Neutral Citation Number: [2019] EWHC 1624 (QB)

Case No: QB/2018/0285

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2019

Before:

THE HONOURABLE MRS JUSTICE SLADE DBE
SITTING WITH AN ASSESSOR

- -

Between:

MXX **(a protected party via her husband and litigation friend RXX)**	**Respondent/ Claimant**
- and –	
UNITED LINCOLNSHIRE NHS TRUST	**Appellant/ Defendant**

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Roger Mallalieu of counsel (instructed by **Irwin Mitchell solicitors**) for the **Respondent/Claimant**
Nicholas Bacon one of Her Majesty's counsel (instructed by **Keoghs solicitors**) for the **Appellant/Defendant**

Hearing date: 5th March 2019

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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.

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THE HONOURABLE MRS JUSTICE SLADE DBE

MRS JUSTICE SLADE DBE:

1. The Defendant to a claim for personal injury appeals from the decision of Master Rowley made on 4 July 2018 on a preliminary issue in a detailed assessment of costs to be paid to the Claimant, the Respondent to the appeal. The preliminary issue was the determination of the Defendant's application sealed on 12 December 2017 for an order pursuant to CPR 44.11 by reason of what they described as a mis certification on 6 January 2015 of the Claimant's costs budget in Form H for the substantive proceedings. The mis certification was basing profit costs on figures including an hourly rate of £465 for a Grade 1 fee earner when the actual hourly rate chargeable to the Claimant at the time of the costs budget was £350. The hourly rate for a Grade A fee earner in the CFA of 24 July 2012 entered into by the Claimant was £335. This was increased to £460 on 30 August 2013. By letter of 20 January 2015, two weeks after the certification of Form H, the Claimant was notified that the hourly rate was reduced to £350 with effect from 1 May 2014.

2. In his statement of 9 March 2018 Mr Steven Green, a partner in Irwin Mitchell LLP, solicitors for the Claimant, explained that in preparing the budget both the incurred and estimated time costs were calculated using a set of composite or 'blended' hourly rates. The composite rates which were used for the respective grades of fee earners were Grade A £465, Grade B £290, Grade C £230 and Grade D £140.

3. When the Bill of Costs was produced on 3rd March 2017 the Defendant's solicitor saw that there was a large disparity between the profit costs claimed and those in the budget. On enquiry the Defendant's solicitors discovered that the hourly rate for a Grade A fee earner was £350 not £465 (the figure used on behalf of the Claimant in the budget). This disparity and a difference in the number of hours claimed led to the application under CPR 44.11.

4. The underlying facts are not in dispute and will be set out in summary form. The Claimant commenced proceedings on 14 October 2014 claiming damages arising from treatment she received when giving birth to her second child in a hospital for which the Defendant was responsible.

5. Judgment was entered for the Claimant by consent on 26 November 2014.

6. On 6 December 2014 the court ordered the parties to file and exchange costs budgets.

7. The Claimant's costs budget was filed and exchanged on 6 January 2015. The total amount included in the Budget for incurred time costs was £339,033 and for estimated time costs £229,894.

8. As the Claimant's costs budget was not agreed a Costs Case Management Conference (CCMC) was held by District Judge Thomson on 20 February 2015 (giving rise to the order made on 2 March 2015). Although the solicitor who had written the letter of 20 January 2015 reducing hourly Grade A rates from £460 to £350 attended the hearing, the court was not informed that the figure for time costs should be reduced. Nor was that figure in the Budget corrected in the year since its preparation.

9. The attendance notes of the CCMC made by solicitors of both parties substantially agree. The District Judge indicated that for budget purposes only £280 per hour would

be used as a composite rate to calculate future time costs but that he was not making any decisions as to which Grade did what work.

10. In his statement of 9 March 2018 Mr Green explained why there was a reduction in the number of hours claimed in the Bill of Costs of 3 March 2017 from those in the Budget. He does not explain how and when it was realised that too high an hourly rate for a Grade A fee earner had been used for the Budget.

The Judgment of Master Rowley

11. At paragraph 59 of his judgment Master Rowley held that to set out in Precedent H in respect of incurred costs anything other than sums calculated by the time spent to date multiplied by the rates agreed with the client and claiming more than the client was obliged to pay was improper. The Master concluded at paragraph 59 that:

> "I do not think that it would even occur to solicitors in general to set out anything other than the sums calculated by the time spent to date multiplied by the rates agreed with the client as incurred costs. But if those solicitors were asked whether claiming more from an opponent than the client is obliged to pay was actually improper, I have no doubt the answer would be yes. To do so deliberately, as Irwin Mitchell have done, seems to me to have flouted the fundamental requirement to comply with the indemnity principle. In my judgment it should clearly carry the stigma of improper conduct, as required by Ridehalgh" [Ridehalgh v Horsefield [1994] 1 WLR 462].

