Case No: QA-2021-000111

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Neutral Citation Number: [2021] EWHC 3392(QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date of Hearing: 29th October 2021

Before:

MRS JUSTICE EADY

- -

Between:

JOHN POYSER & CO LTD

Claimant

- and -

CYNTHIA SPENCER

Defendant

- -

- -

DR MARK FRISTON for the **Claimant**
The Defendant Appeared as a Litigant in Person

- -

APPROVED JUDGMENT

- -

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MRS JUSTICE EADY :

Introduction

1. This is the oral hearing of the claimant's renewed application for permission to appeal against the order of Master James dated 22nd April 2021, leave having been refused on the papers by the order of Mrs Justice Collins Rice, dated 7th September 2021.

2. Given health issues arising from the ongoing coronavirus pandemic, this hearing took place in Court but with counsel for the claimant attending remotely by video link. That was necessary to ensure that the matter could be dealt with justly and without delay. These remained, however, public proceedings and details of the hearing, including its mode and means of access, were provided in the cause list, thus ensuring the principle of open justice.

Background

3. The claimant is a firm of solicitors. The defendant a former client. This matter relates to the fees of the claimant as assessed by the Master subsequent to an order for detailed assessment dated 8th January 2020.

4. 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 15th March 2017 and the claimant had first been instructed in relation to the burial dispute in which there had been a Court hearing on 1st June 2017 (the client care letter in relation to that matter was dated 5th April 2017). The fees in respect of the burial litigation are not in dispute before the Master. 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, who had lived with Mr Williams in that house for some time, but his son (Mr David Williams) had 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, as Mr Victor Williams' live-in partner, she was still entitled to some provision from his estate, of which the house was the principal asset. A new client care letter was entered into between the claimant and the defendant, dated 5th July 2017.

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

6. Court proceedings in relation to the Will dispute were issued on 24th April 2018. The litigation was hard fought on both sides and such offers and counter-offers as were made demonstrate the distance between the parties.

7. Given the nature of the dispute, expert medical evidence was obtained by the defendant, which opined that indeed Mr Victor Williams had lacked capacity at the time of making his Will. Shortly after receiving this evidence, on 7th April 2019, counsel advised that the defendant should seek to settle the proceedings on the best terms possible; advice with which the claimant concurred. The defendant determined,

however, to proceed and preparations were made for trial. Shortly before trial, Mr David Williams made a further offer of £30,000 inclusive of costs and that offer was again rejected.

8. The case duly came on for trial before His Honour Judge Pearce on 7th 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 per cent of the net proceeds of the sale of the house, this being in the region of £70,000 to £90,000. An order was made that there should be no order as to costs.

9. As the claimant accepts, however, this is only part of the relevant narrative. Unhappily, the history must also take into account the dishonesty of Ms Maria Williams, a now struck off solicitor, who was then employed by the claimant, who was the Ms Williams who had conduct of the defendant's claim, at least in the early stages. Ms Williams took monies on account from the defendant in cash, pocketed certain monies, and subsequently sought to falsify documents to cover up her wrongdoing. She was referred to the Solicitors Regulation Authority ("SRA") on 22nd August 2018 and left the claimant firm on 31st August 2018. Prior to this, however, the defendant had complained about the fact that she had given Ms Williams cash payments which had apparently gone missing, initially raising her concerns with Ms Williams but then, no later than in June 2018, with Mr Poyser. Notwithstanding the defendant's complaints, Ms Williams continued to work on her case and continued to be employed by the claimant firm for some months (indeed the Master records seeing an email from Ms Williams on the file dated 30th January 2019, referring to work undertaken on the claimant's witness statement).

