

**This is a judgment to which the Practice Direction supplementing CPR Part 40 applies. It will be handed down on Friday 31<sup>st</sup> May 2019 at 10.00 a.m. in Court 8 at The County Court at Chelmsford. This draft is confidential to the parties and their legal representatives and accordingly neither the draft itself nor its substance may be disclosed to any other person or used in the public domain. The parties must take all reasonable steps to ensure that its confidentiality is preserved. No action is to be taken (other than internally) in response to the draft before judgment has been formally pronounced. A breach of any of these obligations may be treated as a contempt of Court. The official version of the judgment will be available from the County Court Office once it has been approved by the judge.**

Case No:C03EC063

IN THE COUNTY COURT AT CHELMSFORD

Date: 31<sup>st</sup> May 2019

**Before :**

**HHJ LOCHRANE**

**Between :**

Kerri Harris

**Claimant**

**- and -**

1. Estate of Charity Ohaneche

**Defendants**

2. Chieka Ononye

Mr McCafferty (Counsel) for the **Claimant**

Mr Maduforo (solicitor) for the **Defendants**

Hearing dates: 16<sup>th</sup> May 2019

**JUDGMENT**

*Numbers in [ ] are page numbers in the trial bundle.*

**HHJ Lochrane:**

1. There is an application for an order for wasted costs to be paid by Mr Justice Maduforo, principal of Messrs Tice Madox, a solicitor who had been instructed by the Defendants in the main action. Mr Maduforo has appeared on his own behalf before me to resist the application and has filed a statement in support of his position. Mr McCafferty of Counsel has appeared before me for the Claimant to support the application. A further statement in connection with the wasted costs application has been filed by Mr Smith of Messrs Duncan Lewis, solicitors acting on behalf of the Claimant and instructing Mr McCafferty.
2. In the main action the Claimant sought specific performance of the landlord's repairing obligations and damages for disrepair; however, a possession order having been made, the action is now confined to the damages claim. The main action has not yet been concluded but I understand that Mr Maduforo is no longer instructed by the Defendants.

**THE HISTORY**

3. The main action had been listed for trial on 18<sup>th</sup> May 2018 at the County Court at Clerkenwell and Shoreditch before DJ Thomas. It seems that, on the day, the Learned District Judge understandably took the view that he did not have adequate time to hear the matter. The time estimate given of one day was manifestly inadequate. By order of HHJ Luba QC on 19<sup>th</sup> June 2018 [84D], the matter was re-allocated to the multi-track and adjourned for a costs and case management conference which was listed before HHJ Luba QC at the County Court at Central London on 3<sup>rd</sup> August 2018. The order of 19<sup>th</sup> June 2018 included standard directions for the filing of costs budgets.
4. On the 3<sup>rd</sup> August 2018 Mr Maduforo appeared for the Defendants and a Ms Carr (I think) appeared on behalf of the Claimant. It is apparent from the

recording that HHJ Luba QC was distinctly unimpressed by the lack of proper preparation on both sides for this hearing, the directions given on 19<sup>th</sup> June 2019 having been ignored wholesale. I have listened to the recording of the hearing, I shall return to it in due course.

5. At the conclusion of the CCMC HHJ Luba QC drafted an order [84J] which, inter alia, made the following directions:
  - a. Allowing the Claimant's oral application to adjourn the management of her costs budget to the PTR "because of a continuing dispute between herself and the Legal Aid Agency over the scope of legal aid for her claim".
  - b. Allowing the Defendants' oral application to adjourn the management of their costs budget to the PTR "because of the insufficiency of time since the recent re-instruction of solicitors to prepare the same in proper form".
  - c. Providing for a telephone listing appointment to fix a two hour PTR and a three day trial before HHJ Luba QC.
6. By order dated 23<sup>rd</sup> October 2018 [84O, 84Q] the PTR was listed on 22<sup>nd</sup> February 2019, and the trial for 3 days commencing on 25<sup>th</sup> March 2019. Despite the original intention that both would be listed before HHJ Luba QC, by reason of the pressure on his lists the Learned Judge released the claim to be dealt with by me.
7. It is apparent that, between the CCMC and the PTR, the Claimant changed solicitors. I understand that the Claimant's original solicitors may have ceased trading or run into some such difficulty. By the time the matter came before me on 22<sup>nd</sup> February 2019 for the PTR Mr McCafferty and Messrs Duncan Lewis had been instructed by the Claimant. It was rapidly apparent, however, that neither Mr McCafferty nor his solicitor was fully conversant with the file and the history of the litigation. It transpires that this may have been

explicable, in part at least, by the difficulty which Messrs Duncan Lewis had had in obtaining the file from the Claimant's previous solicitors. The important point to note for the purposes of this application is that Mr Maduforo was the only person present at the PTR who had also been present at the CCMC.