The Claimant does not appeal from that finding.

12. Master Rowley did not accept the contention on behalf of the Defendant that failure to revise the Precedent H before the CCMC on 20 February 2015 before District Judge Thomson or at the hearing itself were further acts of improper conduct within the meaning of CPR 44.11.

13. In paragraph 60 Master Rowley stated:

> "It seems to me that District Judge Thomson had no intention of approving a budget based on the sort of rates set out in the claimant's budget and would not have done so even if the Grade A rate had been reduced to £350 per hour. He had clearly formed a view of what he considered to be a reasonable composite rate on which to allow reasonable and proportionate sums for each phase. …In my view it is much more likely that he either decided on a figure between the parties' submissions or he used a figure that he already had in mind which he considered to be reasonable and multiplied hours by that figure. Consequently, the error by the claimant in failing to correct the budget prior to the CCMC was in fact of no effect."

Accordingly Master Rowley stated at paragraph 65:

> "…I do not think the error regarding the Grade A rates has caused any prejudice given the District Judge's approach at the CCMC."

Nor did Master Rowley consider that the fact that more hours were included in the budget than were claimed in the bill of costs was improper conduct or caused any prejudice to the Defendant. Master Rowley concluded:

> "As such the only issue is the inflated sums claimed as incurred costs. That was the position in Tucker [**Stephen Tucker v (1) Dr Rosemary Griffiths (2) Hampshire Hospitals NHS Foundation Trust** Master Rowley 19.5.17] and I am driven to the conclusion that the same situation applies here and that I should apply the same sanction as a result."

The sanction applied was to disallow items in the Bill of Costs for the Claimant's costs of and related to the preparation of the Budget.

14. By order of 20 September 2018 Master Rowley gave the Defendant permission to appeal the order which limited the disallowed costs to those claimed for preparation of and related to the Budget. These amounted to £23,406.30 plus VAT and travel expenses to the CCMC.

The Relevant CPR Rules

15. 44.11

(1) The court may make an order under this rule where –

…

(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.

3EPD2

6 (a) Unless the court otherwise orders, a budget must be in the form of Precedent H annexed to this Practice Direction. ..A budget must be dated and verified by a statement of truth signed by a senior legal representative of the party.

(The wording for a statement of truth verifying a budget is set out in Practice Direction 22)

16. Precedent H has separate columns for costs incurred and for costs estimated. The cells on Precedent H allow for time costs for various stages in the litigation showing those which have been incurred and those estimated. Hourly Rates for each grade of fee earners are to be shown.

22PD 2

2.2A The form of the statement of truth verifying a costs budget should be as follows:

'This budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur in this litigation.'

CPR 3.15

(2) The court may at any time make a 'costs management order'.

CPR PD 3E7

7.10 The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget.

CPR 3.18

3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –

(a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;

(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and

(c) take into account any comments made pursuant to rule 3.15(4) or paragraph 7.4 of Practice Direction 3E and recorded on the face of the order.

17. There was no real dispute between the parties as to the meaning of 'unreasonable or improper conduct' which gives rise to the discretion of the court to make an order under CPR 44.11(1) and to apply a sanction under CPR 44.11(2).

18. After the hearing on 11 May 2018 but before the reserved judgment was given on 4 July 2018 the Court of Appeal on 21 June 2018 gave judgment in **Gempride Ltd v Jagjit Bamrah and another** [2018] EWCA Civ 1367. The judgment in **Gempride** sets out a clear, authoritative and helpful analysis of the meaning of 'unreasonable and improper conduct' in CPR 44.11(1). **Gempride** concerned a claim in a Bill of Costs by the claimant, a sole practitioner solicitor acting for herself through her firm, that she knew was higher than that she was obliged to pay. I understand that one of the reasons Master Rowley gave permission to appeal in this case was to have some guidance on

the application of CPR 44.11 to a Costs Budget. **Gempride** was concerned with a Bill of Costs.

19. In **Gempride** Lord Justice Hickinbottom set out the relevant parts of previous authorities concerned with behaviour of solicitors which set out the principles which the court held should be applied to the meaning of the words 'unreasonable or improper conduct' in CPR 44.11. That full exposition will not be repeated here but the material passages are:

> "10. In the conduct of litigation, the court is entitled to assume that an authorised person such as a solicitor will comply with his duty to the court. As Judge LJ put it in Bailey v IBC Vehicles Limited [1998] 3 All ER 570 ("Bailey") at page 574j:
>
> > "As officers of the court, solicitors are trusted not to mislead or to allow the court to be misled. This elementary principle applies to the submission of a bill of costs".
>
> That theme was taken up by Henry LJ in a concurring judgment (at pages 575g-576c), with which Butler-Sloss LJ expressly agreed.
>
> The signature on the bill of costs under the rules is effectively the certificate by an officer of the court that the receiving party's solicitors are not seeking to recover in relation to any item more than they have agreed to charge their client under a contentious business agreement.
>
> The court can (and should unless there is evidence to the contrary) assume that his signature to the bill of costs shows that the indemnity principle has not been offended….
>
> …
>
> An order under CPR rule 44.11 can only be made against a party or a party's legal representative. The jurisdiction is not compensatory: it is not necessary to show that the applicant has suffered any loss as a result of the misconduct. It is a jurisdiction intended to mark the court's disapproval of the failure of a party or of a legal representative to comply with his duty to the court by way of an appropriate and proportionate sanction."

