Neutral Citation Number: [2025] EWHC 851 (KB)

APPEAL REF: KA-2024-000200

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 April 2025

Before :

MR JUSTICE CAVANAGH
- -

Between :

Rebekah Vardy

Claimant/Appellant

- and -

Coleen Rooney

Respondent/Defendant

- -
- -

Jamie Carpenter KC (instructed by **Kingsley Napley**) for the Claimants
Benjamin Williams KC and **Robin Dunne** (instructed by **Brabners**) for the Defendants

Hearing date: 31 March 2025
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- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 10 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Cavanagh:

Introduction

1. This appeal is concerned with an issue that has arisen in relation to the costs of the very well-known defamation proceedings between Rebekah Vardy and Coleen Rooney ("the Claimant" and "the Defendant", respectively). The Claimant's claim was unsuccessful, and the trial judge, Steyn J, ordered that the Claimant should pay 90% of the Defendant's costs on an indemnity basis. A hearing took place on 7 to 9 October 2024 before the then Senior Costs Judge, Andrew Gordon-Saker ("the Judge"), to deal with a number of preliminary issues in respect of the Defendant's Bill of Costs.

2. This appeal has been brought by the Claimant. It deals with one of the issues that was decided by the Judge, and which is the subject of a judgment dated 8 October 2024. There are a number of other outstanding issues relating to the detailed assessment of the costs of these proceedings which are now being dealt with by Costs Judge Whalan (following the retirement of the Judge). Those other issues are unrelated to this appeal.

3. The issue in the appeal is whether the Judge was wrong to decline to find that the Defendant or her solicitors had conducted themselves improperly or unreasonably for the purposes of CPR 44.11(1)(b). If the Judge had found there to be improper and/or unreasonable conduct, he would have had to go on to consider whether or not to exercise the discretion, set out in CPR 44.11(2)(a), to impose a sanction by disallowing some of the costs that would be otherwise payable to the Defendant by the Claimant.

4. CPR PD 3, paragraph 3(a) requires that, save in exceptional circumstances, parties must lodge a document in a prescribed form for costs budgeting purposes. The document is called Precedent H, a template for which is annexed to CPR PD 3. That template

includes a statement of truth which must be included at the bottom of Precedent H, immediately before the space for the signature of the party's solicitors. When filling in Precedent H, a party's solicitors are required to set out the incurred and predicted future costs which it would be reasonable and proportionate for their client to incur in the litigation. This is the basis upon which costs are awarded on the standard basis under CPR 44.3(2).

5. In these proceedings, the Defendant filed two Precedents H. These were then the subject of oral and written submissions before the Master who was dealing with costs budgeting and case management, Master Eastman. With the encouragement of the Master, the parties agreed their costs budgets at a costs and case management hearing on 4 August 2021. As, in the event, the trial judge awarded costs on an indemnity basis in favour of the Defendant in this case, the costs budgets and the Defendant's Precedents H are not directly relevant to the assessment of costs. CPR 44.3(3) provides that a party who has been awarded indemnity costs is entitled to receive payment of their full reasonably incurred costs, rather than only such costs as were reasonably and proportionately incurred – which is, as I have said, the amount of costs that are payable on a standard basis, and which is the basis upon which incurred and future costs are calculated for the purposes of the preparation of Precedent H.

6. The alleged improper and/or unreasonable conduct relates to the written and oral submissions that were made to Master Eastman on behalf of the Defendant and which were critical of the figures for incurred legal costs that were provided on behalf of the Claimant in her Precedents H. The Claimant contends that a misleading impression was given to Master Eastman, because the Defendant's legal advisers had failed to make clear to the Master and to the Claimant that the figures for the Defendant's costs in

Precedent H did not set out the actual costs that she had incurred to date: rather, they were the Defendant's solicitor's estimate of the incurred costs that would be allowed, at the costs assessment stage, as being reasonable and proportionate for a costs award on a standard basis. This was a lower figure than the actual costs incurred to date. As a consequence, in the Precedents H, the figures for the Claimant's incurred costs were very much higher than the figures for the Defendant's incurred costs. If the Defendant's Precedents H had set out the Defendant's full incurred costs to date then those costs would not have been very much lower than the incurred costs that were set out in the Claimant's Precedents H.

7. The Claimant does not say, in this appeal, that it is in itself necessarily improper or unreasonable for a party to set out figures for incurred costs in Precedent H which are lower than the party's actual incurred costs to date (though this argument was advanced before the Judge). It is now accepted that this is a legitimate course of action if the party's legal advisers do not believe that the actual figures would be regarded as reasonable and proportionate on an assessment on the standard basis. However, the Claimant submits that, in the circumstances of this case, the failure on the Defendant's legal advisers' part to make the position clear to the Master and the Claimant's legal advisers amounted to unreasonable and/or improper conduct. It is submitted that they should have been transparent about what they had done, particularly in circumstances in which they made trenchant criticisms of the Claimant's incurred costs and suggested, expressly or implicitly, that the actual costs incurred by the Claimant to date were very much greater than the actual costs that had been incurred by the Defendant to date.

8. The Judge did not accept this submission. I will summarise his reasoning later in this judgment. His conclusion, at paragraph 18 of his judgment, was that:

> "In embarking on a resolute attack on Mrs Vardy's incurred costs, it behoved them to set out, or to explain, that the costs shown on their client's budget as incurred costs was in fact only part of the picture. However, on balance, and I have to say only just, I cannot say, given the uncertainty of the wording of the statement of truth and the assumption that Mrs Rooney's solicitor could have made as to the basis of Mrs Vardy's costs, that the failure to be transparent was sufficiently unreasonable or improper within the definition as provided by the Court of Appeal in **Bamrah**."

9. The reference to "the assumption that the Defendant's solicitors could have made as to the basis of the Claimant's costs" is a reference to an assumption that the Claimant's Precedents H were prepared on the same basis as the Defendant's Precedents H. In other words, an assumption that the Claimant's legal advisers had also set out figures for incurred costs that represented only the amount of costs incurred so far that the Claimant's legal advisers believed would be recoverable on a standard basis assessment on a "reasonable and proportionate" basis, and so did not represent the amount of costs actually incurred to date (which was higher). The reference to **Bamrah** is to **Bamrah and another v Gempride Ltd** [2018] EWCA Civ 1367; [2019] 1 WLR 1545, a case in which the Court of Appeal set out guidance about the approach to applications made under CPR 44.11. I will summarise the key principles to be derived from **Bamrah** for present purposes below. The reference to the statement of truth is to the statement of truth that is required to be set out at the bottom of Precedent H, immediately before the signature of the party's solicitors. The statement of truth states that:

> "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."

