JUDGMENT : Mr Justice Davis: QBD. 17th April 2008.

1. This is an appeal from a decision of 4 September 2007 of Master Wright, sitting as a Costs Judge on the assessment of costs in group litigation known as the Gower Chemicals Group litigation. Acting under the provisions of para. 40.14 of the relevant Costs Practice Direction supplementing Part 47 of the Civil Procedures Rules he ordered the receiving parties (the claimants in the litigation) to elect either to disclose certain experts' reports for which they were seeking recovery of costs, those experts' reports having not previously been disclosed in the litigation, to the paying parties (the defendants); or to decline disclosure and rely on other evidence.

2. It is said on this appeal by the appellants (the receiving parties) that this case involves an important question of practice and procedure relating to the operation of para. 40.14. The Master gave permission to appeal on that basis. For reasons which I will come on to explain, I am not so sure that any great point of general importance is in truth raised at all. But certainly the parties in this case seem to attach importance to the matter as between themselves.

3. The terms of para. 40.14 of the Costs Practice Direction are as follows:-

   "The court may direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision. These documents will in the first instance be produced to the court, but the court may ask the receiving party to elect whether to disclose the particular document to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence. "

   The Practice Direction thus confers a discretion ("may") on the Costs Judge.

4. The appellants say that the decision of the Master was wrong. They advance four grounds for that, saying that the Costs Judge:-

   "1. failed to identify a genuine issue, resolution of which required reliance on the contents of the undisclosed reports;

   2. failed to consider the contents of the documents himself in order to determine whether they were of sufficient importance to be taken into account at arriving at a conclusion as to their recoverability.

   3. failed to consider whether it was both reasonable, just and proportionate to put the Claimants to their election in respect of the documentation being disputed; and

   4. failed to balance the interests of the parties accurately or fairly by wrongly accepting the Defendants' submission that once a paying party states that it does not wish to deal with the matter on an informal basis the receiving party should be put to their election."

Background

5. The background to the costs assessment relates to what was, as Master Wright said, hard fought litigation between the parties. The background is very helpfully and fully set out by Master Wright himself in a previous judgment of his given in the detailed assessment on 20 July 2006.

6. In summary, the First Defendant (Gower Chemicals Limited) received a large consignment of the chemical Freon at their premises at Crymlyn Burrows in Swansea on 16 August 1996. A shortfall in delivery was noted and an employee reported that chemicals had been leaking from the tanker as it was unloaded. No further steps, however, were taken. On 10 October 1996 two Council employees were working at a sewage pumping station in Crymlyn Burrows (for which Neath and Port Talbot Borough Council had responsibility). There had been a reported blockage. One worker, Mr Preece, went into the chamber. He was overcome by toxic fumes and collapsed. The other, Mr Simpson, went to his aid. He also was overcome. A neighbour, Mr Fearn, gallantly sought in turn to rescue him: he too was overcome, but was rescued. Tragically, Mr Preece and Mr Simpson both died. Police, fire-fighters, ambulance workers and members of the public also attended at the scene.

7. Many people reported varying ill-effects of exposure to what turned out to be the past spillage of Freon. Many claims were brought by members of public services, council workers and other members of the public, as well as by Mr Fearn and the estates of Mr Preece and Mr Simpson: the proceedings being commenced variously between August and October 1999.

8. Prosecutions were successfully brought against the Council and the company for breach of the relevant regulations. Substantial fines were imposed. At the inquest, a verdict of unlawful killing was returned. However, the defendants made no admissions of liability in the civil proceedings.

9. The claimants were variously represented by various firms of solicitors. On 23 November 2000 HHJ Graham Jones, sitting in the Cardiff County Court, made a group litigation order. On 19 April 2001 judgment was entered by consent in the cases of Mr Preece deceased, Mr Simpson deceased and Mr Fearn. The remainder of the litigation proceeded. At various stages, remarks were made in court by the defendants and by the judge himself about the lack of clarity or particularity of the claimants' case. In addition, however, at various stages orders for specific disclosure were made against the defendants. By early 2002 fresh leading counsel had been instructed for the claimants. It is not disputed that the claimants' case acquired (at the very least) a much sharper focus at that stage: as the defendants would say, it changed very significantly.

10. At a hearing on 27 March 2002, Judge Graham Jones gave a number of directions. These included leave to adduce expert evidence in four specified disciplines, as well as other matters.

