Neutral Citation Number: [2022] EWHC 1678 (QB)

Appeal Ref: QA-2021-000111

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM MASTER JAMES, COSTS JUDGE
THE SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 1 July 2022

Before:

MR JUSTICE MORRIS
SENIOR COSTS JUDGE GORDON-SAKER (ASSESSOR)

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Between:

JOHN POYSER & CO LTD

Appellant/ Claimant

- and -

CYNTHIA SPENCER

Respondent/ Defendant

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Mark Friston (instructed by **John Poyser & Co Ltd**) for the **Appellant /Claimant**
The Respondent/Defendant appeared in person unrepresented
Hearing date: 15 February 2022
Further written submissions: 17 February 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice Morris:

Introduction

1. This is an appeal by John Poyser & Co Limited ("the Claimant") against a final costs certificate issued by costs judge, Master James, dated 5 May 2021 ("the Certificate") in Part 8 proceedings brought by the Claimant against Cynthia Spencer ("the Defendant"). By these proceedings the Claimant claimed an order for the detailed assessment of its bills pursuant to a retainer with the Defendant.

2. The appeal raises an important point of principle, namely whether the provisions of CPR 44.11 concerning misconduct can apply to an assessment of costs between solicitor and client pursuant to section 70 Solicitors Act 1974 ("the 1974 Act") and CPR Part 46.9 and 46.10 ("Solicitor/Client Assessment"). The Master held that they can apply, and then applied them to reduce by 75% the profit costs recoverable by the Claimant. I have concluded, for the reasons set out below, that CPR 44.11 cannot apply and thus that the Master was wrong to apply that reduction.

3. On 22 April 2021 the Master handed down her revised judgment ("the Judgment"). She concluded, inter alia, as follows:

   (a) The Claimant's profit costs should be reduced in any event, by about two- thirds to a sum of £13,195;
   (b) She had power, pursuant to CPR 44.11(1)(b), to reduce further the amount of the Claimant's costs by reason of its misconduct; and
   (c) On the facts, the Claimant was guilty of such misconduct, particularly in relation to a "shortfall", and thus the Claimant's profit costs fell to be reduced by a further 75% to £3,298.75; and
   (d) Taking account of recoverable disbursements and netting off of sums already paid by the Defendant, there was a substantial balance due from the Claimant to the Defendant.

   By the Certificate, issued pursuant to the terms of the Judgment, the Master assessed the Claimant's total costs as £29,386.08, recorded that £47,650.98 had already been paid by the Defendant and therefore certified that the Claimant should pay to the Defendant the balance of £18,264.90 within 14 days, together with interest thereon in the sum of £2914.37, totalling £21,179.27.

The Grounds of Appeal

4. The Claimant now appeals, with the leave of Eady J, against the Certificate and seeks to have it set aside, on two grounds only:

   (1) The Master made an error of law in that she imposed a penalty pursuant to CPR 44.11 in an assessment under Part III of the Solicitors Act 1974 when no such jurisdiction to impose such a penalty existed.

   (2) Alternatively, to the extent that the court had jurisdiction to make findings of misconduct, the Master's decision was "wrong" within the meaning of CPR 52.21(3)(a) because the findings that the Master made were based on findings

of fact that were incorrect or were findings of fact that were incapable of justifying a finding of misconduct within the meaning of CPR 44.11.

5. In her written judgment, Eady J refused permission to appeal on all other grounds. The Claimant's essential purpose of the appeal is to set aside the Master's findings of misconduct made against the Claimant, and against Mr Poyser in particular.

The course of this appeal: the Defendant's vulnerability

6. The Claimant has been represented, in this appeal and in the later stages before the Master, by counsel, Dr Friston. The Defendant is unrepresented, as she was before the Master. As the Master records and as is accepted by the Claimant, the Defendant is a particularly vulnerable person.

7. Prior to the hearing on 15 February 2022, the Defendant applied to adjourn the hearing. However, in the event, she was able to appear before me on a video link, albeit without the friend who had previously assisted her before the Master. Throughout the hearing, Dr Friston and the Court took steps to explain the arguments being put forward. The Defendant herself made some, albeit limited, arguments, to the effect that she should not have to repay any of the sums paid to her.

8. Following the hearing, the Defendant was given an opportunity to put forward any further points she wished to make in writing, and with the benefit of assistance from her friend. To that end, and at the court's direction, Dr Friston was required to provide a written summary, in non-technical language, of the Claimant's arguments in the appeal and explaining how much money the Defendant would be required to repay to the Claimant if the latter's argument was correct. I directed that the Defendant should show that summary to her friend and that she should submit any comments in writing within a further 10 days or such longer time, should she require. No such further written submissions were made by the Defendant within that or any extended time.

9. Additionally, as explained in paragraphs 96 and 104 below, I raised by way of a Note to the Parties dated 17 February 2022, ("the Note") a further issue arising from the Claimant's arguments. Dr Friston responded in writing on the same day.

10. A week later, an email was received from a Mr Kirk-Blythe of Complex Legal Ltd, a firm of "regulatory advisors" (but not lawyers). In that email, Mr Kirk-Blythe accepted that he was not representing the Defendant in the present proceedings, but referred to, and enclosed, a complaint they had made to the Claimant back in June 2020 about its conduct towards the Defendant, in particular in relation to the fees she had paid. He accepted that he did not know how those historic allegations were relevant to the issues now before the Court. The matters raised in his email did not appear to take the evidence already before the Court any further. For this reason, I did not accede to his request to be allowed to speak "as a witness or as a McKenzie friend".

11. The Note and Dr Friston's response was sent to the Defendant and to Mr Kirk-Blythe inviting a response within 6 days. Mr Kirk-Blythe responded by return, indicating that he could not respond, as his firm was not authorised to conduct litigation and did not have sufficient expertise in costs law. He added that the disparity of arms continued to be a real worry, but at the same time indicated that the Defendant was very grateful for all of the Court's assistance and that the court was doing its utmost to support the

Defendant. Nothing further was received from the Defendant, her friend, or Mr Kirk-Blythe.

The Law

The Solicitors Act 1974: statutory right to assessment of a solicitor's bill

12. Part III of the 1974 Act deals "Remuneration of Solicitors". Within Part III, Section 70, in particular, provides as follows:

> "Assessment on application of party chargeable or solicitor.
>
> (1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.
>
> (2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order—
>
> (a) that the bill be assessed; and
>
> (b) that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed.
>
> …
>
> (5) An order for the assessment of a bill made on an application under this section by the party chargeable with the bill shall, if he so requests, be an order for the assessment of the profit costs covered by the bill.
>
> (6) Subject to subsection (5), the court may under this section order the assessment of all the costs, or of the profit costs, or of the costs other than profit costs and, where part of the costs is not to be assessed, may allow an action to be commenced or to be continued for that part of the costs.
>
> (7) Every order for the assessment of a bill shall require the costs officer to assess not only the bill but also the costs of the assessment and to certify what is due to or by the solicitor in respect of the bill and in respect of the costs of the assessment.
>
> …

(9) Unless—

(a) the order for assessment was made on the application of the solicitor and the party chargeable does not attend the assessment, or

(b) the order for assessment or an order under subsection (10) otherwise provides,

the costs of an assessment shall be paid according to the event of the assessment that is to say, if the amount of the bill is reduced by one fifth, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs.

(10) The costs officer may certify to the court any special circumstances relating to a bill or to the assessment of a bill, and the court may make such order as respects the costs of the assessment as it may think fit.…"

Relevant provisions of the Civil Procedure Rules

CPR Part 44

13. CPR Part 44 is headed "General Rule about Costs". CPR 44.1, entitled "Interpretation and application", provides, inter alia, as follows:

"(1) In Parts 44 to 47, unless the context otherwise requires-

…

"detailed assessment" means the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47;

…

"summary assessment" means the procedure whereby costs are assessed by the judge who has heard the case or application.

…

(2) The costs to which Parts 44 to 47 apply include –

(a) the following costs where those costs may be assessed by the court –

(i) costs of proceedings before an arbitrator or umpire;

(ii) costs of proceedings before a tribunal or other statutory body; and

(iii) costs payable by a client to their legal representative; and

(b) costs which are payable by one party to another party under the terms of a contract, where the court makes an order for an assessment of those costs…"

(emphasis added)

14. CPR 44.2 addresses the Court's discretion as to costs and CPR 44.3 sets out the bases of assessment (standard and indemnity). CPR 44.4 is headed "Factors to be taken into account in deciding the amount of costs" and provides, inter alia, as follows:

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

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

(i) proportionately and reasonably incurred; or

(ii) proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

….