10. Permission to appeal was granted by Kerr J on 17 December 2024. There are two grounds of appeal. These are that:

    (1) The Judge was wrong to find that the Defendant's solicitors would or could have believed that the Claimant had also understated the incurred costs; and

    (2) In any event, the Judge was wrong to regard that finding or uncertainty about the meaning of the wording of the statement of truth on a Precedent H as excusing conduct which involved misleading the Claimant and the Court and which he had otherwise found to have been at least unreasonable. The Judge should have found that the conduct in issue was improper and/or unreasonable and therefore misconduct.

11. In a Respondent's Notice, the Defendant submitted that the decision of the Judge was correct and should be upheld for the reasons set out in the judgment and for the following additional reasons:

    (1) The Claimant has said that no criticism is made of the Defendant's counsel. In circumstances in which there has been no waiver of privilege and no application to cross-examine the Defendant's solicitor, no inference adverse to the Defendant's solicitor can be drawn. There is no criticism of the Defendant herself. It follows that the Claimant cannot make good the allegation that the Defendant or her legal advisers acted unreasonably and/or improperly for the purposes of CPR 44.11; and

(2) The Judge's criticism of the Defendant's legal advisers for lack of transparency is misplaced.

12. The parties agree that, if the appeal succeeds, the issue of remedy should not be remitted to a Costs Judge: this court should exercise its own discretion as to whether to impose a sanction and, if so, should decide what that sanction should be. The Claimant submitted that a proportionate sanction would be to limit the Defendant's recoverable costs incurred up to and including 4 August 2021 (the date on which the costs budgets were agreed) to £220,955.07 plus VAT (if applicable), being the stated sum in the Defendant's second Precedent H of 16 July 2021, and to order that the Defendant should not be permitted to recover on detailed assessment any costs of the costs budgeting process.

13. The Defendant submitted, as regards disposal, that even if the court accepts the Claimant's submission that the Judge should have found that the Defendant's legal advisers acted unreasonably and/or improperly, the court should not impose any sanction. The Defendant was not herself in any way culpable, and, even if there had been unreasonable and/or improper conduct, the Claimant had not suffered any loss, since the Claimant's costs budget as set out in her second Precedent H was, in the event, agreed (with minor amendments) and, in any case, the Defendant was awarded indemnity costs against the Claimant, and so no use has been made of the costs budgets or of the figures set out in the parties Precedents H.

14. I was accompanied at the appeal hearing on 31 March 2025 by Acting Senior Costs Judge Jason Rowley, who sat with me as an assessor. Judge Rowley has great experience in costs matters. As I told the parties I would do, I have conferred with Judge Rowley in relation to the issues in this matter. I am very grateful to Judge Rowley

for his assistance. Judge Rowley has indicated that he is in agreement with my decision.

15. The Claimant was represented on the appeal by Jamie Carpenter KC. The Defendant was represented by Benjamin Williams KC and Robin Dunne. I am grateful to all counsel for their clear and helpful submissions, both those made orally and in writing.

The relevant law

16. There is no dispute between the parties about the relevant legal principles to be applied to applications under CPR 44.11 (though, as will be seen, there is disagreement about the approach to be taken by the appellate court to appeals in cases such as this).

17. CPR 44.11 is headed "Court's powers in relation to misconduct." CPR 44.11 states, in relevant part:

> "(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."

18. CPR PD 44, paragraph 11.2 provides that:

> "Conduct which is unreasonable or improper includes steps which are calculated to prevent or inhibit the court from furthering the overriding objective."

19. The leading authority on the meaning and effect of CPR 44.11 is **Bamrah**. The misconduct that was alleged in that case was very different from the misconduct that is alleged in the present case. In **Bamrah**, a solicitor acted for herself, as claimant, in a personal injury case. There were a number of errors in the Bill of Costs that had been prepared for the claimant by a firm of costs draftsmen. In particular, the hourly rate that was claimed was higher than the hourly rate that had actually been charged, and the claimant had given an untrue answer to a question as to whether before the event insurance had been available. The master had disallowed the claimant's firm's profit costs in so far as they exceeded the fixed hourly rate recoverable by litigants in person, on the ground that the claimant's conduct had been unreasonable or improper for the purposes of CPR 44.11. A judge allowed the claimant's appeal, finding that she had not been dishonest and had not herself been guilty of conduct that was unreasonable or improper. The judge further found that the claimant could not be held responsible for errors made by the costs draftsmen. The Court of Appeal (Hinckinbottom and Davis LJJ) allowed the defendant's appeal. The Court of Appeal held that, for the purposes of CPR 44.11, a party's legal representatives were responsible for the acts or omissions of agents, such as costs draftsmen, to whom they delegated parts of the conduct of the litigation. The Court of Appeal further held that dishonesty is not a necessary ingredient for a finding of unreasonable and/or improper conduct for the purposes of CPR 44.11 and that, on the facts, the claimant's conduct both in certifying the Bill of Costs as

accurate and in giving the answer that she gave to the point of dispute concerning before the event insurance had been unreasonable or improper for the purposes of rule 44.11(1)(b).

20. The following helpful summary of the relevant points of principle was provided by Hickinbottom LJ in **Bamrah** at paragraph 26, and was referred to by the Judge at paragraph 9 of his judgment below:

(1) A solicitor as a legal representative owes a duty to the court;

(2) 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;

(3) Mistake or error of judgment or negligence, without more, will be insufficient to amount to "unreasonable or improper" conduct;

(4) Although the conduct of the legal representative must amount to a breach of duty owed by the representative to the court to perform his duty to the court, the conduct does not have to be in breach of any formal professional rule or dishonest;

(5) Where an application under CPR 44.11 is made, the burden of proof lies on the applicant in the sense that the court cannot make an order unless it is satisfied that her conduct was "unreasonable or improper";

(6) Even where the threshold criteria are satisfied, the court still has a discretion as to whether to make an order; and

(7) 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 (paragraph 14).

