,ii or iii of the order - nor was any such statement

forthcoming until my insistence upon the production of such a statement at a hearing which took place on the 25th September 2002 and in the most unsatisfactory circumstances, an issue to which I shall return in due course.

37. Delay ensued whilst the Claimant pursued permission to appeal the said order. I assume at this stage that the Claimant's Solicitor was ignorant of the fact that the said order had come about effectively by consent. The application for permission to appeal was subsequently abandoned in late February/early March 2002 at which point I assume that the solicitor had become so aware.

38. The Claimant's Solicitor subsequently wrote to the Court on the 25th February 2002, the 26th March 2002 and the 29th April 2002 requesting a final hearing to be set for assessment of costs. On 12th March 2002 and 16th April 2002,1 caused letters to be sent to the Solicitors seeking clarification with regard to the issue of privilege. For reasons at that time best known to himself, but later to become clear, the Claimant's Solicitor failed to comply with the agreed order in this respect. As I have said, the statement required under paragraph (iii) of the last mentioned order was not forthcoming.

39. In frustration, on 18th July 2002, I ordered that the matter be listed for further directions and a hearing date of 25th September 2002 was set.

40. In the interim, a further matter had been called to my attention, being the McCreery litigation in which the legal representatives of the Claimant and the Defendant were the same and the same or similar issues as to disclosure in respect of conditional fee agreements were being argued. I accordingly directed that the McCreery litigation should also become before me for consideration o£ the costs process at the same time as the Ward litigation.

The McCreery Litigation

41. In this matter the bill was lodged on the 7th February 2002 and a directions order was made on the 12th February 2002. Again, the directions order was in terms similar to that which I have outlined above together with a provision for payment of an interim sum of £10,000.

42. On or about the 2nd May 2002 a memorandum was lodged following the negotiation between the parties. As with the Ward litigation, this memorandum indicated that very little had actually been agreed between the parties. The memorandum was signed only by the Claimant's Solicitor.

43. On the 14th May 2002, the Claimant issued an application to strike out the Defendant's points of dispute and for the bill to be assessed as drawn. This application was based upon the Defendant's failure to sign the memorandum following negotiation. Subsequently, a memorandum signed by both parties came into existence and was filed. The said application was not pursued.

44. On the 20th May 2002, the Defendant issued for directions and in particular orders as to disclosure of documents and/or information. That application was considered by me at the hearing which took place on the 25th September 2002.

The Hearing of 25th September 2002

45. By the time of this hearing, it was apparent that the parties had drawn up their battle lines. The Defendants required in both cases sight of the conditional fee agreement and supporting documents and information with regard to the circumstances in which the agreement had been entered into. For the purpose of negotiation of other aspects of the bill (time claimed etc.) the Defendants required sight of the supporting documentation. As we know, in the Ward litigation the Claimant had agreed to provide the CFA Agreement and other information. Disclosure of further documentation was adamantly refused. In the McCreery litigation there was an outright refusal to disclose any documentation whatsoever.

46. By the time that the hearing on the 25th September took place, the Solicitor acting for the Claimant in the Ward litigation had been compelled, by reason of inability to provide a copy of a conditional fee agreement referable to the fees of Junior Counsel as had been ordered, to concede that in fact there had never been any such agreement entered into. This is despite the fact that a 60% success fee for Junior Counsel was claimed in the body of the bill which bill was certified by the conducting Solicitor in the usual way as being true and accurate. No satisfactory explanation of these extraordinary facts

has ever been proffered. Indeed, there are only two possible explanations. Either the false certification was a deliberate act of the Solicitor or, alternatively, the Solicitor has taken a singularly cavalier attitude to the certification of the bill. Whichever of these may be the correct explanation, neither is acceptable.

