

JUDGMENT : Mr Justice Patten: Chancery Division. 24th July 2007

Introduction

1. This is an appeal by the Claimant, Dyson Technology Ltd ("Dyson") against various preliminary rulings of Master O'Hare made in relation to the detailed assessment of costs in this action following a trial before Sir Donald Rattee in November 2005.
2. The central issue before the costs judge and on this appeal is how to divide the common costs of the action so as to give effect to the trial judge's order. For these purposes, common costs are non-specific costs such as travelling expenses which are general to the action in the sense that they do not relate to the handling of any particular issue and would have been incurred whatever issues were involved and specific common costs (such as the preparation of witness statements, research, attendances on clients, and brief fees) all of which relate to work done on more than one issue in the case, but which are not separated for the purposes of charging out time or as disbursements.
3. The CPR make no special provision for dealing with costs of this type and some of the difficulties in the assessment of these costs arise directly from a common failure by judges to appreciate the complexities which can be created by orders which seek to split the responsibility for costs between the parties other than by an order for the payment of a simple percentage or proportion of the total costs bill.
4. CPR 44.3, so far as relevant, sets out the following powers of the Court in relation to costs:
"44.3(1) The court has discretion as to—
 - (a) whether costs are payable by one party to another;*
 - (b) the amount of those costs; and*
 - (c).....*
 - (2) If the court decides to make an order about costs—*
 - (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
 - (b) the court may make a different order.*
 - (3)*
 - (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including —*
 - (a) the conduct of all the parties;*
 - (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and*
 - (c)*
 - (5) The conduct of the parties includes—*
 - (a)*
 - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
 - (c) the manner in which a party has pursued or defended his case or a particular allegation or issue;*
 - (d)*
 - (6) The orders which the court may make under this rule include an order that a party must pay —*
 - (a) a proportion of another party's costs;*
 - (b) a stated amount in respect of another party's costs;*
 - (c) costs from or until a certain date only;*
 - (d) costs incurred before proceedings have begun;*
 - (e) costs relating to particular steps taken in the proceedings;*
 - (f) costs relating only to a distinct part of the proceedings; and*
 - (g)*
 - (7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).*
 - (8)*
 - (9)"*
5. A popular modern practice endorsed by the Court of Appeal in cases such as **Summit Property Limited v Pitmans** [2001] EWCA Civ 2020 has been to divide liability for the costs of the action according to the issues on which each party succeeded or failed. Chadwick LJ at paragraph 27 of his judgment in *Summit* described this approach in these terms: *"An issue based approach requires a judge to consider, issue by issue in relation to those issues to which that approach is to be applied, where the costs on each distinct or discrete issue should fall If in relation to any issue in the case before it the court considers that it should adopt an issue based approach to costs, the court must ask itself which party has been successful on that issue. Then, if the costs are to follow the event on that issue, the party who has been unsuccessful on that issue must expect to pay the costs of that issue to the party who has succeeded on that issue. That is the effect of applying the general principle on an issue by issue based approach to costs. Further, there will be cases (of which this is not one) where, on an issue by issue approach, a party who has been successful on an issue may still be denied his costs of that issue because in the view of the court, he has pursued it unreasonably."*
6. These authorities are, of course, binding on this Court, but the implementation of orders of this kind or indeed for any kind of division of costs in relation to specific issues can involve the parties and the costs judge in extensive further litigation in the course of the detailed assessment, during which the whole history of the action is scrutinised in order to determine which part of any expenditure related to which issue. In the present case, Master O'Hare was sensibly asked by the parties to make certain preliminary rulings as to the principles on which the division of the common costs should be approached. But I am told that this process has so far generated tens of thousands of

pounds in additional costs and that the hearing of the detailed assessment has been allocated a further four days of court time. There is therefore every prospect that the length of time taken in the assessment of costs will exceed the length of the trial itself and add vastly to the costs of the litigation in general. These matters need, I think, to be borne firmly in mind by a trial judge who is asked to make a complicated order for costs. There is much to be said for the application of the general rule that costs should follow the event and for keeping to the simple formula of orders for a stated proportion of the costs or a stated amount of costs in cases where recognition of a limited degree of success by one or other party is called for.

Dyson is a member of the Dyson group of companies through which Mr James Dyson has developed and marketed a range of vacuum cleaners embodying what is described as the cyclonic system of dust extraction. Dyson itself carries out research and development in this field and for that purpose employs a team of engineers. The Defendant, Mr Strutt, whom the judge described as a very able engineer, was employed by Dyson Ltd (another group company which originally carried out the research) from 22 January 2001 and his employment was transferred to Dyson in 2004 following a group re-organisation. He worked for Dyson until 22 April 2005 when he left to take up employment as a design engineer with Black & Decker.

8. Black & Decker manufacture a range of power tools including vacuum cleaners. Dyson was concerned that Mr Strutt might use his knowledge of its technology and know-how gained during his employment with the company in his design work for Black & Decker. On 14 June 2005 it issued the claim form seeking an injunction to enforce two specific covenants contained in clauses 18 and 19 of Mr Strutt's contract of employment and for damages for breach of those covenants.

9. So far as material the covenants were in these terms:

"Clause 18:

"The contractual relationship between the company and its employees is founded on trust. You shall not, either during your employment or at any time after its termination, disclose to any person or use for your own purposes other than those of the company any private, confidential or secret information specific to the business of the company. Any breach of this trust by you, such as the unauthorised disclosure to a third party of private, confidential or secret information relating to the business of the company will render an employee liable to disciplinary action and/or to civil proceedings to restrain the employee from disclosing the information to a third party or of making use of it without authority or for damages, if loss to the company results from the unauthorised disclosure."

Clause 19:

Obligations after employment

"You will not, for the period of 12 months immediately after the termination of your employment, whether as principal or agent and whether alone or jointly with or as a director, manager, partner, shareholder, employee or consultant of any other person, directly or indirectly:

"1. So as to compete with the company, carry on or be engaged, concerned or interested in any business which is similar to and competes with any business being carried on by the company at the termination of the employment and with which you were involved at any time during the period of 12 months immediately preceding the termination of the employment."

10. On 21 June 2005 the Claimant also issued an application notice seeking interim injunctive relief in the same terms over the trial of the action. The application came before Etherton J on the same day. He accepted undertakings from Mr Strutt not to disclose any of Dyson's confidential material (as disclosed in two witness statements of Mr Alex Knox, the Floorcare Projects Director of Dyson) and gave directions for pleadings, disclosure and evidence (including expert evidence) leading to a speedy trial not before 3 October 2005. In the event, the trial commenced on 7 November that year and judgment was given on 25 November 2005.