21. The following additional points, or further clarification, can be derived from **Bamrah**:

(8) As was pointed out by Mr Carpenter KC, at paragraph 10 of his judgment in **Bamrah**, Hickinbottom LJ said this:

> "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** [1998] 3 All ER 570, 574, "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."

(9) The jurisdiction under CPR 44.11 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 that is intended to mark the court's disapproval of the failure of a party or a legal representative to comply with their duty to the court by way of an appropriate and proportionate sanction (**Bamrah**, paragraph 14);

(10) "Unreasonable" and "improper" in CPR 44.11 have the same meanings as they have in the wasted costs provisions in CPR 46.8 and CPR PD 46, paragraph 5. Therefore, a similarly narrow construction of the terms should be given in each context, and the authorities on wasted costs, such as **Ridehalgh v Horsefield** [1994] Ch 205, provide guidance on the scope of unreasonable or improper conduct in the context of CPR 44.11 (paragraphs 17 and 18). (The wasted costs jurisdiction applies to "negligent" conduct, which is not the case with CPR 44.11.);

(11) The definitions that were provided for “unreasonable” and “improper”, in the context of the wasted costs jurisdiction, by Lord Bingham MR in **Ridehalgh v Horsfield** at page 232 are relevant for the purposes of an application under CPR 44.11 (paragraph 21). These are:

> “"Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. 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.
>
> "Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded

as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

(12) Conduct which is unreasonable may also be improper. There is no sharp differentiation between these expressions (**Bamrah** paragraph 23, citing **Ridehalgh v Horsefield**, at page 233); and

(13) The procedure to deal with applications under CPR 4.11 should be as simple and summary as fairness permits (**Bamrah**, paragraph 168). It is essential that the court's approach to applications under CPR 44.11, and to any sanctions imposed under CPR 44.11(2) is reasonable and appropriate (paragraph 169). This observation was triggered by the fact that the substantive hearing of the CPR 44.11 appeal in **Bamrah** took 13 days before a judge and an assessor, and the claimant claimed nearly £1 million of legal costs for the CPR 44.11 proceedings before the master and then the judge.

The facts

22. As the following outline of the relevant facts will demonstrate, the figures provided by the parties in each of their Precedents H indicated a figure for costs incurred to date by the Defendant which was about 40-50% of the figure for incurred costs that was put forward by the Claimant. The figure for incurred costs that was set out by the Defendant's solicitors in the two Precedents H were some 55-60% of the Defendant's actual incurred costs to date. The Defendant's actual expenditure on legal costs in the period up to the point at which the costs budgets were agreed (4 August 2021) was about 79% of the Claimant's actual costs in the same period. This difference was largely accounted for by the higher hourly rate that was used by the Claimant's solicitors.

23. The explanation for the figures for the Defendant's incurred costs in her Precedents H that has since been given by the Defendant's solicitor, in a response to a Part 18 Request in the costs assessment process, is that:

> "The costs included within the Precedent H were those that, in the conducting solicitor's view at the time, it would be proportionate for the Defendant to incur in the litigation. That figure was lower than the actual costs incurred because it was considered that the actual costs incurred would be deemed to be disproportionate".

24. As I have said, the Claimant no longer contends that it was unreasonable or improper for the Defendant to take this approach to the compilation of the incurred costs figures in the Precedent H. But, submits the Claimant, having done so, the Defendant's legal advisers were obliged to be transparent about it, at least in circumstances in which they were making trenchant criticisms of the incurred costs figures in the Claimant's Precedents H.

25. The parties each filed and served their first Precedent H in these proceeding on 22 February 2021. The figures for the Claimant's incurred and estimated costs were substantially higher than the Defendant's figures. The Claimant's figures for incurred costs, estimated future costs, and total costs were, respectively, £431,158.49, £655,380, and £1,086,538.49. The Defendant's figures were £181,249.57, £402,312.50 and £583,562.07. This means that the figures set out by the Defendant in the first Precedent H for incurred costs were approximately 42% of the equivalent figures given by the Claimant.

26. The figures subsequently provided by the Defendant in the Bill of Costs show that the Defendant's actual incurred costs as at the date of the first Precedent H were

£323,792.44. This means that the figure in Precedent H was about 56% of the Defendant's actual incurred costs. It also means that, at that stage, the Defendant's actual expenditure on legal costs was about 75% of the Claimant's actual costs.

27. On or about 16 March 2021, the Defendant served her Precedent R budget discussion report, in which she made observations on the Claimant's first Precedent H. In some general comments in Precedent R, the Defendant's legal advisers invited the court to "exercise its discretion under CPR 3.15(4) and record that the incurred costs are disproportionate and unreasonable in amount. Substantial costs – in excess of £430,000 have been incurred to date." The Defendant's team acknowledged that some of the difference was caused by the fact that the Claimant was using London solicitors, whilst the Defendant was using Liverpool solicitors, but said that even if the hourly rates were reduced by 25%, the Claimant's figures would still be higher than the Defendant's figures for incurred costs. The Defendant's legal advisers added,

> "As noted by Nicklin J, this defamation claim is a straightforward one and whilst high profile, this should not detract from the obviously massive expenditure incurred by the Claimant to date. The Claimant's litigation has not been run at [and there the copy of the document becomes illegible]"

28. The first Costs and Case Management hearing took place before Master Eastman on 16 March 2021. This hearing was adjourned, because it was considered better to postpone decisions until after a forthcoming application on the part of the Claimant for strike out/summary judgment. However, during that hearing, Counsel for the Defendant said:

> "We are fundamentally asking that in fact you reject the Claimant's budget and ask them to review it because it is, in the words of my

> lay client, as I am instructed, it is grotesque. The sums are so huge, and the duplication of effort is so massive that you are looking at a situation where the Claimant's budget to date, including incurred costs, is double that of the Defendant's. It would assist if you would take some time … to record your comments on the budget as it currently stands, because in whatever way this goes forward the budget that we have at the moment indicates that things are getting well out of hand…"

29. I should add that Counsel for the Defendant at the two CCMCs was not Mr Williams KC or Mr Dunne.

30. Master Eastman declined the invitation to comment on the costs budgets on that occasion, but he said that "the budgets do seem extraordinarily high" and he encouraged the parties to go through them with a fine-tooth comb before the matter came back for him for any further budgeting.