At paragraph 17 Lord Justice Hickinbottom considered that it was appropriate to look to wasted cost authorities for guidance on the scope of 'unreasonable or improper' conduct in the context of CPR 44.11. Lord Justice Hickinbottom set out at paragraph 26 propositions on CPR 44.11 which were substantially drawn from the judgment of the Court of Appeal in **Ridehalgh v Horsefield** [1994] Ch 205 which were relevant to the appeal in **Gempride**. These included:

> "26 (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.
>
> (vii) If the court determines to make an order, any order made (or "sanction") must be proportionate to the misconduct as found, in all the circumstances."

20. At paragraphs 126 and 127 Lord Justice Hickinbottom made it clear that the court was bound by the finding of fact below that Ms Bamrah's conduct was not dishonest nor was she intending to mislead. Nevertheless Lord Justice Hickinbottom considered that her conduct in certifying a Bill of Costs based on an hourly rate in respect of a period of time when the rate payable was lower was unreasonable or improper. The judge observed that Ms Bamrah was aware of the indemnity principle. Her explanation for claiming the higher hourly rate which had only been agreed to apply from a later date was that she had been assured by the firm of costs consultants and draftsmen acting for her that this was acceptable. Lord Justice Hickinbottom held:

> "Nevertheless, in my view, her conduct in allowing Part 1 of the bill to be submitted and then maintained with a rate which she knew was in excess of the contractual rate was at least reckless. The analysis which led her to that conclusion has certainly never been explained. I consider that her conduct permitted no reasonable explanation and, in the light of the indemnity principle, no competent solicitor acting reasonably would have certified Part 1 of the bill of costs in the circumstances in which Ms Bamrah did so. For those reasons, her own conduct was unreasonable or improper for the purposes of CPR rule 44.11
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> …
>
> Although we must proceed on the basis that Ms Bamrah was at no time dishonest, and the misconduct did not in the event result in costs being determined or settled on a false basis, in my view her conduct was serious even within the parameters of "unreasonable and improper". As this court made clear in Bailey (see paragraph 10 above), a solicitor as a legal representative holds a particular position of trust; and, on the basis of that trust, when a solicitor signs a bill of costs, he certifies that the contents of the bill (including the hourly rates due from the client) are correct. The court and the receiving party are entitled to rely upon that certificate; indeed, unless there are circumstances such as to raise suspicion, the paying party cannot go behind the certificate. It is bound to accept it. In this case, although not doing so with any intention to deceive, in certifying Part 2 of the bill, Ms Bamrah certified an inaccurate bill with essential recklessness – appreciating the indemnity principle, but being

> persuaded by Lawlords on some unexplained basis that a retrospective increase in the claimed rate did not breach it – which led to Gempride offering to settle at an hourly rate higher than that which Ms Bamrah was obliged to pay Falcon Legal"

21. Mrs Justice Carr in a judgment approved by the Court of Appeal in **Valerie Elsie May Merrix v Heart of England NHS Foundation Trust** [2017] EWHC 346 (QB) and [2017] EWCA Civ 792 emphasised the importance of a costs budget. Applying CPR 3.18(b) the Master of the Rolls held at paragraph 44 that:

> "Where there is a proposed departure from budget – be it upwards or downwards – the court on a detailed assessment is empowered to sanction such a departure if it is satisfied that there is good reason to do so. That of course is a significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so."

The Grounds of Appeal

22. The Grounds of Appeal fall into three categories. Grounds 1, 2 and 9 fall within the first category that Master Rowley erred in not finding that Irwin Mitchell had misconducted themselves by acting improperly or unreasonably within the meaning of CPR 44.11 by failing to correct the Precedent H and/or by failing to bring to the court's and the Defendant's attention the fact that the rate claimed was substantially incorrect or inflated above the actual agreed hourly rate. Ground 2 sets out the factors relied upon to challenge the decision of the Master not to make separate findings of misconduct in relation to failure to correct the Precedent H or to bring the incorrect and inflated hourly rate in the budget to District Judge Thomson's attention. Ground 9 challenges the decision of the Master that it is not unreasonable for a solicitor to include in a budget all time recorded rather than such time as would be recoverable from the opposing party.