11. The evidence before Etherton J consisted of Mr Knox's two witness statements which describe the product technology and other confidential information sought to be protected in the action and a witness statement of Mr Martin Bower, the Head of Dyson's legal department, which sets out the basis of the Claimant's concerns about disclosure relied upon to justify the grant of an injunction. On 24 June Dyson served its particulars of claim in which (in paragraph 7) it pleaded that it was the owner of confidential information relating to future products and unpublished technology identified in a Confidential Annex A to the particulars of claim. This consists of a list of fourteen categories of information alleged to be confidential to various listed products and five further categories of information said to be confidential in relation to various technologies a large number of which are included in or relate to vacuum cleaners.

12. The particulars of claim went on to allege that Mr Strutt has a duty either in equity or under cl. 18 of his contract of employment not to disclose the Confidential Information (which is defined as the contents of Confidential Annex A) to Black & Decker and that he had either acted in breach or intended to act in breach of cl. 19 by taking up employment with Black & Decker designing new products for them including vacuum cleaners.

13. In paragraph 11 of the particulars of claim it was alleged that cl. 19 (the non-compete clause) was reasonably necessary for the protection of Dyson's business because Mr Strutt had been in possession of the Confidential Information in the course of his employment with Dyson and would encounter potential difficulties in putting all that information out of his mind and distinguishing his general skills from knowledge directly relating to the Confidential Information. There was also an allegation (in paragraph 12 of the particulars of claim) that Mr Strutt had threatened and intended to misuse the Confidential Information by disclosing parts of it to his new employers.

14. It is therefore clear from the pleading that the Confidential Information as defined was material not only to the claim to enforce the cl. 18 obligation of confidence, but also the claim for injunctive relief in respect of cl. 19.
15. Although this is not the occasion for a detailed analysis of the issues which can arise in relation to non-compete covenants in contracts of employment, it is worth identifying in broad terms what those difficulties are because they clearly influenced the conduct of the Claimant's case in this action. In *Faccenda Chicken Ltd v Fowler* [1986] FSR 291 Goulding J identified three categories of information which might come into the possession of an employee. The first category consists of trivial or publicly accessible material which is obviously not protectable from disclosure. The two important categories are confidential information (which comes to the employee during his employment and cannot be disclosed during that period without breaching his obligation of loyalty to his employer) and specific trade secrets. The third category is protected from disclosure in equity as the property of the employer both during the employment and after it ceases. But the second category of information becomes part of the employee's own skill and knowledge and can only be prevented from disclosure post-employment if the employee has entered into an express covenant not to disclose it. The enforceability of such a covenant will depend on whether it is reasonable and not unenforceable as a restraint of trade and there are strong dicta which cast doubt on the extent to which any restrictive covenant to protect confidential information is enforceable to the extent that it does not itself consist of a trade secret or its equivalent: see e.g. *Faccenda Chicken Ltd & Fowler* [1987] Ch. 117 at p. 137 F-G.
16. Clause 18 covers any "private, confidential or secret information specific to the business of the company". It therefore purports to cover a far wider class of information than trade secrets and gives rise to obvious problems of definition. Not only was Dyson required to identify the relevant business relied upon. More importantly, it had to show that the Confidential Information described in the Confidential Annex A was confidential or secret information specific to that business and was of a kind which justified a permanent bar on disclosure in accordance with the terms of the covenant.
17. By contrast, cl. 19.1 does not in terms prohibit disclosure of any particular kind of confidential material, but merely imposes a restriction on employment in a competing business for a period of twelve months. Non-compete clauses of this kind are obviously in restraint of trade and are only enforceable if they can be shown to be reasonable in the interests both of the parties and of the public. This required the court to consider whether (as at the date of the contract) Dyson had a legitimate business interest which required protection in the form of the covenant and that the covenant was no wider in its terms and effect than was reasonably necessary for the protection of that interest: see *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.
18. This issue of reasonableness had obviously to be considered in the light of all relevant circumstances including the other terms of the contract. The limits of enforceability of cl. 18 were therefore highly material to the reasonableness of the restraints imposed by cl. 19.1. If cl. 18, as drawn, was only enforceable in respect of trade secrets, then the need to protect other confidential information might provide support for the restrictions contained in cl. 19.1. Similarly, the obvious difficulties any ex-employee must face in relation to the use of confidential information gained in an earlier employment may justify the imposition of an interval between the two rival employments as the only practical means of minimising the risk of the competitor obtaining commercial advantage from the use of the enhanced knowledge and skill of its new recruit. It is not therefore surprising that by the time that the matter came on for trial the Claimant had recognised that its primary claim had to be the enforcement of cl. 19.1. Paragraph 15 of the Claimant's skeleton argument for the trial was in these terms: *"However, because of the breadth of the confidential information to which D has been exposed during his employment, the practical problems of defining that breadth of confidential information and the risks of disclosure and use of it (if only inadvertently) C seeks to enforce clause 19.1. It is the enforceability of clause 19.1 that, so far as C is concerned, is the principal issue in the proceedings."*
19. I have set out some of the more obvious issues affecting the enforceability of cls. 18 and 19.1 really to emphasise that they cannot be considered in isolation. The enforceability of cl. 18 requires an analysis of the Confidential Information whose protection is sought and that analysis also necessarily informs the question of the reasonableness of the restraint under cl. 19.1. This was recognised in paragraph 11 of the particulars of claim which pleads the reasonableness of cl. 19.1 by reference to the Confidential Information contained in the Confidential Annex. In paragraph 5 of his defence served on 8 July 2005 Mr Strutt put the enforceability of cl. 19.1 in issue. It was alleged to be an unreasonable restraint on trade because, inter alia, cl. 18 provided sufficient protection for the Claimant's legitimate interests (i.e. trade secrets) and cl. 19.1 was therefore unreasonably wide. In paragraph 15(c) Mr Strutt denied that he would have difficulty putting trade secrets out of his mind or distinguishing them from his general skill and knowledge. This remained the Defendant's case up to and including the trial and it was therefore always an issue between the parties whether the Confidential Information as defined was limited to trade secrets and (if not) whether the remainder of the information justified the restriction contained in cl. 19.1.