11. In the event, and after further steps in the litigation, mediation on 31 July 2003 resulted in the settlement of most of the claims. The remaining claims were thereafter also settled before trial. It was agreed (subject to some

exceptions) that the defendants should pay costs on the standard basis, to be subject to a detailed assessment if not agreed.

12. Those costs have never been agreed. On the contrary the claimants' solicitors' claims for costs have been hotly disputed. It is the case, as I was told, that the total costs claimed are in the region of £1,935,000 (as against total damages paid of £838,029).

13. Regrettably, one can perhaps sense a degree of mutual antipathy between the legal teams for the claimants and for the defendants. The claimants take the view that the defendants were in the defence of the claim unnecessarily obdurate and unrealistic in disputing liability; and were lamentable in their disclosure obligations, thereby causing delay, difficulty in the pursuit of the claim and a great increase in costs. The defendants take the view that the claimants' case was (save, perhaps, with regard to Mr Preece, Mr Simpson and Mr Fearn) unfocused and unparticularised: indeed that the claimants were advancing a case said "clearly going to be doomed" until rescued by new leading counsel. At all events, the assessment of costs, which started during 2006, has itself also been very protracted and there have been already a number of lengthy hearings before Master Wright. Master Wright thus had, by the time he gave his decision on 4 September 2007, a very good knowledge indeed of the litigation background and documents, and indeed had by then concluded the assessment of many items of costs. There were, I gather, a number of bills of costs, costs having been claimed both generically and in respect of each individual successful claimant.

The present decision of Master Wright

14. By 19 July 2007 Master Wright had come to the part of a Bill of Costs (item 202) where he had to assess the costs of a report (from a Dr Ferner, toxicologist). This was an expert report obtained by the claimants but not disclosed to the defendants in the proceedings. There were a number of other expert reports (also thereafter itemised in the Bill of Costs and for which costs were being claimed) which likewise had not been disclosed to the defendants in the litigation. I was told that all or most of these reports antedated the involvement of the new leading counsel in early 2002 who had, as it was said, advised a change of tack in the presentation of the case: and other reports of other experts were then obtained by the claimants and disclosed. It was common ground before me that the undisclosed reports were privileged. I have not myself been shown the Bill of Costs; but significant sums, I gather, of over £30,000 (with possible consequential costs also) are claimed in respect of these undisclosed reports.

15. Up to that stage in the assessment the parties had been content for the Master where necessary to look for himself at otherwise privileged documents and make his assessment accordingly – an informal, sensible, pragmatic and time and cost saving procedure. But when the assessment came to these reports – starting at item 202 – the defendants (paying parties) indicated that they were not content with that to continue. They accepted they had no absolute right to see these (privileged) reports. But their position was that if the claimants (receiving parties) wished to rely on those reports for the purpose of recovering the costs of them and wished the Master to see them, then privilege would be waived; and the paying parties should, in fairness, then be entitled themselves to see the reports and make comments on them with regard to recoverability of the costs of those reports – this arising, of course, in the context of item 202 having been reached. At that stage, that report, and the other undisclosed reports, had thus far not been placed before the Master for his specific consideration.

16. The Master adjourned the matter for further argument. Extensive argument was addressed to him on 4 September 2007, over several hours. He then gave his decision.

17. At the outset of his judgment, he summarised the position in this way:-

"In this case the detailed assessment, which is being conducted over a fairly extensive period so far, has reached the point where certain reports by scientific experts have been arrived at. Those reports are not reports which have been disclosed to or exchanged with the paying party. The discussion is about whether the reports are reasonable in the context of the amounts of money which are being sought for them and also reasonable having regard to what the reports say and whether, basically, they are worth the money that the paying party is being asked to pay for them . So it is a question really of the quantum the paying party is being asked to pay for these reports which the paying party has not seen."

18. He then noted the informal position thus far adopted by the parties with regard to his seeing privileged documents: and noted that the paying parties were now objecting to such an approach with regard to the undisclosed reports for which substantial sums were being sought. He then summarised the competing arguments, referred to para. 40.14 of the Practice Direction and in conclusion said this:-

"10. It is quite evident from that that if the paying party does not, in relation to certain documents, want to go down the informal route, the court has to be extremely careful to ensure that the parties are on an equal footing. There are two competing interests which are, of course, repeated in the European Convention on Human Rights. One is that a party is entitled to keep confidential privileged documents and is not obliged to show them to the other side if it does not want to. The other principle is that both sides must be entitled to see the same documents in order to have a fair assessment.