31. On 16 July 2021, the parties exchanged and filed revised Precedents H. In the revised Precedents H, the Claimant's figures for incurred costs, estimated future costs, and total costs were, respectively, £469,579.99, £367,155 and £836,734.99. This represented an increase in incurred costs but a reduction in costs overall. The Defendant's figures in her revised Precedent H were £220,955.07, £316,074 and £537,029,07. In the Defendant's case, therefore, there was a modest increase in incurred costs, but a reduction overall. So far as incurred costs were concerned, the Defendant's Precedent H figure was approximately 47% of the Claimant's figure. The total costs claimed by the Claimant, as compared with the total costs claimed by the Defendant, were affected

by two matters: first, the Claimant's solicitors' hourly rates were some 15% higher than the Defendant's solicitors' hourly rates, and, second, the Claimant had budgeted for estimated future costs on the basis of a 7-day trial, whereas the Defendant had estimated that the trial would take 5 days.

32. The Defendant's actual costs up to the date of the adjourned CCMC, which took place on 4 August 2021, were £367,732.77. The incurred costs figure in the second Precedent H were about 60% of that figure. At that stage, therefore, the Defendant's actual expenditure so far on legal costs was about 79% of the Claimant's actual costs to date.

33. The Defendant's counsel filed a skeleton argument for the CCMC on 4 August 2021 (updated Precedents R were dispensed with). The skeleton said the following about the level of the Claimant's incurred costs:

(1) "To date C's litigation has been run at a disproportionate cost incurring costs to date of just under £470,000";

(2) This figure was "not just substantial but wholly unreasonable for a claim that if successful, is unlikely to yield damages anywhere near six figures";

(3) The Claimant's proposed total costs (incurred and estimated) were "demonstrably far too high";

(4) "Furthermore, given the huge amount of incurred costs it can be assumed that a considerable proportion of all necessary work has already been done and the need for more than a third of a million pounds of additional estimated expenditure is disproportionate and unreasonable";

(5) "C's budget has always been inflated and reliance cannot be placed on it… By contrast, on an already much more modest budget, D has generated further savings of about £47,000."

34. The CCMC on 4 August 2021 took place remotely, as it was during the Covid pandemic. At the CCMC, the Master said that "it is clear that the Claimant has spent a great deal of money on this matter already" but declined to make any more substantial comment on the level of costs in the Precedents H. He invited the parties to agree each other's costs budget. They did so, but, before the adjournment took place in order for the parties to enter into discussions, and notwithstanding that the Master had already indicated his view that the costs budgets should be agreed rather than argued over, counsel for the Defendant was critical of the Claimant's incurred costs figure. He said:

> "There is the case of **Harrison** in the Court of Appeal, which confirms that whilst incurred costs are not budgeted, the Court could and should consider incurred costs, which you have done, you have considered them, when considering proportionality of future estimated work. There is a proper balance without necessarily making a comment that to arrive at proportionality and reasonableness it is right to look at the incurred costs, and I will take instructions but, Master, you will have noted from the last document that I sent through, that in terms of solicitor hours for instance, there are 1200 hours spent by Mrs Vardy's solicitors between incurred and estimated costs of which 843 hours are already incurred. That is double, absolutely double what the defendant's solicitor's time costs are. That is very significant, the distinction, the difference is

> which Ms Mansoori has drawn your attention to in her skeleton argument between counsel fees are not as dramatic as the difference in the time costs. I would just ask that the Court bears that particular authority in mind"

The judgment below

35. The judge did not accept that it was unreasonable or improper for the Defendant's solicitors to interpret the statement of truth in Precedent H to mean that the incurred costs figures should be only those costs as they believed would be proportionate to incur in the litigation. He did not consider it necessary to resolve the dispute about whether a party was obliged to set out their actual incurred costs in Precedent H (as the Claimant contended), or whether a party was obliged, or at least permitted, to exercise a judgment about proportionality and then set out a figure for incurred costs which reflected the amount that the party's legal advisers considered to be proportionate (as the Defendant contended). Since the issue does not arise on this appeal, it is not necessary or appropriate for me to say more than that I agree with the Judge that it is permissible for a party to set out, in the incurred costs column in Precedent H a figure that represents those incurred costs that the party's legal advisers consider to be proportionate, even if that figure is lower than the figure for actual incurred costs. This was made clear by the court in the **Pan-NOx** case referred to below.

36. As for the issue that remains live in this appeal, the Judge recorded that Mr Carpenter KC was careful to indicate that no criticism was made of counsel, on the assumption that he was acting on instructions from the Defendant's solicitors. At paragraphs 16 and 17 of the judgment, the Judge said:

> "16. There is logic in [the Defendant's] argument that a solicitor who has concluded that he could only include reasonable and proportionate costs in the incurred columns would assume that the other party had done the same. On that basis, the Defendant's solicitor was not comparing apples with pears. [The Defendant's] reasonable and proportionate incurred costs as against [the Claimant's] all-inclusive costs effectively on an indemnity basis, he was comparing [the Defendant's] reasonable and proportionate incurred costs with what he assumed were [the Claimant's] reasonable and proportionate costs.
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> 17. As the Court stated in the **Pan-NOx Emissions Litigation** [2024] EWHC 1728 (KB) at paragraph 38, there is nothing wrong in principle with a party recognising in advance of the costs budgeting exercise that the incurred costs will not be justified on assessment and should be reduced. However, there must be transparency. If a party is saying that its proportionate incurred costs are X pounds, whereas in fact its actual incurred costs are two X pounds, it cannot reasonably criticise its opponent for incurring two X pounds without stating that its own costs were actually two X pounds and that is where I would criticise [the Defendant's] lawyers."

37. I have already set out paragraph 18 of the Judge's judgment, at paragraph 8, above. The Judge said that, as they had embarked upon a resolute attack on the Claimant's costs, the Defendant's solicitors should have made clear that their own Precedents H had not

set out the entirety of the Defendant's incurred costs to date. However, on balance, and only just, and in light of the uncertainty of the wording of the statement of truth and the assumption that the Defendant's solicitors could have made to the effect that the Claimant's solicitors had adopted the same approach as them to the figure for incurred costs, this failure to be transparent did not mean that they had acted unreasonably or improperly for the purposes of CPR 44.11.