In paragraph 22 of his first witness statement made in support of the application before Etherton J, Mr Knox took the position that it seemed unnecessary to disclose any more confidential information than was contained in his evidence because Mr Strutt had not disputed that he was aware of Dyson's confidential material. But in his witness statement of 20 June Mr Strutt raised the point about the lack of certainty in relation to the injunction sought in respect of cl. 18. It appeared to cover, he said, all types of information and not just confidential material. This led to the preparation of Mr Knox's second witness statement referred to earlier which set out further details of the

information Dyson was seeking to protect. But the nature of the defence outlined above also made the stance originally taken by Mr Knox impossible and in their skeleton argument for the hearing on 21 June Mr Supperstone Q.C and Mr Mitcheson contended in terms that only confidential information in the form of trade secrets was capable of protection from disclosure after Mr Strutt's employment had ceased and that the Claimant needed to specifically identify the confidential information it was seeking to protect before the court could determine whether cl. 18 offered sufficient protection or whether the Claimant needed to resort to cl. 19.1. This position was later pleaded out in the paragraphs of the defence I have referred to.

21. It seems to me therefore that at a comparatively early stage in the proceedings the battle lines were drawn in relation to cl. 19.1 but even before the service of the pleadings the claim form sought injunctions both under cl. 18 and under cl. 19.1 and Knox (1) (prepared for the hearing of 21 June) after setting out its limited account of the confidential information explained in terms why the twelve month restriction imposed by cl. 19.1 was necessary to prevent Black & Decker obtaining an unfair commercial advantage from making use of Mr Strutt's knowledge of Dyson's new product ideas. I do not therefore accept the submissions contained in the Defendant's skeleton argument on this appeal to the effect that the initial purpose of Knox (1) and (2) and the work done on preparing the Confidential Annex was carried out solely for the purpose of the claim under cl. 18 and not also for that under cl. 19.
22. The Claimant's evidence prepared for the trial consisted of a second witness statement of Mr Bowen dated 25 August 2005 (setting out the circumstances of Mr Strutt leaving Dyson's employment and the basis of the claim for injunctive relief) plus a third witness statement from Mr Knox and a witness statement from Mr Alexander Bommer, Dyson's Research Director, both dated 31 August 2005. Since no claim is made for the costs of Mr Bommer's witness statement I need say no more about it but Mr Knox's witness statement deals both with the Confidential Information and with the importance to Dyson of cl. 19.1.
23. On 13 September Dyson's solicitors, Wragge & Co wrote to Mr Strutt's solicitors, Hammonds, indicating that it proposed to restrict the injunction sought in respect of cl. 18 to the confidential information relating to two vacuum cleaners (identified as N75 and N82) and to the research areas of shroud optimisation and root cyclone. This would, the letter went on, make it necessary to rely on only four paragraphs of Mr Bommer's witness statement and would restrict the amount of confidential disclosure of documents to those relating to the two products and technologies identified in the letter.
24. Hammonds responded by asking to be supplied with an amended Confidential Annex A and confirmation that Dyson intended to amend its particulars of claim. Wragge and Co confirmed (in a letter of 14 September) that they would do this but also stated in that letter that they continued to rely upon Knox (3) in its entirety "which is directed at both cl. 18 and cl. 19.1". This point was repeated in a subsequent letter of 31 October which states that it has never been the Claimant's intention to modify the cl. 19.1 case.
25. The letter of 31 October enclosed a draft of the amended particulars of claim. In this Confidential Annex A had been reduced to the items referred to in Wragge & Co's letter of 13 September and had an additional introductory sentence which reads: *"For the purposes of this action, the Claimant will seek relief under clause 18 in relation to the confidential information in relation to each of the following products:"*
26. To take account of the fact that the Confidential Information as defined was now limited to those items in relation to cl. 18 the draft also contained an amendment to paragraph 11(b) as follows: *"The technical information relied upon hereunder, insofar as it does not comprise part of the Confidential Information, is also confidential as set out in the third and fourth witness statement of Alex Knox"*

It was therefore apparent from this that although the cl. 18 claim was now to be limited to the items in the reduced Confidential Annex, the claim for relief under cl. 19.1 remained much wider and was only limited by the contents of Knox (3) and (4).

- Knox (4) was served on 26 October in reply to the Defendant's trial evidence and deals like Knox (3) with a wider range of confidential information similar but not, I think, identical to the original Confidential Annex. It was intended to answer Mr Strutt's evidence filed in response to Knox (3) and to give examples of how some of the Dyson technology could be transferred to Black & Decker's own products. In their letter of 18 October Hammonds had complained about Dyson's failure to particularise the information alleged to be confidential and to make proper disclosure. Following the service of Knox (4) they wrote on 28 October complaining that the witness statement raised a number of new issues in relation to confidential information and was much more extensive (as it was) than the contents of the amended Confidential Annex A. In the absence of a pleading particularising the information still alleged to be confidential together with supporting disclosure, they would apply to exclude parts of the witness statement.
28. Wragge & Co's response of 31 October did not resolve the dispute about particularisation and led ultimately to an opposed application for permission to amend before the trial judge. Part of the Defendant's complaint was that the confidential information relied on in support of the cl. 19.1 claim was not now (and may never have been) in the Confidential Annex and required to be particularised and to be supported by relevant disclosure. It is however clear from the skeleton argument of both parties exchanged before the trial and from the way that Mr Hillier Q.C opened Dyson's case, that the Claimant was seeking to rely upon cl. 19.1 because of what it said was the width of the confidential information which might be disclosed and the difficulties in defining it. The recognition

of this had led to the narrowing of the cl. 18 claim to the four specific items contained in the amended Confidential Annex.