47. It will be recalled that in correspondence I had become frustrated with this same Solicitor's failure to provide the statement which I had previously ordered to be lodged so that I could put to rest my fears that the claim for privilege made in the course of the costs procedure was indeed made upon the client's instruction. Even by the date of this hearing no such statement had been lodged. At the hearing, Counsel sought to re-open arguments as to my power to make such an order. I refused to entertain any such argument, there having been no attempt to appeal the order in that regard. After a frank discussion and my clear indication that I required my order to be complied with, a short recess was granted and I was after some few minutes provided with a statement hand-written and signed by the Solicitor. It was admitted in the hearing by Counsel on behalf of the Solicitor that privilege had initially been claimed without any instruction whatsoever from the client. The argument put forward was that it was the Solicitor's duty to preserve the client's right to privilege. Quite frankly, such an argument was patently absurd insofar as it was intended to justify pursuing repeatedly a claim for privilege without ever referring to the client in the knowledge that such claim was obstructing any possible negotiation on the issue of costs. In the event, the Solicitor in his terse statement, verified by a statement of truth, confirmed that he had since discussed the matter with the client, had advised the client that he (the client) had an absolute right to claim privilege and had received no instruction to waive privilege. It is worthy of note that whereas my order was intended to adduce from the Claimant some reasoned justification for claiming the right to privilege, in the terms, perhaps, of an explanation of some material disadvantage arising from permitting inspection of the documentation, the only explanation given in the said statement was that privilege is an absolute right.

48. In the McCreery litigation, I have not required the lodging of a statement to explain the basis upon which the right of privilege is claimed. In the light of that which has transpired in the Ward litigation, I have no doubt whatsoever that my order would be met with a similarly unhelpful statement. Similarly, whether or not in the McCreery litigation the Solicitor is acting upon specific instruction from the client in claiming the right of privilege, I have to say that I have absolutely very strong suspicions that privilege is being claimed not for any true purpose of protecting the position of the Claimant but solely for the purpose of protecting the position of the Solicitor upon the issue of costs.

The Areas of Dispute

49. In both the Ward and the McCreery litigation, the Defendant raises dispute which can essentially be divided into two key areas:
    (a) In respect of conditional fee agreements and the related risk assessments objections are raised in general terms as to the enforceability of the conditional fee agreements. Thereafter, objections are raised as to the reasonableness of the success fees and other additional liabilities claimed to be recoverable.
    (b) As to the remainder of the bill, there are general challenges as to the reasonableness of the work undertaken, time taken etc.

50. Beyond all shadow of doubt say the Defendants, and I agree, the drive of the Civil Justice Reforms has shown clearly that openness encourages negotiation to settlement of issues. Lack of openness leads to entrenchment of positions and argument.

51. It necessarily follows that the more information that is provided to the paying party, the more likely a settlement is. The experience of this court, as outlined in the opening paragraphs of this decision very much reinforces that view.

52. The right to claim privilege is an important right - but those who claim that right without giving any consideration to the consequences, who claim it simply because it is an absolute right, endanger the process of justice by encumbering the court with contested hearings for no good reason.

53. In the Ward litigation, a copy of the conditional fee agreement has now been provided to the Defendant. That, it has to be said, has not brought about a settlement. The Defendant has now raised and submitted arguments based upon the alleged unenforceability of the conditional fee agreements in the ward litigation and the consequences of that unenforceability. The benefit of disclosure, however, has been that the Defendant has been able properly to focus the arguments to be brought before the court. Further hearings before the court will now be centered upon the essence of the dispute - whether the requirements of the Regulations have been met with regard to the conditional fee agreements and, if not, precisely in what manner there has been a breach and what are to be the consequences of those specific breaches. These are the true arguments which the court should address so that guidance can be given for the future after properly informed argument has been had.

54. Unfortunately, in the McCreery litigation the Claimant still is not prepared to take the same view as to the inspection of documents said to be privileged. The arguments put forward are simply expressed:
(a) It is submitted that the court simply has no power at all in the course of costs proceedings to order disclosure/inspection.
(b) It is submitted that the conditional fee agreement and accompanying risk assessment are privileged documents and thus are not open to inspection. (c) That the balance of the documentation which supports the claim for costs (attendance notes, counsel's advices etc) are privileged documents and thus are not open to inspection. It underlies each of the latter two arguments that the Claimant has an absolute right to claim privilege where it applies and cannot be called upon in any circumstances to explain the assertion of that right.

I turn to each of these submissions of the Claimant in turn.

Does the court have the power to order disclosure/inspection of documents in the costs process?