23. Grounds of Appeal 3, 4, 5, 6 and 7 challenge the findings of the Master on the effect of the improper or unreasonable conduct of which he had concluded that Irwin Mitchell were guilty and that, as alleged in those grounds, he erred in the sanction he imposed. It was further contended in Ground 6 that the Master erred in concluding that this case was indistinguishable in terms of appropriate sanction under CPR 44.11 from that of **Stephen Tucker v Dr Rosemary Griffiths and Hampshire Hospitals NHS Foundation Trust** (Case No: IR 1607217) 19 May 2017. Accordingly the Master erred in limiting the sanction to the costs of costs management elements in the Bill. It was said that there were material differences between the two cases which are set out in Ground 7.

24. Thirdly, as contended in Ground 8, it was said that the Master erred by failing to address the question of whether there was 'good reason' to depart from the Budget at the detailed assessment.

Grounds of Appeal

Grounds 1, 2 and 9

Submissions of the parties

25. Mr Bacon QC for the Defendant commenced his oral submissions by stating that this is an appeal from the sanction imposed by Master Rowley. Whilst at no point suggesting dishonesty, the concern of his solicitors expressed in the statement of Mr Petrecz was that the Budget was inflated deliberately to improve the prospects of the Bill of Costs not being subject to scrutiny as the figure in the Bill would be less than the costs in the Budget for the same period. The Grounds of Appeal are directed to challenging the basis of the decision on remedy for conduct within CPR 44.11. It was said that other conduct of the Claimant's solicitors should have been taken into account in deciding on remedy. It was submitted that the Master should have taken into account failure to correct the Budget before the CCMC took place or at the CCMC hearing itself. Further the causative effect of errors in the Budget were not an answer to the question of whether there had been improper conduct.

26. Mr Bacon QC for the Defendant submitted that Master Rowley erred in holding at paragraph 60 that the failure by Irwin Mitchell to correct Precedent H before the CCMC appointment to give the agreed Grade A hourly rate and/or to make that correction at the hearing was not improper or unreasonable conduct within the meaning of CPR 44.11. The Master had found at paragraph 59 that claiming more in a Budget for incurred costs than the client was obliged to pay was improper conduct. There has been no appeal from that finding. It was said that the same should have been said of failures to correct the inflated claim.

27. Counsel for the Defendant contended that Master Rowley erred in failing to hold that the omission to correct the hourly rate claimed for a Grade A fee earner reducing it from £465 to £335 was a further and separate breach of the indemnity principle. Put another way it was said that the adoption and maintaining of the incorrect hourly rate for a Grade A fee earner was an independent and separate act of unreasonable or improper conduct. Further it was said that perhaps even more improper was the failure of the representatives of Irwin Mitchell in court at the CCMC to draw the error in the hourly rate stated in the Budget for the incurred costs for a Grade A fee earner to the attention of District Judge Thomson and the Defendant's legal representatives. This failure was all the more egregious because Martha Sweet the solicitor from Irwin Mitchell who had written the letter of 20 January 2015 informing the Claimant that the charging rate for a Grade A fee earner from 1 May 2014 onwards was £350 per hour was in court at the CCMC hearing. It was said that Martha Sweet must or should have appreciated that the court was being presented with a budget which included an hourly rate for a fee earner which the Claimant was not obliged to pay. This was a clear breach of the indemnity principle. The difference between the agreed rate for a Grade A fee earner was significant, £115 per hour.

28. Mr Bacon QC contended that the starting point for determining whether figures are reasonable and proportionate is to some if not a large extent influenced by the sums set out in the budget which depend upon hourly rates of and time spent by fee earners. It is therefore critical that the starting point is not wrong or misleading.

29. It was submitted, as was accepted, that the Budget not only was based on the incorrect hourly rate for a Grade A fee earner but included time which the Claimant now accepts should not have been included. This wrongly included time was time which was irrecoverable from the Defendant.

30. Mr Bacon QC contended that Master Rowley erred in relying on the causative effect of failing to correct the error in the budget in rejecting the contention that this was a further and separate act of improper conduct. Counsel submitted that the importance of the Budget is shown by the requirement that it be attested by a statement of truth. This requires the signatory to verify that the budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for the client to incur in the litigation. Further, the approval of a budget has consequences. Pursuant to CPR 3.18(b) the court assessing costs will not depart from the approved budget unless there is good reason to do so.

31. Mr Bacon QC relied upon the judgments of the Court of Appeal and of Mrs Justice Carr in **Merrix** to show the importance of a budget. The Master of the Rolls held at paragraph 44 that CPR 3.18(b) is a significant fetter on the court having an unrestricted discretion in assessing costs. Figures in an approved budget will only be departed from if good reason to do so is established.