29. Sir Donald Rattee was resistant to the need to particularise the confidential information relied on for the purpose of the cl. 19 claim. His starting point seems to have been that it was common ground that Mr Strutt was in possession of confidential information and that it was not therefore necessary for him to decide what was or was not confidential information for the purposes of the claim. The only issue was whether in the circumstances it was reasonable for Dyson to seek to impose a non-compete clause on Mr Strutt in addition to the restrictions on disclosure contained in cl. 18. This required the court to take into account the alleged difficulties of determining what was confidential information and the consequential problems for the employee of deciding when and whether he would be making wrongful use of such information in breach of cl. 18. Mr Supperstone opened his resistance to the application by saying in terms that the case was all about cl. 19.1. His submission was that the effect of the amendments restricting the scope of the Confidential Annex for the purposes of cl. 18 but relying on a much wider class of "technical information" for the purposes of cl. 19.1 was to shift the focus of the latter claim away from trade secrets properly so-called towards an unspecified range of other information. This needed to be particularised for the case on cl. 19 to be understood and for the need for the non-compete clause to be justified.
30. In his ruling Sir Donald Rattee refused permission to introduce the amendment to cl. 11 (b) because it would burden the pleading by reference to "witness statements of evidence intended to support allegations that are already made in either paragraph 11 of the particulars of claim or in paragraph 2 of the reply". But it is clear from this that the judge considered (rightly) that the Claimant's case on cl. 19 relied on the wider range of confidential information described in Knox (3) and (4) and the trial proceeded on that basis. When the claim for a cl. 18 injunction was abandoned on the second day of the trial, none of the Claimant's witnesses was stood down and there was extensive cross-examination of Mr Bowen and Mr Knox about the confidential information and technologies which Mr Knox and the others had described in their evidence.
31. In his judgment Sir Donald Rattee dealt with the reasonableness of imposing cl. 19 as follows:
"61 More recently, in **Turner v Commonwealth & British Minerals Limited** [2000] IRLR 114 the Court of Appeal had to consider the reasonableness of a similar covenant in restraint of trade and at paragraph 18 of his judgment Lord Justice Waller said this:
"Thus, to enforce the covenant at all, the company would have to establish proprietary rights in the nature of trade connection or in the nature of trade secrets. I should emphasise that, because those are the matters which they are legitimately entitled to protect, it does not follow that clause 5.6 must be unreasonable because covenants restraining the use of confidential information or the canvassing of trade connections could be, and indeed in this case were, imposed. It has been recognised in many cases that, because there are serious difficulties in identifying precisely what is or what is not confidential information and who may or may not have been a customer during the period of an employee's service, a restraint against competing which is reasonable in time and space will not only be enforceable but the most satisfactory form of restraint."
62 Mr Supperstone, not surprisingly, sought to escape from the reasoning adopted by the Court of Appeal in the two cases I have just cited by submitting that on the evidence in the present case Mr Strutt would have no difficulty in distinguishing between confidential information, which he is not at liberty to use for his new employer, and information acquired by him while working for the claimant, which is not entitled to protection as confidential. Attractively though Mr Supperstone put the submission, he failed to satisfy me that the reasoning adopted by Lord Denning MR and Lord Justice Waller in the two cases I have cited is not equally applicable to the present case. In my judgment it is, and the inclusion in Mr Strutt's contract of employment of clause 18 is no objection to the reasonableness of clause 19.1.
63 I would add to this reasoning a further point, namely that, as was apparent from Mr Strutt's own evidence in this case, if he were left free to work on the design of vacuum cleaners for Black & Decker or any other employer, he would be placed in a position of extreme difficulty if his new employer required him to work on the design of a proposed new product which he realised would compete with a design of the claimants which might not have become public knowledge, and would therefore constitute confidential information within clause 18 of his contract with the claimant. Mr Strutt said that in that situation he would have to decline to comply with his new employer's instruction to work on the design in question, because to do so would involve a risk of his making use of the confidential information he had acquired in working on the claimant's design in breach of clause 18. I accept Mr Hillier's submission that such a refusal might well itself alert the new employer to the existence and nature of the confidential information concerned. This seems to me to constitute another good reason for the claimant to protect itself and Mr Strutt from just such a risk by limiting his freedom of employment for a reasonable period by just such a provision as clause 19.1. "
32. He therefore granted the injunction enforcing the non-compete clause.
33. There then followed a hearing about costs which took place immediately after the handing down of the judgment on 25 November. Dyson conceded that the Defendant should have the costs thrown away by the amendments to the particulars of claim and that there should be some allowance made for the costs of the abandoned cl. 18 claim. Mr Hillier submitted to the judge that these should not exceed 10% of the total claim and that what the court should do was to apportion an appropriate percentage of the costs to that issue. In support of this, the judge was provided with a witness statement from Mr Jonathan Chamberlain of Wragge & Co giving a breakdown of

the Claimant's costs which amounted to £288,008.23. The point made in the witness statement and adopted by Mr Hillier in argument was that any costs awarded to Mr Strutt on the cl. 18 issue should be limited to costs which were attributable solely or predominantly to cl. 18. Much of the evidence and other material relating to confidential information was common to both issues and was utilised and relied on in relation to the cl. 19 claim. On this basis, Mr Chamberlain estimated that the Claimant's costs attributable to cl. 18 and the amendment application did not exceed £27,247.70, approximately 10% of the total bill.

34. The Defendant relied on a witness statement from Miss Lianne Bulger of Hammonds. She says in her evidence that she carried out an analysis of time spent on dealing with what she describes as the confidential information element of the action as opposed to the restrictive covenant element. Where there was any difficulty attributing the work done to either of these categories she split the figure for time spent in half. The result of this exercise was that in relation to the costs of the main action some 66% of the costs have been attributed to the confidential information issue and only 34% to the restrictive covenant claim.
35. Sir Donald Rattee declined to deal with the discontinuance of the cl. 18 claim by making an order for the Defendant to have a proportion of his costs and for the Claimant to receive less than 100% of its own costs. He expressed the view that it would be impractical to deal with the evidence in this way given the wide discrepancy between the parties as to what would be a realistic figure for the costs attributable to the claim under cl. 18. He therefore ordered the Defendant to pay the Claimant's costs of the action (including those of the interim application) save for the three specific items of costs identified in paragraphs 3 (b) - (d) of his order. These state:
- "(b) the Defendant's costs of the claim for an injunction under clause 18 of the Contract be paid by the Claimant to the Defendant, and
- (c) the Defendant's costs of and occasioned by the application to amend the particulars of claim on 7 November 2005 be paid by the Claimant to the Defendant,"
- Paragraph 3(d) of the order dealt with the costs of the expert evidence on both sides as to which the judge made no order.
36. The order is not entirely happily worded in that the excluded items (b) and (c) are framed solely in terms of the Defendant's costs and not those of the Claimant but both parties accept that the order should be read as limiting the costs payable to the Claimant to the costs of the action apart from the costs of the claim for an injunction under cl. 18 and the application to amend and as giving the Defendant his costs of those issues.
37. The judge gave no further guidance as to what his order was intended to cover, beyond what is recorded in an exchange with counsel following his decision on costs when clarification was sought as to how the order should be drawn up.