55. The argument in this respect as put before me involved, in my view, an erroneous view of the concepts of disclosure and inspection. Counsel appeared to confuse the two concepts and to use the words inter-changeably. For the avoidance of doubt, disclosure is the continuing obligation to advise the other party of the existence of documents relevant to the matters in issue. All relevant documents are, in the course of substantive litigation, necessarily disclosable. That is, their existence must be made known. A document is relevant if it bears upon an issue between the parties to the litigation, whether it supports or weakens the case of the party making disclosure or, indeed, whether it in fact supports the case of that party's opponent.

56. Inspection is the provision of access to the documents disclosed, so that their content can be examined. A party making disclosure must disclose the existence of all relevant documents, including privileged documents - but may object to the inspection of any document by stating briefly the ground of such objection - for example, legal professional privilege.

57. As I understand it, the Defendant contends that the court simply has no power to order disclosure and/or inspection in the costs process. In this context the Defendant relies upon **Goldman v Hesper**. With respect to counsel, that submission is based upon a confusion between the common English meaning of disclosure (laying open) and the modern day legal concept of disclosure (advising of the existence of a document).

58. I find such a submission untenable in modem day litigation. I will accept, without any in depth examination of the issue, that prior to the advent of the CPR the costs provisions of both the RSC and the CCR were regarded as "self-contained" code. This cannot any longer be regarded as the case.

59. The overriding objective set out in CPR Part 1.1 is applicable throughout the CPR. There is nothing which disapplies the overriding objective in the costs process. CPR 1.2 emphasises the obligation to give effect to the overriding objective in exercising any power or interpreting any rule. CPR 1.4 emphasises the need actively to manage cases and CPR 1.4(2) expressly states the need properly to identify issues at an early stage and to encourage the use of alternative dispute resolution. Informed negotiation is a means of alternative dispute resolution.

60. CPR Part 3 explains the court's case management powers. In particular, CPR 3.1(2)(m) emphasises that the court may make any order for the purpose of managing the case and achieving the overriding objective.

61. In addition to the general case management powers, the question of disclosure is specifically dealt with under CPR Part 31. In CPR 31.1(2) we find confirmation that Part 31 applies to all claims - except a claim proceeding in the small claims track. There is no reason to limit Part 31 so that it has no application in claims for costs.

62. The specific costs provisions are found at CPR Parts 43 to 48. These indeed contain the main provisions as to costs, dealing with the way in which the court will award and assess costs. These provisions, however, do not provide a complete self-contained code to the exclusion of all other parts of the CPR. I refer to the White Book and to the notes at 43.0.2 in this respect. In particular at 43.0.4 there is support for the proposition that the court's general case management powers extend into the costs process.

63. Indeed, logically, how can it be otherwise? Is it to be said that for some unstated reason the court is in the costs process bereft of the precise tool that may be required to define issues?

64. For these reasons, I find that in the costs process the court has all the case management powers available in substantive proceedings, including the power to order disclosure and inspection. At this point in my decision I accept entirely that as the law presently stands the Claimant can in giving disclosure claim privilege where it applies.

Are the conditional fee agreements and risk assessment documents privileged from disclosure/ inspection ?

65. The conditional fee agreements and risk assessments are disclosable - their existence must be made known. The existence, though not the full terms, of a conditional fee agreement (together with other prescribed information) is in any event to be made known to the other party by service of a notice upon issue of the proceedings or otherwise at the time of entering into a CFA if there is to be any prospect of recovery of additional liabilities (success fee, insurance premium). (Refer to CPR 44.15 and paragraph 19.2 of the costs P.D. as set out at 44PD.13 of the White Book).

66. Are these documents which attract privilege so as to preclude inspection by the Defendant? The doctrine of legal professional privilege is well established. The reasoning behind the doctrine is that a person must be able to consult with his lawyer in confidence, otherwise he may tell the lawyer only part of the truth. Therefore, the client needs to be sure that what he tells his lawyer will never be revealed without his consent. Equally, so the advice that is given to a client must be privileged. Letters and other communications between a party and his Solicitors are privileged from production, provided they are, and are sworn to be, confidential and written to or by the Solicitor in his professional capacity for the purpose of getting legal advice or assistance for the client.

Does a conditional fee agreement and/or a risk assessment document fall within this category of documents?