(3) The court will also have regard to –

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

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

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

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

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

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

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

(f) the time spent on the case;

> (g) the place where and the circumstances in which work or any part of it was done; and
>
> (h) the receiving party's last approved or agreed budget.
>
> …" (emphasis added)

15. CPR 44.11 is headed "Court's powers in relation to misconduct" and provides as follows:

> "(1) The court may make an order under this rule where –
>
> (a) a party or that party's legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or
>
> (b) it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.
>
> (2) Where paragraph (1) applies, the court may –
>
> (a) disallow all or part of the costs which are being assessed; or
>
> (b) order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur. …." (emphasis added)

16. In relation to this provision, the "Editorial note" in the White Book Service 2021[1] at §44.11.1 states as follows:

> "Before the re-enactment of Pt 44 by the Civil Procedure (Amendment) Rules 2013… this rule was r.44.14. Previously, by the Civil Procedure (Amendment No 3) Rules 2000 para. (1) of this rule was amended for the purpose of making it clear that misconduct may relate to the conduct of both summary assessment and detailed assessment proceedings, and to failures to comply, not only with any provision of Pt 47 or any direction of the court, but with any rule, practice direction or court order.…
>
> The provisions relating to misconduct now extend to the legal representatives of a party as well as to the party personally. The provisions relate both to unreasonable or improper conduct before or during the proceedings giving rise to the assessment

[1] The White Book Service 2022 is to the same effect

> proceedings, and during the assessment proceedings themselves."
>
> (emphasis added)

Paragraph 11 of Practice Direction 44 addresses the court's powers in relation to misconduct under rule 44.11.

17. In *Bamrah v Gempride Ltd* [2018] EWCA Civ 1367 [2019] 1 WLR 1545, Hickinbottom LJ considered in detail the scope of CPR 44.11 and in particular the meaning of "unreasonable" and "improper" conduct. At §26 he stated, inter alia:

> "(ii) Whilst "unreasonable" and "improper" conduct are not self-contained concepts, "unreasonable" is essentially conduct which permits of no reasonable explanation, whilst "improper" has the hallmark of conduct which the consensus of professional opinion would regard as improper.
>
> (iii) Mistake or error of judgment or negligence, without more, will be insufficient to amount to "unreasonable or improper conduct"…."

18. The background to CPR 44.11 is explained in the 1995 edition of *Cook on Costs* at p239 and in *Friston on Costs* (3rd edn) at §57.45. The CPR 44.11 power to impose sanctions for unreasonable or improper conduct is a continuation of a long-standing power that vested only in the judge who made the entitling costs order and subsequently the power was delegated to masters and then all costs judges. It was a power to punish, and not just to compensate. It commonly took the form of a percentage discount or flat reduction in costs. Prior to the Civil Procedure Rules, the powers of taxing officers in relation to misconduct were contained in RSC Order 62 rule 28, which had been first introduced in 1986. Prior to rule 28, where matters of neglect during the main proceedings did not become apparent until taxation, it had been necessary for taxing officers to refers such matters back to the judges, who were reluctant to reopen finished cases. As a result of observations of Megarry V-C in a case reported in 1982, to deal with this, rule 28 was introduced to enable taxing officers themselves to deal with such instances.

Assessment of solicitor and client costs: CPR Part 46

19. CPR Part 46 deals with "Costs – Special Cases". Part II deals with "Costs Relating to Legal Representatives", and within that Part, CPR 46.9 and CPR 46.10 and paragraph 6 of Practice Direction 46 ("46PD.6") deal with detailed assessment of a solicitor and client bill under the 1974 Act i.e. a Solicitor/Client Assessment. In particular CPR 46.10 sets out the procedure to be followed where the court has made an order under Part III of the 1974 Act for the assessment of costs payable to a solicitor by the solicitor's client. 46PD.6 then contains detailed provisions as to the procedure to be

followed in such a court assessment. The "Editorial notes" in the White Book Service 2021 at §46.10.2 state, inter alia, as follows:

> "The procedure set out in Pt 47 (Detailed Assessment of Costs and Default Provision) applies subject to the provisions of this rule and to any contrary order made by the court. (See paras 6.4 to 6.19 of Practice Direction 46 as to the procedure to be adopted.)"

Paragraph 6.8 of 46PD.6 provides that the provisions relating to default costs certificates (CPR 47.11) do *not* apply to cases to which rule 46.10 applies.

20. In *Alpha Rocks Solicitors* v *Alade* [2015] EWCA Civ 685 [2015] 1 WLR 4534, a claim for costs and expenses by a solicitor against a former client, Vos LJ observed at §§21 and 32 that, where the solicitor has been acting fraudulently and advanced false claims the appropriate remedies include penalties in costs and interest, the serious possibility of proceedings for contempt or even criminal prosecution. In considering the available remedies, Vos LJ however made no reference at all to a penalty/discount for misconduct under CPR 44.11.

CPR Part 47: Procedure for Detailed Assessment

21. CPR Part 47 sets out the procedure for detailed assessment of costs and default provisions. The contents to CPR Part 47 lists 24 sub-rules covering the full and detailed range of matters relevant to a "detailed assessment" under CPR 47. In particular, CPR 47.16 provides a power for the court to issue an interim cost certificate; CPR 47.17 makes provision for the issue of a final costs certificate, following the filing of a completed bill at the end of the detailed assessment. I refer further to the provisions of CPR 47 in paragraphs 80 to 84 below.

The Factual Background

22. The following factual background is, in part, adapted from the description of Eady J in her judgment on permission to appeal.

23. The Claimant is a firm of solicitors. The Defendant is a former client. This matter relates to the fees of the Claimant as assessed by the Master. The Claimant was instructed to represent the Defendant in matters concerning the late Victor Williams involving a dispute over his burial and a further dispute relating to his estate. Mr Williams had died on 15 March 2017. The Claimant had first been instructed in relation to the burial dispute. In relation to that matter there was a client care letter entered into between the Claimant and the Defendant dated 5 April 2017. The fees in respect of the burial litigation are not in dispute. As for the dispute relating to Mr Williams' estate, Mr Williams had made a will leaving half the value of his house to the Defendant. The Defendant had lived with Mr Williams in that house for some time. Mr Williams' son challenged this on the basis that his father lacked capacity at the time of making his will. The Defendant contended that the will was valid, but even if it were not, she was entitled to some provision from his estate of which the house was the principal asset. On 5 July 2017 a further client care letter was entered into between the Claimant and the Defendant.

24. Both client care letters explained that Maria Williams, a solicitor (and no relation to Mr Victor Williams or his son) would carry out most of the work in this matter supervised by Mr John Poyser, the Claimant's senior partner ("Mr Poyser"). It was further stated in those letters that "the hourly expense rate for executive staff in the department in charge with carrying out your instructions is £217, to which VAT is added".

Ms Williams and payment of fees: 2017 and 2018

25. Ms Williams was employed by the Claimant and had the conduct of the Defendant's claim in the early stages. She took monies on account from the Defendant in cash, pocketed certain monies and subsequently sought to falsify documents to cover up her wrongdoing. The Defendant complained about the fact that she had given Ms Williams cash payments which had apparently gone missing.

26. The dispute at the heart of the case is about the amounts which the Defendant paid to Ms Williams and whether the Claimant has given the Defendant full credit for those amounts in its accounts, or whether there was "a shortfall". The Master concluded that there was a shortfall in the amount for which the Claimant gave credit. The Claimant contends that the Master was wrong and that there was no such shortfall. Whilst from time to time, the Claimant has given confusing evidence, and made erroneous calculations, the evidence now before the Court establishes the following.

27. Between 11 April 2017 and 10 July 2017 the Defendant made a series of withdrawals from her Halifax bank account totalling £6,090, as follows:

    (1) on 10 April 2017, £1,000 was withdrawn; £800 credited by the Claimant to the client account the following day;

    (2) on 27 April 2017 £1190 was withdrawn from the Halifax; £1,090 was credited to the client account on that day;

    (3) on 15 May 2017 £400 was withdrawn from the Halifax; this was not credited to the client account;

    (3) on 5 June 2017 £3,000 was withdrawn from the Halifax; this was not credited to the client account;

    (5) on 10 July 2017 £500 was withdrawn from the Halifax; this was not credited to the client account.