"MR HILLIER: *May I just mention one matter? It is not to say anything contrary to what my Lord has indicated. It is just to ensure there is no lacuna. It is this:*

My Lord is covering clause-18 costs, my Lord is covering clause-19.1 costs. My Lord, in referring to clause-18 costs, has rightly referred to the costs in relation to the confidential-information claim.

SIR DONALD RATTEE: *What I am saying should be paid by the claimant to the defendant are the costs relating to that claim made in the particulars of claim which I think was numbered 3 in the list I set out following the particulars of claim, namely, a claim to enforce clause 18.*

MR SUPPERSTONE: *Can I just ask my Lord to consider whether that should be extended to include -The confidential information fed into clause 19.1 and therefore I am anxious to have to have my Lord say that the costs assessor should consider the costs of not just clause 18 in the confidential information but the costs of the confidential information insofar as they fed into clause 19.1. So it is the whole area of confidential information.*

SIR DONALD RATTEE: *A, I do not understand the point. B, I do not think the costs judge would be any the wiser if I said that. I do not think there is any cause for it. The only costs which I am going to exclude from the costs of the action which are payable by you to them which will therefore be payable by them to you are costs relating to their claim to enforce clause 18."*

38. It seems to me clear from this that Sir Donald Rattee was certainly not minded to give the Defendant all his costs of dealing with the confidential information, regardless of which of the two claims it was relevant to.

The decision of the costs judge

As indicated earlier, the trial involved extensive cross-examination of Mr Knox about the confidential information referred to in his various witness statements. The Defendant did not abandon his contention that cl. 19 was unenforceable so far as it sought to protect confidential information not consisting of trade secrets and that given the existence of cl. 18 no further protection was required. The bulk of the costs in dispute relate to the confidential information. The Defendant's approach before the trial judge on the hearing about costs was to divide the work done between the confidential information and the restrictive covenant and to claim half of the costs of any work that was common to both. This has resulted in claims for only 50% of the costs of some items such as telephone conferences with counsel and the preparation of certain witness statements but the Defendant's bill of costs also contains a large number of items for time spent on confidential information issues when 100% of the costs involved are claimed in relation to matters arising from Knox (4) which was solely concerned with the cl. 19 claim. References for example to the Claimant's cyclonic technology were removed by amendment from the Confidential Annex for cl. 18 purposes but dealt with in Knox (3) and (4) for purposes of cl. 19.

40. In the points of dispute and reply, the difference between the parties was set out in unambiguous terms. Dyson emphasised that although the cl. 18 claim was abandoned on the second day of the trial the confidential information set out in Knox (3) and (4) continued to be relied upon and was adduced in support of its claim that the cl. 19 restriction was reasonable and to meet the Defendant's case that cl. 19 was unnecessary in the light of cl. 18 and that Black & Decker were not competitors in the same market. Their bill was therefore drawn so as to exclude costs solely attributable to the cl. 18 issue but not costs incurred in preparing evidence or advising upon matters relating to confidential information which were either wholly relevant to the cl. 19 claim or were common to both. Their position was and remains, that preparatory costs should not be apportioned unless part of the work is exclusively referable to the cl. 18 issue. If the work is relevant to both claims but would have had to be carried out even if the cl. 19 claim was the only claim in the action, then no apportionment or deduction should be made.
41. The position of the Defendant is said to be simple, correct and supported by authority. Costs that relate solely to cl. 18 are recoverable in full. Costs that are common to both the cl. 18 and cl. 19 issues should be apportioned equally; and costs solely relating to cl. 19 are excluded from its bill. At the hearing before Master O'Hare it was accepted on behalf of Mr Strutt that much of the work on confidential information was common to both claims and should be apportioned equally between them. This was described as a middle position by contrast to Dyson's claim for 100% of such costs.
42. The purpose of the hearing before the Master on 7 December 2006 was to seek his directions on this issue of principle about apportionment in relation to costs common to both the cl. 18 and the cl. 19.1 claims. After a brief summary of the issues in the action, the Master described the circumstances and purpose of the amendment application in these terms: *"At a late stage, the Claimant sought to confine Annex A only to clause 18, so as to leave open an argument that clause 19 was also protecting it from damage caused by other confidential information on an almost unlimited basis. That late amendment was treated by the Defendant as a refocusing of the Claimant's case away from an unwinnable clause 18 claim towards getting a clause 19 claim which would be easier to prove. As such, of course, that amendment was opposed, but it was opposed unsuccessfully. Part of the opposition was to say "You have particularised these things before. Now you are taking the particulars away. You ought to particularise them." That generated the answer "Well, for particulars see the witness statements of Mr Knox and others." The Judge ruled that it was quite unnecessary for particulars of witness statements to be made part of the pleadings, but nevertheless the Claimant should be allowed to change Annex A to limit it to the clause 18 claim."*

This was criticised by Mr Hillier as a conflation of two quite separate issues: i.e. the reduction of the Confidential Annex A for the purposes of the cl. 18 claim and the widening of the types of confidential information relied upon to support the reasonableness of cl. 19. It is, however, clear from paragraph 4 of his ruling that the Master appreciated that the reduction and subsequent discontinuance of the cl. 18 claim had no significant effect on the length of the trial and did not (as he put it) significantly alter the presentation of evidence or the cross-examination of witnesses. He also referred (in paragraph 7) to the fact that Sir Donald Rattee was asked to but refused to order that all the costs relating to confidential information should be treated as costs payable by the Claimant to the Defendant.

