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Case No: QA-2019-000333
QA-2020-000189

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2024

Before :

MRS JUSTICE YIP
Sitting with Costs Judge Whalan, as assessor

- -

Between :

DAMIAN DELIA FRANCOIS **Claimant**

- and –

LONDON BOROUGH OF WALTHAM FOREST **Defendant**

- -
- -

Roger Mallalieu KC (acting pro bono) for the **Appellant**
Michael Mullin (instructed by **Waltham Forest Legal Services**) for the **Respondent**

Hearing dates: 26 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE YIP

Yip J :

1. Pursuant to CPR r 46.5(3)(b), a litigant in person in whose favour a costs order has been made may recover payments reasonably made for legal services relating to the conduct of the proceedings. The issue raised by this appeal is whether fees charged by a barrister in respect of work undertaken when he did not have a valid practising certificate are recoverable.

2. In 2017, the appellant initiated judicial review proceedings against the respondent. She obtained advice and assistance with drafting from Mr Matondo Mukulu, a barrister instructed on a direct access basis. Mr Mukulu first advised in conference on 5 April 2017. He advised on a number of other occasions and drafted various documents. He then attended the hearing of a renewed application for permission to proceed with the judicial review on 15 June 2017. His fees totalled £3,200.

3. The respondent was ordered to pay the appellant's costs, to be subject to a detailed assessment. The appellant's claim for the costs of the judicial review proceedings was limited to recovering Mr Mukulu's fees. She additionally sought her costs of the assessment process.

4. Mr Mukulu did not hold a practising certificate between 1 May – 17 May 2017. An investigation by the Bar Standards Board concluded that this resulted from an inadvertent breach whereby Mr Mukulu forgot to renew his practising certificate on time. According to a letter from the BSB dated 24 August 2018, Mr Mukulu had notified the appellant that he did not have a practising certificate. He had apologised to the appellant and she had raised no concerns. The BSB issued Mr Mukulu with a warning for holding himself out as a barrister and practising as a barrister, providing reserved legal activities, when not authorised to do so.

5. The appellant has not yet made any payments to Mr Mukulu and he has taken no action to recover his fees. At the hearing which resulted in the order which is the subject of this appeal, the appellant told the Master that she could not pay Mr Mukulu until she had resolved the issue of the recoverability of her costs from the respondent. There was no evidence before the Master, or this court, as to the contractual arrangements between the appellant and Mr Mukulu.

6. Responding to the appellant's Bill of Costs by way of Points of Dispute, the respondent put the appellant to proof of her contractual liability to pay Mr Mukulu during the period when he did not have a practising certificate.

7. On 12 May 2018, Costs Officer Martin provisionally assessed the appellant's costs, reducing Mr Mukulu's fees to £2,975 on conventional grounds, subject to confirmation that his practising certificate had been backdated. The Costs Officer's note suggested that if the certificate was not backdated, the appellant would have no liability to pay him for the period he was without a certificate and so those costs would not be recoverable from the respondent.

8. On 12 June 2018, the Costs Officer recorded that he was now satisfied that Counsel was entitled to conduct and charge for the litigation. The provisional assessment was therefore confirmed in the sum of £2,975. The Appellant was awarded £375.57 in respect of her costs of assessment and the time for seeking an oral review under CPR

47.15(7) was to run from receipt of the amended assessment. The material on which the Costs Officer based his decision has not been identified.

9. Neither party exercised the right to seek an oral review hearing under CPR 47.15(7). In those circumstances, the rule provides that "the provisional assessment shall be binding upon the parties save in exceptional circumstances." However, matters then took an unusual course. The respondent applied to set the costs of this case off against outstanding costs orders made in the respondent's favour in other litigation. That application was granted on the papers by Master Howarth. On 2 October 2018, the Master varied his order to delete reference to costs orders that were subject to appeal. The order recorded that the Costs Officer's provisional assessment was confirmed "subject to an oral hearing if requested by either party pursuant to CPR 47.1(7) [sic] by 4pm on 15.10.18". (Presumably this included a typographical error and Master Howarth intended to refer to CPR 47.15(7).)

10. It is not clear why the Master allowed for an oral hearing under CPR 47.15(7) at this stage as the time for seeking a review of Costs Officer Martin's provisional assessment had already passed. The assessment had therefore become binding unless there were exceptional circumstances. However, the parties agree that the effect of the order made on 2 October 2018 was to extend time for seeking an oral review of the provisional assessment made on 12 June 2018.