67. Section 58(3) of the Courts and Legal Services Act 1990 provides that all conditional fee agreements must be in writing, must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement, and must comply with requirements, if any, as may be prescribed by the Lord Chancellor. Section 58(4) provides that if there is a success fee, the conditional fee agreement must relate to proceedings of a description specified in an order made by the Lord Chancellor, it must state the percentage uplift on the fees which would be payable if it were not a conditional fee agreement and the percentage uplift must not exceed the percentage specified in relation to this type of proceedings by order of the Lord Chancellor. There is no question that the present proceedings are proceedings in which it is permissible to enter into a conditional fee agreement.

68. The relevant regulations are the Conditional Fee Agreement Regulations 2000. Regulation 3 requires that if the conditional fee agreement provides for a success fee, it must set out briefly the reasons for setting the percentage increase at the level stated. It must also specify how much of the percentage increase, if any, relates to the costs to the Solicitor of the postponement of his fees and expenses. The

Regulations further requires that, if the conditional fee agreement relates to court proceedings, it must provide that where the percentage increase becomes payable, and if the fees are assessed and the Solicitor is required to disclose to the court or any other person the reasons for setting the percentage increase at the level stated in the agreement, he may do so. This, of course, does not go so far as to require inspection to be given of the CFA or the underlying risk assessment. That however would be the simplest means of providing the information.

69. The regulations also contain specific requirements, which I will not set out in detail for the purpose of this decision, as to the information which must be provided to the client even before the agreement is entered into. There are also certain specific requirements as to the contents of the conditional fee agreement, signature variation etc. Suffice it to say for today's purposes that the provisions of the regulations are sufficiently complex to allow the position where inadvertently or otherwise there may be a breach of one or more of the provisions.

70. In the context of a detailed assessment hearing, the provisions of paragraphs 32.4 and 32.5 of the costs P.D. come into play (see White Book at 47PD5). Paragraph 32.4 requires the Claimant to serve on the defendant, amongst other things, details of the additional liability sought to be recovered. Paragraph 32.5 states what the required details are - I will not recount these in full here. Does the fact that the rules require only the disclosure of these limited details impact in any way upon the question under consideration? I find that it does not. The purpose of these paragraphs is to ensure that the basic information that a Defendant may require to take a view on the issue of the recoverability of the additional liabilities is available from the outset. It may be in some cases that the Defendant will be satisfied on the issue without further ado - though experience suggests that such cases will be very few and far between. These provisions cannot however impact upon the question as to whether the CFA and risk assessment documents attract privilege, which is an issue to be decided by reference to the substantive law.

71. In Dickenson **(Dickenson Equipment Finance) -v- Rushmer (T/A F J Associates)** (2001] All ER (D) 369, when commenting upon the allegedly privileged status of a client care letter, Rymer J indicated clearly that he was not satisfied that a client care letter, or the calculations showing what the client had in fact paid, were privileged. He stated that whilst a client care letter may contain advice or other material which would serve to cloak it with privilege, he could not see why a letter merely setting out the terms on which a Solicitor is to act for the client should be privileged: *"I can in any event see no good reason why the client care letter and a payment calculation should not have been disclosed to the paying party, since I have not been persuaded that they were privileged. But if anything in them might have been regarded as privileged, one course which might have at least been considered was the redaction from them of the privileged parts."*

72. Why then should a conditional fee agreement be privileged? Other considerations may apply to the risk assessment document, which necessarily may contain information beyond the purely financial/administrative information envisaged to be contained in a conditional fee agreement. However, in that respect, as Rymer J pointed out, that problem can be addressed by the redaction of truly privileged portions of the risk assessment. For my own part, as set out below when I come to a further consideration of the whole issue of privilege in the context of proceedings for the assessment of costs, I would doubt the correctness of such redaction in the majority of cases. I can accept that prejudice could be caused to the Claimant if the risk assessment was not covered by privilege during the course of the substantive litigation, but is there any true justification for the continued protection of the document once that stage of the process is concluded.