    Further, on 10 July 2017 the Defendant withdrew £4,500 in cash from her Barclays Bank account. £1,500 was credited to the client account on that day and £1,000 was credited on 12 July 2017. Thus a total of £4,390 was credited to the client account. As regards the remaining £2,000 of the Barclays Bank cash, this was misappropriated by Ms Williams, but thereafter, on or about 16 March 2018, she used her own funds to pay directly for counsel's fees in that amount (which do not appear on the ledgers). In this way the Claimant maintains that, effectively, the £4,500 was fully accounted for.

28. Thus on this basis, £10,590 in total was withdrawn by the Defendant; the total credited to the Defendant as paid was £6,390, being £4,390 plus the £2,000 counsel fees.

29. On 24 April 2018 court proceedings in relation to the disputed will were issued. The litigation was hard fought on both sides and such offers and counteroffers as were made demonstrated the distance between the parties.

30. In June 2018 the Defendant raised her concerns about the missing cash payments with Mr Poyser. At a meeting on 5 June 2018 at the Claimant's offices between the Defendant and Mr Poyser, the Defendant complained about payments she had made to Ms Williams. She agreed to provide copies of bank statements concerning payment of the £4,500. Shortly after the meeting, the Defendant produced at the Claimant's offices and for Mr Poyser the bank statements, showing that she had withdrawn cash of £10,590. Mr Poyser thereafter agreed to investigate the matter.

31. On 2 July 2018 there was a meeting between Mr Poyser and the Defendant at which payment of fees to Ms Williams was discussed. In the Judgment, the Master suggested that the attendance note of that meeting indicated that Mr Poyser pressurised the Defendant into settling the dispute about the amounts she had paid. The Claimant says that at that stage, Mr Poyser agreed only to investigate further.

32. Mr Poyser looked into this and concluded that £6,791.86 had been received and credited, but that £3,798.14 had not been accounted for and that the Claimant would give the Defendant credit for this amount. On 6 July 2018 the Claimant issued an amended invoice, having deducted £3,798.14 from an invoice issued on 14 June 2018**.** On 13 July 2018 the Defendant accepted Mr Poyser's resolution of the complaint. The Claimant contends that on this date the Defendant agreed to the crediting of £3,798.14 by discounting an outstanding bill by that amount. This discount was later reduced by £400 to £3,398.14, because the Defendant accepted that £400 of the sums she had paid had in fact been paid to a third party.

33. Thus, in summary, Mr Poyser accepted that there were unaccounted items that had been paid by the Defendant to Ms Williams and as a result he allowed a discount against outstanding fees otherwise payable by the Defendant to the Claimant. (He accepts that, instead, he ought to have credited the client account).

34. On 22 August 2018 Mr Poyser referred Ms Williams to the Solicitors Regulation Authority ("SRA"). He prepared a report to the SRA of that date ("the SRA Report"). On the next day Ms Williams tendered her resignation from the firm. The SRA Report explained the position as set out above, as follows:

> "My investigation into the client's complaint revealed that the firm had record of her paying on account of fees the sum of £6791.86. I then added the amount that the client alleged she had paid in addition by way of cash payments to Miss Williams, which brought the total payment on account to £10,590, a difference of £3,798.14 The client had a bill outstanding to the firm of £14,400 inclusive of VAT in relation to one of her litigated matters.
>
> As the client was unable to produce to me any further evidence other than the bank statements showing that cash had been transferred from one account to another and then withdrawn and Miss Williams was maintaining that she had received no more in

> cash from the client other than the sum of £4500, this left me in a difficult position in terms of trying to resolve the client's complaint and therefore without any admission of liability on the firm's part and totally without prejudice, in an attempt to resolve the client's complaint alone to her satisfaction and so that she was not out of pocket, I agreed to deduct from the outstanding bill the unaccounted amount of £3,798.14 which left the balance for the client to discharge of £10,601.86. The client agreed to accept this in full and final settlement of her complaint."

At the end, and somewhat confusingly, the SRA Report added:

> "I should add, that in relation to the monies it is alleged by the client she had transferred from her Halifax Instant Saver to her Halifax Current Account which she has then withdrawn in cash amounting to £6,090 and given to Miss Williams, I have not found any evidence to support that these payments were ever received by Miss Williams and only have the oral evidence of the client maintaining that they were paid and Miss Williams' denial that they were received."

The discrepancy between the £6,791.86 referred to in the SRA Report (and in Mr Poyser's subsequent first statement) and the £6,390 which I refer to in paragraph 28 above was subsequently explained in Mr Poyser's second statement: see paragraphs 47 and 91 below.

35. According to Mr Poyser's first witness statement, Ms Williams formally left the employment of the Claimant firm on 31 October 2018 (although there is some evidence that she remained involved in some way thereafter).

The disputed will proceedings

36. Meanwhile, as regards the ongoing disputed will proceedings, in the light of expert medical evidence, on 7 April 2019 the Defendant's counsel advised her that she should seek to settle the proceedings on the best terms possible. The Claimant concurred in this advice. The Defendant decided to proceed and preparations were made for trial. The case came on for trial before HH Judge Pearce on 7 May 2019, who found that the will was not valid, but that the Defendant's dependency claim should be allowed, such that she was awarded 50% of the net proceeds of the sale of the house, that being in the region of £70,000 to £90,000. He made no order as to costs.

The present Part 8 proceedings

37. On 7 October 2019 the Claimant issued these Part 8 proceedings against the Defendant for an order for the assessment of its fees.

38. On 20 November 2019 the Master made directions adjourning matters to a hearing on 12 December 2019. On 8 January 2020 Master James made an order that there should

be a solicitor and client assessment and ordered that a detailed breakdown of costs (referred to as a Bill) be drawn up. The Bill as served was for £77,201.92. This was made up of profit costs of £44,110.40 plus VAT and disbursements (including VAT) of £27,612.58, thus totalling £80,600.06, less the reduction of £3,398.14 (being £3,798.14 less £400).

39. By witness statement dated 24 March 2020, the Defendant set out her points of dispute in support of her challenge to the costs claimed by the Claimant. In that witness statement she set out at Appendix A a summary of cash payments she had made to Ms Williams (including the payments referred to in paragraph 27 above) and to Mr Poyser. In Appendix B she exhibited her bank statements highlighting payments made to Ms Williams from her Halifax and Barclays Bank accounts.

40. A hearing fixed for the detailed assessment on 20 July 2020 was adjourned and relisted for 27 October 2020, pending the prosecution of Ms Williams. On 27 October 2020 a telephone hearing took place. The Master indicated she was minded to make an order pursuant to CPR 44.11 in the light of Ms Williams' dishonesty and concerns about other matters (namely, the hourly rates charged, and that both work relating to the Defendant's complaint and time reading into the file for a Mr Alleyne had been included within the Bill). She directed the Claimant to provide further evidence and written submissions on this issue by 24 November 2020, with the Defendant able to respond by 8 December 2020 . From the Claimant's attendance note of that hearing it appeared that the Master accepted that the Defendant had not made payments that were greater than those that the Claimant had accounted for. Addressing the applicability of CPR 44.11(1)(b) and any sanction to be applied, the attendance note states:

> "[The master] accepted that the client had been credited for the sum she had been robbed, but said that this did not address CPR 44.11.
>
> …
>
> [The master] advised that she was with [the Claimant] in respect of the allegations that further payments had been made beyond those in the complaint, but did not agree that [the Defendant] was being opportunistic. [The Master] believed [the Defendant] was clearly struggling after the lapse of time, but she was wrong. [The Master] stated it was not her reading that [the Defendant] was trying to pull the wool over anyone's eyes."

41. Thus, it appeared that, at that stage, it was not the shortfall itself which formed the basis of the possible application of CPR 44.11, but rather the three other concerns.

42. On 20 November 2020 Mr Poyser filed a witness statement addressing the issue of the applicability of CPR 44.11 and on 21 November 2020 the Claimant filed written submissions from counsel addressing the question whether any penalty could or should be imposed under CPR 44.11. No further hearing took place. The Judgment was finally handed down on 22 April 2021 and on 5 May 2021 the Master issued a Final Costs Certificate.