10. Although Ms Williams had accepted receiving certain cash payments from the defendant, the amount she accepted was less than the defendant said she had paid. In his attempt to resolve that dispute, Mr Poyser asked to see the defendant's bank statements and ultimately concluded that, in fact, £400 of the sums the defendant said she had paid had in fact been paid to someone else. Having accepted, however, that there were unaccounted sums that had been paid by the defendant to Ms Williams, a discount was allowed against the fees otherwise payable by the defendant. The claimant accepts that was wrong; the deficit should properly have been made good by crediting the entirety of the sum in question to the client account.

11. It will be necessary to return to this background in further detail in due course but, at this stage, I turn to the costs proceedings.

12. On or about 7th October 2019 the claimant issued Part 8 proceedings for payment of its unpaid fees. On 8th January 2020, the Master directed there should be a solicitor and client assessment and ordered that a detailed breakdown of costs (referred to in the judgment as a bill of costs) be drawn up.

13. There were, I understand, several hearings before the Master. The claimant was represented by a costs lawyer, employed by MRN, a firm of solicitors specialising in costs. The defendant acted in person.

14. At a hearing on 27th October 2020 the Master indicated that she was minded to make an order pursuant to CPR 44.11, in particular given Ms Williams' dishonesty and given the Master's further concerns that (and I take this summary from the claimant's

skeleton argument in support of the application for permission to appeal; I have not seen the order of 27th October 2020 or any directions given by the Master or indeed any transcript or note of the hearings before her):

i) certain fees had been claimed at Grade A rates for work carried out by someone described in the papers as 'Bev'. 'Bev', as Master subsequently found, was Ms Williams' sister, a law graduate with no professional qualification who had been engaged on a temporary basis by the claimant;

ii) Mr Poyser, the managing partner of the claimant, had made repeated attempts to deal with the complaint raised by the defendant and there was a concern that fees relating to that work may have been claimed in the bill;

iii) time had been claimed for a Mr Alleyne, a solicitor employed by the claimant, reading into the file following Ms Williams' departure.

15. On 21st November 2020 the claimant filed written submissions, drafted by Dr Friston of counsel, addressing the question whether any penalty could or should be imposed under CPR 44.11. A witness statement was filed from Mr Poyser, dated 20th November 2020, stated to be made in 'support of written submissions we have been ordered to file addressing the applicability of CPR 44.11(1)(b) and any sanction to be applied in relation to these proceedings.'

16. Mr Poyser further exhibited various documents relating to the defendant's dispute with the firm, relating to monies paid to Ms Williams and the reports he had made to the SRA in this regard.

17. The Master initially handed down her judgment on 29th March 2021. MRN then applied, on their own behalf, to have that judgment recalled on the basis that it appeared to make certain criticisms of that firm. The Master acceded to that request and a revised judgment was handed down on 22nd April 2021. In that judgment the Master concluded (I summarise) as follows:

i) the claimant had not accepted the defendant's case that she had paid the additional monies of £6,090 to Ms Williams;

ii) to the extent that the claimant contended that the defendant had accepted a resolution of her complaints on 13th July 2018 (such that a credit of £3,798.14 should be allowed in full and final settlement of what she said were the sums she had paid to Ms Williams, but had not been properly accounted for), it had subsequently unilaterally varied that sum by £400;

iii) the detailed breakdown of costs contained time for work attributable to the complaint about Ms Williams, which had led to the defendant to being overcharged, and the bill had been mis-certified;

iv) in July 2018 Ms Williams had noted on the file that the 'confusion' as to monies 'allegedly paid' to the claimant had delayed matters since the defendant had been unwilling to make further payment until this was resolved: effectively, because Ms Williams had retained cash money dishonestly and had tried to conceal this fact, the claimant had refused to do further work

unless and until the defendant, a vulnerable client, paid the claimant even more, which had a knock-on effect on costs as it meant a lot of work then had to be done at the last minute;

v) the bill of costs had not been carefully drafted and there had been no attempt, scrupulously or at all, to put the defendant in the position she would have been in had Ms Williams not acted dishonestly;