11. In my judgment this is a case where the court should not look at these documents – the detailed assessment having already begun – for the purpose of the argument about the reasonableness of the sum of money involved, the reasonableness of the report and whether it is worth the money that is being asked for. The court should not see

those documents if the receiving party is not willing to disclose them to the paying party. The correct approach is set out in Costs Practice Direction 40.14:

'These documents will in the first instance be produced to the court' – which they have been under 40.12 – 'but the court may ask the receiving party to elect whether to disclose the particular document to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence.'

12. It seems to me that the only way in which I can reasonably ensure, or try to ensure, that both sides are playing on a level playing field is to ask the receiving party to make that election. I think that that stage has been reached. As I say, the reason it has been reached is because the paying party does not wish to have these particular issues – the issue of reasonable amount to be paid for these documents – decided in an informal manner; it wants to know what is in the documents."

The submissions

19. Mr Foy QC, on behalf of the appellant receiving parties, says that the Master's approach and conclusion was wrong. He says that the Master's decision was in fact premature. He submits that the Master should have adopted a five stage procedure. First, the Master should assess whether the receiving parties were relying on the documents; second, he should assess what issue arose; third, he should then consider the contents of the documents for himself; fourth, having done that, he should decide whether the contents of the reports were of sufficient importance to influence a decision on the identified issue and on recoverability; finally, and only then, he should, balancing the relevant considerations, exercise his discretion as to whether to put the receiving parties to their election, having regard to what was reasonable, just and proportionate. In further argument, Mr Foy maintained that unless the Master himself saw the documents he would not be in a position to determine the identified issue, whatever that may be, or to assess properly whether the documents were of sufficient importance on the question of recoverability.

20. Mr Foy complains that, as he submitted, the Master in effect simply decided to put the receiving parties to election once, and purely because, the paying parties had declined to continue with the previously agreed informal approach: and that the consequence was that it was the paying parties who had in effect compelled the decision to put the receiving parties to election. He said, indeed, that the Master had not exercised any discretion of his own at all. Mr Foy yet further said that such a course as adopted by the Master could set a bad precedent and for the future unseat the informal procedure (viz. letting the Costs Judge in any particular case see documents for himself) which has, desirably and customarily, as he said, been adopted in most costs assessments.

21. Mr Friston, on behalf of the respondent paying parties, said that the key here was fairness and equality of arms. He said that the Master was being in terms asked by the receiving parties to look at privileged documents – thereby connoting a waiver of privilege – and to make a decision by reference to them: in circumstances where the paying parties would have had no chance to see them or make submissions on them, whether as to their importance or otherwise. He said that it was self-evident that the contents of these undisclosed reports would bear on the ultimate issue of recoverability; and thus, if the receiving parties wanted to rely on them, the paying parties should have the chance to see them and make submissions on them. He said that the paying parties were justified, at this stage of the assessment, in departing from the informal approach previously adopted, given that these were complex scientific reports, not previously disclosed in the litigation, for which very substantial costs were being sought. Thus, he said, it was clearly right in such circumstances that the receiving parties should be put by the Master to their election as they were.

22. I was referred to a number of authorities.

23. In ***Pamplin v Express Newspapers Limited*** [1985] 1 WLR 689, the situation had to be assessed under the provisions of the erstwhile and unlamented RSC 0.62. The plaintiff, a determined litigant, wanted to see all the documents lodged by the receiving parties at the outset of a taxation of costs. In his judgment, Hobhouse J noted the potential conflict between two legal principles: one, which he called the principle of natural justice, meant that if one party wished to place evidence or persuasive material before the tribunal then the other party must have the chance to see it and address the tribunal on it. (That of course is also now a principle arising under Article 6 of the European Convention on Human Rights: see ***Krecsmar v Czech Republic*** [2001] 3 EHRR 41 at paragraph 40.) The second principle was the right in law to keep confidential documents which were covered by legal professional privilege.