Mr Poyser's first witness statement: 20 November 2020

43. Mr Poyser made his first statement in support of written submissions addressing the applicability of CPR 44.11(1)(b). He addressed the three issues of misconduct raised by the Master at paragraphs 52 and following. The earlier paragraphs of the statement were made "by way of background", and addressed, in particular, the position of Ms Williams and fees paid to her. It was in that introduction that he addressed the issue of "shortfall". Importantly, Mr Poyser explained the position as follows:

> "16. The Defendant alleged that she had paid directly to Ms Williams a total of £10,590.00 up to that date, more than what I was able to account for. Whilst my investigation failed to find any evidence to confirm the allegation as being true, in order to address the complaint the Defendant was offered a reduction in the fees outstanding at the time amounting to £3,798.14. This figure was the difference between what the Defendant alleged she had paid in fees to the firm up to that date and the fees she had paid on account, which I had calculated to be £6,791.86, however this was calculated based upon payments made out and not received, the figure ought to be £6,390.00. …
>
> 17. The Defendant had a bill outstanding to the firm of £14,400 inclusive of VAT in relation to one of her matters. As the Defendant was unable to produce to me any further evidence other than the bank statements showing that cash had been transferred from one account to another and then withdrawn, whilst Ms Williams was maintaining that she had received no more cash from the Defendant other than the sum of £4,500, I was in difficulty establishing the definitive position. In the circumstances, I agreed to deduct from the outstanding bill the unaccounted amount of £3,798.14 which left a balance for the Defendant to discharge of £10,601.86. My priority was to ensure that the client was treated fairly and transparently."
>
> (emphasis added)

Notice of Appeal

44. On 20 May 2021 the Claimant issued the Notice of Appeal, setting out four grounds of appeal. In addition to the two grounds set out in paragraph 4 above, Ground (2) included a procedural complaint that the Master had not given proper notice of the allegations of misconduct. Ground (3) complained that the penalty imposed for misconduct was excessive and disproportionate. Ground (4) took issue with the Master's alternative conclusions at paragraph 147 of the Judgment. I refer to Ground (4) further at paragraphs 99 to 101 below.

Reference to the SRA

45. Subsequently it came to light that the Claimant had not repaid the amount due to the Defendant under the Certificate, and, as a result, on 6 August 2021 the Master, of her own motion, sent a copy of her Judgment to the SRA (pointing out at the same time the

existence of this appeal). Since that date there have been further exchanges between the Claimant and the SRA.

46. By order dated 9 September 2021 Mrs Justice Collins Rice refused permission to appeal on the papers. On 22 September 2021, the Claimant paid the Defendant £21,781.27 being the amount in the Certificate plus additional interest.

Mr Poyser's second witness statement

47. On 26 October 2021 Mr Poyser filed and served a second witness statement, in which he sought to correct what he had said in paragraphs 16 and 17 of his first statement, explaining that the correct figure for sums credited to the Defendant was £6,390 and explaining why the original figure of £6,791.86 required revision.

Permission to appeal 29 October 2021: Eady J

48. On 29 October 2021, following an oral renewal hearing, Mrs Justice Eady gave permission on to appeal on Grounds (1) and (2) (limited to findings of fact). She refused permission in relation to the procedural aspect of Ground (2), and in respect of Grounds (3) and (4). At the time she also ordered that this Court should have a copy of attendance note of the hearing before the Master on 27 October 2020.

The Judgment

49. The Master's judgment is somewhat discursive in style and structure, and repetitive at points. Her decision can be summarised as follows.

50. The detailed bill was for a total of £80,600.06. The Master's concerns about misconduct were not to do with the quantum, but with the Claimant's conduct, including, but not limited, to the conduct of Ms Williams.

51. As regards payments made to Ms Williams (which she referred to as "the complaint"), at paragraph 12 of the Judgment, the Master cited the passages from the SRA Report (set out above). The Master understood that the Defendant was alleging that an additional £6,090 in cash had been paid to Ms Williams, but had not been credited to her account by the Claimant. She further concluded that, since Ms Williams denied having received that cash, the Claimant did not accept the Defendant's version of events and that this £6,090 had never been treated as a payment on account; and that the Claimant contended that the Defendant could not pursue the £6,090 because matters had been settled on 13 July 2018 meeting: see paragraphs 14 to 16. The Master concluded by accepting the Defendant's account that a further £6,090 had been handed over and that the settlement discount of £3,798.14 failed to take account of that £6,090 (i.e. there was a shortfall of £6,090): paragraphs 22 and 25. (The Master revisited the shortfall issue later in the Judgment, at paragraphs 141 and 142).

52. In addition to the "shortfall", the Master identified a number of additional concerns, which had led to "heavy overcharging" (paragraphs 35 and 45):

    (1) Hourly rates: work carried out by "Bev" and by Mr Alleyne had been charged, wrongly, at Grade A rates (see paragraph 33) – this was sufficient of itself to amount to misconduct (paragraph 37 and then, in detail, paragraphs 46 to 56);

(2) Fees in respect of work carried out in relation to the Defendant's complaint (about Ms Williams and the missing payments) had been included within the Bill (paragraphs 33(b), 39 to 44 and then, in detail, paragraphs 57 to 79).

(3) Time spent as an indirect result of the complaint had been included in the Bill (paragraphs 80 to 90).

(4) She also identified some other examples of overcharging, including work arising from the Claimant's administrative error and over-recording of time (paragraphs 91 to 96).

53. As regards items (2) and (3) above, she indicated that as much as two-thirds of the timed attendances in the Bill related to the misappropriated funds and the fallout from that issue, rather than the issues in the litigation itself (paragraph 89).

The "first" reduction to a "reasonable" sum

54. At paragraphs 100 to 114, the Master then sought to reduce the Bill to take account of "the complaint and other overcharging, on a broad-brush basis" (and *prior t*o any consideration of a reduction for misconduct under CPR 44.11). Of the 190 hours and 18 minutes recorded in the Bill, she considered that as much as two-thirds was incurred dealing with the complaint and its consequences, and further time was spent on the Claimant's own errors. She considered that 75 of the 190 hours could be attributed to the litigation, and then, reducing the hourly rates to Grade C for 55 of those 75 hours, the profit costs figures fell to be reduced from £41,295.10 to £13,195, as being reasonable: see paragraphs 105 to 107. This was a very substantial reduction to less than one-third of the amount in the Bill. At paragraph 108, the Master recalculated the overall Bill (taking account of disbursements and VAT) leading to a final figure of £41,261.58 (as opposed to the approximately £80,000 claimed). At paragraph 109, the Master then considered the overall balance of sums, taking account of the agreed reduction in respect of payments to Ms Williams, and sums already paid by the Defendant. She concluded that there had been an overpayment by the Defendant in the sum of £6,389.40. Instead the Defendant had been presented with Bill seeking a further £33,436.73 combined with a statement of costs of the assessment, seeking a further £17,675.12. In view of the distress caused to the Defendant, the Master then went on to consider whether any further reduction should be imposed.

CPR 44.11 and misconduct

55. The Master then considered the application of CPR 44.11 (at paragraphs 115 to 148). Her analysis was made under three sections: "CPR Part 44.11 and remedies"; "Reasons why CPR Part 44.11 should apply in these Solicitors Act proceedings'; and "Other Procedural objections to CPR Part 44.11".

56. In the first section, at paragraph 115, the Master appeared to suggest that whether or not CPR 44.11 applied strictly was "really beside the point". She considered that the Claimant's misconduct went beyond Ms Williams' involvement (paragraph 118). At paragraph 121, the Master stated that its conduct in the Detailed assessment proceedings and in the underlying litigation had "clearly been unreasonable and improper". It "charged rates to which it was not entitled and charged for work which did not fall within the retainer; this in my judgment falls within the (mis) conduct envisaged within CPR 44.11". At paragraph 126, she concluded that "it is appropriate under CPR

44.11(1)(a) and (b) and (2)(a) to disallow part of the costs which are now being assessed for the misconduct above-referred to".

