Master Wright 19th August 2004

1. The background to this matter is explained in the narrative to the Claimant's bill of costs.

2. The Fifth Defendants ("TW") raised a number of general points of dispute in their points of dispute dated 4 February 2004. The hearing which took place on 19 August 2004 related to two of those general points.

3. The first ("G1") relates to proportionality. The second ("G4") relates to hourly rates.

4. The Claimants replied to the points of dispute on 20 July 2004.

5. At the hearing TW was represented by Ms Judith Ayling of Counsel who provided a helpful skeleton argument in support of G1 and G4 of the points of dispute.

6. Ms Ayling referred to the Settlement Agreement dated 13 August 2003 ("*the Settlement Agreement*"). Paragraph 8 provides that TW will pay the Claimants their costs on the standard basis (*including pre-action costs which themselves include the Claimants' costs of and incidental to the mediation in December 2002*) incurred up to the date of the Settlement Agreement against or relating to any of the Defendants. In default of agreement there was to be an immediate detailed assessment of those costs rather than at the conclusion of the proceedings and there were provisions for the payment of interest.

7. Paragraph 10 of the Settlement Agreement provides the Claimants should not be entitled to recover certain elements of costs which are there set out.

8. Dealing firstly with point of dispute G1 (proportionality) Ms Ayling said that the claim had been settled at an early stage. The claim form which had been issued in December 2002 (for limitation reasons) had not (by agreement) been served until July 2003 and no Particulars of Claim had been drafted. It was not she submitted an especially difficult case nor one of very high value.

9. In essence the Claimants sold their shares in Holland Studio Craft Limited in January 1996 for about £1,000,000. Unless reinvested the Claimants faced a liability to capital gains tax of about £400,000. The Claimants reinvested about £750,000 which qualified for Enterprise Investment Scheme tax deferral relief. The Claimants later application for relief in respect of the reinvestment of the balance was rejected by the Inland Revenue in November 2001 as being out of time. The Claimants pursued the Defendants for the lost opportunity to obtain relief on the reinvestment of about £250,000 and therefore to defer the payment of any tax on their unsheltered gain.

10. The Claimants were exposed to a claim for tax of 40% on the sum of £250,000 plus interest and a possible penalty of between 0% and 100% of the tax. The initial protocol letters sent to the Defendants on 24 December 2001 referred to a potential overall liability of £165,000 (£100,000 tax, interest of £40,000 and a penalty of 25% of the tax being a further £25,000).

11. In the event, in about April 2003 the Inland Revenue agreed to extend the time limit and the immediate liability fell to under £10,000.

12. The claim settled for £47,000, a substantial proportion of which sum related to costs already incurred in mitigating the Claimants? tax liabilities (see paragraph 10 of the Settlement Agreement). Those costs amounted to £33,750 plus VAT.

13. The Claimants' bill for detailed assessment is for a little over £190,000. Ms Ayling submitted that this was disproportionate.

14. She submitted that the prospect of a demand from the Inland Revenue was not a licence to incur disproportionate costs. Nor was the fact that the litigation was being funded under a conditional fee agreement, so that the Claimants bore no liability for profit costs if they lost, a licence to incur disproportionate fees.

15. Ms Ayling submitted that identical initial letters had been sent to the Defendants in December 2001 and then identical formal pre-action protocol letters had been sent in July 2002. This was not, she submitted, a case where the involvement of several defendants meant that the Claimants raised different causes of action against each of them and therefore costs were thereby greatly increased.

16. She submitted that whether the claim's value was the settlement sum of £47,000, or £165,000 as mentioned in the initial letters of December 2001, or even £250,000 the costs claimed of £190,000 were disproportionate.

17. Ms Ayling submitted that there was no indication of proper litigation planning by the Claimants. She cited the passage from the judgment of Her Honour Judge Alton in ***Jefferson v National Freight Carriers*** which had been cited and approved by Lord Woolf CJ in ***Lownds v Home Office*** [2002] 4 All ER 775: *"In modern litigation with the emphasis on proportionality there is a requirement for the parties to make an assessment at the outset of the likely value of the claim and its importance and complexity and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial and the likely overall cost."*

18. She submitted that there had been no urgency in the matter when the letters of 24 December 2001 had been sent to the Defendants because a decision had already been taken that judicial review proceedings would not be appropriate. Nevertheless considerable costs were incurred by the Claimants in correspondence before they sent their formal pre-action Letters of Claim on 19 July 2002. That correspondence did not, she submitted, comply with the Professional Negligence Pre-Action Protocol.