8. Discussion at the PTR turned to costs budgeting. Both advocates addressed me on the basis that it was necessary for costs management of the costs budgets to be carried out on both sides, following the same having been adjourned to the PTR by HHJ Luba QC. Neither advocate drew to my attention the issues with the Legal Aid Agency which had exercised HHJ Luba QC and I have to confess that I had not sufficiently digested the order made by HHJ Luba QC to have raised it myself. The hearing proceeded on the basis that costs management of both sides' costs budgets was appropriate; neither advocate has suggested to the contrary and I presume any difficulties which the Claimant had faced with the Legal Aid Agency, and the impact which that might have had on costs budgeting, had been resolved.
9. Mr McCafferty was not able to produce a Precedent H costs budget. Nor, on taking instructions, was he able to say whether one had ever been filed for the Claimant. I suggested that, in light of the failure to file a budget, CPR Pt3.14 applied and, for the purposes of costs budgeting, the Claimant would be limited to court fees. Mr Maduforo submitted that this was the appropriate course of action and did not suggest that he was aware that the Claimant's Precedent H had been filed for the hearing on 3<sup>rd</sup> August 2018. The hearing then proceeded to costs management of the Defendants' costs budget and further directions and housekeeping in preparation for the trial on 25<sup>th</sup> March.
10. Following the PTR it is apparent that the solicitors for the Claimant delved deeper into the file and established the truth about the filing of the Precedent H on behalf of the Claimant before the 3<sup>rd</sup> August 2018 hearing. Having made enquiries of the Claimant's previous solicitors, an email was discovered which

had been sent to HHJ Luba QC and to Mr Maduforo at 17.33 on 1<sup>st</sup> August 2018. The text of the email was as follows:

*Dear Honour Judge Luba QC*

*Thank you for your email of Mon 30/07/2018 11:03, as well as the emails from your clerk this week.*

*We understand that the CCMC is currently listed for 2:00 pm on Friday 3<sup>rd</sup> August 2018.*

*Tice Maddox state that they are only re-instructed on the morning of 31<sup>st</sup> July 2018, and so the parties have not been able to agree to all directions and issues.*

*I therefore hasten to enclose herewith the following:*

- 1. Chronology, Case Summary, Proposed Directions and Questions/Issues for the judge to consider at trial – Prepared by the Claimant*
- 2. Precedent H Cost Budget for the Claimant*
- 3. Application Notice of Claimant dated 31<sup>st</sup> July 2018. This has already been filed at court and on the other side, with our appropriate PBA number. We did request for the court to place this before you/amongst your papers for this case.*
- 4. Defendant's Responses to Case summary and Directions*
- 5. Defendant's Schedule of costs*

*The parties have not been able to agree as per your request, and so a single joint reply was not possible. We trust that the above and attached will be acceptable to you in the circumstances, and given the short notification for the CCMC.*

*Essentially, the matter was listed for a 1 day fast track trial on 18<sup>th</sup> May 2018, but the trial was adjourned and was to be re-listed for a 3 day trial under the multitrack. It is proposed by the Claimant that a 3 day trial is excessive, and that 2 days would be sufficient.*

*Yours sincerely*

*Bahareh Amani-Kholsari (Mrs) MA LLB (Hons)*

*Partner*

11. A copy of this email and its attachments was sent by Mr Smith to Mr Maduforo on 28<sup>th</sup> February 2019 at 5.00pm. One of the attachments, entitled “Harris v Ononye\_20180739112325”, contained a case summary and the first page of the Precedent H form on behalf of the Claimant. The covering email from Mr Smith invited Mr Maduforo not to oppose a proposed application to set aside para 10(i) of my order of 22<sup>nd</sup> February 2019, which recorded the failure to file a costs budget by the Claimant and the consequential entitlement to recover court fees only.
12. Mr Maduforo’s response at 18.12 on 28<sup>th</sup> February 2019 was highly critical of Mr Smith’s handling of the Claimant’s case. He says in the second paragraph: “We are not aware of your alleged costs budget. None of the paragraphs 1-5 in the email mentioned or listed claimant’s (*sic*) costs budget.” Mr Maduforo went on to say that he objected to the proposal to approach me informally to seek revocation of para 10(i) on the basis that I had been misinformed about the filed Precedent H. Mr Maduforo warned Mr Smith that any application should be made in the proper form and that the Defendants would seek their costs of any such application. It was in fact the case, of course, that the body of the email did at paragraph 2 contain reference to the Claimant’s costs budget which was attached to the email.
13. As a result of the Defendants’ refusal to accept that the order had been made on an erroneous basis and should be amended, and the insistence by Mr Maduforo on a proper application being made, the Claimant issued an application to vary the order and admit the Claimant’s costs budget. This application was listed to be heard at the start of the trial listed for three days before me starting on 25<sup>th</sup> March 2019.