vi) generally, absent a line-item assessment of the bill (which would be disproportionate), it was impossible to say how much of the claimant's timed attendances in the bill related to the misappropriated funds, and the fallout from that issue, and how much to issues in the litigation; but from what she had seen in the claimant's files, the Master concluded that it was 'apt to be as much as two thirds, increasing in the later stages';

vii) the hourly rate claimed for 'Bev' had been charged out at a Grade 8 hourly rate of £217 when, if recoverable at all, her time should have been claimed as a Grade D fee earner, allowable at £118 per hour; moreover, the Master considered that the claimant should be deprived for any fee for Bev's services, given that the retainer letter of 5th April 2017 only gave a rate of £217 per hour;

viii) Mr Alleyne was a Grade C fee earner and has also been wrongly charged at Grade A rates;

ix) using her experience as a costs judge, the Master concluded that, if a proper bill had been prepared, the figure charged for the claimant's profit costs would have been in region of £13,195 and, were the sums to be credited to the defendant taken into account, it would have shown nothing due and owing (indeed, a repayment may have been due); instead, the defendant was presented with a bill, seeking a further £33,436.73 plus an additional £17,675.12 for the detailed assessment;

x) rejecting the claimant's argument that CPR 44.11 could not apply in this case, the Master further reduced the claimant's costs by 75%, finding that the misconduct in this case was worse than that in *Gempride v Bamrah* [2018] EWCA Civ 1367, where a 50% reduction had been applied, reducing profit costs to £3,298.75;

xi) in the alternative, the Master made clear that she would have arrived at the same figure carrying out an assessment, so as (a) to take into account the missing cash payment of £6,090 (paragraph 145) and (b) to have regard to all the circumstances pursuant to CPR 44.4 (see paragraph 146).

The Grounds of Appeal

18. The Appellant seeks to pursue four grounds of appeal as follows:

i) The Master erred in imposing a penalty pursuant to CPR 44.11 in an assessment under Part 3 of the Solicitors Act 1974, when no such jurisdiction to impose such a penalty existed.

ii) In the alternative, to the extent that the Court had jurisdiction to make findings of misconduct, the Master's decision in that regard was 'wrong', within the meaning of CPR 52.21(3)(a), and/or 'unjust because of a serious procedural or other irregularity', within the meaning of CPR 52.21(3)(b) because:

a) the master did not give notice of all allegations of misconduct prior to giving judgment and thereby deprived the claimant of the opportunity to make submissions on each of those allegations, contrary to PD 44 paragraph 11.1;

b) in any event, the findings that the Master made were based on findings of fact that were incorrect and/or incapable of justifying a finding of misconduct within the meaning of CPR 44.11.

iii) In the further alternative, to the extent that the Master was entitled to find misconduct, the penalty imposed was excessive and disproportionate.

iv) 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'. 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.

Discussion and Conclusions

Ground 1. The applicability of CPR 44.11

19. CPR 44.11 relevantly provides as follows:

> "Court's powers in relation to misconduct
>
> (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."

20. It is the claimant's submission that CPR 44.11 is of no application to an assessment under Part 3 of the Solicitors Act 1974. In support of this ground, the claimant

objects that, so far as counsel's researchers have disclosed, no other judge has exercised the power afforded by CPR 44.11 in such an assessment. It is further noted that in *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685 at paragraph 21, in relation to a strike-out application (in the context of a claim by a firm of solicitors to recover their costs and expenses from their client, where the client alleged those bills were fraudulently exaggerated or misstated), the Court identified that other available remedies would include costs and interest penalties and proceedings for contempt of Court or criminal prosecution, making no mention of CPR 44.11.

21. I am sceptical as to whether this raises an arguable point with reasonable prospects of success for the following reasons (in summary).