73. The CFA is not entered into for the purpose of giving advice. It does no more than serve the dual purpose of recording the terms of the retainer and complying with the requirements of the regulations. For these reasons, I find that a conditional fee agreement is not a privileged document, is to be disclosed and inspection of it permitted. In the Ward litigation, the conditional fee agreement has already been disclosed. In the McCreery litigation, the agreement was produced to me at the hearing. There was nothing within that document to cloak it in privilege and in the McCreery litigation, therefore, the conditional fee agreement must be disclosed.

74. As to the risk assessment documents, my understanding is that in the Ward litigation these also have been disclosed. In the McCreery litigation, they have not yet been disclosed. In my view, the risk assessment document are documents, inspection of which is necessary in order to confirm the most important aspect of the conditional fee agreement - that is, the success fee applied. I accept that the risk assessment is a document which is more likely than the conditional fee agreement to contain information which would as the law presently stands be regarded as privileged. One approach to that is of course to adopt the suggestion of Rymer J that privilege parts should be redacted. However, as will become apparent from the following paragraphs of my decision, I choose to adopt a varied approach to the issue of privilege where the documents in respect of which privilege is claimed are in fact the evidence by which the Claimant's claim for costs can best be assessed.

75. It should be mentioned at this point that the fact that the CFA and risk assessment documents are found to be documents for which privilege cannot be claimed does not render them documents of which disclosure, still less inspection, would have to be given in the substantive proceedings between the parties, to which proceedings these documents are entirely irrelevant. The relevance of these documents arises only in the context of the costs process.

The place of privilege in costs proceedings in the future.

76 The claimant contends that the position in respect of privilege is clear and settled - that there is an absolute right of legal professional privilege together with the right of litigation privilege arising where proceedings are in being or in contemplation. There are also other circumstances in which privilege may be claimed - " without prejudice" communications, documents tending to criminate or to expose to penalty etc. Coupled to the concept of privilege is also the recognised approach of the courts in controlling inspection of documents which attract public interest immunity or which contain confidential trade information. The defendant, conscious of my views expressed in the course of the hearing that in the context of the costs process the courts ought now to revisit and modify the concept of privilege in so far as it operates in this field, has contented itself in adopting those expressed views which now upon further consideration I affirm and set out below.

77 I have included within my consideration of the adaptation of the right of privilege all the documentation which forms the evidence upon which the claim for costs is founded. Although I have earlier found that the CFA and risk assessment documents are not privileged documents, nonetheless I have them in mind also when considering this aspect of my decision since clearly my decision as to their non-privileged status will in all probability be the subject of an appeal, which appeal may be successful.

78 To consider the final issue between the parties (whether the balance of documentation including CFA agreements and risk assessments are to be made available for inspection), we must examine more closely the justification for the continuation of the right to claim privilege after determination of the substantive litigation between the parties in circumstances where the documents in respect of which privilege is claimed are those documents which are the best evidence to support or otherwise the claim for costs.

79 I have already spoken above of the concept of legal professional privilege. I have referred also to the other circumstances in which a claim to the right of privilege may arise.

80 Again, as I have already mentioned, the willingness of the parties to costs proceedings to engage in a process of disclosure and inspection considerably contributed to the vastly improved record for settlement of costs disputes without the need for the involvement of the court. Even those cases which did not settle in full undoubtedly became more focused with a consequential saving in court time.

81 The experience of Judges generally allows them to see more clearly than most the considerable changes in approach to litigation brought about by "cards on the table" litigation. As already said, openness engenders informed and reasonable negotiation to a settlement or proper definition of issues.

82 In the costs process, the concept of openness comes into direct and stark conflict with the concept of privilege. Privilege of course exists in the substantive litigation which has led to the costs process. The

difference is that now, in the costs process, the application of the right of privilege operates to bar the paying party from a consideration of those documents which are in fact the very best evidence upon which the claim for costs can be assessed. Is that fair and reasonable?

83 In the vast majority of cases there is no true merit in claiming privilege. Put bluntly, the receiving party has nothing to hide. Consequently, in the vast majority of cases, privilege causes no difficulty as it is not claimed. In a small but significant minority privilege is claimed, and as a consequence informed negotiation is impossible. The parties and the court are dragged inexorably towards a contested hearing.