14. There were in fact three or four applications which had to be dealt with at the start of the trial and, as it turned out, the whole of the first day of the trial was taken up dealing with the applications, the majority of which was spent on the application to set aside para 10(i) of the order of 22<sup>nd</sup> February 2019.
15. Mr Maduforo maintained his objection to the application and I became concerned that I may have been misled. Initially, Mr Maduforo maintained his contention that the Claimant had not filed a Precedent H and that he had never been made aware of its existence. When it was pointed out to him that the email to HHJ Luba QC of 1<sup>st</sup> August 2018 was also sent to him, his next position was that the attachments did not include the Claimant's Precedent H, by reference to the titles to the attachments which, it is correct, did not specifically identify which attachment included the form.
16. When it was further pointed out that one of the attachments entitled "Harris v Ononye\_20180739112325" contained the Case Summary, Chronology and the Precedent H, Mr Maduforo then asserted that he had never opened the attachments to the email, suggesting that on the face of them, by reference to the titles of the attachments, they did not contain documents which would have been of interest to him for the purpose of the forthcoming hearing. At this stage my frustration with Mr Maduforo's prevarication was becoming apparent. I asked Mr Maduforo what explanation there could be for his failure to open the attachments to an email which had been sent by his opponent to him and the judge for the purposes of a hearing at which he had been instructed to represent the Defendant; one of the documents identified as being a costs budget with which, prima facie, he had been instructed to deal at the impending CCMC. I suggested that, unless he could propose an alternative explanation, such a failure it seemed to me could only be explained by negligence or incompetence.
17. Mr Maduforo did not offer an alternative explanation in terms but stoutly resisted the suggestion that he might have been either negligent or

incompetent in handling the Defendant's case. He then told me that in reality his client's instructions were frequently fluctuating and whilst he had been instructed in the past, he was not in fact instructed to represent the Defendant at the hearing on 3<sup>rd</sup> August until the day before the hearing and so, he suggested, the email had arrived at a time when he was not instructed to attend the hearing and accordingly he did not feel the need to pay it any attention. This we now know not to have been true from Mr Maduforo's own statement of 1<sup>st</sup> April 2019 for this hearing; at paragraph 10 he states: "The Defendants re-instructed me on 31<sup>st</sup> July 2018 to act only up to the hearing on 3 August 2018". This is reflected in the text of the email to HHJ Luba QC and Mr Maduforo set out above.

18. Mr Maduforo was adamant throughout the exchanges in court that at no point during the hearing before HHJ Luba QC on 3<sup>rd</sup> August 2018 had there been any mention, let alone discussion, of the Claimant's Precedent H. He was clear, and repeated on a number of occasions, that he was not aware of the alleged existence of the Claimant's Precedent H until the Claimant raised the issue of the potential application to have para 10(i) reconsidered.
19. It is also worth noting at this point that both advocates agreed that the single sheet Precedent H actually filed by the Claimant was compliant with the rules by virtue of CPR Pt3 PD3E 6(c).
20. By this stage I was becoming very concerned that Mr Maduforo's changing position, as he was confronted with each further item of uncomfortable evidence, was beginning to look as though he was attempting to cover his tracks and had in fact been deliberately misleading me. I suggested to Mr Maduforo that I felt a third explanation might now be possible for his actions: that he knew of the existence of the Precedent H and had misled the Court into dealing with the case on a basis which he knew not to be correct. Mr Maduforo strongly resisted the suggestion that he had deliberately misled the Court. I suggested that it might be appropriate for me to listen to the recording



of the hearing before HHJ Luba QC and Mr Maduforo did not seek to dissuade me from that course. I made it plain that, if it transpired that the Claimant's Precedent H had been discussed before HHJ Luba QC with Mr Maduforo participating, I would consider whether the matter should be drawn to the attention of the SRA.

21. During the course of the day several short adjournments had been necessary, inter alia to consult the court file and establish definitively what had in fact been attached to the email sent to Mr Maduforo and HHJ Luba QC. It had, as a result, become late in the day and it was clear that nothing further could be constructively achieved that day. I adjourned the hearing until the following day and suggested that Mr McCafferty might like to give some consideration overnight to quantifying the Claimant's costs of the application to set aside para 10(i) with a view to considering an application for wasted costs on the following day.
22. The next day Mr McCafferty attended with a schedule of the costs of the Claimant in respect of the application to set aside para 10(i), which amounted to £3,065.52, in support of an application for the Claimant's wasted costs to be paid by Mr Maduforo. Further, there was some discussion about whether there was sufficient time to complete the trial in the two days then remaining available, about which I was highly skeptical and the advocates were dubious. I was due to finish my stay at the County Court at Central London at the end of March, accordingly any part heard trial would have had to follow me to Chelmsford and fit into a busy Family Court list which might take many months. Mr Maduforo also made the submission that his client had become very concerned about the tone and tenor of the exchanges on the previous day and how they might reflect on the presentation of his case.
23. I had myself become concerned about the perception which Mr Maduforo's client might reasonably have about the views expressed by me of Mr Maduforo's behaviour and how that might adversely impact on his case. In all