22. As CPR 44.1(2) relevantly makes clear:

> "(2) The costs to which Parts 44 to 47 apply include –
>
> (a) the following costs where those costs may be assessed by the court …
>
> (iii) costs payable by a client to their legal representative …"

23. In this case the Master had ordered a detailed assessment under Section 70 Solicitors Act 1974 and, that being so, where a detailed assessment has been ordered by the Court then, as the Master observed (see paragraph 134 of the judgment) in the White Book commentary to CPR 46.10 (dealing specifically with solicitor/client assessments) it is provided:

> "The procedure set out in Part 47 Detailed Assessment of Costs and Default Provisions applies subject to the provisions of this rule and any contrary order made by the court."

24. Where CPR 47 is not to apply, PD 46 makes that clear, thus:

> "6.8 The provisions relating to default costs certificates (Rule 47.11) do not apply to cases to which Rule 46.10 applies."

25. There can be no doubt that CPR 44.11 applies to CPR 47 detailed assessments; as the Master again recorded, in the White Book commentary to CPR 44.11 it is stated:

> "Previously, by the Civil Procedure (Amendment No. 3) Rules 2000 (SI 2000/1317) 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 …"

26. In summary, CPR 44.11 applies to CPR 47 assessments and CPR 47 applies to CPR 46 cases, unless disapplied. Understood in this way, it seems to me that there is a coherent and complete procedure under the CPR, applicable to a detailed assessment of solicitor/client costs; on the face of the Solicitors Act 1974 and the CPR, there is no reason not to apply the detailed assessment provisions under CPR 47 to detailed

assessments carried out pursuant to the Solicitors Act 1974, save to the extent that those provisions are expressly disapplied.

27. For the claimant, however, it is said that this approach offends against the principles of statutory construction identified in *Bennion* at paragraph 27.1 and that there is no authority, absent the commentary in the White Book, which would allow the approach adopted by the Master.

28. Given the apparent lack of authority on the point and given that I am, in any event, granting limited permission to appeal, in respect of other grounds, I allow this first ground to appeal, there being some other compelling reason why it should be permitted to proceed. This will give the Court the opportunity to consider the arguments raised as a question of law on the applicability of 44.11 in these circumstances, which may be of wider assistance than just this case.

Ground 2. The decision was wrong/unjust

29. To the extent that the Court did have jurisdiction to make findings of misconduct, the claimant contends that the Master's interpretation of the evidence cannot reasonably be justified or explained, and is therefore wrong within the meaning of CPR 52.21(3)(a), and/or that her decision was unjust because of a serious procedural or other irregularity in the proceedings below, see CPR 52.2(1)(3)(b).

30. This ground relates to what Dr Friston has described as 'the shortfall'. In order to understand this, it is necessary to descend into the detail of the defendant's complaints about the cash payments she made to Ms Williams. In seeking to carry out this exercise, I have regard to the evidence, as adduced by the claimant, which was before the Master (primarily Mr Poyser's first witness statement and the SRA report attached).

31. I note that Mr Poyser has provided a second witness statement for the purpose of this hearing, which also provides further clarification in relation to a discrepancy in the amounts that he addressed in his evidence before the Master. For convenience, at this stage, I am going to proceed without dealing with that further clarification and purely on the basis of the figures that were before the Master.

32. On Mr Poyser's evidence, the defendant's complaint (so far as he was aware) arose when she went into the claimant's offices on 5th June 2018, whilst Ms Williams was on leave, and met with Mr Poyser. During their meeting, there was a discussion regarding costs and the payments the defendant had made to the claimant on account of fees. In Mr Poyser's witness statement, he explains (at paragraph 8):

> "The defendant disputed the sum that I was able to identify from the file and the client ledger. The defendant mentioned that there was a payment of £4,500 she had handed Ms Williams, as well as other payments."

33. As those payments could not be verified from the client ledger or file, Mr Poyser asked the defendant to show:

> "Copies of her bank statements, evidencing the sums and the dates of the withdrawals of the cash that she had subsequently handed to Ms Williams."