19. Ms Ayling submitted that no formal costs estimates had been given by M&S to the Claimants or the Defendants although figures had from time to time been given to the Defendants. She submitted that there is a duty under rule 15 of the Solicitors? Practice Rules and the Solicitors? Costs Information and Client Care Code to provide costs estimates.

20. She referred to the "client care" letter sent by M&S to the Claimants dated 24 April 2001. She referred to the paragraph in that letter about costs estimates which says: *"As litigation is unpredictable we cannot guarantee any particular quotation or estimate given."*

She said that this indicated that M&S were seeking to contract out of the obligation to give estimates. This was arguably something they were not entitled to do because the client care code has statutory force.

21. She submitted that because no estimates were given, there was no necessity for M&S to carry out proper litigation planning and there was no brake on costs being incurred. It had, she submitted, been incumbent on M&S to supply proper estimates of costs to the Claimants in particular because some of Counsel's fees were apparently incurred before his CFA dated 13 May 2002 and it was likely that under the terms of their CFA with M&S the Claimants would have been liable for those costs had the claim failed. Similarly substantial fees were claimed for the expert Colin Mitchell, a disbursement for which the Claimants would have been liable had the claim failed.

22. Ms Ayling referred to what she submitted were illustrations of the disproportionate nature of the costs incurred by M&S which appear in the bill. The extensive involvement of counsel; the excessive level of the initial attendances on the Claimants particularly in January 2002; the time spent in drafting the Settlement Agreement; and the items claimed in respect of the bill and apportioning time between the settled claims and those which are still proceeding. The overall costs claimed for preparing and checking the bill amounted (she submitted) to over £10,000. In addition to this 185 hours were claimed for work on documents which she said was excessive in a case which had settled at such an early stage.

23. Ms Ayling submitted that M&S had ratcheted up costs without proper control between December 2001 and July 2002 when the full letter of claim was sent. The claims (which included the negligence claims which have not been settled) were never properly quantified. It had been unreasonable for the Claimants to ask for an indemnity from the Defendants with no proper quantification of their claims. She did not accept that the responses of the Defendants to M&S correspondence between December 2001 and July 2002 had been unreasonable.

24. As further evidence of the disproportionate way in which the matter had been conducted Ms Ayling referred to the "team" which ran the Claimants' case. Mr Hughes charged £220 per hour, Mr Dagnall of Counsel charged ?225 per hour and Mr Mitchell charged £125 per hour. This made a total of £570 per hour. It was not proportionate for the Claimants to conduct their case at those rates.

25. Mr Hughes replied on behalf of the Claimants. He accepted that the claim for costs was high. He said that his initial instructions in April 2001 were to instruct Colin Mitchell to see if he could resolve the tax situation brought about by the Defendants? negligence in advance of considering the potential causes of action against the three firms of chartered accountants. Because of Mr & Mrs Holland?s financial position, costs were uppermost in their minds from the outset.

26. After TW had been discharged and Colin Mitchell had been instructed, the Inland Revenue announced (in November 2001) that it would not permit Capital Gains Tax relief and set out its pro forma advice on the availability of judicial review. Mr Hughes said that he then sought counsel?s advice. He submitted that a proportionate approach had been adopted in not pursuing pre-action protocol procedures before that.

27. Although the initial letters of 24 December 2001 gave an estimate of the tax claim (including interest and penalties) of £165,000, he was, he said, subsequently advised that the potential penalty was between 0 - 100% of the basic tax and throughout the proceedings he had thought that the Claimants were potentially exposed to a claim of £250,000.

28. Mr Hughes submitted that the Claimants would have been unable to find £165,000 let alone £250,000. All their money was invested in their new business. That was why it had been necessary for the proceedings to be funded under conditional fee agreements.

29. Having been advised by counsel that judicial review was not an appropriate remedy (since it would potentially be enormously expensive and even if successful would only require the Revenue to reconsider its decision rather than to reverse it) the Claimants had to pursue the three firms of chartered accountants. Any further approach to the Inland Revenue might precipitate a claim which the Claimants could not afford to meet.