84 Again as I have already commented, unfortunately often one suspects that privilege is invoked for the protection not of the client but of the Solicitor. One often suspects, as in the Ward litigation, that the claim for privilege is invoked without reference even to the client, whose right it is.

85 1 trust that we would accept that a right which, if claimed, deprives the paying party of access to the evidence upon which the claim for costs is based is a right which any reasonable person would refrain from exercising save in the most compelling of cases. Sadly, that is not always so. The consequence then is that the Court is driven by unreasonable exercise of an absolute right to a contested hearing and the parties are embroiled in contested litigation without the prospect of proper, informed negotiation.

86 1 suggest that this is not a state of affairs which should be tolerated in modem litigation. How then is it to be addressed? The right of legal professional privilege is an absolute right - see R v Derby Magistrates Court ex p.B. Similarly, once the necessary ingredients of the other grounds upon which privilege can be claimed are in existence, in those instances also the right is to all intents indefeasible.

87 It will be recalled that in its initial form the CPR contained provisions which effectively disapplied the right to claim privilege where the documents in respect of which the right would otherwise be claimed were themselves evidence in the costs process. Those provisions were attacked as being ultra vires - purporting as they did to alter the substantive law by use of powers granted to promulgate regulations to deal with procedural matters. I would not question the decision in **General Mediterranean Holdings v Patel** that such attempted variation of the law relating to privilege was indeed ultra vires.

88 However, that does not mean that the courts themselves are not entitled to re-visit the law relating to privilege. The right to claim privilege is a right which the courts are entitled to tailor to meet the demands of changing society, of changing litigation. It is indeed the duty of the court to keep under review such concepts as privilege, concepts which place the rights of one party above those o€ another to the disadvantage of thast second party. The imbalance which such rights create gives rise to an obligation to ensure that as laws and the views of society change the disadvantage to the second party is not permitted to become greater than that which is truly justifiable. Whereas I would not argue against the law relating to privilege as it presently stands in the context of substantive proceedings, I am of the view that it is time for it to be revisited in the context of costs proceedings where, after the determination of the litigation, those documents in respect of which privilege may be claimed are the very documents by reference to which the claim for costs can only properly be tested.

89 In **R v Derby Magistrates Court**, Lord Taylor of Gosforth provides us with a learned exposition of the law in respect of legal professional privilege from the earliest cited case of **Berd v Lovelace** (1577) through to **Hobbs v Hobbs and Cousens** (1959) and later. At page 541 (line F and following) he gave consideration to the submission that there might be occasions in which the rule should yield to some other consideration of even greater importance, concluding that the drawback to any such approach is that once any exception to the general rule is allowed, the confidence of the client is necessarily lost. I have to question whether that is so if the relaxation of the right is properly controlled and safeguards are put in place to ensure that the client will continue to have the right to claim privilege where to refuse that right would indeed cause some prejudice to the client. It is already recognised that in proceedings brought by a client against his former solicitor alleging negligence the client is deemed to have waived the right of privilege in those documents which are relevant to the issue to be tried - see

Lillicrap v Nalder & Son (1993). The basis for such an approach is of course that the defendant must be at liberty to refer to the contents of the documents in the preparation of the defence, and the court itself must have access to the documents in order to do justice between the parties. The waiver so implied is limited to within the proceedings before the court and disclosure / inspection of the documents is subject to the implied undertaking that neither the documents nor the information contained within them can be used outside the proceedings. I suggest that costs proceedings are similar in nature to such proceedings in that the documents which form the best evidence upon which to judge the claim are documents to which privilege attaches.

90. Before I pass to develop this line of thought, I pause to consider the manner in which the rules now seek to deal with this issue. The relevant provisions of the CPR are to be found at Paragraph 40.14 of the costs P.D. and can be found at page 1039 of the White Book. A very useful overview of the operation of the provision can be found at pp-1014 -1016 of the White Book. The procedure which this envisages is as follows. If the document required to prove an issue is one in respect of which privilege is claimed, the receiving party must be put to his election. If the privileged document is opened up to inspection at this point, the paying party has the evidence needed upon which to base his points of dispute. It may be, of course, that such inspection as can be carried out in the middle of an assessment hearing is truly insufficient to give the paying party a proper opportunity to prepare objections. It may be that such late inspection leads to a request for an adjournment. Those are the risks.