34. Shortly afterwards, and whilst Ms Williams was still on leave, the defendant produced bank statements that showed that she had withdrawn cash of £10,590. She did this by producing a Barclays bank account statement showing the withdrawal of £4,500 in cash on 10th July 2017 and a Halifax bank account statement showing a series of withdrawals, amounting to £6,090, between 11th April and 10th July 2017. It was her case that she had paid those monies in cash to Ms Williams (see paragraph 11 of Mr Poyser's statement).

35. When Ms Williams returned from leave, she conceded that she had received £4,500 in cash from the defendant, which she had failed to pay into the client account (see paragraph 12 of Mr Poyser's statement).

36. Having carried out an investigation as best he could, Mr Poyser reported his conclusions to the SRA on 22nd August 2018. As is explained in that report, and in Mr Poyser's statement, he determined that the claimant's records showed that the defendant had paid £6,791.86, leaving a shortfall of £3,798.14 (namely £10,590 less £6,791.86). Mr Poyser explains that whilst he found himself in a difficult position, he gave the defendant the full benefit of the monies he understood she was asserting had been paid to the firm (see paragraph 16). He did this by discounting an outstanding bill of £14,400 by the aforesaid £3,798.14, leaving a balance for the defendant to discharge of £10,601.86 (see paragraph 17). Subsequently, as he then explains at paragraph 20 of his statement, he concluded that in fact the sum of £400 withdrawn by the defendant had not been paid to the claimant but to a third party. As the Master noted, at paragraph 13 of her judgment, this sum was then deducted from the £3,798.14 credited against the claimant's bill.

37. It is Dr Friston's submission that the evidence thus demonstrates (and can only demonstrate) that Mr Poyser in fact accepted the defendant's account and sought to give her the fully benefit of monies she said she had paid to the claimant.

38. The Master, however, concluded:

    i) in addition to the £4,500 cash it had been accepted had been paid by the defendant to Ms Williams, the defendant said she had withdrawn a further £6,090, also given to Ms Williams;

    ii) in relation to this sum, Mr Poyser's evidence was that his 'investigation could not definitively confirm or deny this' (paragraph 26 witness statement);

    iii) the claimant was contending that on 13th July 2018, the defendant had agreed to the crediting of £3.798.14 against the claimant's bill and that agreement was binding, so it was not open to her to seek to pursue the matter of the £6,090; that was so, even though the claimant had itself subsequently reduced the amount credited against the bill by £400;

    iv) the £6,090 had never been treated as a payment on account and had never been credited to the defendant;

v) on the balance of probabilities, the claimant paid more than £4,500 to Ms Williams and the assertion that the claimant had made good the shortfall was incorrect: a further £6,090 had gone astray; it had never been in the claimant's hands, had never reached the claimant and Ms Williams had denied its existence.

39. Acknowledging that an appeal Court may interfere with a judge's assessment of evidence only if it cannot be reasonably justified or explained (see *Chen v British Virgin Islands* [2017] UKPC 27), the claimant says that the Master's conclusions in these respects are simply wrong and based upon an interpretation of the evidence that cannot reasonably be justified or explained, apparently founded upon a misreading or misunderstanding of both the SRA report and Mr Poyser's statement. This was not a matter of weighing the credibility of Mr Poyser as a witness - because he was never cross-examined on this or any other point - it was an error based on a misreading of the documentation. In particular, the reason the Master had been unable to find the monies having been credited to the cash account was because: (a) part of the monies related to the burial proceedings, of which she was seized; and (b) the remaining credit was given by way of discount to an outstanding invoice.

40. It is the claimant's contention that this was a mistake with profound consequences: as well as casting a shadow over the entirety of the findings in the assessment, it was a serious finding that had resulted in the claimant being referred to the SRA.

41. I first considered the claimant's objection in this regard on the basis of procedural irregularity. As I have said, I have not been provided with the earlier directions of the Master or any note from any relevant earlier hearing (and I understand that the issue of misconduct arose, in particular, at the hearing on 22nd October 2020), but it is apparent that the evidence before the Master included the witness statement of Mr Poyser and the documentation attached thereto. The statement that had been provided by Mr Poyser was specifically made to address the applicability of CPR 44.11(1), and any sanction to be applied. The claimant further made written submissions, as drafted by counsel, on these points.