30. Mr Hughes said that M&S had to persuade the three accountancy firms that (1) a tax bill would eventually be sent; and (2) if it came without the indemnity which the accountants were asked to give, the Claimants would have to liquidate assets which placed a risk on the survival of the business itself. There might be six months before the bill would arrive. That explained the reference to urgency in the letters of 24 December 2001. In those letters M&S had said: *"An initial estimate of the likely tax bill, with interest and penalties, is in the order of £165,000 payable immediately. If there is any delay or dispute in agreeing to meet this or any other part of the claim to be made, then a very serious and genuine risk as to the future of the health spa business operated by SHL arises, in which event consequential losses would, we estimate, be massive. By goodwill and co-operation in the handling of this claim, such further losses may hopefully be avoided."*

31. On 12 February 2002 M&S wrote to the Defendant firms with an analysis of the consideration for the sale of Holland Studio Craft Limited and its tax treatment and contact details of the firms.

32. On 5 March 2002 PKF wrote to M&S: *"In short, nothing which has been produced alters our view that your clients have no valid claim against this firm."*

33. On 28 March 2002 M&S wrote to Barlow Lyde & Gilbert (who had by then been instructed to represent PKF) in the following terms: *"As you will know from earlier correspondence, we asked all three firms of accountants or their relevant representatives to respond to the tax bill issue, in particular to the following three questions:*

(a) to comment with full reasoning if there is any aspect of the analysis dated 12 February 2002 with which they disagreed;

(b) on the basis that they agree with the analysis, to admit openly that it was part of their clients? duty to have ensured that the tax computations and returns were correct, but that they failed so to do; and

(c) to confirm their clients? agreement that they will meet the Revenue?s tax bill with penalties and interest in full upon its delivery or, better still, to agree to make a payment on account now to prevent further statutory interest running."

34. The letter goes on to refer to Barlow Lyde & Gilbert's letter of 20 March 2002 in which they denied liability on behalf of PKF, denied that anything they had seen to date amounted to a formal letter of claim under the protocol and said that it was inappropriate for their clients to comment upon the tax calculations "which are now being produced".

35. M&S went on in their letter to enclose a copy of:

"1. A pre-action letter of response received this afternoon from Hammond Suddards Edge on behalf of Afford Astbury Bond;

2. A letter from Collegiate on behalf of Thompson Wright dated 26 March."

36. The letter then says: *"In brief summary, no one party is offering to take responsibility for this matter. Indeed each one requires us to pursue one or both of the other two. We estimate that costs in excess of ?50,000 excluding VAT or uplift have already been incurred and, as a direct result of the positions adopted by each of the three parties, costs will inevitably escalate. They will continue to do so until our clients are compensated, and yet our clients, in the time available and within the financial constraints upon them, have done their best to mitigate the tax bill and give the accountants in this matter opportunity to resolve their difficulties quickly."*

37. Mr Hughes submitted that M&S had faced the problem of approaching three professionally insured firms of chartered accountants without compromising the Claimants position by dealing with them individually. They had taken the view that they should approach them all together and ask them to accept their responsibilities to the Claimants. Their reaction had been to deny responsibility and to blame the others (including the Claimants themselves) for what had happened.

38. Mr Hughes said that apart from the tax claim there were numerous other claims (described in the pre-action protocol letter of 19 July 2002). These were not simple or easy to express or quantify. There was a claim which was relevant to AAB and PKF where the factual matrix went back before the date of the sale of the shares on 29 January 1996. M&S had had to make inquiries going back before 1995. M&S had had to get a full grasp on those issues once it became clear in December 2001 that claims would have to be made against the Defendants.

39. There was also the issue of mediation. Proposals for mediation had been made early on. AAB had been prepared in principle to attend but PKF and TW would not agree. However after the summer period arrangements were made for mediation to take place on 9 December 2002. The mediation did not result in a settlement.

40. With regard to the giving of costs estimates, Mr Hughes said that M&S had not been in breach of Practice Rule 15 and although detailed estimates had not been provided, he had given oral advice to the Claimants about the costs from time to time. In addition to the estimate of costs incurred given to the parties of £50,000 excluding VAT in March 2002, a further estimate had been given in September 2002 that the costs incurred (including counsel and the fees of Mr Mitchell) were of the order of £110,000 plus VAT (see letter to Collegiate Management Services who represented TW of 5 September 2002).

41. Mr Hughes submitted that so far as the pre-action protocol in professional negligence claims was concerned, it was his contention that he had complied with it in all respects.