91 But what if the paying party declines to open the document to inspection? It would appear that in those circumstances the receiving party is to be allowed to prove the disputed claim by reference to "other evidence". I ask, what other evidence? Oral evidence from the Solicitor involved as to the document in question? How is that to be elicited without disclosing the very privileged information protected by the right? Even if it is possible to bring forward in this way such evidence as may on the face of it establish the challenged item, how is the paying party to challenge it? What will such a procedure do to hearing times in a system already overloaded with arguments as to costs? How does such an approach serve the overriding objective ?

92 f we know, and we do know, that openness is the correct way forward, then how does this procedure serve openness? The answer is quite simply that it does not. Why then is this procedure tolerated? The reason must undoubtedly be that in the balance of things generally, the desire of society that people should be free to discuss openly with their legal advisers without fear of outside scrutiny of the content of their discussion is of greater weight than the right of a party paying costs to have those costs quantified after proper and informed argument.

93 But is this still true to the same absolute extent? Has the balance shifted? One very important shift in balance comes from the advent of conditional fee agreements, success fees and legal expenses insurance premiums. In a difficult case an unsuccessful Defendant may be expected not simply to meet base costs, but also a 100% success fee and a large insurance premium. In those cases, costs will have more than doubled. Even in the less complicated cases the combined effect of a success fee and a recoverable insurance premium can lead to a doubling of the overall costs.

94 Another important shift in emphasis is the greater recognition which we give to the true worth of openness. The requirements of the Human Rights Act, and in particular the demands of Article 6 of the convention, require the courts to ensure a fair trial. How can it be fair if the defendant is denied access to the evidence by assertion o€ an absolute right by the claimant?

95 A further consideration is the practical affect which the assertion of the right has upon the process of negotiation. We rightly now place great emphasis upon encouraging parties to negotiate their own settlements. Where the involvement of the courts is unavoidable, the parties must be able to reduce and define issues so that such involvement is kept to the minimum. This can only be achieved by informed negotiation.

96 The question therefore is are there any steps which we ought reasonably take to redress the balance? I believe that there are. The reasonable litigant who claims privilege does not do so in a blanket assertion of the right. The reasonable litigant does so only where it is indeed necessary to protect some

continuing purpose. He exercises his rights in accordance with natural justice, with the overriding objective, with the intention not of being solely self-serving but of affording his opponent the opportunity to come to a proper and reasoned position upon the issues, with the intention of affording to the court the opportunity to decide only properly focused and unavoidable contested issues.

97 Is it not then reasonable that the courts should now move to a reconsideration of the right to claim privilege in the context of costs proceedings so that it accords with that which a modem day society requires from its legal system? In contested costs proceedings, as in any other procedure, openness must be the starting point. Once the substantive litigation is concluded, the absolute right to claim privilege must end. Disclosure and inspection must be the norm. That said, there should be a continued right to claim privilege upon showing the justification for such a claim, upon showing a continuing good purpose for such a claim. What would such continuing good purposes be? I suggest here some examples, without wishing to be exhaustive:

(a) The real prospect of further litigation between the parties to which the document would be material and in the course of which further substantive litigation the documentation would be privileged.

(b) Where the costs process relates to .a class or type of litigation where there are other such claims still pending or likely to be brought before the court and the information in the documentation is material to those other claims and has not yet been open to inspection in those claims.

(c) Where the information in the documentation may lead to further civil or criminal process against the Claimant, whether by the other party to the current litigation or otherwise.

(d) Where the documentation contains information with regard to a technical secret.

I emphasise that this list is not intended to be exhaustive. The principle, however, should be clear - openness, inspection of documentation must be the way forward and fairness demands that such a norm must be disapplied only in cases where there is a continuing good purpose for the claim to privilege. The litigant claiming such continued good purpose must be under an obligation to set out clearly the basis of the claim.

98. It may be asked what this process would achieve of any import which is not already achieved by CPR? The answer is that it will give the paying party the right to examine the evidence at the outset of a contested costs process unless the receiving party puts forward an assertion of continued good purpose or for refusal to permit inspection. It will place on the receiving party, the party who is required to prove his case in the costs process, the obligation to do so by reference to evidence which has been made available for inspection - whilst at the same time preserving the right to decline to provide that documentation for inspection, that right now being qualified by reference to appropriate criteria. It will promote openness and experience shows that openness will lead to proper settlement of areas of dispute.