11. An oral hearing was requested on 12 October 2018 pursuant to the extension of time granted by Master Howarth. I am told this was the appellant's application although I have not seen the application. After vacating two earlier dates, the hearing was listed before Master Howarth on 28 June 2019. The appellant did not attend, having applied for an adjournment. Her application was refused and the hearing proceeded in her absence. The Master heard Counsel for the respondent and read a letter from the Bar Standards Board, which I take to be the letter dated 24 August 2018 addressed to Mr Mukulu. The Master reassessed the appellant's costs at nil and ordered her to pay the respondent's costs of £500.

12. The appellant applied to set aside the order of 18 June 2019. It is unnecessary to go into the detail of the procedural course taken thereafter but it resulted in Master Howarth reassessing the appellant's costs in the sum of £894, representing Mr Mukulu's fees for work done while he had a practising certificate. Following a further application by the appellant, a remote hearing took place before Master Howarth on 12 May 2000. The parties are agreed that this hearing is to be treated as the oral review hearing under CPR 47.15(7). There had been no such hearing before then.

13. In making her application, the appellant relied on a further letter from the BSB dated 16 September 2019. That letter confirmed that Mr Mukulu had been issued with a warning for holding himself out as a barrister and providing reserved legal activities when not authorised to do so between 1 May – 17 May 2017. In response to the appellant asking for confirmation as to whether Mr Mukulu was entitled to charge for work completed when he did not have a valid practising certificate, the BSB said:

> "The BSB are of the view that the question of whether a professional can be paid for work undertaken in a professional capacity when they are not authorised to do so is a legal/contractual question. This is not covered in the BSB

> Handbook and is not something which we consider we would be able to advise upon."

14. The appellant submitted to the Master that "what Mr Mukulu did did not fall into the list of stuff he couldn't do." The work done by Mr Mukulu during the period he did not have a practising certificate was not within the definition of "reserved legal activities". His fee note demonstrates that the work done during the relevant period was confined to advising in conference and drafting documents. The only advocacy he conducted was at the hearing in June 2017, when he did have a practising certificate.

15. Mr Mullin submitted on behalf of the respondent that the issue was not whether the appellant had a contractual liability to pay Mr Mukulu but whether the costs were recoverable from the respondent. In considering that issue, the gateway was CPR 46.5. He referred to a note in the White Book, which summarised the decision in *Campbell v Campell* [2018] EWCA Civ 80; [2018] 1 WLR 2743, although did not cite the authority itself. In *Campbell*, the Court of Appeal determined that a litigant in person could not recover for services provided by a foreign lawyer. Mr Mullin argued that a lawyer without a valid practising certificate was in an analogous position to a foreign lawyer.

16. Although no submissions had been made to that effect, the Master decided that the costs proceedings had been concluded when he reassessed the appellant's costs at £894 and ordered that a final costs certificate be issued. Therefore, the matter could not be reopened save by way of appeal. That part of his judgment is the subject of Ground 2 of this appeal. The parties are agreed that the Master was wrong to conclude that the costs could not be reassessed at that stage. The proceedings had taken an unusual course and had become protracted. However, the effect of the Master's previous orders was that the hearing on 12 May 2020 was the oral hearing pursuant to CPR 47.15(7), which the appellant was entitled to. The Master also suggested that the appellant was seeking the assessment of a second bill relating to the same issues. That could not be permitted and therefore the "amended bill of costs" would be struck out. That appears to have been a misunderstanding of the documents filed by the appellant and/or linked to the belief that the assessment could not be reopened.

17. In the circumstances, Mr Mullin accepts that the appeal should stand or fall on the substantive issue, namely whether the appellant was entitled to recover costs relating to Mr Mukulu's fees during the period he did not have a practising certificate. If the Master's conclusion that she was not so entitled was wrong, the respondent does not seek to rely on any procedural bar to reassessment. That being so, it is unnecessary to say more about Ground 2.

18. Dealing with the substantive issue, the Master referred to CPR r 46.5(3)(b) and then said:

> "Looking at all the evidence it is quite clear that the claimant has not paid anything for legal services to her barrister. Secondly, it seems to me that for her to recover her barrister's fees from the defendant the claimant barrister must be competent and able to provide legal services. The fact of the matter is that, during the period I disallowed his costs, he did not hold a practising certificate to practise as a barrister at the Bar."