the circumstances, the decision was taken that the main trial should be adjourned to a further three days listing before another judge. The application for wasted costs was adjourned to be heard by me in the County Court at Chelmsford on 16<sup>th</sup> May 2019 and directions were given for Mr Maduforo and the Claimant to file statements in respect of the application if so advised.

24. Mr Maduforo's statement in opposition to the wasted costs application deals with the history of his involvement with the Defendants' case; it is dated 1<sup>st</sup> April 2019. As I have already pointed out, he states at paragraph 10 that, contrary to his assertion in court, he was in fact instructed to represent the Defendants at the hearing scheduled for the 3<sup>rd</sup> August 2018 on 31<sup>st</sup> July. He accepts he received the email of 1<sup>st</sup> August 2018 together with its attachments but says he did not open the attachments because of pressure of work on other unrelated matters and, in any event, he had "already dealt with the matters directly with the Claimant's then solicitors (SSP Law)". He states that "in hindsight if I had glanced on the subject of the email and attachments, it only contained matters I had already dealt with including the Defendants' costs budget". Somewhat surprisingly he goes on to say: "There was no indication of any new attachment unknown to me from the email" and refers to a copy of the email of 1<sup>st</sup> August 2018 annexed to his statement. It is, as I have once again already pointed out, apparent from the body of the email that it has as an attachment the Claimant's Precedent H which, on Mr Maduforo's evidence, he had not previously seen and which he must be taken to have known, or ought to have known, would be considered at the impending CCMC. Quite apart from that, Mr Maduforo's statement does not explain, nor has he explained elsewhere, how he was able to tell from the title to the relevant attachment ("Harris v Ononye\_20180739112325") that it did not contain anything of interest to him in representing his client's interest at the forthcoming CCMC.
25. Mr Maduforo's statement goes on to state that he repeated his somewhat cavalier approach in respect of the attachments to a further email received by him on 2<sup>nd</sup> August 2018 from the Claimant in preparation for the CCMC.

“Again,” he states in paragraph 14, “the Claimant’s costs budget was not attached in the list of attachments.” Whilst it seems to be correct that the Claimant’s budget was not attached to that email (I have not seen the attachments), it is, of course, not correct for him to imply that it had not been attached to the earlier email.

26. In paragraph 15 Mr Maduforo makes reference to the skeleton argument which he filed for the hearing on 3<sup>rd</sup> August 2018 (which I have not seen as it was not annexed to the statement and does not appear in the trial bundle). He states: “You will note that I made no mention of the Claimant’s costs budget because I was not aware of it”.
27. In paragraph 16 Mr Maduforo gives a very detailed account of the hearing on 3<sup>rd</sup> August 2018. He correctly identifies a number of issues which were covered by the Learned Judge during the hearing:
  - a. He criticized the Claimant for the failure to provide a bundle for the hearing;
  - b. He criticized the Claimant for the form and content of the application to amend the Particulars of Claim and, after some discussion, made provision for an amended version to be filed;
  - c. He dealt with the proposal by the Defendants to file a new statement from a witness, Tony Mohan, which was out of the timetable and for which permission would be needed;
  - d. He considered the Defendants’ costs budget and provided for the Defendants to file a compliant costs budget, the one filed being inadequate;
  - e. He considered the issues which the Claimant was apparently having with the Legal Aid Agency.

- f. He adjourned further consideration of both parties' costs budgets to the PTR.
28. Having listened to the recording, the above description of the matters discussed at the hearing is correct, as far as it goes. It is apparent that Mr Maduforo clearly does have a detailed and fairly accurate recollection of what was discussed before HHJ Luba QC on 3<sup>rd</sup> August 2018.
29. Prior to the hearing on 16<sup>th</sup> May 2019 I listened to the recording of the hearing on 3<sup>rd</sup> August 2018.
30. At approximately half way through the hearing, which took a few minutes more than 1 hour, there was a discussion about the Claimant's costs budget. HHJ Luba QC expressed some concern about the necessity and/or jurisdiction for the Court to consider the costs budget of a legally aided party.
31. Counsel for the Claimant related that there was a dispute with the Legal Aid Agency in relation to the apparent suggestion that the claim would only be funded in part under the Legal Aid Certificate. HHJ Luba QC observed this was an error and Counsel for the Claimant suggested the consideration of costs budgeting for the Claimant be adjourned to the PTR for the issue to be resolved.
32. When asked for his view by the Learned Judge, Mr Maduforo said that he had been surprised to see the cost budget filed by the Claimant, that he thought the Court should "deal with it today", and he submitted it was "disproportionate". At no point did he suggest that he had only just received the form or that he had not had proper time to consider it. In the course of further exchanges with the Learned Judge it was explained to Mr Maduforo that there was nothing to deal with until the situation in respect of the Claimant's legal aid was resolved. Mr Maduforo ultimately agreed that consideration of the Claimant's costs budget should adjourned to the PTR.