42. Given that the Master was considering making a finding of misconduct pursuant to 44.11, the Practice Direction gave the claimant, as legal representatives, the right to seek an oral hearing; as is provided at paragraph 11.1 of the Practice Direction:

> "Before making an order under Rule 44.11 the Court must give the party or legal representative in question a reasonable opportunity to make written submissions or if the legal representative so desires, to attend a hearing."

43. The claimant's submissions addressed both the potential applicability of 44.11 (why the claimant was saying it was not applicable) and the alternative analysis, if it was held that the Court did have jurisdiction to impose a penalty. At no stage did the claimant seek a hearing.

44. As to whether the claimant understood that *how* the defendant's complaint was dealt with was in issue, as a potential finding of misconduct, it seems to me that it plainly did. That, after all, was the major focus of Mr Poyser's statement and the documentation he attached.

45. Dr Friston says the unfairness that arises was the failure by the Master to make sufficiently clear what potential findings of misconduct were in issue and to give the claimant the opportunity to make submissions and be heard. He accepts that, if given a reasonable opportunity to make written submissions on properly particularised allegations of misconduct, then the Court is not bound to hold an oral hearing. He says that in this case, however, the opportunity provided by the Master was not sufficient because (a) the Master's finding of mishandling of the client's money was of a different scale and would otherwise be a finding of misconduct under 44.11, and (b) the claimant had not had adequate notice of the findings in question.

46. I do not consider that the Claimant has raised any reasonable objection on which permission to appeal can be granted on this basis. I return to the specific findings made which are in issue below, but I bear in mind the observations of Lord Justice Vos at paragraph 32 in *Alpha Rocks*, where he opined that where:

> "where there is starkly conflicting witness evidence, [the case needs] to be evaluated after disclosure and the hearing of oral evidence and not by a process of forensic deduction from apparently unsatisfactory documentation."

47. The need for such an evaluation, it seems to me, is expressly provided by the Practice Direction, which makes clear that when a possible finding is to be made under CPR 44.11: the opportunity to make representations must be provided and that an oral hearing needs to be listed if the legal representatives ask for it. The purpose of that provision is plainly because it is envisaged that findings of misconduct under CPR 44.11 would have potentially serious consequences for legal representatives, such as solicitors, and I do not consider that the claimant was unaware of the potential findings that were open to the Master that might be adverse to the claimant (as opposed to simply those adverse to Ms Williams). Given Ms Williams' role in the claimant firm, that was plainly an issue that needed to be addressed in some detail, as it was in Mr Poyser's statement. The claimant plainly understood what was in issue and could have sought an oral hearing to explain its position further, but it did not. There is no procedural irregularity in the proceedings before the Master and no arguable ground of appeal arises on that basis.

48. Turning then to the second point raised under this ground, it is first relevant to bear in mind what material was before the Master (the claimant having chosen not to seek an oral hearing). The Master had in evidence Mr Poyser's first witness statement (from November 2020), the SRA reports, various correspondence between the parties, photocopies of bank account statements, client account ledgers, extracts and other primary records.

49. Looking at the narrative on the basis of Mr Poyser's witness statement, there is a degree of ambiguity. From paragraph 8 it is apparent that the defendant had disputed the sum that he had been able to identify on the client file and the client ledger: she had said that she had made cash payments of £4,500 as well as other payments; the suggestion being that those cash payments were over and above the payments shown as already made on the claimant's files. At paragraph 11, it is then explained that, in seeking to demonstrate the additional cash payments, the defendant had shown Mr Poyser bank statements evidencing withdrawals of cash totalling £10,590.