24. Hobhouse J further noted that on a taxation of costs the proceedings were essentially adversarial. He then said this:-

"At the taxation a problem may arise. An issue of fact may emerge which necessitates the master making formally or informally a finding of fact. In such a situation, the master may have to ask the claimant what evidence he wishes to rely upon in support of the contested allegation of fact. The respondent may then take the stand that if the claimant wishes to adduce evidence, he (the respondent) wishes to see it and comment on or contradict it. This will mean that the claimant will then have to elect whether he wants to use the evidence and waive his privilege or seek to prove what he needs in some other way. The type of situation which this visualises is where, in the ordinary course, the claimant would seek to prove his allegation by simply producing a document. If, however, the respondent objects to the claimant using the document without his seeing it as well, the claimant may prove the allegation in another way. For example, if it is the solicitor who conducted the litigation who is attending the taxation, by that solicitor formally or informally giving oral evidence. The respondent could then formally or informally cross-examine the solicitor. The master would then decide, having taken into account any counter-evidence relied upon by the respondent, whether he

accepted the claimant's allegation. I do not visualise that this would happen, at least not often, but it does serve to illustrate the essentials of the situation."

25. A little further on he said this:-

"But it is the duty of the Master, if the respondent raises a factual issue which is real and relevant and not a sham or fanciful dispute, to require the claimant to prove the facts on which he relies. The claimant then has to choose what evidence he will adduce and to what extent he will waive his privilege. That is a choice for the claimant alone."

He commented, however, that the insistence of a paying party on the "*more formal approach*" should be rare and normally little or nothing would be achieved by asking to see the documents. He also commented that it was "*well within the expertise and discretion of the Master*" to decide when in truth a factual issue needed deciding; and pointedly further noted that if the Master was to be given power to decide an issue on the basis of material which the respondent is not to be allowed to see power to do so needed to be conferred expressly by the Rules.

26. On the facts of ***Pamplin,*** the application was rejected as a "fishing expedition", the plaintiff having requested at the outset to see all the documents, without exception, initially lodged pursuant to the Rules of Court. That is quite different from the present case, where the assessment is well advanced and the paying parties are at this stage seeking to see certain items only (being the undisclosed expert reports) in respect of which substantial sums of costs are sought to be recovered.

27. In ***Goldman v Hesper*** [1988] 1 WLR 1238 the question of entitlement to inspection of privileged documents again arose, under the RSC regime. In the course of his judgment Taylor LJ said this:-

"… It follows that once a party puts forward privileged documents as part of his case for costs some measure of their privilege is temporarily and pro hac vice relaxed. In most cases, as Hobhouse J observed in ***Pamplin's*** *case [1985] 1 WLR 689, 695, no problem would arise on taxation about privilege. However, when the problem does arise the taxing officer has the duty of being fair to both parties: on the one hand, to maintain privilege so far as possible and not disclose the contents of a privileged document to the paying party unnecessarily; on the other hand, he has to see that that party is treated fairly and given a proper opportunity to raise a bona fide challenge. The contents of documents will almost always be irrelevant to considerations of taxation which are more concerned with time taken, the length of documents, the frequency of correspondence and other aspects reflecting on costs. In my judgment, the approach adopted by Melford Stevenson J in the* ***Hobbs case*** *[1980] P.112 was too rigid and uncompromising. There may be instances in which a taxing officer may need to disclose part , if not all, of the contents of a privileged document in striking the appropriate balance. He will no doubt use all his expertise and tact in seeking to avoid that situation wherever he can. I do not envisage it occurring, except very rarely. Of course it is always open to the claimant not to rely on privileged documents which he regards as peculiarly sensitive."*

Mr Foy emphasised that Taylor LJ contemplated that the need for such disclosure would be very rare. It seems to be the case, however, that no Practice Direction containing the present para. 40.14 (or its equivalent) was in place at that time.