19. On that basis, the Master affirmed the assessment of costs in the sum of £894 and ordered the appellant to pay the respondent's costs of the application which he summarily assessed at £500.

20. Matters did not end there. Following the hearing, the appellant wrote to the court querying the fact that the costs of the assessment, which Costs Officer Martin had allowed in the sum of £375.57 appeared to have been disallowed by Master Howarth. By response communicated in a letter dated 27 May 2020, the Master agreed that the appellant should have those costs and directed that a final costs certificate should be issued in the sum of £1,269.57.

21. This appeal, brought with permission from Murray J, is against the order of 12 May 2020, as amended by the letter dated 27 May 2020. There has been significant delay in the progress of the appeal but any issues that arise from that were dealt with by Murray J when he gave permission and I need say no more about it. In relation to the substantive issue which is the subject of Ground 1 of the Amended Grounds of Appeal, the appellant contends that Master Howarth was wrong to disallow the fees of Mr Mukulu during the period he did not have a practising certificate. Her position now is that the provisional assessment of Costs Officer Martin was correct. She therefore seeks final assessment of her costs of the original action in the sum of £2,975. Ground 3 of the appeal deals with the costs of the May 2020 hearing. Plainly, orders made in relation to the assessment proceedings will need to be considered in light of the outcome on Ground 1, so I will return to this.

22. The costs of litigants in person are covered by CPR 46.5. The relevant sub-paragraph is CPR r 46.5(3) which provides:

> "The litigant in person shall be allowed –
>
> (a) costs for the same categories of (i) work; and (ii) disbursements, which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf;
>
> (b) the payments reasonably made by the litigant in person for legal services relating to the conduct of the proceedings; and
>
> (c) the costs of obtaining expert assistance in assessing the costs claim."

23. The focus of the parties' submissions both before Master Howarth and on appeal was the definition of "legal services" in CPR 46.5(3)(b). In his skeleton argument, Mr Mallalieu KC suggested that Mr Mukulu's fees could have been viewed as a disbursement for work which an instructed legal representative would commonly 'send out' to counsel so as to fall within sub-paragraph (a). However, he acknowledged that this did not bear upon the respondent's principled objection based upon the lack of a practising certificate. During the appeal hearing, he confined his arguments to the proper interpretation of CPR 46.5(3)(b) on the basis that Mr Mukulu's fees represented charges for legal services supplied by him to the appellant.

24. It sems to me that this was an appropriate concession since Mr Mukulu could not hold himself out as a barrister while he did not hold a practising certificate and therefore

could not properly have been briefed by a legal representative as such. For the same reason, Mr Mukulu could not himself have come within the definition of a "legal representative" contained in CPR r. 2.3(1) while he was without a practising certificate because he could not be instructed by a party to act in the role of barrister.

25. In *United Building and Plumbing Contractors v Kajla* [2002] EWCA Civ 628, the Court of Appeal refused to allow recovery of the fees of a debt collector who had assisted the unrepresented claimant. Tuckey LJ noted that the term "legal services" was not defined by the rules but said:

> "I think the sub-paragraph is referring to services which are "legal"; that is to say, services provided by or under the supervision of a lawyer."

26. In *Agassi v Robinson* (Inspector of Taxes) (No2) [2005] EWCA Civ 1507; [2006] 1 WLR 2126 the Court of Appeal held that the tennis player Andre Agassi was not entitled to recover fees paid to a firm of specialist tax advisers, whom he had used instead of a firm of solicitors, whether as a disbursement under the rule that is now CPR r. 46.5(3)(a) or payments for legal services under the equivalent of r. 46.5(3)(a).

27. These authorities were considered by the court in *Campbell v Campbell* (ibid) and Newey LJ said that it could be seen that "legal services" must be "provided by or under the supervision of a lawyer". He continued [at paragraph11]:

> "It is also, I think, implicit in the provision that the lawyer must be someone who can be expected to be competent to supply services "relating to the conduct of the proceedings", which will be proceedings in this jurisdiction. A lawyer qualified in England and Wales will be such a person, but a foreign lawyer will not. … In short, a foreign lawyer lacking a qualification in this jurisdiction cannot be regarded as a "lawyer" or, hence, providing "legal services" for the purpose of CPR 46.5.(3)(b) as what matters in that context is expertise in the law and procedure governing the relevant proceedings, viz that of England and Wales."