32. Whilst there is no appeal from the finding of Master Rowley that Irwin Mitchell had conducted themselves improperly within the meaning of CPR 44.11 by inserting into their Budget an hourly rate for a Grade A fee earner which was substantially higher than that which the Claimant was obliged to pay, Mr Mallalieu, counsel for the Claimant commented that such a conclusion was wrong.

33. Mr Mallalieu submitted that before Master Rowley Irwin Mitchell had acknowledged that they had made a regrettable mistake in not updating the costs budget to reflect the reduction in the hourly rate for Grade A fee earners which had been notified to the Claimant two weeks after the Budget had been prepared.

34. In paragraph 32 of his witness statement of 9 March 2018 Mr Green, a partner and the National Head of the Costs Department of Irwin Mitchell, wrote that the step of reducing the Grade 1 hourly rate whilst increasing marginally the others was not one that had been anticipated by the draftsmen of the Budget. Mr Green continued:

> "34. On reflection it is regrettable that the Claimant's costs budget was not updated prior to the CCMC in order to take into account the fact that the Grade 1 fee earner rate had been reduced from £460 to £360. Again, I do not know why we did not prepare an updated costs budget but suspect that it was something which was simply overlooked, with the connection between the two not having been made.
>
> 35. I apologise to the court and to the Defendant for this omission. Having said that, it is unlikely that the Defendant was in fact prejudiced by this oversight since the district judge had used his own 'composite' hourly rate (£280 per hour) to calculate the amounts which he allowed for estimated/future time costs (i.e. a rate well below the £465 set out in the budget)."

35. Mr Green stated that the total costs set out in the Budget were £954,928.64 (excluding the 1% and 2% allowances for dealing with the costs budgeting process). The total amount of incurred time costs was £339,033 and estimated time costs, £229,894.

36. Mr Mallalieu pointed out that the hourly rate stated for Grade 1 was correct when the Budget was prepared. It was reduced two weeks later. Mr Green had apologised for not correcting the figure in the Budget to reflect the reduction.

37. Counsel accepted that an accurate statement of incurred costs should be given in the Budget. However he submitted that a budget is not to be equated with a Bill of Costs. Mr Mallalieu pointed out that District Judge Thomson did not base his approval of the Budget on accepting the Claimant's figures without question. Master Rowley commented that the District Judge had clearly formed a view of what he considered to be a reasonable composite rate of fees across all grades of fee earner on which to allow reasonable and proportionate sums for each phase of the proceedings.

38. Mr Mallalieu submitted that it was never put to the Claimant's solicitors by the Defendant that there was a point in time when they should have appreciated that the figure in the budget for a Grade 1 fee earner was higher than that which the Claimant was obliged to pay. Counsel referred to paragraph 21 of **Gempride** in which Lord Justice Hickinbottom cited **Ridehalgh**. The Master of the Rolls in that case observed of the question of whether conduct of a solicitor was unreasonable:

> "The acid test is whether the conduct permits of a reasonable explanation."

Of 'improper' conduct the Master of the Rolls held:

> "Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code."

In paragraph 22 of **Gempride** Lord Justice Hickinbottom made it clear that CPR Rule 44.11, unlike the wasted costs jurisdiction, does not apply when the conduct is no more than 'negligent.' Mistake or error of judgment or negligence, without more, will be insufficient to amount to 'unreasonable or improper' conduct.

39. It was submitted on behalf of the Claimant that the evidence before Master Rowley did not support a conclusion that the failure of Irwin Mitchell to correct the hourly rate for Grade A fee earners in the original Budget and to draw the need for such correction to the attention of the Defendant and Deputy Master Thomson was anything more than at the worst negligent. There was no evidence that at any time before or at the hearing before Deputy Judge Thomson Irwin Mitchell realised that the figure in the Budget for the Grade A hourly rate was higher than was payable.

40. Mr Mallalieu submitted that as Lord Justice Hickinbottom emphasised in **Gempride** at paragraph 110 'context is crucial'. The evidence before Master Rowley did not support a conclusion that failing to correct the hourly rate for a Grade A fee earner in the Budget either before or at the CCMC on 20 February 2015 was unreasonable or improper. There was no reason to suppose that the rate which applied on the date the Budget was

prepared, 6 January 2015, would be revised downwards on 20 January 2015. Rates were usually revised upwards, hence the addition of £5 to take into account anticipated future increases for costs to be incurred. Whilst, as Mr Green acknowledged, it was regrettable that the Claimant's costs budget was not updated prior to the CCMC in order to take into account the fact that the Grade A fee earner rate had been reduced from £460 to £350 this was no more than an unfortunate oversight. It was not improper or unreasonable conduct. Nor could failure to draw this to the attention of District Judge Thomson at the CCMC hearing on 20 February 2015 be so categorised.