28. In ***Dickinson v Rushmer*** [2002] Costs L.R.128 again there was an issue as to disclosure of privileged documents on an assessment of costs: one issue being whether the indemnity principle had been breached. The factual position thus was significantly different from the present. However, Rimer J conducted a thorough and helpful review of the authorities. Having cited ***Goldman v Hesper*** he said this at paragraph 18 of his judgment:-

"18. In ***Goldman,*** *the Court of Appeal therefore recognised that the requirements of fairness as between the receiving and paying party may result in a need for the costs judge to require any privileged document on which reliance is placed to be disclosed either wholly or at least partially to the paying party, or at least to that party's lawyers. If I may respectfully say so, the most basic concepts of fairness appear to me to make that approach almost self-evident."*

After further citation of authority, and review of the arguments before him Rimer J said this at paragraph 32:-

"32. The situation was, therefore, one in which a problem arose at the detailed assessment of precisely the type that Hobhouse J had referred to in the ***Pamplin*** *case at [1985] 1 WLR 696. It was one which involved an issue of fact which the costs judge had to decide. It appears to me to be obvious that as soon as it became clear that the claimant was proposing to support his own case on the point by reference to documents which he was not willing to disclose to the defendant, the costs judge should have considered whether that course was consistent with one of the most basic principles of natural justice, namely the right of each side to know that the other party's case is and to see the documentary material that he is relying on so that he can make his own comments on it. The point is comprehensively explained by Hobhouse J in the* ***Pamplin*** *case, and I regard his views as being just as valid now as they were then. In his judgment, Hobhouse J made suggestions as to how the court might approach a problem such as came before the judge in the present case. But it is not apparent that the judge had those guidelines in mind. He was content to decide the matter by reference, amongst other things, to a consideration of documents which claimant provided only to him and kept from the eyes of the defendant. Moreover, in his written reasons the judge referred to his decision on the point as being by reference to what he had "seen and heard" and the inference must be that these documents played a part in his decision."*

29. In ***South Coast Shipping Co Limited v Havant BC*** [2002] 3 All ER 779, paragraph 40.14 of the Practice Direction was directly invoked. Pumfrey J ruled that paragraph 40.14 of the Practice Direction was compatible with the requirements of the Convention. (That was agreed before me as correct.) He further decided that once a document - and I think by that he included the contents of a document - is "of sufficient importance to be taken

into account in arriving at a conclusion as to recoverability then, unless otherwise agreed, it must be shown to the paying party or the receiving party must content himself with other evidence": see paragraph 29. He said this at paragraph 30:-

> *"30. This is not intended to suggest that the costs judge may potentially put the receiving party to its election in respect of every document relied on, regardless of its degree of relevance. I would expect that in the great majority of cases the paying party would be content to agree that the costs judge alone should see privileged documents. Only where it is necessary and proportionate should the receiving party be put to his election. The redaction and production of privileged documents, or the adducing of further evidence, will lead to additional delay and increase costs."*

It is to be noted that in the circumstances of that case, although dismissing the appeal on other grounds, Pumfrey J accepted that in principle the Costs Judge should have put the receiving party (South Coast) to its election under paragraph 40.14 of the Practice Direction: see paragraphs 57 and 60.

30. I was also referred to, and bear in mind, a number of other cases, including ***Bailey v IBC Vehicles Ltd*** [1998] 3 All ER 570; ***Hollins v Russell*** [2003] 1 WLR 2487; and ***Hazlett v Sefton MBC*** [2000] 4 All ER 887. These were of only limited assistance in my view, in part because they related to the issue of disclosure for the purposes of establishing (or challenging) a retainer. But Mr Foy said, correctly in my view, that they at least support the proposition that a real or genuine issue must be identified before putting a party to his election should be contemplated.

Disposition

31. Having considered the arguments before me, I consider that the Master exercised his discretion properly in this case and that he was fully justified at the stage of the assessment that had been reached – and paragraph 12 of his judgment shows that he had indeed had regard to the stage of the proceedings reached – given the situation that had arisen, in putting the receiving parties to their election. He was not wrong to do so.