33. When submissions moved on to the Defendants' costs budget the Learned Judge asked where he would find the Defendants' costs budget, no bundle having been provided for the hearing. Mr Maduforo informed the judge that it had been filed with the court by the Claimant and referred to the email of 1<sup>st</sup> August 2018. The Learned Judge expressed some surprise about the Claimant filing the Defendants' budget, but on examination acknowledged that it was an attachment to the email of 1<sup>st</sup> August 2018 sent to him, but that it had not been printed off. The Learned Judge was supplied with a copy of the purported budget by Mr Maduforo. After some further discussion on the inadequacies of the Defendants' costs budget documentation, the Learned Judge agreed to provide time for the Defendants to file a compliant costs budget and that provision would be made for it to be considered at the PTR.
34. At no stage in the hearing did Mr Maduforo suggest that he had only been supplied with the Claimant's costs budget at court, indeed he associated himself with the Learned Judge's complaint that no bundle of relevant documentation had been provided by the Claimant for the CCMC hearing.
35. It is also clear that, far from suggesting the Claimant needed to file a more comprehensive or compliant costs budget, the Learned Judge's concern was focused on the need for, or appropriateness of, the Claimant filing a costs budget for a legally aided party at all. There was no discussion, as Mr Maduforo now suggests, around the need for the Claimant to file additional information for the purposes of cost budgeting. There was, in fact, no discussion of the adequacy of the Claimant's documentation for the purposes of costs management, there was only brief discussion about the relevance of costs budgeting documentation for the Claimant in the circumstances. All the discussion about the inadequacy of the costs budgeting documentation was concentrated on the Defendants' documentation and included a recommendation by HHJ Luba QC to the Defendants and Mr Maduforo that, whilst it might be a little more expensive, the Defendants might be better served by ensuring they employed specialist housing Counsel in the future.

36. It is also of some note that, at the conclusion of the hearing, Mr Maduforo made an application for his client's costs to be paid by the solicitors themselves acting for the Claimant because of the way, he suggested, they had conducted the litigation. HHJ Luba QC did not grant that application.
37. At the hearing before me on 16<sup>th</sup> May 2019 in Chelmsford, Mr Maduforo appeared and Mr McCafferty appeared on behalf of the applicant Claimant. The latter produced a schedule of wasted costs, now including the hearing on 16<sup>th</sup> May, which amounted to £6,809.63.
38. The start of the hearing was delayed because the disc containing the recording of the 3<sup>rd</sup> August 2018 proceedings had only arrive that morning and I was listening to it. I listened to much of it before coming into court on 16<sup>th</sup> May and listened to the rest after the hearing.
39. I informed the parties I had listened to the recording and sought confirmation from Mr Maduforo that his position remained he was unaware of the existence of the Claimant's Precedent H prior to the application in respect of paragraph 10(i) of the order of 22<sup>nd</sup> February 2019, this not having been explicitly repeated in his recent statement. He confirmed that was his position, but now qualified it by saying that the hearing had been a long time ago and he could not be expected to recall everything which happened in the course of his busy practice. Mr Maduforo said that if he had in fact received the attachment containing the form, it was not intentional that he had not opened it and also that not everything sent by email is in fact received.
40. I then informed the parties that the recording made it clear that the Claimant's Precedent H had indeed been discussed during the hearing on 3<sup>rd</sup> August 2018 and that Mr Maduforo himself made submissions about it, clearly indicating that he had considered it and found it "disproportionate".
41. Mr Maduforo now said that the only discussion about the Claimant's costs budget which he recalled was on the basis that HHJ Luba QC required the

Claimant to file a full, detailed Precedent H, without reference to one which already existed. He suggested that Learned Judge's order did not reflect accurately what HHJ Luba QC had indicated during the hearing he intended to order in this respect. Had the advocates been tasked with drafting the order, Mr Maduforo suggested, he would have ensured the order reflected the Learned Judge's expressed intentions. As I have set out above, there does not appear to have been any such discussion during the course of the hearing. From what I heard, the order drafted by HHJ Luba QC is an accurate reflection of his expressed intentions during the hearing.