57. In the second and third sections, the Master rejected Dr Friston's submission that CPR 44.11 does not apply in a Solicitor/Client Assessment under CPR 46. In the second section, first, there had been relevant misconduct in the present Detailed Assessment proceedings, being "the assessment proceedings" within CPR 44.11(1)(b). Secondly, there had been a relevant failure to comply with a court order and breaches of the overriding objective and of the CPR more generally, falling within CPR 44.11(1)(a).

58. In the third section, the Master addressed Dr Friston's argument of principle (paragraphs 133 to 139). She relied in particular on the White Book commentary to CPR 44.11 and the commentary to CPR 46.10, and upon paragraph 6.8 of 46PD.6 (see paragraphs 16 and 19 above) to the effect that CPR 47 applies to CPR 46. At paragraph 135, she concluded that "CPR 44 is not immaterial on a Solicitor/Client Assessment unless it has been disapplied" and that nothing suggested it was disapplied. At paragraph 136, she placed particular reliance upon the inclusion within CPR 44.1(2) of "costs payable by a client to their legal representative". She continued as follows:

> "137 As such, whilst I have high regard for Counsel's learned opinion, I disagree with his interpretation that CPR Part 44.11 does not apply because it is in Part 44 of the Civil Procedure Rules, "*which relates solely to costs between opposing parties.* " Nor do I agree that *'the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47'* excludes Solicitor/Client assessments undertaken in accordance with CPR Part 46.
>
> 138. The above extracts from the Civil Procedure Rules and the commentary thereto, clearly extend beyond party and party assessments, and underline the importance of CPR Part 47 even in Solicitor/Client assessments. Neither limb of CPR Part 44.11(1) defines 'Detailed assessment' by reference only to CPR Part 47, rather than CPR Part 46.
>
> 139. Finally, if CPR Part 44.11 did not apply to an assessment under CPR Part 46.9, there would be a lacuna in the power of the Court to deal with misconduct in proceedings before it. It may be a very rare occurrence for CPR Part 44.11 to be needed in Solicitors Act Detailed Assessment proceedings, but in my judgement, it is not excluded from such proceedings as a matter of law and is clearly an appropriate means to deal with the events in this case."

59. Significantly, at paragraphs 140 to143, she then turned to the facts and, in particular returned to the issue of the "shortfall" and the £6,090. She found, on the balance of probability, that the Defendant had paid more than £4,500 to Ms Williams and that the Claimant knew that the Defendant alleged a further £6,090 had gone astray and that there was indeed a shortfall. (She repeated this in paragraph 145 below). The

Claimant's assertion that the shortfall had been made good was incorrect. That was relevant misconduct, as were the other concerns relating to billing and fee earner rates.

An alternative analysis?

60. Then at paragraphs 145 to 147, the Master seemed to apply an alternative analysis, in the following terms:

> "145. If I am wrong and CPR Part 44.11 is not applicable, either directly or by analogy, I consider that a reduction is nevertheless appropriate for other reasons. Firstly, the missing £6,090.00 has never been credited to the Defendant and does not appear in the Cash Account on her Bill. I find that it was more likely than not that the Defendant handed this money, over several transactions, to Miss Williams, and therefore its absence from the Cash Account should be rectified.
>
> 146. Secondly, CPR Part 44.4 states that the Court will have regard to **all the circumstances** in deciding whether costs were (if it is assessing costs on the indemnity basis) unreasonably incurred; or unreasonable in amount, and states that in making that decision, the Court will have regard to the conduct of all the parties, including in particular conduct before, as well as during, the proceedings; and the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.
>
> 147. Hence it seems to me that I have a general discretion to assess costs by reference to the Claimant's conduct in recording time spent on the Defendant's complaint, on the litigation file, and billing so much of that time to the Defendant, at Grade A rate besides. Similarly, the fact that I have previously expressed concern as to how the Claimant was proceeding in this matter, and the Claimant's failure to act upon that concern, instead continuing to maintain that there was no or no significant issue beyond the actions of Miss Williams, is something that (in my view) I can and should take into account."
>
> (emphasis added)

The Master's conclusions

61. In the final section of the Judgment, headed "Reduction made", the Master applied a 75% reduction. At paragraph 148, she stated:

> "I therefore reduce the Claimant's costs by a further 75% on the basis that, as stated above, I believe the misconduct in this case

> to be worse than in *Gempride v Bamrah* (50%) giving the following total..." (emphasis added)

62. It is clear from the reference to *Gempride* that the Master was making the reduction pursuant to CPR 44.11. The Master then set out a revised calculation, modifying the calculations at paragraphs 108 and 109. The sole modification was to reduce the (already substantially reduced) profit costs figure of £13,195 by 75% to £3,298.75. (In this way profit costs had been reduced from £41,295.10 to £3,298.75). The effect of this further reduction was to increase the final amount due to the Defendant to £18,264.90. (As explained below, there is doubt as to whether the Master made a clear positive finding in the alternative to CPR 44.11 that, pursuant to CPR 44.4, a further 75% discount was applied).

The Parties' submissions and the Issues

63. The Claimant submits as follows:

(1) CPR 44.11 has no application to a Solicitor/Client Assessment under section 70 and CPR 46.9 and 46.10. For that reason, the Master had no power at all to make any finding of misconduct, and thus to apply the 75% reduction. (Ground (1)).

(2) Even if there was power to apply CPR 44.11, the Master erred on the facts in finding that the Claimant's conduct was "unreasonable or improper" (i.e. misconduct). In particular, the Master was wrong to find that there was any relevant "shortfall" in amounts by the Defendant and that the hourly rate applied could constitute "misconduct". (Ground (2)).

(3) The Master did not make the reduction on any alternative basis, and in any event, there is no power to make a reduction on any other basis.

(4) Accordingly, the finding of misconduct should be set aside and the 75% reduction in costs should be removed. As a result, the amount owing to the Defendant falls to be reduced and, to that extent, sums paid over by the Claimant to the Defendant should be repaid.

64. The Defendant submits that the Master's judgment and decision was correct and should stand. She had overpaid the Claimant and did not wish to pay any more. The appeal should be dismissed.

The Issues

65. Thus, there are essentially three issues:

(1) Ground (1): jurisdiction: CPR 44.11 and the 1974 Act;
(2) Ground (2): misconduct on the facts;
(3) The overall consequences of upholding Grounds (1) and/or (2).

Ground (1): Does CPR 44.11 apply to assessments under the Solicitors Act 1974?

66. The Master's conclusion that CPR 44.11 does apply is based on her analysis at paragraphs 127 to 139 of the Judgment and can be summarised as follows (and as expressed by Eady J in her judgment).

67. CPR 44.1(2) provides that CPR Parts 44 to 47 apply to costs payable by a client to their legal representative. The commentary in the White Book establishes the following. Where a detailed assessment under section 70 has been ordered, the procedure set out in CPR 47 applies subject only to the provisions of CPR 46.10. Where CPR 47 is not to apply, 46PD.6 makes that clear (e.g. 46PD.6 para 6.8). The White Book also makes it clear that CPR 44.11 applies to detailed assessments under CPR 47.

68. Thus, in short, CPR 44.11 applies to CPR 47 assessments; CPR 47 applies to CPR 46.9 and 46.10 cases, unless it is disapplied. CPR 46 cases include Solicitor/Client Assessments under the 1974 Act. Therefore it follows that CPR 44.11 applies to Solicitor/Client Assessments under the 1974 Act.

69. Dr Friston submits that the Master was wrong in law to find that CPR 44.11 is capable of applying to a Solicitor/Client Assessment under the 1974 Act. CPR 44.11 cannot apply to such an assessment. First, he contends that, as a matter of textual analysis of the provision itself, CPR 44.11 does not contemplate or cover a Solicitor/Client Assessment. Secondly, he makes a number of high level points relating to: the underlying nature of a Solicitor/Client Assessment; the legislative history of CPR 44.11; the absence of need for such a power in the case of a Solicitor/Client Assessment; and principles of statutory construction relating to penalties. Thirdly, he submits the Master's analysis of the provisions of the CPR (and in particular of CPR 44.1(2) and CPR 47) was wrong.