The approach to appeals against decisions on an application under CPR 44.11

38. On behalf of the Claimant, Mr Carpenter KC submitted that this was not a case in which the appellate court should show any particular deference to the decision of the court below. There was no oral evidence and, indeed, no disputed evidence of any kind, and so, he submitted, the Judge was not better placed that this court would be to decide the matter. This was not a decision taken after a long trial, in which the first instance judge was able to obtain a "feel" for the case which would not be available to the appellate court. It was not a decision which involved the exercise of a specialist knowledge of costs. Ultimately, Mr Carpenter KC said, the requirements for a finding of misconduct are satisfied or they are not.

39. I am unable to accept these submissions. I agree with Mr Williams KC that this is a paradigm case of an appeal against an evaluative judgment. Faced with facts, which, as it happened, were not in dispute, the Judge had to decide whether the acts and/or omissions of the Defendant's legal advisers were unreasonable or improper, as defined for the purposes of CPR 44.11. This was not a binary decision, which admits of only one answer. There will, no doubt, be some cases, perhaps many cases, in which the answer is so clear that no judge could realistically or reasonably come to any other view than that conduct did or did not amount to improper or unreasonable conduct. But there

is other conduct, of which this is an example, for which the position is not so clear-cut. In such cases, it is not the role of the appellate judge simply to substitute his or her view for the view of the first-instance judge. Rather, the appellate judge should only intervene in one of three types of case. The first is where the conclusion reached by the judge is vitiated by an error of law. The second is where the conclusion is vitiated by an error in the judge's process of reasoning. This is not the place to embark upon a detailed examination of this type of case, but, plainly, not every error in the process of reasoning will vitiate the judge's decision. The third type of case is where the judge's conclusion was wrong, in the sense that no reasonable judge, properly directing himself or herself on the law, and properly approaching the issue, could have come to the conclusion that was reached. The third type of case, when dealing with an evaluative judgment, is similar to the approach which appellate courts take to the exercise of a judicial discretion.

40. This approach was described by Mr Williams KC in his skeleton argument as "the appellate restraint principle". It might alternatively be described as the "judicial deference principle". In my judgment, this approach applies to the present case, notwithstanding that the facts were not in dispute. It is true that a different approach applies to cases in which the appeal is an appeal against findings of fact. In such cases, appellate courts will pay particular deference to the findings of the first instance judge, because they are best-placed to have regard to the entirety of the evidence and the atmosphere in the courtroom (see **Fage UK Ltd v Chobani UK Ltd** [2014] ETMR 26, at paragraph 114, per Lewison LJ, approved by the Supreme Court in **Perry v Raleys Solicitors** [2019] UKSC 5; [2020] AC 352, at paragraph 51). Such considerations do not loom so large in cases in which the facts are undisputed or in which there is no challenge to a finding of fact. But this does not mean that, where the facts are

undisputed, the appellate judge is free to substitute his or her own evaluative judgment for the evaluative judgment of the first instance judge. The usual principle of appellate restraint applies to such cases, even though the facts are not in dispute. As the authorities make clear, the point of the appellate restraint principle is not just that the first instance judge saw and heard all of the evidence first-hand. It is also justified and underpinned by the propositions that the hearing at first instance is the "main event", not a "try-out on the road", and that, if an appeal in these circumstances was a rehearing, this would lead to an undesirable duplication of effort and expense, and would clog up the appellate courts (see **Perry v Raleys** at paragraph 50).

41. The approach that I have described is the one that was adopted in the CPR 44.11 context by the Court of Appeal in **Bamrah**. In **Bamrah,** at paragraph 173, Davis LJ described the jurisdiction under CPR 44.11 as "pre-eminently an essentially discretionary and evaluative jurisdiction." The decision whether there has been unreasonable or improper conduct is an evaluative judgment, and the decision, if there is, whether to impose a sanction and, if so, what, is a discretionary decision. In **Bamrah**, the grounds of appeal that were considered and accepted by the Court of Appeal were challenges either on the basis that the decision of the judge below had been based on an error of law (namely that a party's legal advisers could not be responsible for the actions of costs draftsmen, and that conduct could not be unreasonable or improper if it was not dishonest), or on the basis that the decision was wrong on the basis that no reasonable judge could have come to it (see, for example, Davis LJ at paragraphs 173-174). The Court of Appeal did not feel able to overturn the conclusion of the judge below that the claimant had not been dishonest, despite the Court's reservations about it.

42. Furthermore, in my judgment, this case comes within the type of case in which particular deference should be shown to the first instance judge because he was an experienced judge (indeed, arguably the most experienced judge) in a specialist jurisdiction. The question whether there was unreasonable or improper conduct was being considered in the context of costs. A Costs Judge has a particular expertise in, and experience of, costs matters which will inform, in particular, the view as to whether what happened was something which permitted of a reasonable explanation and also whether it was conduct which the consensus of professional opinion would regard as improper. A Costs Judge was, therefore, particularly well-placed to make the evaluative judgment that is required in a CPR 44.11 application in this context.

43. None of this means, of course, that an appeal must inevitably fail, but it means that I do not accept Mr Carpenter KC's submission that the decision under appeal was a binary decision which the appellate court is as well-equipped to decide as the Judge below.

Ground 1

44. The first ground of appeal relied upon by the Claimant is that the Judge was wrong to find that the Defendant's solicitors would or could have believed that the Claimant had also understated the incurred costs.

45. There are two aspects to ground 1. The first is the submission that there was no evidential basis for this finding. The second is that, in any event, this finding was irrelevant, because what mattered was what the Defendant's solicitor actually thought, not what he "could have" thought, or what it would have been reasonable for him to think.

Was there any evidential basis for the finding that the Defendant's solicitors would or could have believed that the Claimant had also used the "reasonable and proportionate" basis when setting out incurred costs in Precedent H?

46. It is clear that the Judge did make such a finding. He referred at paragraph 18 of his judgment to "the assumption that [the Defendant's] solicitor could have made as to the basis of [the Claimant's] costs." This refers back to a passage in paragraph 16 of the judgment, in which the Judge accepted that there was logic in the Defendant's argument that a solicitor who had concluded that he could only include reasonable and proportionate costs in the incurred columns would assume that the other party had done the same. It is worth emphasising that the Judge did not find that this was definitely what had happened. Rather, he based his decision on the possibility that this assumption might have been made.

47. In my judgment, the Judge was entitled so to find. This was a conclusion that he reached by inference, based upon the primary, undisputed, facts. There was material upon which he was entitled draw the inference and so to reach this conclusion.