42. Mr Maduforo maintained throughout his insistence that he had not opened the attachment to the email containing the Claimant's Precedent H. In light of the revelation, despite his frequent and adamant protestations to the contrary, that he had received and considered the form so as to be able to deal with it on the day, he insisted that if he had seen it, it must have been handed to him at court that day as this was the Claimant's solicitors' common practice (the CCMC was, of course, the first hearing at which these solicitors had appeared for the Claimant).
43. Mr Maduforo insisted that, in deciding the application, I should consider the overall fairness of the situation and that he had been working for the Defendants for a very small fee and under some pressure. He suggested that if I felt it appropriate to make a wasted costs order on this application, I should consider that the costs would be cancelled out by the costs which the Defendants were entitled to recover following the Claimant's failure to succeed in some of her applications; possibly somewhat missing the point about the liability in respect of any costs orders as between his lay clients and himself.
44. Mr Maduforo made detailed submissions on the schedule which the Claimant had produced setting out the suggested wasted costs. He suggested they were completely disproportionate and they were an example of the Claimant's

solicitors deliberately milking the situation and inflating their costs so as to extract as much money out of the application as possible. Mr Maduforo further suggested it was wholly unnecessary for the Claimant to be represented at the hearing of the application before me, and certainly it was not necessary for a solicitor to be present as well as Counsel. He insisted the reality is that both parties were at fault and their respective costs offset each other.

45. Mr Maduforo has not suggested, nor provided any evidence to suggest, that he would not be able to pay, or have difficulty paying, an order for wasted costs of the magnitude suggested.
46. Mr Maduforo has asserted both in his statement and his submissions that my reaction was unnecessary and disproportionate. He suggests that I have treated him unfairly, I have unjustifiably impugned his professional conduct and his honesty and that “the Defendants whom I represent were certain that HHJ Lochrane’s comments and actions were racially motivated”. At no stage has Mr Maduforo sought to proffer an apology for misleading the Court, indeed, on the contrary, he has “demanded” a written apology from me for what he describes as “unnecessary professional embarrassment and personal attack” on him.
47. Mr McCafferty confirmed that the schedule is a detailed record of the time spent and costs incurred in dealing with the application in respect of paragraph 10(i) and preparation for, and attendance at, the 16<sup>th</sup> May hearing, save that the timings suggested for Personal Attendances on Opponents were put there in error and should have been shown as Personal Attendances on the client; the figures were the same. Mr McCafferty submitted that it was justifiable that his solicitor was in attendance given the history of the case and the allegations which Mr Maduforo had made in the past about Messrs Duncan Lewis’ conduct of the litigation.
48. I suggested to Mr McCafferty that it might be said the Claimant’s team was in some degree to blame for the situation because of the failure to digest the file



comprehensively before the 22<sup>nd</sup> February 2019 hearing and provide him with accurate instructions and documentation. He accepted the criticism but pointed out that the Claimant was not seeking any costs in respect of the 22<sup>nd</sup> February hearing.

## **THE LAW**

49. Under the provisions of CPR Pt44.11 the Court may order a party's legal representative to pay costs which he has caused any other party to incur where it appears to the court that the legal representative's conduct has been unreasonable or improper. The power is not confined to conduct referable to the assessment of costs.
  
50. CPR Pt46.8 sets out the procedure to be followed when considering making a wasted costs order under s.51 of the Senior Courts Act 1981. S.51(7) of the Act defines wasted costs as "any costs incurred by a party – (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative..". CPR 46PD 5.3 provides that the Court may make a wasted costs order against a legal representative on its own initiative. CPR 46PD 5.4 provides that a party may make an application for wasted costs orally during any hearing. CPR 46PD 5.5 provides that a court may only make a wasted cost order against a legal representative if: (a) he has acted improperly, unreasonably or negligently; and (b) such conduct has caused a party to incur unnecessary costs; and (c) it is just in all the circumstances to order him to compensate that party for the whole or part of those costs. Accordingly, determination of such an application is a three stage process.

51. Sir Thomas Bingham MR (as he then was) provided the generally applied definitions for improper, unreasonable or negligent conduct in the judgment in *Ridehalgh v Horsefield* [1994] Ch 205<sup>1</sup>.
52. ‘Improper’ covered, but was not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It also covered conduct which according to the consensus of professional, including judicial, opinion could be fairly stigmatized as being improper whether it violated the letter of a professional code or not.
53. ‘Unreasonable’ included conduct which was vexatious, designed to harass the other side rather than advance the resolution of the case: it made no real difference that the conduct was the product of excessive zeal and not improper motive. Legal representatives could not lend assistance to proceedings which were an abuse of process and they were not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for purposes unconnected with success in the litigation, or pursuing a case known to be dishonest. Nor were they entitled to evade rules intended to safeguard the interests of justice as by knowingly failing to make full disclosure on an *ex parte* application or knowingly conniving in incomplete disclosure of documents. However, conduct was not unreasonable simply because it led to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test was whether the conduct permitted a reasonable explanation. It is not unreasonable to be optimistic.
54. ‘Negligent’ did not mean conduct which was actionable as a breach of the legal representative's duty to his own client. There is of course no duty of care to the other party. Negligence should be understood in an untechnical way to

---

<sup>1</sup> See **Cook on Costs** 2019, 23.3 ff

denote failure to act with competence reasonably expected of ordinary members of the profession. However, the court firmly discountenanced any suggestion that an applicant for a wasted costs order needed to prove under the negligence head anything less than he would have had to prove in an action for negligence.