44. His view of how the trial judges's order should be implemented is set out in paragraphs 11 -18 of his ruling as follows:
- 11** *My approach is this. First, the order for costs I have got is an order for costs of issues, and I should treat it in the way we normally treat orders for costs of issues. I say that knowing that such orders are fiendishly difficult to assess. We have already spent one obviously expensive day on this. I think we are likely to spend many more expensive days resolving these issues unless the parties can come to reasonable terms in order to avoid such expense, which is often a disproportionate expense. It becomes disproportionate because both sides are in danger of claiming too much for the issues they won on and conceding too little for the issues they lost on. Both of them try to pull the whole of the blanket on to themselves and leave their opponent with nothing. It being costs of issues, I will indicate below the approach I am going to take.*
- 12** *Secondly, the Claimant's reliance on the words "costs of action " does not provide it with the comfort it seeks. It is not fair to say that the Defendant should be limited only to those things solely relating to the clause 18 claim. Where costs are common to both issues, the Defendant is entitled to his share and, to the extent that the Defendant is so entitled, the Claimant is disentitled to a share. (Of course, each item I am looking at normally refers to quite different expenditure, save when the parties are sitting together in Court. So one has to be careful how one treats that.)*
- 13** *I have got to define how I would approach common costs, and I put it in two ways. The first I call general costs and the other I call costs covering both issues. By "general costs", I mean costs which are not specific in any way. These are costs which would be incurred anyway, even if only one of the two claims was brought. On those, the normal approach is half each. That coincides very much with the example given by Mr Justice Warren in *Faurie v Le Roux* [2006] EWHC 1840 (Ch), where he split travel costs: even though travel costs would be incurred in any event, nevertheless, if they have been incurred for two purposes, you should split them.*
- 14** *I am treating differently from general costs those costs which cover both issues, because here it may be possible, by examining them, to see to what extent each issue was dealt with. For this type of cost, you divide them in proportion to time spent. Time spent is not the ideal expression to use with counsel's fees, because they are not payable by time, but, nevertheless, it is a working approach. Therefore, with each of the following, brief fees, days in Court and time spent proofing witnesses, I can look at them and say "Well, this work was mainly on this topic, so most of the time spent relates to that topic and it is the balance only which relates to the other topic."*

- 15 Thirdly, does confidential information belong solely to clause 18 or does it apply equally to both? In my judgment, this ought to be determined according to the purpose for which the expenditure was made, recognising that that may be different from the use which either side later made of the evidence. It is the natural position of opponents to oppose, and they will oppose in respect of anything put before them. There was a different use made of Annex A by the Defendant for tactical reasons, upon which it later lost. So the way it used Annex A after the clause 18 was abandoned, ought not to indicate to me how I should decide the purpose of the expenditure in Annex A, because the purpose falls to be determined right at the outset.
- 16 In looking for the purpose, I have got to apply an objective test. In other words, I cannot just ask the parties what their actual intentions were, because those intentions, experience tells me, lead to very self-serving positions: each side is absolutely sure that they spent everything on the things they won on and they are absolutely sure that they spent practically nothing on things they lost on. I have to look at it objectively. The other way of using that expression is to say that I have to treat this in a pragmatic way.
- 17 On this basis, the purpose for which the Claimant incurred costs on Annex A and the purpose for which it incurred costs on witness statements relating to Annex A was all in support of clause 18 and was not in support of clause 19. Had there been no clause 18 claim, most of this work would not have been done. Had clause 18 been left blank in the employment contract and all the ex-employer had to enforce was a restrictive covenant, then the sort of evidence needed would have been simple evidence describing the position at the time the Defendant was recruited and describing the sort of confidential information it was reasonable to expect such a recruit would acquire. Therefore, it would not have been necessary to do the work in the enormous depth that the Claimant actually did.
- 18 In my opinion, objectively, that was the purpose of the confidential information evidence. That explains the Judge's criticisms for the Claimant raising it, because he could not see that it was a worthwhile purpose and, indeed, it was not. The Claimant lost on that and must pay the costs of it. There may be other tactical reasons for that. I do not want to speculate too much, but it is often the way that people will do something subjectively which objectively cannot be justified. They will use a particular argument in the hope that it will achieve success, even though it does not achieve any merit. It will bring about a settlement, even though they could not win at trial. I am not going to speculate on that further, because those aspects of how the Claimant intended to use that evidence are not relevant to me. I look at it objectively and, looking at it objectively, the work done in relation to confidential information belongs to clause 18."
45. Mr Hillier took issue with the Master as to whether the trial judge's order ought properly to be characterised as an order for the costs of issues. It certainly is not an order which deals with costs on an issue by issue basis as contemplated in cases such as *Summit Property Ltd v Pitmans*. But this is a sterile debate in the context of the present case because ultimately both sides agreed that the costs order made does not differ materially in its terms from the type of order considered by the Court of Appeal in *Cinema Press Ltd v Pictures & Pleasures Ltd* [1945] KB 356 which in turn applied the earlier decision of the House of Lords in *Medway Oil & Storage Co. v Continental Contractors Ltd* [1929] AC 88
46. The Claimant relies upon these cases as establishing that where (as in this case) the costs of the action are awarded to one party with the exception of costs relating to a particular matter or issue, the party in whose favour the costs of that issue are awarded, is not entitled to recover anything except the extra costs generated by that issue. So in the present case it is said that Mr Strutt is entitled to the costs solely attributable to the cl. 18 claim, but not to costs which were incurred and are equally attributable to both the cl. 18 and the cl. 19 claims. That could only be achieved by an order expressly apportioning the common costs. Mr Hillier accepts that some items (e.g. brief fees) may be split so as to isolate that part of the costs attributable to the cl. 18 claim. But the ability to do this depends he says, upon being able to identify a portion of the fee which is solely attributable to the work done on that claim.
47. In *Cinema Press* the trial judge in a libel action had ordered the plaintiff to have the costs of the action except for the costs of the issue of damages from the date of a payment into court. The taxing master ruled that the order gave the defendant only the increased costs of the issue and overruled the objection that some part of the costs of discovery, the fees paid to counsel for advising on evidence, his brief fee and the costs of the transcript were attributable to the issue on which the defendant succeeded. The decision of the taxing master was affirmed by the High Court but overturned by the Court of Appeal.
48. Lord Goddard CJ in giving the judgment of the court traces the history of the rules of taxation in relation to orders of this kind and the effect of the decision in *Medway*. After a detailed analysis of the earlier cases and various changes in the rules he summarises the position as follows (at p.361):
"Therefore it seems to us that the true rule of taxation in these cases is to be found in the *Medway Oil & Storage*, which no doubt gives effect to the principles formerly applied by the common law masters. That case decides that, in the absence of special directions such as were given by Clauson J. in *Willcox v Kettell*, where both claim and counterclaim succeed or are dismissed with costs, there is to be no apportionment and it follows from what we have already said that this applies equally to a case where one party is given the costs of the action, except those relating to an issue or issues, or where he is not only deprived of those costs but they are given to the other party. But this is not an end of the matter. While the House held that there was to be no apportionment, they held that there could and ought to be a division of some items which were common to both claim and counterclaim. "The distinction," said Lord Haldane, "between division and apportionment may in certain circumstances be a thin one," but he went on to say that it was fundamental. The distinction will be found stated in *Seton*, 7th ed., vol. 1, p. 250, and is in these terms. "When

the court gives 'part of the costs of the action, it may do so in two ways; the one will involve an apportionment of the whole of the general charges, the other will extend only to the excess of expense incurred in consequence of the particular matter directed to be excepted.' Then it is said that, according to the settled practice of the Chancery Division, the former direction carries a portion of the costs of every general proceeding in the action. It is this that the Medway Oil & Storage case prohibits being done in the future, but Lord Haldane points out that there may be items which on their face are single but are in reality double, that is, in part relate to the claim and in part to the counterclaim; and, we may add, in part to one issue and in part to another. In such cases, he says, there must be a division.