41. By Ground 9 Mr Bacon QC contended that it was also improper to include in the Budget solicitor/client costs of time spent which Irwin Mitchell knew could not be claimed from a losing party on a standard basis assessment.

42. At paragraph 62 Master Rowley observed:

> "It seems to me to be unrealistic to expect a party to vet the time recorded on a line by line basis in the manner suggested by the defendant here. The bill of costs has taken nearly one hundred hours to prepare and that involves a considerably greater sum than would be allowed by 1% of the of the budget."

43. The Master observed that in preparing a budget most of the time will be spent in the estimation of future costs and much less in relation to incurred costs.

Discussion and conclusion

44. There is no real difference between the parties as to the law and legal principles applicable to the decision as to whether the conduct of a party's legal representative is 'unreasonable or improper' within the meaning of CPR 44.11. Although the purpose and function of a bill of costs which was at issue in **Gempride** are different there is no reason to attach lesser weight to a solicitor's attestation to a budget in Precedent H than that to a bill of costs. Albeit the wording of the subject matter of the attestation is different the significance that it is made by an officer of the court is the same. Adapting the words of Lord Justice Henry in **Bailey**, the signature on the budget in Precedent H is effectively the certificate by a senior legal representative of the party, an officer of the court, that the budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for any client to incur in this litigation.

45. The attestation, as does Precedent H, makes a distinction between costs incurred and those estimated. Whilst it may be said that the exercise of and time spent preparing a budget is less than preparing a bill of costs, both are important documents and have their particular purpose and function within the Civil Procedure Rules. The approval of a costs budget has significant consequences. As explained by the Master of the Rolls in **Merrix,** CPR 3.18(b) places a significant fetter on the discretion of the court on detailed assessment of costs. The party seeking a departure from a budget must establish that there is good reason to do so. There is no basis for regarding 'improper or unreasonable conduct' in the preparation of budget lightly. CPR 44.11(2) provides alternative sanctions. The order sought in this case was under CPR 44.11(2)(a), to disallow all or part of the costs which are being assessed. The gravity and consequence of improper or unreasonable conduct whether in preparing a budget or a bill of costs is reflected in the sanction. The standard against which improper or unreasonable conduct

is to be judged does not depend upon whether it is in the context of a budget or a bill of costs. In my judgment the principles set out in **Gempride** which apply in the context of a bill of costs apply equally to improper or unreasonable conduct in preparing a costs budget.

46. It is for the party seeking an order under CPR 44.11 to establish that the conduct of the legal representative of the other party has been unreasonable or improper. Master Rowley found that Irwin Mitchell deliberately claimed in Precedent H more than their client was obliged to pay. Whilst this is not accepted, the Claimant has not appealed this decision.

47. It appears that Master Rowley decided that the Defendant had not established that failing to revise Precedent H prior to the CCMC was not improper or unreasonable conduct within the meaning of CPR 44.11 on the basis that the failure was of no effect. Master Rowley speculated at paragraph 60 that District Judge Thomson appeared to have 'either decided on a figure between the parties' submissions or he used a figure that he already had in mind which he considered to be reasonable and multiplied hours by that figure.'

48. Even if Master Rowley erred in speculating in paragraph 60 of his judgment as to what was or was not in the District Judge's mind at the CCMC, the evidence before the Master would not have supported findings of improper conduct by Irwin Mitchell in failing to correct the hourly rates for a Grade 1 fee earner before or at the CCMC.

49. The evidence before Master Rowley as to why the incorrect hourly rate for a Grade 1 fee earner in the Budget was not corrected before the CCMC was contained in the witness statement of Mr Green. This evidence was not challenged. At the time the Budget was attested, 6 January 2015, the rate was £460. Mr Green wrote that he did not know why the rate for a Grade A fee earner was reduced. This had not been anticipated by those who drew up the budget. Mr Green acknowledged that it was regrettable that the Budget had not been revised when the reduced rate was notified to the Claimant on 20 January 2015. Mr Green stated at paragraph 34:

> "I do not know why we did not prepare an updated costs budget but suspect that it was something which was simply overlooked, with the connection between the two not having been made."

This evidence was not challenged.

50. It was submitted by Mr Bacon QC that the failure to bring to the attention of the Defendant and District Judge Thomson at the CCMC the fact that the hourly Grade A rate should be revised was all the more blameworthy as the solicitor who had written the letter of 20 January 2015 reducing the hourly rates with effect from May 2014 was also in court at the CCMC. The solicitor failed to correct the figure. This led to submissions being made and a decision taken on the incorrect figure.

51. Whilst the fact that the same solicitor who had written to the Claimant on 20 January 2015 notifying her of a reduction in the hourly rate for a Grade A fee earner was in court attending the CCMC one month later yet did not correct the figure is certainly relevant to the question of whether such failure was improper conduct. However it was not sufficient evidence enabling Master Rowley to conclude that it was such. Rightly

it was not submitted that the only inference which could be drawn from the same solicitor having written the fee reduction letter attending the CCMC when an incorrect figure was being advanced was that she must have realised the discrepancy and deliberately withheld such information.