55. The Court in that case adopted the test in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, HL, ‘advice, acts or omissions in the course of their professional work which no member of the profession who is reasonably well-informed and competent would have given or done or omitted to do’; an error ‘such as no reasonably well-informed and competent member of that profession could have made’.
56. In *Persaud v Persaud* [2003] EWCA Civ 394, the Court of Appeal held that there had to be something more than negligence, more akin to abuse of process or breach of duty to the court, to make a legal representative subject to jurisdiction for a wasted costs order. However, in *Dempsey v Johnstone* [2003] EWCA Civ 1134, the Court of Appeal held that negligence alone could justify the making of a wasted costs order, and the correct test was whether no reasonably competent legal representative would have continued with the action when there was a hopeless case.
57. Wasted costs orders should carefully balance two important public interests:
  - (i) that lawyers should not be deterred from pursuing their clients’ interests by fear of incurring a personal liability to their client's opponents, that they should not be penalized by orders to pay costs without a fair opportunity to defend themselves and that such orders should not become a back-door means of recovering costs not otherwise recoverable against a legally aided or impoverished litigant; and
  - (ii) that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponents' lawyers.

58. The burden is formally on the Claimant to satisfy the Court that the evidence supports findings in respect of the relevant elements of conduct and causation and the Court must then be satisfied that it is just in all the circumstances to make an order.

## **FINDINGS**

59. I am afraid I am quite satisfied that Mr Maduforo has not been truthful in his evidence and submissions to the Court. A reading of the history set out above demonstrates quite clearly in my judgment that Mr Maduforo was well aware throughout of the existence of the Claimant's Precedent H form and, absent an explanation from him, I can only conclude that he sought opportunistically to take advantage of the confusion amongst the Claimant's new advisers on 22<sup>nd</sup> February 2019 to seize an unjustified advantage for his client.

60. It is beyond argument that Mr Maduforo was in possession of the form when he appeared before HHJ Luba QC, the recording is quite clear on the issue. It is also quite clear from his own statement that he has a clear and detailed recollection of what went on during that hearing, omitting from his account only the details which contradicted his assertion that he was not aware of the existence of the form.

61. Mr Maduforo has changed his story on a number of occasions in a decreasingly effective attempt to make the facts as they were revealed fit his version of events. On any objective assessment, a solicitor's failure to open attachments to an email which explicitly contained documents intended for and of relevance to a hearing for which he was instructed would be negligent, more certainly if his excuses were that he was too busy or that he did not consider them relevant even without opening them. The email of 1<sup>st</sup> August 2018 explicitly referred to the Claimant's costs budget as an attachment; it was not a document – obviously – which Mr Maduforo had seen before and he was instructed to attend a CCMC where it is obvious that his clients would be entitled to expect him to represent their interests in challenging as appropriate

the proposed budget of their opponent. The titles of the attachments made it impossible to tell what they contained save that they were *prima facie* relevant to the litigation. It is very difficult in those circumstances to believe it to be true that a legal practitioner of even a very low level of competence would fail to open and consider those documents which had also been sent to the judge. As it turns out, I am quite satisfied that it is not true.

62. I am quite satisfied on the evidence that Mr Maduforo was not being truthful when he told the Court that he had not opened the attachments to the email of 1<sup>st</sup> August 2018. He had a copy of the Precedent H in his possession at the hearing and there is no other credible explanation than that he had, in accordance with his professional duty, opened the attachments and considered them. I am quite satisfied he was not telling the truth when he represented on 22<sup>nd</sup> February 2019 before me that he was unaware of the existence of the Claimant's Precedent H. I am quite satisfied he was not being truthful when he subsequently insisted he had never opened the attachments and/or that he was unaware of their content. He has contradicted himself over the timing of his instruction to represent the Defendants at the 3<sup>rd</sup> August hearing in a bungled attempt to explain the otherwise inexplicable. I am quite satisfied that any suggestion that he cannot now remember the relevant parts of the hearing before HHJ Luba QC is untrue; he has demonstrated a clear and detailed recollection albeit he has been somewhat selective in his reporting of it. I am further satisfied he has deliberately set out to deceive the Court (and the Claimant) on more than one occasion in attempts to seize an unjustified advantage in the litigation and then subsequently to cover his tracks.