70. By way of preliminary, it is important to bear in mind the distinction between, on the one hand, the assessment of costs as between opposing parties to litigation (usually pursuant to a court order directing one party to pay the other party's costs) (for ease of reference, "Party and Party Assessment"), and, on the other, assessment of costs as between a party and its solicitor, pursuant to a retainer. The former is subject to the Court's discretion and involves ascertaining an "award of costs" and is governed by the rules in the CPR, in particular CPR 44. Such costs may be subject to summary assessment or detailed assessment. The latter is governed by the contract for services (i.e. the retainer) and is subject to a statutory regime under the 1974 Act, as supplemented by certain provisions in the CPR. It involves a process of determining, by way of evaluation, a reasonable amount. The solicitor has a substantive right to be paid, qualified by the client's substantive right to have those fees assessed.

Textual analysis of CPR 44.11 itself

71. As regards the text of CPR 44.11 itself, CPR 44.11(1) is in two parts. Sub-rule (a) deals with failure to comply with a rule etc "in connection with a summary or detailed assessment". Sub-rule (b) covers unreasonable or improper conduct (i.e. misconduct) "before or during the proceedings or in the assessment".

72. First, as to sub-rule (a) a Solicitor/Client Assessment is not a "summary assessment" (as defined). Whilst the costs *of* the Solicitor/Client Assessment might be summarily

assessed, the costs being assessed in that Assessment cannot be summarily assessed. Moreover, in my judgment, a Solicitor/Client Assessment is not a "detailed assessment" within the meaning of that term in CPR 44.11. For the purposes of Parts 44 to 46, "detailed assessment" is defined, in CPR 44.1(1), as "the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47". A Solicitor/Client Assessment under the 1974 Act and CPR 46.9 and 46.10 is not such a procedure. Even if the procedure for a Solicitor/Client Assessment might, by default, incorporate in part some of the elements of Part 47, (as per the White Book commentary), it is not in itself a Part 47 detailed assessment. (I address this further in paragraphs 80 to 84 below). In my judgment a CPR 46.9/46.10 assessment is not a "detailed assessment" as referred to in CPR 44.11(1)(a). Accordingly CPR 44.11(1)(a) does not apply to the costs the subject of a Solicitor/Client Assessment.

73. Secondly, as to sub-rule (b), the relevant conduct is conduct "before or during the proceedings or in the assessment proceedings". "The assessment proceedings" refer to the "summary or detailed assessment" referred to in sub-rule (a), and thus, for the reasons given above, does not include a Solicitor/Client Assessment. As to "before or during the proceedings", in my judgment those "proceedings" are the proceedings out of which the assessment proceedings arise i.e. prior substantive proceedings between opposing parties.

74. In the context of a Solicitor/Client Assessment under the 1974 Act, there are two stages: the Part 8 proceedings applying for an order for detailed assessment and then, if an order for assessment is made, the detailed assessment itself. On that basis, it might be that CPR 44.11(1)(b) could apply to conduct in, and the costs *of,* the Part 8 proceedings - "the proceedings" in sub-rule (b) would be the Part 8 proceedings and the costs of *those* proceedings will be subject to summary or detailed assessment. However, as a matter of construction, sub-rule (b) cannot apply to conduct of either the solicitor or the client at any stage prior to the Solicitor/Client Assessment i.e prior to the Part 8 proceedings.

75. Thirdly, further support for the conclusion that CPR 44.11 is concerned with Party and Party Assessment (and not Solicitor/Client Assessment) is provided by the following:

(1) Solicitor/Client Assessment applies to costs of both contentious work and non-contentious work carried out by a solicitor under the retainer. Non-contentious work, such as drafting a will or conveyance, do not amount to "proceedings" within the meaning of that word in sub-rule (b).

(2) The references in the rule to "that party's legal representative", and in particular in CPR 44.11(2)(b). Sub-rule (2)(b) expressly contemplates three distinct persons: "the party at fault", "that party's legal representative" and "any other party". In a Party and Party Assessment, there is likely to be at least three (and often four) relevant persons – the parties to the proceedings and their respective legal representatives. However, in a Solicitor/Client Assessment of the costs incurred in the course of the retainer, there are only two relevant persons: the client and the solicitor. Similarly, sub-rule (1)(b) contemplates "a party" and "that party's legal representative" being "on the same side" and the latter's conduct being effectively attributed to the former; and in this way, implicitly, that there are, overall, at least three parties involved. The reference to "a party" suggests that there is another party (other than the legal representative).

76. For these reasons, I conclude that, as a matter of textual analysis, CPR 44.11 does not apply to a Solicitor/Client Assessment.

Context and aids to interpretation

77. This textual analysis is supported by a number of further factors. First, if CPR 44.11(1)(b) were to apply to a Solicitor/Client Assessment, solicitors and licensed bodies would be subject to penalties potentially being imposed by costs judges for shortcomings in the provisions of their services to clients, in circumstances where other professional service providers are not. Such a power might be expected to have been conferred by primary legislation, rather, somewhat inadvertently, than by way of a civil procedure rule which applies primarily to a different situation (Party and Party Assessment). Secondly, the legislative history of this provision (referred to in paragraph 18 above) indicates that its origins lay in the powers of a trial judge to award costs between opposing parties. A trial judge has never had the power to order a solicitor to be entitled to only part of its fees due from the client under the retainer. Moreover at the time of the enactment of the 1974 Act, costs judges (taxing masters) had no powers in respect of misconduct. Thirdly, some support is provided by the observations of Vos LJ in *Alpha Rocks* (see paragraph 20 above). There, in the case of a Solicitor/Client Assessment there was no suggestion that the sanction for a case of serious misconduct could include the exercise of powers under CPR 44.11. The various powers to which Vos LJ there referred indicate that the inapplicability of CPR 44.11 does not lead to the "lacuna" suggested by the Master (Judgment, paragraph 139). Fourthly, I place some weight upon the principle of statutory interpretation that the court should take into account the principle that a person should not be penalised except under clear law: *Bennion Bailey and Norbury on Statutory Interpretation* (8th edn) §26.4. To the extent that the power to disallow costs in CPR 44.11(2)(a) is akin to a penalty, then the application of that power to a Solicitor/Client Assessment is certainly not *clearly* expressed in that provision.

The Master's analysis

78. The Master's analysis relies upon two central elements. In my judgment, neither support the conclusion that CPR 44.11 can apply to a Solicitor/Client Assessment.

79. First, the Master relied upon CPR 44.1(2), stating that "The costs to which Parts 44 to 47 apply include … (iii) costs payable by a client to their legal representatives". However, properly interpreted, those words do not mean that each and every provision in each of CPR 44 to 47 inclusive applies to each of the different types of costs enumerated in CPR 44.1(2)(a)(i) to (iii) and (b). Rather the effect of that provision is to identify the different types of costs to which some or all of the provisions of CPR 44 to 47 might apply. CPR 44 to 47 covers a number of different costs regimes, with differing provisions and rules. It is not, and cannot be, the case that all the provisions in those four Parts apply to each and every type of assessment identified in CPR 44.1(2). It is clear that some provisions of these rules apply only to some of the particular types of assessment (and in particular to Party and Party Assessments).

80. Secondly, the Master relied upon the proposition that CPR 47 applies to CPR 46.9 and 46.10 (and since CPR 44.11 applies to CPR 47, it also applies to CPR 46.9 and 46.10). That proposition is said to be established by the White Book commentary at §46.10.2 (see paragraph 19 above). However, the White Book commentary is apt to mislead and,

in any event, is not supported by authority. The proposition that the procedure in CPR 47 applies is qualified by the words "subject to the provisions of this rule". CPR 46.9 and 46.10, and in particular, 46PD.6 set out a detailed and comprehensive procedure and rules for a Solicitor/Client Assessment. The sole reference in 46PD.6 to CPR 47 is in paragraph 6.8 of 46PD.6. The Master placed reliance upon paragraph 6.8. However it does not follow from the fact that, pursuant to one specific provision of 46PD.6, one particular provision in CPR 47 does *not* apply to a Solicitor/Client Assessment under CPR 46.10, all other provisions of CPR 47 *do* apply to a CPR 46.10 Assessment.