50. At paragraph 12, Mr Poyser makes clear that Ms Williams had accepted receipt of £4,500 in cash, which was never paid into the client account. At paragraph 16, Mr Poyser says he then calculated the fees that the defendant had paid on account, as taken from the claimant's records, at £6,791.86. As the claimant was saying, she had paid a total of £10,590, he credited her with the difference of £3,798.14 against an outstanding bill.

51. The claimant says the Master got it wrong in thinking there was still £6,090 to be credited to the defendant. The difficulty with that submission is, however, in identifying why that finding was wrong. If the defendant was to be understood as saying she paid a total of £10,590 in cash which was *in addition* to the sums showing on the ledger or client file, and the claimant only acknowledged an additional £4,500, then the question is why was the Master wrong to find that no account had been taken of the further £6,090, or at least some part of that?

52. The claimant's case assumes acceptance that the £6,090 was taken into account either because account was taken of the sums already credited to the defendant or in the additional credit that Mr Poyser subsequently allowed. The most favourable reading to the claimant of the evidence before the Master, however, is that while that might have been one possible reading of Mr Poyser's statement, the Master plainly understood the evidence to be that the £10,590 paid in cash was over and above what was recorded on the claimant's files (that is apparent from her findings, for example, at paragraphs 141, 142 and 145).

53. The difficulty therefore, for the claimant, is that, given the ambiguity on the face of Mr Poyser's witness statement, the finding does not seem to be obviously wrong. That difficulty becomes all the greater because on the claimant's own submission (see paragraph 27 of the submissions made below):

> "The Court would not be able to rely with any confidence on any time records or attendance notes written by Ms Williams as being accurate. Indeed, the fees attributable to Ms Williams should be approached with caution generally."

54. As Mr Poyser's second witness statement (not before the Master) makes apparent, however, the figure he had used, of £6,791.86, was derived from an account provided to him by Ms Williams, which he then checked against the claimant's records. On that basis, it does appear that the Master was not incorrect in thinking that he had, to some extent at least, preferred Ms Williams' account to that of the defendant.

55. In putting those difficulties to Dr Friston, his submission is that the evidence has to be seen as ambiguous and, on that basis, the Master - given the serious nature of the findings she went on to make against the claimant - ought properly to have listed this matter for an oral hearing: even if she was taking her findings from the claimant's evidence (not contested witness evidence as in the *Alpha Rocks* case), there was an ambiguity that meant this was not apt for a desktop assessment leading to the findings made.

56. For the reasons I have already provided, I do not accept that there was a procedural irregularity or unfairness arising from any step taken by the Master. That said, Dr Friston has persuaded me that he raises a reasonably arguable point, namely that,

given the apparent ambiguity on the evidence before her, and given that she was having to undertake this as an assessment on the documents and on the witness statement evidence rather than on the basis of testing oral evidence, it was arguably wrong for the Master to make the serious finding adverse to the claimant that she did in relation to this issue. In permitting this ground to proceed, I am mindful of the seriousness of the Master's findings for the claimant and consider that the potential ambiguity of the evidence identified by Dr Friston provides an arguable basis for his contention that the Master's decision was therefore wrong.

57. I will also permit, under ground 2, the claimant's further objections in relation to what have been described as 'additional matters', which relate to the hourly rates point (the Master having found that there was misconduct in the overcharging in respect of 'Bev', Mr Alleyne, and in relation to the charging for time relating to the complaint). In this regard I note that, as a result of these findings, the Master made a finding of mis-certification, which the claimant also challenges. It is accepted, however, that that is a consequential finding and the claimant first has to establish the first two objections; if it is unable to do so, it will get nowhere with the mis-certification objection.