48. The unchallenged evidence was that the Defendant's solicitor had inserted figures into Precedent H which represented his estimate of the level of incurred costs that were reasonable and proportionate and so which would be allowed on the standard basis. In the Part 18 Response at the costs assessment stage, the Defendant's solicitor said that he did so because that is what he believed was required by CPR 3 and Precedent H. He said:

> "Thus, the budget is not a statement of the actual incurred costs at the point of filing the Precedent H. …. It can be seen therefore that the Precedent H does not ask a party to set out what the actual

> incurred costs are. It demands that a party set out the costs which in their view it would be reasonable and proportionate to have incurred and to incur going forward."

49. This was credible evidence. It would have been entirely understandable that a solicitor would take this approach, given the wording of the statement of truth. The wording, on an ordinary reading, requires that the budget set out in the statement of truth consists of a fair and accurate statement of the incurred costs which it would be reasonable and proportionate for the client to incur in the litigation – not a statement of the actual costs, if higher. It is true that this is not the only possible interpretation of the statement of truth: the alternatives are that a party's solicitors are expected, though not obliged, to proceed on this basis, or that the qualification that the costs must be reasonable and proportionate applies only to the estimated future costs. Nevertheless, it would have been perfectly reasonable for the Defendant's solicitor to interpret the statement of truth to mean that there was an obligation for each party's figure for incurred costs in Precedent H to be the reasonable and proportionate costs.

50. Given this was so, it was also legitimate for the judge to draw the further inference that, if the Defendant's solicitor came to the conclusion that this was what he was obliged to do, then he would, or might, assume that the Claimant's solicitor would adopt the same interpretation of the statement of truth and so would adopt the same approach.

51. The position would be different if any of the observations that were made by the Defendant's solicitors, in Precedent R, or by the Defendant's counsel, in the skeleton argument or at the two CCMCs, were such as to make clear beyond doubt that the Defendant's solicitors or counsel appreciated and recognised that the incurred costs figure in the Claimant's Precedent H represented the actual cost, without any reduction

for reasonableness and proportionality. If the Defendant's counsel had said any such thing, and was not immediately asked to correct his statement by his solicitors, then that would demonstrate that the Defendant's solicitors actually knew full well that the Claimant's Precedents H had been drafted on a different, full-cost, basis and so that the adverse comparison that counsel was making was, in the Judge's words, misleadingly comparing apples with pears.

52. But that is not the position. In my judgment, none of the observations made by solicitors or counsel for the Defendant, as set out earlier in this judgment, unequivocally show that they were proceeding on the basis that the incurred costs figure used by the Claimant's solicitors was the full-cost figure, rather than the figure for reasonable and proportionate costs. Each of the observations by counsel for the Defendant is consistent with the conclusion that the Defendant's legal advisers assumed that the Claimant was also using "reasonable and proportionate" figures for incurred costs.

53. If the figure for incurred costs set out in the Claimant's first Precedent H was a "reasonable and proportionate" figure, then it would follow that the actual figure was the same or higher. In those circumstances, to refer to the "obviously massive expenditure incurred by the Claimant to date", as was said in the Precedent R filed by the Defendant's solicitors before the first CCMC on 16 March 2021, does not indicate that the Defendant's legal advisers must have realised that the Claimant's figure in her first Precedent H for incurred costs was the figure for actual incurred costs. The same applies to the statement made by counsel at the CCMC on 16 March 2021 to the effect that the sums in the budget were "grotesque". This comment makes as much sense if it is a comment on a figure for "reasonable and proportionate" costs as it does is if it is a comment on a budget which includes actual incurred costs and an estimate for actual

future costs. Similarly, the comment that the Claimant's budget to date, including incurred costs, was double that of the Defendant could just as readily be made on the basis that both budgets were dealing with "reasonable and proportionate" costs as it could if the Claimant's budget was understood to be dealing with actual costs. Again, the comments made in the skeleton argument for the second CCMC do not show clearly that, by then, the Defendant's legal advisers realised that the Claimant was using the actual costs basis for her incurred costs figures in the second Precedent H. The criticism of the costs figures set out in the Claimant's budget works equally well if the Defendant assumed that the budget was limited to "reasonable and proportionate" costs as it does if the Defendant was working on the basis that the Claimant's budget dealt with actual costs. In particular, the assertion that the figures in Precedent H indicate that a considerable proportion of all of the necessary work has already been done on behalf of the Claimant does not imply that the Defendant knew that the Claimant was budgeting on an "all-costs" basis. As I have already said, a figure calculated on the "reasonable and proportionate basis" will either be the same as the "all-costs" figure or, more likely, will be significantly lower. This means that if the Defendant's legal team had assumed that the Claimant's side were using the "reasonable and proportionate" basis, this would make their argument that too much money had already been spent seem all the stronger. Yet again, the statement in the skeleton argument that the Claimant's budget has always been inflated is consistent with an understanding that the budget was on the "reasonable and proportionate" basis.

54. The final statement by counsel that is relied on by Mr Carpenter KC to show that the Defendant's legal team knew full well that the Claimant was proceeding on a "full-costs" basis is one that was made by the Defendant's counsel in oral argument at the CCMC on 4 August 2021. He pointed out that the Claimant's solicitors' time costs for

work done so far are "double, absolutely double" what the Defendant's solicitors' time costs are. Even this statement, however, does not come close to being an unequivocally clear indication that the Defendant's legal team knew that the Claimant was setting out the entirety of the Claimant's incurred costs in the Precedents H. This was simply a submission as to why the judge should look sceptically on the Claimant's proposed budget for future costs because her budget for incurred costs was so high. Such an argument works if it is based on the proposition that the incurred costs in the Claimant's Precedent H are the reasonable and proportionate costs.