32. The first thing that seems to me obvious is that an issue had been identified which was *"real and relevant and not a sham or fanciful dispute"* (***Pamplin)*** or "*genuine"* (***Hazlett)*** or "raising sufficient doubt to make it necessary to go into the matter"(***South Coast***): the precise test does not, as it seems to me, much matter for present purposes. This was no fishing expedition. Mr Foy asserted, relying on ***Goldman v Hesper***, that the contents of the reports were irrelevant: it was the fact of the reports that mattered. If that were indeed so, however, it is rather hard to see how this whole debate need have arisen: the receiving parties could, if they really considered the contents of the reports irrelevant, simply have said that they did not propose to rely upon the contents of the reports themselves to establish recoverability. Mr Foy repeatedly asserted that the receiving parties had only asked the Master to see them to help him decide the issue of election: not of recoverability. But even if that were right (and I am sceptical) the position would still be – as Mr Foy had to accept – that a judicial decision as to whether or not to require election would have been made without one side (the paying parties) having any chance to comment on the documents which the other side (the receiving parties) was seeking to put before the Master to enable him to make up his mind one way or another. In the circumstances of this case, that was not fair or necessary. Moreover, the paying parties would be left with the uncomfortable knowledge that, if the receiving parties were thereafter put to their election and did elect, the Master would by then have (as requested by the receiving parties) *specifically* seen and carefully studied the reports: it might not be easy for him then to put them out of his mind. In fact, matters go further. As the Master noted in paragraph 5 of his judgment, the receiving parties were inviting the Master among other things to consider, after he had studied for himself the reports, whether to continue with the previous informal approach. That means, if he did decide to do that and to continue with the previous informal approach, that he could indeed thereafter have regard to the contents of the reports on the issue of recoverability. But what sort of fairness is that to the paying parties: who have no idea of the contents of the reports and no means of addressing the Master as to the weight to be attached to them for the purposes of assessing recoverability? That that scenario continues to be an option the receiving parties continue to keep open was in effect confirmed by the – to me, very surprising – statement, made on instructions, by Mr Foy (on my query) to the effect that the receiving parties do not yet know, or cannot say, whether they will be relying on the contents of the various reports for the purposes of the costs assessment.

33. That a real and relevant issue had already arisen, without the Master being required first to see the reports to assess whether it had, in my view is sufficiently established by the very fact that these reports had never been used or disclosed in the litigation, although other experts' reports subsequently had been. I would for myself expect in such circumstances a Costs Judge, for that reason alone, to want to see such a report if its costs were to be sought to be recovered and, in consequence, to permit the paying parties also to have the opportunity of seeing them, subject to para. 40.14. Besides, if more were needed there was more: for it was known to the Master that the claimants' new leading counsel in 2002 had advised a change of tack in the way the claim was advanced and it was also known that new leading counsel had been less than complimentary about some of the reports previously obtained (and some of which were not, in the event, disclosed). As Mr Friston submitted, this raised a real concern as to whether the paying parties were being asked to pay twice for the preparation of the claimants' case and/or whether they were being asked to pay for reports which were of no value and/or whether those reports had only been prepared for a case which at that time (so the paying parties say) could not succeed and thereafter had to be, and was, changed radically. I reject Mr Foy's assertion that the contents of these reports were likely to be "irrelevant" or "of no material significance" on the question of recoverability.

34. In fact, I had great difficulty in understanding why the receiving parties here – unless it be general wariness of setting a precedent to these paying parties for the future of this assessment – were so reluctant to let the paying parties see these reports. The litigation was over. Disclosure of such reports, even if privileged, could hardly matter very much at this stage. I accept that a party is not positively required further to justify a lawful claim to privilege: even so, I got no clear explanation from Mr Foy as to why the receiving parties were not prepared to disclose at this stage. No prejudice was identified. The impression I rather got in fact was that the receiving parties did not want to bring about, by disclosure, a painstaking and time-consuming dissection by the paying parties of these reports on the issue of recoverability of costs – an exercise which the receiving parties would view as being of no real purpose. But even then I do not think that satisfactory. First, if a "painstaking" analysis could result in showing that some or all of the costs claimed should be disallowed, why should the paying parties be precluded from such an analysis? Second, if the "painstaking" analysis in truth leads nowhere then the Costs Judge can cut it short and intervene by robust trial management; and in any event the Costs Judge could (as Mr Foy and Mr Friston both agreed) impose a costs sanction.

35. In my view, that fairness required putting to the receiving parties at this stage to their election in the circumstances of this case is consistent both with the observations and with the approach of Hobhouse J in ***Pamplin,*** Rimer J in ***Dickinson*** and Pumfrey J in ***South Coast***. It is in no way inconsistent with ***Goldman v Hesper***: on the contrary it meant that the paying parties were "*given a proper opportunity to raise a bona fide challenge*". No doubt such a situation is indeed relatively rare: just because parties pragmatically choose to adopt an informal procedure. But it can happen. Here, in the context of undisclosed expert reports, for which very substantial costs were being claimed and which the receiving parties were prospectively asking the Costs Judge to look at, the paying parties were justified in saying they wished themselves to see and make submissions on the contents of such reports if the receiving parties wished to rely on them. That very much accords with the "*cards on the table*" approach which is, generally speaking, encouraged in modern litigation.