99. The provisions of CPR will not be redundant. They will become the "fall back" position for areas where the qualified privilege is claimed.

100. I accept entirely that what I propose here is an entirely new approach to this area of the law. There will be some who no doubt will consider it presumptuous for a District Judge to embark upon this path. I take this route because I believe most strongly that this is an area which requires review. It will be said that it is not my function to open up such debate, that I should follow the well-trodden path. I can only say that these are arguments which must be had. To my mind, the Ward and McCreery litigation on costs represents all that is wrong in the costs procedure. The true arguments which should be before the court are whether the conditional fee agreements are enforceable and, if they are not enforceable, what is the consequence of that unenforceability. Assuming the agreements are enforceable, then we have the "usual" arguments as to the reasonableness of the work undertaken, including arguments as to time taken. These arguments can only be addressed if we insist that our costs procedures are as open from the very outset as is the substantive litigation which comes before our courts. Particularly in litigation funded under conditional fee agreements there is understandable fear that Claimants effectively now are litigating in a no risk area. Comment has already been made at

higher levels as to the grave risk of abuse which thus arises - see **Callery v Gray**. In other contexts, comment has been made upon the lack of information which is available to the court so that it may properly understand the new costs regime brought about by conditional fee agreements. Are we then to refuse to insist upon the information which the courts require being brought before the courts and made the subject of proper scrutiny?

101 For these reasons in answer to the third point of dispute between the parties, it is my decision that, .subject to the right of the Claimant to continue to claim privilege for good purpose, the documents which form the evidence to substantiate the claim for costs should be disclosed and made available for inspection. I trust that in making the decision whether or not to assert a continued right to privilege for good purpose, the Solicitors will give a little more thought to the assertion of such a right than would appear to be the case heretofore in this litigation.

Orders

102. In the Ward litigation

(i) (In fact, this litigation has already been directed to a final assessment hearing as the parties felt that there having been disclosure of the conditional fee agreement this was appropriate. A detailed skeleton argument on the conditional fee agreement has already been submitted by the Defendant and there is in place a direction for the delivery of the Claimant's skeleton argument. There are still grumbling issues as to disclosure of other documents in that case and the parties should therefore seriously consider whether the final assessment hearing listed on the 11th February 2003 should proceed.)

(ii) The Claimant shall pay the Defendant's costs of the hearings on 25th September 2002 and those reserved from the hearing on 21st December 2001. Those costs are to be assessed at the conclusion of the Claimant's costs. The Defendant shall file and serve a schedule of those costs by 4.00pm 4th February 2003.

103. In the McCreery litigation

(i) The Claimant shall by 28 days give disclosure by list of: (a) all conditional fee agreements; (b) all risk assessments, and (c) all other documents being evidence of the claim to costs.

(ii) At that same time the Claimant shall offer inspection of the disclosed documents to the Defendant.

(iii) The obligation to give disclosure and to grant inspection is subject to the right if so claimed on the ground of justifiable continued good reason to claim privilege in respect of any specified document or any part of such document - in which case the Claimant must at the time of granting disclosure file and serve a statement setting out the justification for such a claim.

(iv) By 4.00pm on 8 weeks the Claimant shall report to District Judge Harrison setting out the present position as to disclosure, inspection and further negotiation. Upon receipt of such report, the Judge will direct further.

(v) Costs of and incidental to the hearing be the Defendant's to be assessed by summary assessment at the conclusion of the assessment of the Claimant's costs. The Defendant is to file and serve a schedule of such costs by b weeks.

104 In both Ward and McCreery litigation

Permission to the Claimant to appeal on all aspects of this decision, such permission being granted upon the basis that issues of general importance are raised.

Footnote

105. I am aware that I have not been addressed on the question of the costs of the hearing, nor with regard to the costs reserved previously. I have dealt with these aspects in line with that which I regard regard to be the inevitable outcome consequent upon my decision.

Dated this 24th day of December 2002

District MWA J J Harrison