28. At paragraph 12, Newey LJ dealt with public policy issues:

> "I agree with [the respondent's] submission that the "true policy consideration in the interpretation of these rules is that those who provide advice and assistance in connection with litigation in this jurisdiction should be properly qualified, regulated and insured in this jurisdiction. The point derives support from the Agassi case [2006] 1 WLR 2126, para 81 in which Dyson LJ expressed concern about the possibility of an "unqualified and unregulated person" assisting with litigation and considered the court's ability to limit recovery to what is reasonable and proportionate "would at best be an imperfect tool for controlling the activities of unskilled and unregulated persons"."

Further, Newey LJ said that the appellant's case was not assisted by arguments about access to justice and the desirability of "unbundling" of legal services, reflected in the Woolf reforms. CPR 46.5(3)(b) reflected Lord Woolf's support for arrangements whereby litigants could undertake much of the preparation of their case but with access to legal advice and representation as necessary. There was no reason to suppose Lord Wolf had in mind the provision of assistance by a foreign lawyer.

29. On behalf of the respondent, Mr Mullin argued that the facts of *Campbell v Campbell* were strikingly similar to the situation here. The lawyer in *Campbell* had qualified in this jurisdiction in 1997 and was admitted as a solicitor. He moved to Jersey in 1999 and later qualified as an advocate there. He remained on the roll of solicitors in England and Wales until 2014 but was not on the roll and did not have a practising certificate in this jurisdiction at the time the relevant work was undertaken in 2016. By the time of the appeal, he had been restored to the roll and had obtained a practising certificate entitling him to practise as a solicitor in England and Wales once more. Mr Mullin submitted that in both cases, the lawyers had legal qualifications in this jurisdiction but did not hold practising certificates. Both later went on to obtain practising certificates. Like Mr Mukulu, the lawyer in Campbell was not undertaking "reserved legal services" or conducting litigation. The services provided were of a similar nature. Mr Mullin accordingly argued that there is no proper distinction to be drawn between *Campbell* and this case. Competence to supply services related to the conduct of proceedings in this jurisdiction (the test laid down in *Campbell*) cannot be assessed on a case-by-case basis having regard to individual skills and experience but rather must relate to professional and regulatory standing. Mr Mukulu was not competent to supply services related to the conduct of proceedings because he did not have a practising certificate and so was not authorised to practise as a self-employed barrister.

30. Mr Mallalieu argued that this case could be distinguished from *Campbell*. The lawyer in that case was not a solicitor in this jurisdiction at the relevant time. Not only did he not have a practising certificate but he was no longer on the roll of solicitors. The issue in that case was whether a litigant in person could recover for the services of a foreign lawyer. The fact that the lawyer had qualified in this jurisdiction before going to practice elsewhere was not treated as a relevant consideration and he was treated as having no relevant qualification to practise here. This is apparent from paragraph 11 of the judgment where Newey LJ said:

> "In short, a foreign lawyer lacking a qualification in this jurisdiction cannot be regarded as a "lawyer" or, hence, as providing "legal services" for the purpose of CPR r 46.5(3)(b) as what matters in that context is expertise is the law and procedure governing the relevant proceedings, viz that of England and Wales."

31. Mr Mallalieu agreed with Mr Mullin that there can be no question of the court examining an individual lawyer's qualifications and experience when determining whether a litigant in person is entitled to recover for services provided by them. He did not therefore rely upon the fact that Mr Mukulu's practising certificate had lapsed through oversight and only for a relatively short period. Rather he contended that CPR r.46.5(3)(b) allowed for the recovery of costs relating to services provided by any unregistered barrister, that is a barrister without a practising certificate.

32. Mr Mallalieu referred to the Unregistered Barristers Guidance contained in the BSB Handbook which provides guidance for barristers without practising certificates who wish to provide legal services to employers or to the public. Such barristers may not carry on any activity which is reserved under the Legal Services Act but the guidance states:

> "As an unregistered barrister, you can provide any legal services that are not reserved activities. However, there are some important rules in the BSB Handbook which you need to follow in doing so."