The most frequent instance would no doubt be the fee on the brief and the charges for instructions for brief, and the division referred to by Lord Haldane can easily be understood by an illustration. Suppose an accident case, in which both liability and damage were an issue and in which the defendant made a payment into court with denial of liability. To establish liability it may be that the plaintiff has to call a large number of witnesses, including expensive experts. To prove his damage he may only have to call one doctor. The defendant also brings an array of witnesses on liability. In the result the plaintiff establishes liability, but fails to recover as much as was paid into court. If the judge gives the defendant the general costs, but gives the plaintiff the costs of the issue on which he succeeded, it would clearly be wrong if no division of the brief fee were made. The fee has been marked for counsel to argue and contest both issues, and in the case supposed most of the time and labour will have been spent on liability. It seems to us that in such a case the taxing master must consider what would have been a fair fee to fix had the only issue been liability. Or it may be that on the issue of damage several doctors and surgeons were called on either side. Here, again, the fee ought to be divided and it might well be that in a particular case the right view would be that more was attributable to the medical aspect than to that of liability, and so a smaller proportion of the fee only ought to be allowed.

So while the answer of the master in the present case, "that there is no apportionment of costs in issue cases," is correct as far as it goes, this does not deal with the question whether there are not some items which must be divided, nor would it appear that he has applied his mind to that question. It may well be that the result in this case will be trifling, for, as I have already said, it is possible that there will be no division of brief fee and instructions for brief, but this case is of some general importance as calling attention to the fact that it is the Medway Oil & Storage case that is now the governing authority, and taxing officers must in these cases consider the question of the division of certain items common to both issues in the light of that decision, as distinct from apportionment in accordance with the former, but now rejected, practice of the Chancery Taxing Office. The court has not read the briefs or instructions and nothing that we have said is to be taken as meaning that in this case there can be no division. Whether there should be the master will consider in the light of this judgment. It also seems that some other items to which our attention has been called, such as discovery and correspondence, may also have to be reconsidered, and accordingly the bill must be referred back to the master for reconsideration. "

49. It is clear from these passages that the Court of Appeal was affirming the approach of the taxing master and the judge that the Defendant was only entitled to recover expenditure solely attributable to the issue of damages. The appeal was allowed because the taxing master failed to recognise that consistently with this principle it was nonetheless possible to divide costs and disbursements such as brief fees so as to isolate the time spent or the proportion of the fee charged for dealing with the issue on which the Defendant had succeeded.
50. The decision in Medway applied in Cinema Press establishes that on a taxation of common costs of the kind that the Master described as specific common costs, it is appropriate to attribute part of a composite fee to the items of work which the fee was intended to cover. In the present case that exercise can be carried out to isolate the proportion of the brief fees paid on both sides to cover work done solely on the cl. 18 claim. The same goes for time spent on preparing parts of witness statements which deal separately and exclusively with that issue. But what the decision in Medway does not do is to authorise the taxing master in a case like the present, to apportion the costs of work all of which is relevant to both claims.
51. Medway was a claim for damages for the wrongful repudiation of a contract to purchase a large quantity of kerosene oil. The defendant purchasers counterclaimed for the difference between the contract and the market price of the oil on the ground that the plaintiff vendors had themselves repudiated the contract by failing to deliver the first instalment of the oil on time. The defence to the counterclaim was that the defendants' tanks were not ready to receive the oil and that the defendants had conspired with the plaintiffs own suppliers to defeat the plaintiff's attempts to obtain the oil.
52. The trial judge in that case (McKinnon J) dismissed both the claim and the counterclaim with costs on the grounds that the plaintiff had not established a repudiation by the defendants and (in relation to the counterclaim) that the defendants had suffered no loss. On a subsequent appeal from the taxing master he held (applying the principle in Wilson and Walters [1926] 1 KB 511) that the only costs which the plaintiff could recover as costs of the counterclaim were such costs as it had incurred by reason of the counterclaim and would not have incurred apart from it. These amounted in that case to the costs of calling a witness as to market price. The Court of Appeal allowed an appeal on costs holding that all the matters in issue arose both on the claim and the counterclaim and that the costs of everything should therefore be apportioned.
53. The House of Lords restored the order of McKinnon J. They therefore accepted that costs attributable to work done which was common to both the claim and the counterclaim could not be apportioned and that the plaintiff was only entitled to recover the extra costs solely attributable to the counterclaim. The importance of the decision

lies, however, in its recognition that some costs (particular brief fees) consist of a composite fee covering separately identifiable work carried out on the different issues in the case to which the costs order relates. This is not an abrogation of the principle in *Wilson v Walters* but an application of it to composite fees. It is, however, inherent in this process that what the taxing master is seeking to identify is work that would not have had to be done but for the cl. 18 claim.

54. This approach of the House of Lords is set out in the following passages in the speech of Viscount Haldane:

"The view of the Court of Appeal is that where the plaintiff fails with costs in his claim and the defendant with costs in his counterclaim, the proper mode of taxation is not, as MacKinnon J. thought, to give the defendant all costs incurred in resisting the claim, depriving him only of any costs which he has incurred exclusively in supporting his defeated counterclaim. In that view no question of what is called apportionment can arise. The Court of Appeal has on the contrary held that where evidence is given of facts which are put forward in connection with the claim and the counterclaim in common, there is no reason why the plaintiff should not be allowed the costs incurred in relation to them when resisting the counterclaim on which he has got judgment, and the duty of the taxing master is to apportion the amounts when taxing the entire costs.