52. Mr Bacon QC did not rely on any evidence in the statement of Mr Petrecz to show that including in a budget as stated incurred costs all the time recorded by a solicitor for work carried out but not recoverable from the opposing party was improper conduct within CPR 44.11.

53. In the absence of findings of fact and evidence to support a finding of improper conduct in not correcting the Costs Budget before or at the CCMC hearing in my judgment Master Rowley did not err in holding that these did not constitute misconduct within CPR 44.11.

Grounds of Appeal 3, 4 and 5

Submissions of the Parties

54. Mr Bacon QC contended that it was wrong for Master Rowley to speculate in paragraph 60 as to the effect on District Judge Thomas of the overstated hourly rate for a Grade A fee earner. Master Rowley recorded:

> "Whilst the budget was drafted on the basis that the Grade A fee earners would carry out 50% of the work, the district judge was clear that he was making no assumptions as to who did what work."

Counsel submitted that there was no basis for Master Rowley to conclude that it was likely the District Judge decided on a figure between the parties' submissions or used a figure he had in mind. As there was no basis for such assumptions Master Rowley erred in holding that the failure to correct the Budget prior to the CCMC was in fact of no effect.

55. Rightly Mr Mallalieu did not seek to support the speculation of what District Judge Thomson had in his mind when he revised and approved the Costs Budget.

56. Mr Bacon QC contended that Master Rowley erred in concluding at paragraph 65 of his judgment that failure to correct the hourly rate in the Budget for a Grade A fee earner had given rise to no prejudice to the Defendant. In reaching this conclusion he relied upon the speculation in paragraph 60 as to what was in District Judge Thomson's mind when making his decision at the CCMC.

57. Counsel pointed out that there was no substantial difference between the parties' solicitors notes of District Judge Thomson's observations when making the costs management order. The note made by the representative of the Claimant was that the District Judge said that:

> "Can't do anything re: incurred costs – seem high. But matter for detailed assessment."

The note continues that the District judge noted that this was a Grade A case. He decided that for budget purposes only he would take £280 per hour as a composite rate.

58. Mr Bacon QC made the point that the parties' representatives would have made submissions to the District Judge on the figures in Precedent H as to the hourly rates stated and hours spent attested to in that form.

59. Mr Bacon QC further submitted that the conclusion of Master Rowley in paragraph 65 that the improper conduct of the Claimant's solicitors in misstating the Grade A hourly rate had caused the Defendant no prejudice was based on speculation and was not supported by evidence.

60. Mr Mallalieu did not seek to defend the decision of Master Rowley on penalty insofar as it was based on paragraphs 60 and 65. Counsel submitted that irrespective of those observations the decision on penalty was one which Master Rowley was entitled to reach on the material before him.

Discussion and conclusion on Grounds 3, 4 and 5

61. In my judgment Master Rowley had no means of knowing whether and to what extent District Judge Thomson took into account the sum stated as the hourly rate for a Grade A fee earner in the Claimant's budget. The case was said by the Claimant to be a Grade A case. Solicitors for the Claimant say that they used a 'blended rate', that is a 'blend' of the rates of all grades of fee earner. There was no proper basis for the observation of Master Rowley that it was 'very unlikely that the hourly rate that he [District Judge Thomson] chose as the composite rate was a simple division of the aggregate of the four different grades.'

62. In any event it would be curious if the decision of District Judge Thomson had been taken without regard to all the evidence before him which included the Precedent H. In my judgment Master Rowley erred in engaging in speculation as to what was in District Judge Thomson's mind when he reached his decision on the Budget. Since Master Rowley reached his decision on whether the misstatement of Grade A rates in the Budget affected Deputy Judge Thomson's decision based on speculation rather than evidence it cannot stand.

Grounds of Appeal 6 and 7

Submissions of the parties

63. Mr Bacon QC submitted that Master Rowley erred in concluding that his judgment in **Tucker** was indistinguishable from the current case. Counsel referred to significant differences between the two cases. It appears from paragraphs 34 and 36 of **Tucker** that the improper and unreasonable conduct found in preparation of the budget was to use a 'blended' hourly rate for costs incurred rather than setting out the hourly rate for each fee earner. In this case the hourly rates for each fee earner were set out in the Budget but the rate for Grade A was substantially overstated. Even if the sanction applied at paragraph 43 in **Tucker** of disallowing the costs of the costs management elements, or 'non-phase' part, of the bill were correct, that sanction was applied for different improper or unreasonable conduct. Master Rowley erred in relying on **Tucker** to decide the sanction in this case in which the improper conduct found was different.