The definition of legal services in this context includes legal advice and drafting of the nature undertaken by Mr Mukulu during the relevant period. The guidance makes it clear that an unregistered barrister may not practise as a barrister and as such may not hold themselves out as a barrister while providing legal services. They cannot use the title "barrister" or otherwise give the impression that they are practising as a barrister.

33. The guidance contains the following at paragraph 6:

> "Legal services, other than reserved legal activities, can be supplied by anyone and are not subject to any special statutory regulation. It would therefore be disproportionate to impose regulatory requirements on unregistered barristers who supply such services just because they are barristers, except where there would otherwise be a clear risk to their potential clients. The risk that needs to be managed is that most potential clients are not aware of the different categories of barrister and will tend to assume the same regulatory requirements and protections apply to all barristers. Barristers with practising certificates are subject to important requirements, such as having insurance and keeping their professional knowledge up-to-date, which do not apply to unregistered barristers. Some of their clients also have the right to complain to the Legal Ombudsman. These are important safeguards for clients, who may assume that they will apply whenever they seek legal services from someone they know or believe to be a barrister. The rules below are intended to manage this risk while still allowing unregistered barristers to provide unreserved legal services."

34. The rules that follow include the core duties which apply to any barrister who supplies legal services such as the duty to the court and to act in the best interests of the client; duties relating to honesty, integrity, independence, confidentiality and not discriminating. They also include duties to provide a competent standard of work and to comply with legal and regulatory obligations. Beyond those core duties, the guidance addresses the duty not to mislead clients as to issues such as status, the extent of regulation, the services that can be supplied and insurance cover. The guidance contains a suggested form of wording for an explanation as to the status of unregistered barristers.

35. Mr Mallalieu argued that it is therefore clear that a barrister without a practising certificate remains subject to control by the BSB when providing legal services. In

contrast to the lawyer in *Campbell*, Mr Mukulu was therefore regulated in this jurisdiction and there was no suggestion that his legal qualification had become a nullity. As the BSB Guidance makes clear, he was entitled to refer to himself as a "lawyer" or a "legal adviser". As he had a qualification and was subject to regulation, the concerns identified in *Campbell* did not apply and his fees were recoverable under CPR r. 36.5(3)(b). Mr Mallalieu accepted that this would apply to anyone who had been called to the Bar of England and Wales. Insofar as this created a distinction between the two branches of the profession, he said that may flag an issue in relation to the treatment of solicitors who had the additional requirement to remain on the roll but this was not something to concern the court in dealing with this appeal. The sole question was whether an unregistered barrister fell the right side of the line such as to allow recovery of his fees under CPR 46.5(3)(b).

36. Mr Mallalieu stressed that none of the services provided by Mr Mukulu at the relevant time were reserved legal activities and suggested that care must be taken not to conflate the provision of legal services generally with undertaking reserved legal activities. Some of the respondent's arguments before the Master appeared to confuse the concepts. At one point, Mr Mullin suggested that if something was not a reserved legal activity it could not fall within the definition of legal services. I agree that is plainly not right. Advising and drafting are not reserved legal activities but are commonly undertaken as legal services and recoverable as such. However, if there was any confusion, such formed no part of the Master's reasoning.

37. Mr Mallalieu also contended that whether Mr Mukulu told the appellant that he was unregistered when providing legal services is irrelevant. He said that could not affect the indemnity principle though it might give rise to disciplinary proceedings.

38. Mr Mullin argued that creating a distinction between solicitors and barristers (which would be the logical result of accepting the appellant's arguments) would be unjust and is unnecessary. An unregistered barrister is in truth subject to very limited regulation, many of the rules relate to the requirement not to mislead potential clients as to status. Mr Mullin submitted that there can be no real distinction between a qualified but unregistered barrister and the solicitor in *Campbell*, who had qualified in this jurisdiction.

39. In his skeleton argument, Mr Mullin argued that given the time that has now passed, the fact that Mr Mukulu has taken no action to recover his fees and having regard to the provisions of section 5 of the Limitation Act 1980, the appellant no longer had any liability to pay him. Therefore, even if the appellant's arguments had merit, it would not be right to order the respondent to pay these costs. The respondent has not served a respondent's notice and so is not entitled to seek to uphold the decision on different grounds. I must look at the position at the time of the Master's decision in May 2020. The fact that the appellant had made no payments to Mr Mukulu was though something that formed part of the Master's reasoning.