55. It is true that, as Mr Carpenter KC emphasised, the Defendant did not call her solicitor, Mr Paul Lunt, and so the Judge did not hear direct evidence from the solicitor to confirm that he had proceeded on the assumption that the Claimant's solicitors were also using the "reasonable and proportionate" basis for costs budgeting. However, this did not preclude the Judge from drawing the inference that the Defendant's solicitor might have proceeded on the basis of that assumption. He was entitled to proceed on the basis of the evidence that was placed before him. As the Court of Appeal made clear in **Bamrah**, applications under CPR 44.11 are supposed to be as fair and simple as circumstances permit. It should not normally be necessary for witnesses to be called by a respondent to such an application, or for there to be cross-examination. In any event, however, the Defendant's solicitor had stated in his Part 18 Response that he believed that solicitors were under an obligation to set out in Precedent H only such incurred costs are were reasonable and proportionate. The Part 18 Response was accompanied by a statement of truth, and it would have been open to the Claimant to apply to cross-examine Mr Lunt upon it, under CPR 32.7, so as to explore whether he did in fact believe that solicitors were obliged to set out only reasonable and proportionate incurred costs in Precedent H and whether he had assumed that the

Claimant's solicitors had done so. I do not blame the Claimant's legal advisers for failing to do so, especially given the guidance in **Bamrah**, but in the circumstances I do not accept that it was not open to the Judge to accept that this understanding on the part of the Defendant's solicitor meant that he might have assumed that the Claimant's legal solicitors proceeded on the same basis.

56. It follows, in my judgment, that there was ample material before the Judge to justify the conclusion that the Defendant's solicitors could have made the assumption that the Claimant's solicitors had prepared their Precedent H on a "reasonable and proportionate" basis.

Was this finding irrelevant, because what mattered was what the Defendant's solicitor actually thought, not what he "could have" thought, or what it would have been reasonable for him to think?

57. The burden of proving that there has been unreasonable or improper conduct rests with the party seeking to establish it. In this case, that was the Claimant. If the Judge could not exclude a real, rather than fanciful, possibility that there was an explanation for the Defendant's legal advisers' conduct which was neither unreasonable nor improper, then he was right to dismiss the Claimant's application under CPR 44.11.

58. If the Claimant had been able to prove, to the civil standard, that the Defendant's legal advisers, or one of them, had deliberately misled the Court, then, in my view, this would clearly be unreasonable or improper conduct. The submissions on behalf of the Defendant would only have been misleading if the Defendant's legal advisers (or any of them), knew that a comparison between the parties' incurred costs in the Precedents H would be misleading because the Claimant's figures were based on actual incurred costs, whereas the Defendant's figures were a lower figure based on reasonable and

proportionate costs, and yet went ahead and made the comparison, without being transparent about it.

59. It follows from this that if the Judge was satisfied either that the Defendant's legal advisers did not know that the Claimant's advisers were using the "full-costs" basis for incurred costs in Precedent H, or that they might not have known this, then the Claimant would not have satisfied the burden of showing that the Defendant's lawyers had deliberately misled the Court or had failed to be transparent about the different ways in which Precedent H had been completed.

60. It follows in turn that the question whether the Defendant's legal advisers knew, or might have known, that the Claimant's advisers were using a different basis for costs budgeting from theirs was of central importance to the outcome of the application under CPR 44.11.

61. I should add that the Defendant does not accept that the incurred costs figures set out by the Claimant in the Precedents H were, in fact, the Claimant's actual incurred costs. The Defendant's legal advisers believe that the Claimant's actual incurred costs might have been higher and so that the Claimant's legal advisers might have discounted the costs in Precedent H to some extent at least for reasonableness and proportionality reasons. The Claimant's solicitors have stated in correspondence to the Defendant's solicitors that the incurred costs in the Claimant's Precedent H were indeed her actual costs, which had not been discounted. In my view, whether or not this is so is of no relevance for present purposes. What matters is that there is no valid basis for challenging on appeal the Judge's conclusion that the Defendant's legal advisers may have proceeded on the assumption that the figures in the Claimant's Precedent H were

prepared on the same "reasonable and proportionate" basis as the figures in the Defendant's Precedent H.

Ground 2

62. In ground 2, Mr Carpenter KC submitted that the Judge's conclusion lost sight of the fact that, whatever the Defendant's solicitor might have thought, submissions were made to the Court on the Defendant's behalf that were misleading, in that they gave the impression that the Defendant's actual incurred costs were being compared with the Claimant's actual incurred costs. Therefore, Mr Carpenter KC submitted, the Judge was wrong to find that there was no misconduct for the purposes of CPR 44.11. Mr Carpenter KC emphasised that ground 2 stood on its own and did not depend upon ground 1.

63. In my judgment, the Judge was entitled to find that that Claimants had not shown that there was unreasonable and/or improper conduct on the part of the Defendant's legal team. I have already expressed the conclusion that it was open to the judge to find that the Defendant's lawyers did proceed or might have proceeded on the basis that both sides were using figures for incurred costs that were prepared on the "reasonable and proportionate" and not "full-cost" basis. This means that the Judge was entitled to find that the Claimant had not proved that the Defendant had acted unreasonably or improperly by making submissions that compared apples with pears without making clear to the Judge that this is what they were doing.

64. Nevertheless, the judge was critical of the Defendant's legal team. He criticised them for embarking upon a resolute attack on the Claimant's incurred costs without setting out or explaining that the Defendant's own costs budgets did not set out actual costs but, rather, set out actual costs that were then reduced on a reasonable and proportionate

basis. In other words, they had not been as transparent as they might have been. The importance of transparency in this context was emphasised by Constable J and the Judge in the costs budgeting decision in **Pan NOx Emissions Litigation** [2024] EWHC 1728 (KB). Though the **Pan NOx** ruling was made some three years after the costs budgeting exercise in the present case, it should have been apparent to the Defendant's legal advisers even in 2021 that they should have acted with transparency. Criticism of a lack transparency in the present case was a fair comment for the Judge to make in light of the evidence before him, but it does not undermine his ultimate conclusion that their behaviour had not, albeit only just had not, crossed over into unreasonable and improper behaviour.

65. The Court of Appeal in **Bamrah** made clear that, whilst conduct does not have to be dishonest or a breach of a professional rule in order to amount to unreasonable and improper behaviour for these purposes, it has to be something more than mistake, error of judgment, or negligence. The Court also said that the words "unreasonable" and "improper" should be given a narrow construction. It is inevitable, where a court is dealing with an evaluative judgment, that some matters will come close to the line without crossing it. In my judgment, the Judge was fully entitled to decide, on the facts of this case, that the lack of transparency on the part of the Defendant's legal advisers did not cross the line. It was open to the Judge, on the evidence in this case, to conclude that what happened was a mistake, and an error of judgment, but was not misconduct for the purposes of CPR 44.11.