81. In the course of argument, Dr Friston took the Court through each of the provisions of CPR 47.1 to 47.20. The vast majority of those provisions can have no possible application to a Solicitor/Client Assessment; for example, CPR 47.4 as to venue cannot apply because CPR 67.3 makes express provision for the venue of a Solicitor/Client Assessment; CPR 47.5 to 47.10 apply only to costs payable by one party to another or payable to a charity; CPR 47.11 to 47.15 also apply only to costs payable by one party to another (and in any event the subject matter of CPR 47.13 and 47.14 is covered by CPR 46.10 and 46PD.6). CPR 47.20 can have no application to Solicitor/Client Assessment, in the face of the 1/5th rule in section 70(9) of the 1974 Act. The only provisions which might apply to a Solicitor/Client Assessment are those relating to interim and final certificates in CPR 47.16 and 47.17.

82. As regards the White Book commentary at §46.10.2, in advance of the hearing, I drew to Dr Friston's attention the judgment of Asplin LJ in *Ainsworth v Stewarts Law* [2020] EWCA Civ 178, a Solicitor/Client Assessment case where at §36 she cited with approval that passage in the White Book in the following terms:

> "It seems to be quite clear, that although CPR r 46.9 and r 46.10 apply in relation to solicitor and own client assessments, it is necessary to look to CPR Part 47 for assistance <u>in relation to the form which points of dispute should take.</u> In my judgment, therefore, the notes in the White Book at 46.10.2 are accurate. They provide that the procedure in Part 47 applies to a solicitor and own client assessments subject to CPR r 46.10 itself and any contrary order of the court." (<u>emphasis</u> added)

83. At first blush, those observations of Asplin LJ appeared to support the Master's analysis. However in my judgment they were made in the context of the very specific issue in that case and do not detract from my analysis of the applicability of CPR 47 to Solicitor/Client Assessment. In that case, the specific issue was whether the points of dispute served by the client pursuant to CPR 46.10(3) were insufficiently detailed so as to justify them being dismissed. Neither CPR 46.10 nor 46PD.6 gives any indication as to the *form* which points of dispute are required to take. However there is provision in the Practice Direction to CPR 47 as to the form which points of dispute in CPR 47 proceedings should take. It was against this background Asplin LJ concluded that it was necessary to look to CPR 47 for assistance "in relation to the form which points of dispute should take". CPR 47 could be used to fill a gap in the CPR 46.10 procedure. However this is not authority for the proposition that CPR 47 applies wholesale to a Solicitor/Client Assessment, let alone that such an Assessment is "a CPR 47

procedure/detailed assessment". Where there is nothing in 46PD.6 or there is a gap, it is permissible to consider CPR 47, but that is not the same thing as saying that the whole of Part 47 applies to Solicitor/Client Assessment or that the latter constitutes a "detailed assessment" within Part 47.

84. In these circumstances, it is not possible to say either specifically that a Solicitor/Client Assessment can proceed "in accordance with Part 47" - (it follows that such an Assessment is not a "detailed assessment" within the definition in CPR 44.1(1)); nor that, more generally, CPR 47 applies to CPR 46.9 and 46.10.

Conclusion on Ground (1)

85. For these reasons, I conclude that the provisions of CPR 44.11 do not apply to a Solicitor/Client Assessment carried out pursuant to the 1974 Act and CPR 46.9 and 46.10. It follows that, for this reason alone, the Master was wrong, at paragraph 148 of the Judgment, to apply a further 75% reduction to profit costs pursuant to CPR 44.11.

Ground (2): misconduct on the facts

86. In the light of my conclusion on Ground (1), Ground (2) does not arise for determination. Nevertheless, in the event that my conclusion on Ground (1) is wrong, I address this ground, albeit in relatively brief terms.

87. The Claimant submits that at the heart of the findings of misconduct on the part of the Claimant is the Master's erroneous finding on the "shortfall" issue. It further submits that the Master was wrong to find that (a) the Claimant's approach to the hourly rates of "Bev" and Mr Alleyne and (b) the inclusion of time related to, and items consequential upon each constituted "misconduct".

The "shortfall"

88. The Master's concluding finding on this issue was that £6,090 was never credited to the Defendant and does not appear in the cash account and that the Claimant did not make good the shortfall: see paragraphs 141, 142 and 145. That failure amounted to misconduct on the part of the Claimant.

89. In this regard, the evidence and explanations provided over time by the Claimant have been confused, inconsistent and subject to errors and corrections; particularly, in relation to the cash payments initially made by the Defendant to Ms Williams, how and when amounts were credited to the Defendant's client account, the course of the complaint made by the Defendant to Mr Poyser, the amount of the shortfall, and when, whether and to what extent the Claimant gave a compensating credit for these payments. Regardless of Ms Williams' own dishonesty, the Claimant can justifiably be criticised for the manner in which it handled this issue.

90. Having said that, in my judgment, on the evidence before the Court and indeed before the Master, the Master's finding was wrong. On careful analysis of the evidence relating to (i) the cash withdrawn and handed over to Ms Williams and (ii) the amounts credited to the client account for the Defendant and (iii) the subsequent discounting of the bill in July 2018, I am satisfied that there was no "missing £6,090", and that Mr Poyser genuinely sought to make good any relevant shortfall, and indeed substantially

(if not wholly) achieved that objective by the discount given. That this is so can be seen both from the explanation in the SRA Report and in paragraphs 16 and 17 of Mr Poyser's first statement. Indeed at the hearing on 27 October 2020 the Master appeared to accept this. At that stage her concerns as to misconduct were directed to other matters.

91. The position in summary is as follows. The Defendant withdrew and paid over cash in the sum of £10,590; however £400 of that had in fact been paid over to a third party. Thus she paid only £10,190. Of that sum, £4,390 was credited to the client account, and a further £2,000 was used to settle counsel's fees. Thus, in total, the Claimant gave credit for £6,390. That left a shortfall of £3,800. In fact, as a result of earlier miscalculations, the Claimant applied a discount of £3,798.14[2].

92. I conclude that the Claimant did not substantially fail to make good any shortfall and further that the Claimant did not refuse to accept the Defendant's "version of events" and that its conduct in relation to the shortfall did not amount to "unreasonable or improper conduct" within the meaning of CPR 44.11(1)(b). Furthermore, I accept that this issue of "shortfall" was central to the Master's overall assessment and ultimate finding of misconduct: for example her findings that Mr Poyser put improper pressure on the Defendant at the meeting on 2 July 2018 was predicated on her erroneous conclusion that he was not willing to accept the Defendant's version of events (see Judgment, paragraphs 29, 31 and 116) . Since this central finding was wrong, I conclude that the Master's finding of misconduct in its entirety is unsafe and vitiated.

Misconduct: the other "concerns"

93. As regards the findings in relation to the hourly rates and in relation to charging for matters related to the complaint, the Master concluded, at paragraph 121, that merely charging for these items amounted to misconduct within CPR 44.11. However it is clear that the Master took these two aspects fully into account in reducing the profit costs to a reasonable amount *prior to* the 75% "misconduct" reduction (paragraphs 105 and 106). As regards the latter, she reduced the number of hours by almost two-thirds; as regards the former, she disallowed the contractual rate and applied a substantially reduced rate for 55 of the 75 hours which she found to be reasonable. Having taken these matters into account in the assessment of reasonable costs, the Master provided no clear justification for concluding that, additionally, they amounted to misconduct justifying a further very substantial reduction. Rather, some of these aspects appear to have arisen from "mistake or error of judgment or negligence, without more" (see *Gempride* §26 (iii) at paragraph 17 above).

94. As regards the hourly rates in particular, the Master found (at paragraph 37) that there was "overcharging" by reference to the excessive rates charged for "Bev" and Mr Alleyne and that such overcharging amounted to "misconduct". However, the Claimant charged for these two individuals at the rate of £217 expressly specified in the contract of retainer. The Master may have been justified in disallowing the full rate on assessment (as she did). However, in circumstances where that rate had been agreed in the contractual retainer, absent further analysis, I see no basis for a conclusion that to do so amounted to "misconduct" in the senses identified in the *Gempride* case (see

[2] The £1.86 difference between the two figures is accounted for by (1) an overestimate by the Claimant of £401.86 in the amount received *less* (2) an overestimate of £400 by the Defendant in the total amount paid to Ms Williams.

paragraph 17 above). There was a reasonable explanation for charging at that rate. To this extent at least, I conclude that the Master erred in finding that the application of the agreed contractual rate of £217 per hour amounted to misconduct within CPR 44.11.