Discussion and conclusions on Ground 1

40. Given the way in which this appeal has been argued, I am invited to determine whether, as a general proposition, a litigant in person may recover the fees of an unregistered barrister pursuant to CPR r. 46.5(3)(b). It seems to me that charges made by an

unregistered barrister do not fall within the scope of the rule, as interpreted by the Court of Appeal in *Campbell v Campbell* and the earlier decisions.

41. An unregistered barrister is not entitled to provide legal services as a barrister. The BSB Guidance requires that this is made clear to the person obtaining the services. The Guidance also makes it clear that the legal services which an unregistered barrister may supply are services that may be supplied by anyone and which are not subject to special statutory regulation. Unregistered barristers are not required to have insurance or to keep up to date with professional development. They are not subject to the complaints process operated by the Legal Ombudsman.

42. Given that an unregistered barrister cannot act as a barrister, they are to be treated as no different to any other professional such as the debt collector, tax adviser or foreign lawyer, all of whose services have been found not to qualify for recovery under r. 45.5(3)(b). The policy underpinning the rule is the unbundling of legal services, allowing a litigant to seek some legal assistance without committing to the costs of full representation. It is not to expand the classes of those whose fees for providing assistance with litigation may be recovered. As the Court of Appeal have said, those who provide advice and assistance in connection with litigation must be properly qualified, regulated and insured. The logical extension of the appellant's arguments is that once someone qualifies as a barrister, they would for evermore be regarded as someone for whose services an unsuccessful opposing party could be expected to pay. That was not the case for the solicitor in *Campbell* and I am unable to accept that the limited regulation of unregistered barristers by the BSB creates any meaningful distinction. As the BSB Guidance states, the main objective is that clients should be aware that "unregistered barristers are not subject to the same regulatory safeguards that would apply if they instructed a practising barrister".

43. I was not invited to decide this appeal on its own facts. The factual information was incomplete in any event. It is known that Mr Mukulu was without a practising certificate for only a relatively short period as a result of oversight. His general competence probably did not lapse in that time. There was no difficulty in him subsequently renewing his certificate. He may well have been up to date on his professional development and to have paid his insurance premium, although whether he could have been validly insured without a practising certificate I do not know.

44. I admit I would have some real sympathy for a litigant in person who had made payments to someone they reasonably believed was providing services as a practising barrister but whom was later discovered to have been temporarily without a practicing certificate through oversight. In those circumstances, I might have had some reservations about placing the onus on the litigant in person to recover the payments from the barrister. However, that is not the situation that applies here and I do not need to determine whether such circumstances might lead to a different outcome.

45. The difficulty the appellant faces if the particular facts are examined is that she has not in fact made any payments to Mr Mukulu. That formed part of the Master's reasoning for limiting recovery of his fees. The Points of Dispute questioned the appellant's contractual liability to pay Mr Mukulu. She apparently satisfied Costs Officer Martin of that but I have not seen the material that was before him and there is nothing to suggest it was before the Master.

46. There has been no testing of the contractual arrangements between the appellant and Mr Mukulu or of her liability to pay him. Mr Mukulu was not entitled to provide services as a barrister. If he did provide legal services without a practising certificate, he was under an obligation to ensure that the client understood that he was not acting as a barrister. The BSB found clear evidence within Mr Mukulu's invoice that he held himself out as a barrister when providing services in the period for which he did not have a certificate. I agree. There is no breakdown to show work done as a barrister and work done in another capacity. Mr Mukulu was instructed as a barrister. It is inconceivable that he failed to renew his certificate through oversight yet told the appellant that he was providing services in a different capacity. The administrative sanction (warning) imposed on Mr Mukulu was for holding himself out and practising as a barrister in the context of the work done for the appellant. In those circumstances, there is, at the very least, a serious issue as to whether Mr Mukulu was entitled to charge for services apparently rendered as a barrister at a time he could not act as a barrister.

47. The appellant did not present any evidence to the Master or on the appeal to confirm that Mr Mukulu sought to recover those fees. Given his breach, he may well have decided not to pursue them. There is no suggestion that the appellant took any steps to discover whether he maintained that he was entitled to claim the relevant fees. The rule allows recovery of payments "reasonably made". In my view, that cannot extend to payments yet to be made in respect of which there are very real issues as to whether they are payable. The indemnity principle was a live issue from the time of the Points of Dispute. The appellant produced no evidence to the Master, or on appeal, to deal with that issue.