64. Mr Mallalieu submitted that **Tucker** was not materially distinguishable from the current case. The figure decided upon in the budgeting exercise in both cases was the use of a 'blended' rate. In **Tucker** the solicitors for the Claimant used a 'blended' rate in the Budget. In the current case it was District Judge Thomson who adopted a 'blended' rate based on figures in the Budget. Accordingly it was said that Master Rowley did not err in relying upon **Tucker** in reaching his decision on penalty.

Discussion and conclusion

65. In my judgment Master Rowley erred in basing his decision on penalty for improper conduct of including too high an hourly rate for Grade A fee earners in the Budget in this case on his decision in **Tucker**. Whilst as in **Tucker** the conduct found to be improper within the meaning of CPR 44.11 was stating inflated sums claimed as incurred costs in the Budget the conduct giving rise to those inflated figures was different. In **Tucker** it was using a 'blended' rate. In this case it was including an hourly rate for a Grade A fee earner which was greater than the Claimant was obliged to pay. Each case of penalty for breach of CPR 44.11 must be judged on its own facts.

Ground of Appeal 8

Submission of the Parties

66. By Ground 8 Mr Bacon QC contended that Master Rowley failed to decide whether the fact that a budget in Precedent H misstates and inflates hourly rates for a grade of fee earner in itself amounts to a good reason within the meaning of CPR 3.18(b) to depart from the Budget. The Claimant has admitted that too high an hourly rate for a Grade A fee earner was included in the Budget. There has been no appeal from the finding of Master Rowley that this misstatement was improper conduct within the meaning of CPR 44.11.

67. Mr Mallalieu agreed that Master Rowley did not decide whether the overstatement of the hourly rate for a Grade A fee earner was a good reason to depart from the Budget. However he submitted that if Master Rowley's findings regarding the error and his assessment of how the CCMC proceeded are to stand the logical consequence is that those issues in themselves do not found a good reason for departure from the Budget as provided in CPR 3.18.

Discussion and conclusion

68. Master Rowley held in paragraph 59 that setting out in respect of incurred costs anything other than sums calculated by time spent to date multiplied by the rates agreed with the client was improper. The Master held that this is what Irwin Mitchell did. Further he held that they did so deliberately. Although Irwin Mitchell disagree with this finding it stands. The misstatement has led to a considerable overstatement in the Budget of the costs incurred to the date of its preparation. Further, the notes made by the respective solicitors of the observations of District Judge Thomson at the CCMC record that he considered that costs incurred would be a matter of detailed assessment.

69. It is clear that Master Rowley did not decide whether there was good reason to depart from the approved Costs Budget. I do not accept, as submitted by Mr Mallalieu, that if he had done so he would have concluded that there was no good reason to depart from

the budget. The ground of appeal challenging the basis of Master Rowley's assessment of the basis of District Judge Thomson's decision has succeeded. Further the finding of improper conduct in including an inflated figure for the hourly rate for Grade A fee earner in costs incurred remains in place.

70. The issue of departure from the approved Budget remains to be determined in the detailed assessment of costs. Without seeking to fetter the discretion of the Master on assessment, he will no doubt have regard to the contents of this judgment.

Disposal

71. Grounds of Appeal 1, 2 and 9 do not succeed. Accordingly the order under CPR 44.11(2) fell to be determined on the basis that the improper conduct of the Claimant's solicitors was inserting in the Budget for costs incurred a substantially higher hourly rate for a Grade A fee earner than the Claimant was obliged to pay.

72. Grounds of Appeal 3, 4, 5, 6, 7 and 8 succeed. The consequence of the success of Ground 8 is that the Master carrying out the detailed assessment of costs will decide whether the substantial overstatement in the Budget of the hourly rate for a Grade A fee earner is a good reason within the meaning of CPR 3.18 for departing from the Budget. Accordingly there will be an opportunity to correct any injustice caused by that improper conduct.

73. CPR 44.11(2) gives the court alternative powers of penalty following a finding of misconduct under CPR 44.11(1). CPR 44.11(2)(b) provides for an order that the party at fault or their legal representative pay the costs which they caused any other party to incur. The basis for making such an order was not established in this case.

74. Master Rowley made an Order under CPR 44.11(2)(a) that the Claimant's costs of the costs management elements or non-phase part of the bill be disallowed. That decision can only be overturned if it was made in error of law or was one which no Master properly directing themselves on the evidence could have reached. Accordingly notwithstanding the success of Grounds 3, 4, 5, 6 and 7, that cannot be said of the decision on sanction under CPR 44.11(2)(a) in this case.

75. The detailed assessment will be referred back to Master Rowley to be considered in accordance with this judgment.

76. I have been greatly assisted by the expert knowledge and experience of the Assessor Master Jennifer James. However, this judgment and decisions taken are mine alone.