42. He also submitted that it was proportionate in the circumstances of this case for the work to have been carried out by himself with fairly minimal assistance from junior fee earners. Whereas there was indeed a "team" comprising himself, Mr Dagnall of counsel and Mr Mitchell it was not correct to categorise the "team" as charging £570 per hour. The work was not being done by all members of the team at the same time.

43. In deciding whether TW's contention that the costs claimed by the Claimants are disproportionate it is necessary to consider the matters raised by Lord Woolf CJ in his judgment in ***Home Office v Lownds*.** CPR 1.1 defines dealing with cases justly as including:

"(2) (c) Dealing with cases in ways which are proportionate

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party."

44. In the present case the Claimants were awarded their costs on the standard basis. On that basis the court will only allow costs which are proportionate. Part 44.4(2) provides:

"Where the amount of costs is to be assessed on the standard basis the court will ?

(a) only allow costs which are proportionate to the matters in issue; and

(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party."

45. Part 44.5 provides (so far as is relevant):

"(1) The court is to have regard to all the circumstances in deciding whether costs were ?

(a) if it is assessing costs on the standard basis ?

(i) proportionately and reasonably incurred; or

(ii) were proportionate and reasonable in amount ?.

(3) The court must also have regard to ?

(a) the conduct of all parties, including in particular ?

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case; and

(g) the place where and the circumstances in which work or any part of it was done."

46. In paragraph 26 of his judgment Lord Woolf says:

"26. Of course the protocols require a considerable amount of work to be done and the Claimant is entitled to be paid proportionately for this. Here the Costs Practice Direction is relevant. We refer to paragraphs 11.1 and 11.2. They provide:

"11.1 In applying the test of proportionately the court will have regard to rule 1.1(2)(c). The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.

11.2 In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute."

47. Lord Woolf describes the two-stage approach which the Costs Judge should adopt when deciding whether the costs claimed are proportionate. He says in paragraph 31: *"In other words what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having regard to the considerations which Part 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost of that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This in turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner."*

48. In paragraph 38 of his judgment Lord Woolf says: *"In deciding what is necessary the conduct of the other party is highly relevant. The other party by co-operation can reduce costs, by being unco-operative he can increase costs. If he is unco-operate that may render necessary costs which would otherwise be unnecessary and that he should pay the costs of the expense which he has made necessary is perfectly acceptable. Access to justice would be impeded if lawyers felt they could not afford to do what is necessary to conduct the litigation. Giving appropriate weight to the requirements of proportionality and reasonableness will not make the conduct of litigation uneconomic if on the assessment there is allowed a reasonable sum for the work carried out which was necessary."*

49. The test which I have to apply, therefore, is whether, having regard to the guidelines mentioned by Lord Woolf CJ, the costs appear to me to be disproportionate. M&S were faced with the difficult task of trying to persuade three firms of chartered accountants (all have professional indemnity insurance cover) who had advised the Claimants in succession to one another to accept that they were all responsible for the Claimants' predicament. If they could be persuaded of that, the Claimants would be safe from the perils of

a tax demand (which could have amounted to £165,000 but could also have amounted to ?250,000 neither of which sums the Claimants could afford to pay without liquidating their business). If the Defendants had accepted their responsibilities the matter would have been dealt with quickly and cheaply. But they did not and proceedings had to be issued and the potential damage to the business came into the picture.

50. The task (which was reasonably undertaken in my judgment) involved a very considerable amount of work including an analysis of the claim which was put to all the Defendants for comment. It is not correct that all Defendants responded in exactly the same way. An examination of M&S correspondence with each of the Defendants shows that. However that does not mean that their response of refusing to accept liability and blaming each other was not virtually identical.

51. It was only after the Revenue (for whatever reasons) relented and decided to allow the claim for tax relief in about April 2003 that they were able to begin negotiation of the Settlement Agreement.

52. It is not only the amount of money involved in the claims (both settled and unsettled) that is relevant. The costs must equally be proportionate to the matters in issue which were, in my judgment, highly complex. The efforts made by the Claimants to resolve the dispute, the skill and specialised knowledge that they, their counsel and tax adviser demonstrated and the very considerable responsibility they undertook for their clients? case are all very relevant.

53. It seems to me that insofar as it is possible, in a case like this, to plan the litigation, M&S did have a sensible plan. It was to try to broker an agreement with the Defendants before the Revenue made its claim without triggering that claim. Had the Defendants accepted the sense of that and recognised their responsibility which had been painstakingly outlined to them by M&S the matter could have been resolved at for less expense. The conduct of the paying party is a relevant consideration when that aspect of the matter is considered.