48. In all the circumstances, I am unable to conclude that the substantive decision to limit recovery of Mr Mukulu's fees those incurred when he had a practising certificate was wrong.

Ground 3 – the costs of the May 2020 hearing

49. This is a short point concerning the order the Master made that the appellant should pay the respondent's costs of the hearing in the sum of £500. In breach of CPR 44 PD 9.5(2) and 9.5(4) the respondent had failed to file and serve a costs schedule 24 hours before the hearing. I do not believe any costs schedule was before the Master. The respondent's claim for costs was limited to Mr Mullin's fee, which he told the Master was £600 plus VAT. He explained this was a sum negotiated on a block basis between the respondent and members of the Bar instructed by them. The Master allowed £500 (gross) in respect of Mr Mullin's fee for the hearing.

50. CPR 44 PD 9.6 states that the failure by a party, without reasonable excuse, to comply with paragraph 9.5 will be taken into account by the court in deciding what order to make about costs and about the costs of any further hearing or detailed assessment resulting from that failure. The Master made no reference to this. The appellant contends that he therefore failed to exercise his discretion properly. It is submitted on her behalf that this was an egregious breach, particularly bearing in mind she was a litigant in person and the respondent a large organisation. Mr Mallalieu contended that it should have resulted in no order for costs.

51. Given his substantial experience of assessing costs, it seems to me that the Master probably did have CPR 44 PD 9.5 and 9.6 in mind. However, since he did not say so, I have looked at the exercise of discretion afresh.

52. If the respondent had complied with the requirement to serve a costs schedule, it is inevitable that the claim for costs would have been very much greater. The respondent could have claimed for the costs of preparing for the hearing. In limiting the claim in the way that was done, the respondent sought only that which was not open to any great debate, namely Mr Mullin's brief fee. It is now agreed that the VAT was not recoverable from the appellant. For my part, I am not convinced there was any particular basis for challenging the fee of £600. Some judges might have assessed costs in that sum. The reality is that the appellant benefitted from the absence of a costs schedule. She could not realistically have done any better . The respondent effectively capped its costs by its own breach. I consider that the order that the appellant paid the respondent's costs limited to £500 is entirely fair. Accordingly, I decline to interfere with the costs order made by the Master.

Conclusion and disposal

53. For the reasons I have given, the Master was not wrong to limit recovery of Mr Mukulu's fees to those for work done when he had a practising certificate. The order he made for costs was a fair one in all the circumstances even allowing for the fact that the respondent had not filed and served a costs schedule. It follows that this appeal must be dismissed.

Costs

54. In order that I could deal with the costs of the appeal without a further hearing, the parties helpfully addressed me on costs dependent on the outcome of the appeal. It was acknowledged that should the appeal be dismissed, the appellant should pay the respondent's costs and that such costs should be summarily assessed on the standard basis.

55. I have been assisted on this appeal by Costs Judge Whalan, who sat with me as a costs assessor. I have discussed the issues arising with him, albeit the decisions remain for me alone. This applies equally to the summary assessment of costs but I have drawn on his experience in assessing costs in reaching my conclusion. Having heard the parties' submissions, I will reduce the claim for attendances on "others" (which was atypically high without any real explanation at 11 hours) by 5 hours at Grade A rate. It was submitted that the appellant should not be responsible for the costs associated with vacating an earlier appeal hearing on the grounds that this appeared to have resulted from a failure of the court. Counsel were unable to identify what those costs were. It does not appear that the respondent has included drafting a witness statement or preparing an additional bundle associated with the application within the costs schedule. It may be that some of the work is reflected in the attendances on others which I have reduced. I do not consider it proportionate to embark on further enquiry, particularly as I recognise the argument that costs associated with an adjournment which is not the fault of either party may properly be regarded as part of the costs in the appeal. I will disallow line 11 on the schedule of work done on documents, its purpose being unclear. After making the deductions that I do and rounding down a little, it seems to me that a total claim for costs including Counsel's fees of £7,500 is reasonable

and proportionate. Mr Mullin accepted that VAT was not recoverable as it could be recovered through other channels. I therefore summarily assess the costs which the appellant must pay in the total sum of £7,500.