95. Finally I do not embark upon a more detailed analysis of the Master's reasons for the finding of misconduct in relation to charging for matters relating to the complaint. In view of my conclusions on the shortfall and on hourly rates, I am satisfied that in any event the overall finding of misconduct on the facts is vitiated and should not stand, even assuming I am wrong on Ground (1).

(3) Consequences: an alternative?

96. Finally, I turn to the consequences of my conclusions that the Master was wrong to impose a 75% reduction for misconduct pursuant to CPR 44.11 (on Ground (1) or alternatively on Ground (2)). On the particular facts of this case, the answer to this question is not straightforward. Following the hearing, I invited further written submissions on the issue.

97. The issue arises from two particular circumstances: first, the terms of paragraphs 145 to 147 of the Judgment (set out in paragraph 60 above), and secondly, from the fact that Eady J refused permission to appeal on Ground (4). The question is whether the combined effect of these circumstances is such that (despite upholding the substance of the Claimant's appeal) the Master's final conclusion remains in place and that the Final Costs Certificate should remain unaltered.

98. At paragraphs 145 to 147 the Master appeared to set out an alternative basis for her decision. At paragraph 145, she indicated that, if she were wrong about the applicability of CPR 44.11, a reduction "is … appropriate for other reasons". The first reason she gave was the Claimant's failure to credit "the missing £6,090" in the cash account. The second was the court's duty under CPR 44.4 to have regard to all the circumstances in deciding whether costs were unreasonably incurred or unreasonable in amount. At paragraph 147, apparently in application of CPR 44.4, she concluded that she had a general discretion to assess costs by reference to the Claimant's conduct (including hourly rates, time spent on the complaint and the Claimant failing to act on her concerns). However she then moved on, in paragraph 148, to apply the 75% reduction for misconduct, pursuant to CPR 44.11.

99. By Ground (4), the Claimant had contended as follows:

> "The Master further erred in concluding that she had a discretion to disallow the claimant's fees and disbursements, pursuant to CPR 44.4 by reference to 'the claimant's conduct in recording time spent on the defendant's complaint … and billing so much of that time to the defendant, at a Grade A rate'. <u>This was wrong as such conduct would only have been relevant to the costs of the assessment, not the costs that were the subject of the assessment</u>". (<u>emphasis</u> added)

100. In his original skeleton argument considered by Eady J, Dr Friston supplemented this Ground by adding that, given that the Master had already reduced the costs to a

reasonable level (at the first stage), this was not only a misapplication of CPR 44.4, but was visiting double jeopardy on the Claimant.

101. Eady J refused permission on to appeal on Ground (4) in the following terms:

> "59. I am not so persuaded in relation to grounds 3 and 4. In these respects, it is the claimant's submission that, to the extent the Master was entitled to find misconduct, the penalty imposed was excessive and disproportionate and/or gave rise to double counting, in that the Master took into account the putative misconduct both in terms of the penalty she imposed and in terms of the reduction she made to the costs on the assessment itself.
>
> …
>
> 64. As for double counting, or double jeopardy, in his written submission Dr Friston initially pointed the Court towards paragraphs 146 and 147 of the Master's judgment, suggesting that this imposed a double jeopardy. As he accepted in oral submissions, however, those paragraphs do not in fact impose a further reduction or penalty but plainly address the possible alternative approach if CPR 44.11 was not applicable. That is not subjecting the claimant to double jeopardy, but is postulating a potential alternative means of arriving at broadly the same conclusion. No arguable error of law can arise."
>
> (emphasis added)

102. In refusing permission, Eady J clearly addressed the Claimant's argument about "double counting". It is less clear that she addressed directly its contention that CPR 44.4 could not, in principle, apply to conduct relevant to the costs the subject of the assessment.

103. It follows from my conclusion that it was not in fact open to the Master to disallow the Claimant's fees under CPR 44.11, that the question of whether they should then be disallowed under CPR 44.4, and to what extent, would go unanswered. As Eady J. pointed out, it appears that in fact the Master made no reduction under CPR 44.4. She merely identified that as a "potential alternative approach." She did not expressly state that she reduced the costs by 75% pursuant to CPR 44.4.

104. I raised this in the Note. Dr Friston's response was that the permission to appeal granted in relation to the findings of fact relevant to the misconduct should include matters consequential to any appellate findings as to those facts. Alternatively, while the Claimant does not have permission to challenge the existence of the jurisdiction to make further deductions under CPR 44.4, given the initial reductions made before the reduction for misconduct, it would not be appropriate to reduce the Claimant's fees further.

105. In my judgment, it would be open to this Court, under CPR 52.20(2)(b), to refer back to the costs judge the question of what, if any, reduction should be made under CPR 44.4. However it would be obviously inappropriate to do so, if this Court were of the view that there is in fact no power under CPR 44.4 to disallow fees claimed in a Solicitor/Client Assessment (even if it might be said that the refusal of permission on Ground (4) debarred the Claimant itself from putting forward such a contention).

106. For similar reasons to my conclusion that CPR 44.11 does not apply to Solicitor/Client Assessments under the 1974 Act, CPR 44.4 also does not apply. That rule sets out the "factors to be taken into account in deciding the amount of costs" under the bases of assessment set out in the preceding rule (CPR 44.3), following an order for costs made under CPR 44.2. These three rules relate to Party and Party Assessment under orders made between parties; and not a Solicitor/Client Assessment. Moreover the factors set out in CPR 44.4(3) relate more obviously to Party and Party Assessment and some of them could not apply to Solicitor/Client Assessments: namely, the factors at CPR 44.4(3)(a), (c) and (h).

107. CPR 44.4 can have no application in a Solicitor/Client Assessment under section 70 where the function of the court is to decide whether the fees and disbursements incurred were reasonable in amount against the backdrop of the retainer agreed with the client. If CPR 44.4 could have any application to a Solicitor/Client Assessment, it could apply only to consideration of the costs of that assessment. It is that backdrop, of what may have been agreed between solicitor and client, which requires the special rules set out in CPR 46.9. That rule is headed "Basis of detailed assessment of solicitor and own client costs" in distinction to the heading to CPR 44.3: "Basis of assessment".

108. Accordingly, as CPR 44.4 would not allow the Court to reduce the amount assessed in a Solicitor/Client Assessment, I conclude that it would not be appropriate to remit the question of whether such reduction should be made.

109. Finally and in any event, if and insofar as CPR 44.4 sets out the factors to be taken into account when assessing reasonableness, there is obvious force in Dr Friston's argument that a further reduction would not be appropriate in the present case, given that the Master had already reduced the Bill very substantially on the grounds of what would be reasonable (Judgment, paragraphs 106 to 109). Moreover, I have concluded that the Master's finding on the central aspect of the Claimant's conduct (i.e. the shortfall) was wrong as a matter of fact.

110. It follows therefore that the 75% reduction in profit costs was wrongly made and that there are no alternative grounds for applying such a (or any other further) reduction. The Final Costs Certificate will be set aside and the relevant amount will have to be recalculated, in principle along the lines set out in paragraphs 108 and 109 of the Judgment. This will result in a finding that the Defendant's overpayment was in a substantially lesser amount. Since the Claimant has in fact repaid an amount greater than this, ultimately there will be an amount due back from the Defendant to the Claimant. This will be in the region of £13,000. The precise calculation will depend on issues relating to interest and a further small adjustment in the Defendant's favour (concerning the £401.86).

Conclusions

111. In the light of my conclusion at paragraph 85 (alternatively paragraph 95) above, the appeal will be allowed. The Final Costs Certificate will be set aside and in due course substituted with a revised Final Costs Certificate, resulting in a conclusion directing the Claimant to pay a balance to the Defendant in a lesser amount.

112. I will hear the parties further on the precise terms of an order and of a revised Certificate. In any event, pursuant to paragraph 5 of Eady J's order of 29 October 2021, there will be no order as to costs.

113. Finally, for the Defendant personally, the fact that that there is a substantial sum now due from her to the Claimant is likely to be a matter of considerable dismay and is a result for which she bears little responsibility. The Master erred in law in applying CPR 44.11. Further, whilst the Master was further wrong to make findings of misconduct on the Claimant's part, the Claimant's conduct over time has been wanting and its explanations of this matter over time have sown confusion. The Court has sympathy for the position in which she now finds herself. Whether she will be required or able to repay sums to the Claimant is a matter not for this judgment.