54. I am satisfied that costs estimates were given orally to the Claimants and it is evident that the Defendants were also kept informed as to how the costs were mounting up. In those circumstances it seems to me that the Defendants should not be permitted to rely on any alleged breach of the Solicitors Practice Rules or Client Care Code. These are in any case matters which are (in my judgment) relevant only as between solicitor and client.

55. I do not consider, either, that any alleged failure by M&S to comply with the protocol has any relevance in the circumstances of this case. M&S proceeded on the basis of information they were gradually accumulating during the period from November 2001 onwards. They did not have sufficient information to formulate their claim in fully protocol compliant terms until July 2002. Their reasons for approaching the Defendants in December 2001 onwards have already been considered. I consider that those approaches were reasonable and proportionate.

56. It follows that I do not consider that the base costs of M&S in their bill of costs appear to be disproportionate. I must therefore proceed with the detailed assessment on that basis and consider whether each item in the bill to which TW have objected has been reasonably incurred and is reasonable in amount. That may well involve an examination of the matters referred to in paragraph 22 above.

57. In ***Anita Giambrone & Ors v JMC Holidays Ltd (formerly Sunworld Holidays Ltd)*** **[**2003] Costs Law Reports 189) Mr Justice Morland said:

> *"37. In my judgment the Court of Appeal never envisaged that a Costs Judge before giving a preliminary judgment on proportionality of the costs as a whole would plough through in detail this gargantuan mass of material.*
>
> *38. In my judgment even in very complex group litigation an experienced costs judge if provided with succinct skeletons of the parties? contentions beforehand should be able to determine overall proportionality within an hour or less ?."*

58. Although I had the benefit of Ms Ayling's helpful skeleton and submissions and Mr Hughes? submissions at the hearing, I was unable to live up to the standard set by the learned Judge in that case since the hearing about the proportionality issue took a great deal longer than an hour. If it turns out that there are items where proportionality may (individually) be an issue, I will bear in mind that Mr Justice Morland also said (in paragraph 54 of his judgment): *"Even if the Costs Judge had reached the preliminary view that the bill as a whole is proportionate, in my judgment that preliminary view does not disentitle the Costs Judge from concluding*

that certain issues appear disproportionate and applying the dual test of sensible necessity and reasonableness to that item."

59. Ms Ayling then referred to the second of the Points of Dispute which were to be considered at the hearing, namely G4 (hourly rates).

60. In their bill of costs M&S claim the following hourly rates for their work which covers the period April 2001 to August 2003:
Senior partner NM (qualified 1973) £295 per hour
Senior solicitor RH (qualified 1982) £220 per hour
Assistant solicitor VW £155 per hour
Assistant PS £150 per hour

61. In their Points of Dispute TW say:
"TW assume and would accept" that RH was a grade A fee earner.
The base rates claimed are excessive. TW note that the same hourly rates are claimed throughout the bill. M&S are required to disclose their client care letter to the Hs and/or the Conditional Fee Agreement in which the base fees are agreed (redacted if necessary to remove reference to the additional liability, since TW accept the force of clause 11a of the Settlement Agreement) and/or notification of any increase in hourly rates in which the base fees are agreed. TW note that the bill does not divide into pre and post CFA as it should do.

No justification for the very high hourly rates is given.

TW note that they have previously asked in open correspondence (eg letters 18.09.03, 3.11.03, 11.12.03) for costs estimates, and for clarification of the basis of hourly rates particularly since these exceed guideline rates (see letter of 3.11.03). These have still not been provided and TW reserve the right to refer to this failure on the matter of costs.

The June 2001 rate for a grade A fee earner in Leicester SCCO was £130. Grade B was £124, grade C £96 and grade D £74. These rates would be allowed. TW would agree an increase of £10 to each rate from 1 January 2002 and from 1 January 2003 would allow the 2003 SCCO guideline rates, namely £150 for grade A, £135 for grade B, £115 for grade C and £85 for grade D.

Each item in which these rates are claimed should be recalculated at the reduced rates."