*My Lords, the principle applied in **Wilson v. Walters** may have consequences in individual cases which would be harsh if the Taxing Master did not supervise the costs of claim and counterclaim closely, and split up the costs of items which are required by both. In such instances he takes an item, a single fee on the plaintiffs brief for example, and splits it into two notional fees, the one attributable to the claim, and the other to the counterclaim. This is not an apportioning, in which the payment is treated as a single item and the question is to what it is attributable. It is in reality a notional division of what on the face only of it is one item. If the principle is not kept in mind confusion will follow, as was pointed out by Lindley M.R. and other judges.*

The order of the Court of Appeal went on to direct the Taxing Master to allow the respondents (the plaintiffs) all costs properly in fact incurred by them in defending the counterclaim, and to allow the appellants (defendants) all costs properly in fact incurred by them in defending the action, and directed that all common items be apportioned in the discretion of the Taxing Master accordingly. The direction given by MacKinnon J. was in effect that when, as here, the defendant has succeeded in his defence but failed in his counterclaim he is entitled to the costs which he has actually and properly incurred in defeating the claim (including in this case the costs of the issues mentioned), but is not entitled to any costs which he would not have incurred had he not counterclaimed. The plaintiffs are only entitled to such costs as they would not have incurred had they not been compelled to meet the counterclaim.

The view taken in the Court of Appeal was very different. "In considering," said Bankes L.J., "what the real contest between the parties under each of these heads" (the issues) "was, I do not think that justice can be done except by treating the costs of the litigation under each head as costs which must be apportioned if the order as to costs is to be complied with." Atkin L.J. says that "It appears to me wrong both in law and fact to say that when a man sues for 62,000l. and is sued in counterclaim for 46,000l, and the event is to be determined by consideration of the same evidence, he incurs all the costs of evidence because of the claim. He seems to me obviously to incur the cost because of both; in other words the costs are occasioned by both, And it is quite irrelevant as to such costs to consider what he would have incurred if there were no counterclaim, that is with no other cause operating. The result of the rule now laid down is that where there is a substantial counterclaim involving common evidence, the Master will apportion.

*But apportion does not necessarily mean divide into equal moieties. He will decide how much in fact should be attributed to the claim; how much to the counterclaim." He thought that the statement of Fry J. in *Saner v. Bilton* that the plaintiff was to be represented as letting loose the waters of litigation, and therefore if unsuccessful should be in a worse position than an unsuccessful counterclaimant, unsatisfactory.*

*Lawrence L.J. concurred, being of opinion that the authorities disclosed no consensus of view. He followed what was laid down in **Christie v. Platt**.*

*My Lords, the judgments in the Court of Appeal appear to me to go back in spirit as well as in letter on the series of decisions by Fry J., Jessel M.R., Lindley M.R., and other eminent judges whose opinions I have already examined. The purpose of these opinions was to find a principle which might extricate the law relating to taxation in cases like the present from the hopeless confusion in which Fry J. found it. The successive decisions, down to **Christie v. Platt**, established a principle which in individual cases may seem a hard one. But it is a clear one, and in most cases will operate justly, as was pointed out by Fry J., while in others the Taxing Master can correct the effect of applying it in isolation as an abstract rule, by dividing items as distinguished from apportioning general costs. Such as it is, the rule was one necessary to lay down in some form, and I think that the form in which it has been laid down here and in Ireland was adopted by the learned judges, who did so because practice and authority alike pointed to it as the proper one.*

I am therefore of opinion that we must reverse the judgment of the Court of Appeal and restore that of MacKinnon J."

55. On this basis the Master was, I think, wrong to divide what he identified in paragraph 13 of his ruling as general costs. The fact that those costs would have been incurred even if only the cl. 19 claim had been brought requires them to be treated as costs of the action and not costs referable to the cl. 18 issue. These costs are, however, relatively small in relation to the total bill and the bulk of the costs are what he described as specific or specific common costs: i.e. brief fees, refreshers, solicitors' charges for time spent in court and the costs relating to witness statements and other pre-trial preparation.
56. It seems to me that on an application of the *Medway* principles the analysis contained in paragraph 14 of the Master's ruling is correct if the identification of the fees or charges for time spent in relation to work on the cl. 18

claim excludes work that would have had to be done anyway because it also relates to the cl. 19.1 claim. The real difficulty about the ruling is its attribution of all of the costs of the confidential information to the cl. 18 claim.

57. The Master's statement that the costs incurred on witness statements relating to Confidential Annex A was all in support of cl. 18 and not in support of c.19 is simply incorrect. That was not its sole purpose. As explained earlier, the particulars of claim make it clear that Confidential Annex A in its original form was relied on in support of both claims and this remained the position when it was reduced in scale for purposes of the cl. 18 claim, but the contents of Knox (3) and (4) were adduced to support the cl. 19 case. I also do not understand or accept the test which Master O'Hare applies in paragraphs 17 and 18 in order to make the attribution of the costs to the cl. 18 claim. As he himself records earlier in his ruling, the abandonment of the cl. 18 claim had no impact on the evidence called or the subsequent conduct of the trial. The witnesses who dealt with the full range of Dyson's Confidential Information were deployed in support of the cl. 19 claim and cross-examined extensively with a view to showing that cl. 18 gave the Claimant all the protection it needed. With respect to the Master, it is simply not open to him, in my judgment, to conduct some kind of ex-post facto analysis of what was the minimum amount of evidence needed to support the cl. 19 claim and to disallow the costs of much of the evidence actually used. Unless the trial judge has disallowed the costs of particular witnesses (which he was not asked to do) the costs judge should assume that the evidence called was relevant to the claim. In fact, as Master O'Hare himself notes, Sir Donald Rattee was asked by Mr Supperstone to make an order that the costs of all the Confidential Information should be awarded to the Defendant but this was refused. Master O'Hare accepted that his ruling appears inconsistent with this, but suggested that appearances can be deceptive. In this case they are not. The costs of work undertaken in relation to the Confidential Information should not be treated as a separate category of work in its own right attributable only to the cl. 18 issue. Instead the costs judge must analyse all the work done and claimed for in accordance with the **Medway** principles set out.
58. The appeal will therefore be allowed. I am minded to make directions along the lines of the draft prepared by Mr Hillier and handed in at the hearing of the appeal, but I will hear further argument about the terms of the order absent agreement between the parties following the handing down of this judgment. I am grateful to Counsel on both sides for their assistance.

Mr Andrew Hillier Q.C and Mr Nicholas Bacon (instructed by Wragge & Co) for the Claimant
Mr Michael Supperstone Q.C and Mr Martin Farber (instructed by Speechley Bircham) for the Defendant