58. To be clear, I do not accept that the claimant can have an objection based on the fact that it was not heard on these points. These were issues that had been identified by the Master as potentially issues of misconduct for the purposes of CPR 44.11. They were addressed by Mr Poyser in his witness statement, although the claimant chose not to make a request for an oral hearing. In these circumstances, there again can be no arguable criticism of the Master for proceeding on the basis that she did. If there is any issue in relation to these points, then it is, in my judgment, whether the findings relating to the hourly rate and the charging for time relating to the complaint, are properly to be treated as misconduct as defined by the Court of Appeal in *Gempride v Bamrah* 2018 EWCA CIv 1367 (see per Hickinbottom LJ at paragraph 26). On one view, the criticisms that the Master made in these respects may well be seen as relating to conduct which permitted of reasonable explanation or had the hallmark of conduct which the consensus of professional opinion would regard as improper. Again, however, given the serious nature of the finding of misconduct for the claimant, and given that this part of the judgment relates to the finding of overcharging in respect of a solicitor's contractual retainer with their client, I allow this point through to a hearing on the appeal.

Ground 3. Excessive/disproportionate penalty

Ground 4. Discretion pursuant to CPR 44.4

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.

60. Addressing first the question of proportionality, I note that on this alternative case, the claimant's submissions below did not greatly assist the Master, although it was contended that any penalty should be modest, potentially disallowing the entirety of

Ms Williams' fees. Dr Friston says that the claimant had not appreciated the Master would make such extensive findings of misconduct as she did and he says that the Master ought to have handed down her judgment, setting out her findings on misconduct, and should then have invited submissions on sanction. In any event, he says, the Master ought to have taken into account what had been at stake in the litigation, and the costs that would have rightly been incurred, and to have had regard to the reduction she had already made. Adopting a broad brush approach, and respecting the principle of totality, it is said that she would then have realised that this penalty was disproportionate.

61. Again, I cannot see that there was an error in the process adopted. The Master expressly invited submissions and evidence on the applicability of CPR 44.11 and any possible sanction. The claimant was plainly well aware of its ability to address these points and, indeed, presented evidence and submissions on these issues. The Master had also made clear that she had in mind the overcharging aspects that have been identified (as well as the conduct relating to Ms Williams' dishonesty) and it had been open to the claimant to make further submissions on the question of proportionality had it wished to do so.

62. Moreover, I do not consider the Master lost sight of what had been involved in this litigation; indeed, her judgment makes clear she understood the history well. She was bound, however, not only to have regard to proportionality in looking at the litigation in question but also to proportionality in terms of the penalty imposed, have regard to what she had found to be the degree of misconduct. In *Gempride v Bamrah*, Hickinbottom LJ made clear that, if the Court determines to make an order, any sanction must be proportionate to the misconduct as found.

63. In the present case, if the Master's findings of misconduct withstand the appeal under ground 2, then I cannot see there is any reasonable prospect of arguing that - having regard to the reduction that had been made in *Gempride* and having regard to the more serious findings of misconduct that had been made in this case - the Master failed to adopt a proportionate approach. She did not lose sight of totality and the decision she made was one that fell within her discretion.

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.

Conclusions

65. For all the reasons I have given, I permit this matter to proceed on ground 1 and on ground 2, limited to the findings of misconduct not the question of fairness or procedural impropriety. I do not give permission to appeal on grounds 3 and 4.

66. Permission is given on the basis of the concession made by the claimant (as set out at paragraph 4 of the additional skeleton argument provided for this hearing) that it

would be unjust to visit the cost consequences of this appeal on the defendant, a litigant in person, and that the Court should therefore exercise its powers under CPR 52.18(1)(c), to order that the claimant must bear its own costs of the appeal. That is an order that I consider is appropriate to make in this case and that will therefore be a condition of the grant of permission.

67. I also direct that, as well as obtaining a transcript of the judgment that I have given this morning, the claimant must ensure that at the full hearing, the Court is provided with a copy of the Master's order or directions of 27th October 2020 and any other relevant order or directions that she has made relating to these matters. To the extent necessary, that may need to include providing a note or transcript of the hearing at which the misconduct point arose; at the hearing of the appeal, the Court must be fully informed of the position the Master was in.

This judgment has been approved by Eady J.