62. In their replies M&S say:
"The claimants do not accept that the base rates were excessive. The claimants are prepared to disclose the client care letter together with the Conditional Fee Agreement insofar as it relates to rates.
The claimants would submit that there is every justification for the rates claimed.
This was a particularly difficult and complex matter and would repeat the submissions made in G1. The guideline rates as set out in June 2001 for the Leicester County Court are not appropriate in this case.
It is submitted that the rates claimed are reasonable in view of all the circumstances relating to this action."

63. It will be helpful if I set out what Ms Ayling said about the hourly rates in her skeleton argument. She said:
"13. The Hs claim an hourly rate significantly in excess of the local rate. TW rely upon ***Jones v Secretary of State for Wales*** *[1997] 1 WLR 1008,* ***Wraith v Sheffield Forgemasters*** *[1998] 1 All ER 82 and Sullivan v Co-operative Insurance Society Ltd [1999] Costs LR 158. They contend:*
a. M&S have failed to prove that they are a specialist firm of higher calibre or expertise than the local norm, the first limb of the test in Jones.
b. They contend further that even if the court accepts that M&S have satisfied the first limb, they have failed to provide any or any sufficient evidence to support the higher rate sought.
c. The only real ground relied upon would seem to be that £215 has been awarded in the SCCO on 26 May 2004. This was not pleaded in the Replies dated 20 July 2004. This is not a sufficient reason for the rates claimed, or indeed £215, to be awarded now. The Hs must satisfy the two limbs of the test in Jones.
d. Especially given the reliance upon counsel and the costs claimed in respect of the use of a tax expert, the Hs have failed to prove that the case could not reasonably have been handled by another local firm at the applicable local rates, or at most by a firm in Manchester or Birmingham. The Hs live in Stone in Staffordshire. They could have gone to a Stoke-on-Trent or Manchester or Birmingham firm. Even if subjectively the choice of solicitors may have been reasonable, between the parties, the circumstances must be balanced objectively (Sullivan supra). The choice of M&S at the rates now claimed was not a reasonable one, and not one for which TW should have to pay.

e. As a guideline Weightmans? hourly rate for a litigation partner in Manchester even now is £165. The guideline rate for a grade A fee earner in Central Manchester in January 2003 was £175; in Leicester ?150; and in Stoke or Stafford also £150. The client care letter set the rate for Rob Hughes at £220 on 24 April 2001.

14. If the rate claimed is allowed, or a figure close to it, then TW contend that this adds weight to their contention that the claim for a senior partner of 20 years' experience; plus the claim for a great deal of his time; plus the claim for c £40,000 of counsel's fees before uplift; plus the claim for the costs of a tax expert Colin Mitchell are excessive and unreasonable and disproportionate. TW relied upon the services of a claims handling agency employed by their insurers and D2 to D4 an associate with Hammonds/Weightmans with input from counsel only at the point of the drafting of the Settlement Agreement. If a rate higher than the local rate is allowed, then at the very least the claim should have been conducted expeditiously without the need for constant recourse to counsel and to Colin Mitchell."

64. The reference in paragraph 13c to Ms Ayling's skeleton to the £215 per hour awarded by the SCCO in May 2004 relates, Mr Hughes said, to that hourly rate having been allowed for his time by Deputy Master Haworth at a detailed assessment of M&S's bill of costs in another matter. Mr Hughes said that in the light of that decision he would accept that hourly rate in this bill instead of the £220 claimed since the other bill apparently covered the same period of time.

65. Ms Ayling conceded that the rates charged in the bill were rates agreed by the Claimants. However, as foreshadowed in her skeleton argument, she submitted that the rates were unreasonably high. She said that, given that the guideline rates for Leicester firms in 2001 gave a grade A fee earner ?130 per hour and assuming that rate included a 50% uplift on the expense rate, the expense rate would be ?86 per hour with a mark up of ?43 per hour approximately. However if £215 per hour is claimed on an expense rate of £86 per hour the mark up would be 150% which was, she submitted, much too high for a case like this.

66. Ms Ayling submitted that there was nothing about this case which would justify a mark up in excess of 75%. That would give an hourly rate of £150 per hour. She suggested that those rates might be increased for 2002 and 2003 as proposed in the points of dispute.