36. Turning then to the first ground of appeal, it follows that must fail. The Master was plainly right to proceed on the footing that a real issue had been identified – viz. whether the receiving parties should be entitled to pursue recoverability of the costs of undisclosed and unused expert reports: undisclosed reports obtained, moreover, in support of a then claim which thereafter changed significantly and in respect of which claim (as changed) other reports – for which costs also were being sought – had been put in and disclosed in the litigation.

37. The second ground also fails, for the like reasons. A real and relevant issue having arisen already, there was no need for the Master for such purpose to inspect the documents himself. In any event – quite apart from the *perception* of unfairness that could have been created – a Judge ordinarily will, on specific request to do so, be reluctant to seek to look at potentially important documents which he subsequently may be required to put out of his mind. Of course, that not infrequently does happen and judges (as Hobhouse J noted in ***Pamplin)*** are equipped to deal with such a situation. But it is not ideal. In the present case the Master was being positively encouraged (by the receiving parties) to read the reports closely. It is easy to think – and certainly the paying parties would think - that the receiving parties were so inviting the Master just because the receiving parties considered that to be to their own advantage. That the contents of the reports at the least could potentially thereafter be relevant on a conclusion as to recoverability is in fact consistent with this very ground of appeal, as formulated: even if, as the receiving parties assert, the Master was at that stage only being asked to look at them for the purposes of a decision on election.

38. The third ground is devoid of substance. As Mr Friston pointed out, judges always do endeavour to make discretionary orders which are reasonable, just and proportionate. The failure of the Master in this case expressly to intone that as a mantra does not mean that he had failed to consider those concepts (any more, conversely, than the intonation of such mantra can save a discretionary decision which manifestly is unreasonable, unjust and disproportionate). In the present case it is plain from the judgment read as a whole that the Master considered that, in this case, justice and fairness required that the receiving parties be put to their election. It is, to my way of thinking, wholly unsurprising that he did so.

39. The final ground also fails, for the like reasons. In any event, that ground wrongly categorises the position as advanced by the paying parties. No paying party can invariably and automatically compel the putting of the receiving party to his election simply by declining to deal with the matter on the (usual) informal basis – as ***Pamplin,*** for example, illustrates and, as is confirmed by the discretionary terms of para. 40.14. But that is not this case. In this case, the paying parties had, sensibly until then, accepted the informal procedure: it was only at the stage of the assessment of the costs of these undisclosed expert reports for which substantial costs were being claimed that they sought disclosure (if the receiving parties intended to rely on them). These reports were potentially of substantial importance and there was a clear issue arising on this; and there was clear justification for the paying parties to seek to see these reports, if so relied on by the receiving parties.

40. In argument before me – although not in the grounds of appeal – a point was taken that the Master should have confined his ruling to item 202, and not dealt with the other undisclosed reports as well. But the argument before the Master proceeded generically; and there was no reason in principle, on the general arguments put before him, for him to distinguish between these reports. I reject this complaint. Besides if hereafter there is a debate on the other reports, as each item falls individually to be assessed, the receiving parties will not be shut out from particular arguments properly open to them on each particular item, as Mr Friston accepted.

41. Generally I would, with respect, rather deprecate the very rigid and schematic procedure advocated by Mr Foy as that which was required – as he asserted – to be followed in this case by reference to para. 40.14 and in all comparable cases. Costs Judges have, and for good reason, wide and flexible discretionary powers under the Rules and Practice Direction; and it is not generally helpful to circumscribe the procedures they may adopt.

42. In the present case the procedure adopted here by the Master, after hearing full argument, was fair and was designed to produce a fair and just outcome on the point arising. In my view, in this case the Master was fully justified, at the stage that had been reached, in deciding to put the receiving parties to their election. Nor, I might add, can I see any real prospect of such a decision leading to floodgates opening, as Mr Foy submitted in somewhat doom laden terms.

Conclusion

43. This appeal fails on all four grounds advanced and is dismissed.

Mr John Foy QC (instructed by Irwin Mitchell) for the Claimants
Mr Mark Friston (instructed by Morgan Cole) for the 1st and 2nd Defendants