66. As I have already said, I take the view that it would have been different if there was clear evidence that the Defendant's legal advisers had deliberately misled the Master, whether by what was said or by what was omitted. Also, I think that there would clearly

have been misconduct for CPR 44.11 purposes if the Defendant's counsel had innocently said something that was clearly misleading and her solicitors had not then stepped in to correct it. For a solicitor to mislead the Court, either by acts or omissions or by allowing or being complicit in the acts or omissions of others is professional misconduct (see paragraph 1.4 of the SRA Code of Conduct for Solicitors) and would, in my view, plainly be improper behaviour for the purposes of CPR 44.11 (see **Bailey v IBC Vehicles**, above). But that is not what happened in the present case. Though it would have been better for the Defendant's legal advisers to have made clear, when mounting their attack on the Claimant's costs budget, that their Precedent H figures did not represent the actual incurred costs but included a substantial discount from the actual costs, it was open to the Judge to decide that the observations made in writing and in submissions before the Master were not misleading, whether expressly or by implication.

67. The starting point is that the judge decided that the Claimant had not proved that the Defendant's legal advisers knew that the Claimant's lawyers were taking a different approach from them to incurred costs in their Precedents H. This means that the Judge could not be satisfied that they were deliberately misleading the Court by comparing apples with pears, without saying so, when making comparisons with the Claimant's figures for incurred costs. There was, at least, a realistic possibility that the Defendant's lawyers believed that the basis for preparing the incurred costs figures had been the same on both sides. If that were so, then there was nothing unreasonable or improper in drawing adverse comparisons in the course of submissions.

68. Moreover, none of the comments and observations relied upon by the Claimant's legal advisers is clear evidence that the Defendant's lawyers were covering up the fact that

their incurred costs figures were less than their actual costs figures. I have set out the observations relied upon by the Claimant at paragraphs 27-34 above and so I will not repeat them here. Whilst they made comparisons which relied upon the fact that the incurred costs figures in the Claimants Precedents H were substantially higher than the incurred costs figures in the Defendant's Precedents H, none of their comments and observations stated in terms that the Defendant's figures were actual costs figures. Similarly, none of them suggested as much by necessary implication. The points that I have made in relation to the comments and observations in Ground 1 apply equally here. Most of the observations with which the Claimant takes issue are comments about the excessive level of the Claimant's Precedent H figures and, once it is accepted that this is or may be a case of comparing apples with apples, any suggestion that it is misleading falls away. The fact that counsel may have been said to have engaged in hyperbole does not mean that there was unreasonable and improper behaviour.

69. Mr Carpenter KC makes the point that the figures in the Defendant's Precedents H were exact figures, not round figures, and that this in itself implies that they were actual figures, rather than adjusted figures. I can see some force in this, but in my view it does not necessarily follow that a reduction on "reasonable and proportionate" grounds will result in round figures. If, for example, the reduction from the actual figure was done on a percentage basis, this would almost certainly result in figures that are not round figures. This is perhaps a reason why the Defendant should have erred on the side of caution by making clear that the figures were not actual figures, but it does not mean, in all the circumstances of the case, that the Judge was obliged to find that they had crossed the line into unreasonable and improper conduct.

70. The position we are left with, therefore, is that the Court was not persuaded that the Claimant had proved that the Defendant's legal advisers had deliberately misled the Court (or the Claimant) either by things said or things not said. There had been a misjudgment in the form of a failure to be more transparent about the basis upon which the Defendant's figures for incurred costs had been prepared, but that was as far as it went. The Judge was entitled to make the evaluative judgment that this did not amount to unreasonable or improper behaviour, especially as he was so well-placed to form a view about practice in relation to costs.

71. Accordingly, I do not accept that ground 2 is a valid ground of challenge of the Judge's decision.

The Respondent's Notice

72. As I have already found that the appeal must fail on the basis that the Judge was entitled to reach the conclusion that he came to, on the grounds set out in the judgment, I need deal only briefly with the additional points made in the Respondent's Notice.

73. The first additional point made by the Defendant is that, as a matter of principle, in the absence of any waiver of privilege, or of any application to cross-examine the Defendant's solicitor, Mr Lunt, it is not possible for the Claimant to make good the allegation that the Defendant or her legal advisers acted unreasonably and/or improperly for the purposes of CPR 44.11. This is on the basis that the Claimant expressly disavowed any criticism of the Defendant's counsel, and without waiver of privilege or cross-examination, there can be no proof of unreasonable or improper conduct on the part of the Defendant's solicitors (and there no suggestion that the Defendant personally was to blame in any way).

74. I do not accept this submission. If there had been clear evidence – for example in a skeleton argument or a transcript of submissions at one of the CCMCs – that counsel for the Defendant had said something that was misleading, then the Defendant could not defeat an application under CPR 44.11 by the simple expedient of declining to waive privilege (I leave to one side the question whether or not the level of costs is a covered by legal professional privilege, which is a matter upon which the parties disagree). I think that Mr Carpenter KC was right to say that if such clear evidence existed, and the Defendant declined to call evidence to rebut it, the Court could draw the conclusion that there was misconduct for the purposes of CPR 44.11 on the basis that there are two possibilities: either counsel was responsible for misleading the Court without instructions, which the solicitors failed to correct, or counsel acted on instructions. Either way, the Judge could legitimately infer that some member of the Defendant's legal team had acted unreasonably or improperly and so had brought the case within CPR 44.11. I accept, however, that, in such circumstances, if there is no waiver of privilege by the client, the court must give the lawyers the benefit of the doubt: see **Ridehalgh v Horsefield**, at page 237, approved by Lord Bingham (with whom Lords Hobhouse and Rodger agreed) in **Medcalf v Mardell** [2002] UKHL 27; [2003] 1 AC 120, at paragraph 23.

75. The second point that is made in the Respondent's Notice is that the Judge's criticism of the Defendant's legal advisers for lack of transparency was misplaced. I have already dealt with this. In my view, the Judge was entitled to criticise the Defendant's legal advisers for an error of judgment in failing to make clear the basis upon which they had set out their incurred costs in Precedent H, in circumstances in which they had decided to mount an all-out attack on the Claimant's incurred costs.

Conclusion

76. For these reasons, the appeal is dismissed. As a result, I do not need to deal with the question of what sanction, if any, should be imposed if the appeal had succeeded and a finding of unreasonable and/or improper behaviour had been made.