67. Ms Ayling submitted that to be entitled to higher rates than these, the Claimants would have to establish that they were specialists with overheads which were greater than those of other firms in the locality as required in ***Jones v Secretary of State for Wales***. She submitted that there was no evidence that Mr Hughes was a specialist in tax cases and no evidence that the firm's overheads were higher than normal for the Leicester area. Indeed in the "*client care*" letter they had said to the Claimants: *"By being small we ensure that we do not carry unnecessary overheads and by constructing teams of specialists in respect of each case we ensure that the appropriate specialist is used on each occasion rather than just the in-house adviser who happens to be employed by the firm."*

68. Further on in the "*client care letter*" M&S had said: *"We are always aware as to the high cost of matters and feel that we should inform clients that this firm spends over £2,000 a month on compulsory subscriptions and insurances and a further £2,000 a month on maintaining libraries and information technology systems that enable us to provide the advice that we do and these costs have to be reflected in our own charges and enable us to provide the level of service that we do provide."*

69. Ms Ayling submitted that this was not evidence of higher than normal overheads such as to satisfy the test in ***Jones v Secretary of State for Wales.***

70. Ms Ayling submitted that it had not been reasonable for the Claimants to instruct M&S where they could have instructed a firm in Manchester or Birmingham which would have been well able to do the work at lower hourly rates. For example Ms Robbins of Weightman Vizards (now representing TW) confirmed (at Ms Ayling's request) that the hourly rate of a litigation partner in their Manchester office dealing with both insurance and non insurance cases is £165.

71. Ms Ayling submitted that there was no true comparison between the present case and ***Higgs v Camden & Islington HA*** [2003] Costs Law Reports 211. That case had concerned a highly complex clinical negligence claim whose outcome was an award of £3,500,000. The mark up allowed in that case had no relevance to the present case.

72. Mr Kain responded on behalf of the Claimants. He said that M&S were a "niche" litigation practice who specialise in this type of complex heavy litigation. In their client care letter sent to the Claimants they said: *"Our firm is a niche firm. We tend to specialise in all aspects of litigation, company, commercial, agricultural and planning law. We provide a service in these areas to both ordinary clients and to members of the legal profession."*

73. Mr Kain said that the majority of the firm's partners (including Mr Hughes) had worked in the City of London. Many of the cases in which the firm had been involved were reported in the Law Reports. He referred to the passage in the client care letter (see paragraph 68 above) where the Claimants had been informed that the firm spends over £2,000 per month on subscriptions and insurances and a further ?2,000 a month on maintaining libraries and information technology. He submitted that this showed that the firm's overheads were higher than those of a typical local firm.

74. Mr Kain referred to the background of the case and that it involved allegations of professional negligence against three firms of chartered accountants who had successively failed in their duty to the Claimants and had potentially caused their financial ruin. He submitted that the Defendants had all been advised by very large firms of solicitors. He said that this demonstrated that the Claimants had been fully justified in instructing M&S in the knowledge that the hourly rates they would charge would be higher than those of a local firm.

75. He submitted that it would not be appropriate to allow an hourly rate calculated by adding a 75% mark up to the hourly average expense rate for other firms in the area. A higher expense rate was justified having regard to the evidence provided of higher than average overheads. Added to this, in the circumstances of this case, he submitted that a mark up of much more than 75% was justified.

76. In my judgment the court should first consider the factors which have to be taken into account in deciding the amount of costs. These are those listed in CPR Part 44.5.

77. The background to this case has been described in the earlier part of this judgment when I concluded that the costs did not appear to be disproportionate. In my judgment almost all of the factors mentioned in CPR 44.5(3) are relevant to this case.

78. My reasons for concluding that the costs do not appear to be disproportionate apply equally to my conclusions about the reasonableness of the hourly rates claimed.

79. In my judgment the Claimants behaved reasonably when they instructed M&S and should not have been obliged to instruct a firm in Stoke-on-Trent, Manchester or Birmingham. Ms Ayling referred me to *Wraith* and *Sullivan*. In *Wraith* Lord Justice Kennedy said (at pages 141-142) as follows: *"If it is contended that a lawyer amounts to an unsuitable or "luxury" choice made on grounds other than grounds which would be taken into account by an ordinary reasonable litigant concerned to obtain skilful competent and efficient representation in the type of litigation concerned, in deciding whether such an objection is sustainable in practice, the focus is primarily upon the reasonable interests of the claimant in the litigation so that, in relation to broad categories of costs, such as those generated by the decision to employ a particular status or type of solicitor or counsel, one looks to see whether, having regard to the extent and importance of the litigation to a reasonably minded claimant, a reasonable choice or decision has been made."*

80. In my judgment in the circumstances of this case, having regard to the predicament into which the defendants had placed them and the strength of the opposition they would face the Claimants made a reasonable choice.

81. The Defendants have suggested that the Claimants should be allowed different hourly rates for each of the three years 2001, 2002 and 2003. Ms Ayling has suggested an hourly rate of ?150 for 2001 thereafter increasing by £10 to £160 in 2002 and by a further £10 in 2003 to £170. That is based on an assumption that the expense rate for the relevant years would be two-thirds of the guideline rate and that the guideline rate had included a mark-up of 50%.

82. I do not consider that it would be practicable to allow different hourly rates for each of the relevant years. This would involve the considerable expense of re-drawing the bill. I consider that a single (average) hourly rate should be allowed for each category of fee earner.

83. I also do not think that the allowance by the Deputy Master of £215 for Mr Hughes time (see paragraph 64 above) helps me because I do not know the circumstances of the bill he was dealing with.

84. I have calculated that the fee earner NM was engaged for one hour, VW was engaged for 30 minutes and PS was engaged for 4 hours 30 minutes. Therefore by far the most part of the time claimed is that of Mr Hughes.

85. Mr Justice Buckley said in *Jones*: *"There are obvious disadvantages in departing from the well established rule that the hourly rate is to be calculated largely by reference to the local average and nothing I say is intended to encourage such a departure in ordinary cases.*
However, in a case such as this and providing the master is satisfied that the firm in question is clearly outside the range of local solicitors that go to make up the average rate, I can see nothing wrong in a higher rate. I stress that the higher rate would not be appropriate if the firm had engaged in a case which could reasonably have been handled by other local firms. The costs would not then have been reasonably incurred. In other words it must have been reasonable to instruct such a firm for the particular case."

86. I have already concluded (see paragraphs 79 and 80 above) that it was reasonable for the Claimants to instruct M&S.

87. Mr Justice Buckley's judgment also states: *"I am certainly not suggesting that in routine taxations the solicitor must attend with evidence of all his overhead expenses. If he did, it should cut little ice because the touchstone is usually the local average or comparable rate as was underlined in Johnson v Reed Corrugated Cases, L v L and many other cases. However, where a solicitor wishes to challenge what may have become the going rate in any area or, as here, to make a special case, he certainly should be required to produce evidence."*

88. I am satisfied that M&S have provided evidence of having higher overheads than other local firms (see paragraph 68 above). I am also satisfied that the factors mentioned in CPR Part 44.5 when applied to this case justify an hourly rate which is much higher than that which would be justified in most other cases.

89. The Guide to the Summary Assessment of Costs (2002 Edition) states at paragraph 38: *"Guideline figures for solicitors' charges (as at 2001) are published in Appendix 2 to this Guide, which also contains some explanatory notes. The guideline rates are not scale figures: they are broad approximations only. In any particular area the Designated Civil Judge may, after consultation between District Judges and local Law Societies, supply more up to date guidelines for rates in that area. Costs and fees exceeding the guidelines may well be justified in an appropriate case and that is a matter for the exercise of discretion by the court."*

90. In *Higgs* Mr Justice Fulford noted this and said that in the circumstances of that case the SCCO Guide *"is of only limited assistance"*.

91. The learned Judge went on to say: *"(iii) The CPR and the Cost Practice Direction discourage the use of the A plus B calculation and commend the claiming of costs on the basis of a single charging rate. I fully accept the advantages that the hourly rate has for both the paying and the receiving party. However I am not persuaded that the learned Judge did more than use the A plus B method as one of the measures and indicators to ensure that he was able to gauge the propriety or otherwise of a figure of £300 per hour. His decision was based on the submissions made to him; his very full understanding of the case; and his extensive relevant personal knowledge."*

92. In my judgment, having regard to all the factors which I have mentioned I consider that it would be reasonable to allow all the work of Mr Hughes in this exceptional case at ?200 per hour. This represents a reduction on the hourly rate claimed of 9%.

93. The time taken by the other fee earners is, as I have said, insignificant when compared with Mr Hughes' time. However I think it would be reasonable in the circumstances to reduce them by 9% also. This means that NM's time should be allowed at £268.45 per hour, VW's time should be allowed at £141.05 per hour and PS's time should be allowed at £136.50 per hour.

94. If the parties do not attend when this judgment is handed down I will fix another date when the question of costs, permission to appeal and directions for the future conduct of the detailed assessment will be considered. If the parties do attend I will deal with those matters when I hand the judgment down.