63. In my judgment, Mr Maduforo's behaviour may correctly be described as improper; he has deliberately deceived the Court in breach of his professional duties. His conduct may also be correctly described as unreasonable, effectively an abuse of the process in circumstances which do not permit of any reasonable explanation, intended to seize an unjustified advantage and then to cover his tracks. At the very least his behaviour and conduct were

clearly negligent. Mr Maduforo has clearly conducted himself in ways which no reasonably well-informed and competent member of his profession would have done.

64. I make it plain that I have seen no evidence to suggest that Mr Maduforo's clients were in any way complicit in his behaviour. In the circumstances, I can see no justification for leaving them in any jeopardy of liability for the relevant wasted costs.

65. It is also quite clear that Mr Maduforo's conduct has resulted in the Claimant incurring unnecessary costs. By reason of his deceit the order contained in paragraph 10(i) of my order of 22<sup>nd</sup> February 2019 was made. Mr Maduforo's refusal to accept that the order should be varied once the truth was discovered, and his insistence on a formal application which would be (and was) resisted, directly led to the Claimant having to issue an application supported by evidence, and for Counsel to be instructed to pursue it. This resulted in a considerable amount of Court time being taken up investigating and deliberating upon the issue. It further resulted in the wasted costs application and the necessity for a hearing on 16<sup>th</sup> May 2019 at which the Claimant was perfectly entitled to be represented to support the application.

66. At no stage has Mr Maduforo accepted any measure of responsibility nor has he sought to present anything in mitigation. Far from acknowledging the reality and apologizing to the Court and the Claimant, he has throughout protested his innocence (and the Claimant's culpability), and demanded that it is he who is entitled to an apology. He has taken a further two hours of court time in a busy Care Centre's list to continue to resist the wasted costs application on a basis which he knew not to be true. Mr Maduforo has not suggested that he will be in any difficulty paying a wasted costs order, simply that he considers it to be "unfair" that such an order should be made against him.

67. In all the circumstances, I am quite satisfied on the evidence that there are more than adequate grounds for making a wasted costs order against Mr Maduforo. I am further satisfied that the Claimant has incurred unnecessary costs directly referable to Mr Maduforo's conduct. Finally, I am satisfied that it is just in all the circumstances that an order for wasted costs should be made against Mr Maduforo.

#### **ASSESSMENT OF THE COSTS**

68. Mr Maduforo has submitted that it is unnecessary and disproportionate for the Claimant to be represented at the wasted costs hearing and/or that it was unnecessary and disproportionate for the Claimant to be represented at the 16<sup>th</sup> May hearing by both solicitor and Counsel. I disagree. It is entirely unexceptional and appropriate for the Claimant to have been represented at the wasted costs hearing. Whilst it is possible to conceive of circumstances in which the Claimant might have chosen not to be represented on this occasion, I do not accept she can be criticised for choosing otherwise. Whilst I may have been first to suggest consideration of wasted costs, the Claimant has, appropriately in my view, pursued the application. Further, I am satisfied that, in the circumstances it was neither disproportionate nor unnecessary for the Claimant's solicitor to be in attendance as well as Counsel. The allegations centred on Mr Maduforo's misrepresentation of facts in the history of the litigation and he has also been highly critical of the Claimant's solicitors' conduct in the litigation. I can quite understand why both the Claimant and Messrs Duncan Lewis took the view that it was appropriate, even necessary, for a representative of the firm to be in attendance to assist Counsel and the Court.

69. Mr Maduforo submits that the schedule of costs claimed is manifestly excessive and disproportionate and it obviously inflated in an unjustified attempt to extract money from him and/or his clients. I do not agree. The costs at around £6,000 do not appear to me to be manifestly excessive when

covering (a) the making of the application in respect of para 10(i) and attendance at a fairly substantial part of the hearing in respect the applications, including proper preparation for both; and (b) the preparations for and attendance at the wasted costs hearing.

70. Mr Maduforo submits that the time claimed by the Claimant's solicitors for their attendances at the hearings is excessive. What are claimed are 2.5 hours for the 25<sup>th</sup> March 2019, 1.5 hours for the 26<sup>th</sup> March and 1 hour for the 16<sup>th</sup> May. The 25<sup>th</sup> March and the 16<sup>th</sup> May are claimed at the grade B rate and the 26<sup>th</sup> March at grade D. Mr Maduforo did not suggest that he had any issue with the rates claimed. I am quite satisfied that the times suggested as referential to the two issues (para 10(i) and the wasted costs) are broadly accurate. Indeed, they can be said in some respect to be generous to Mr Maduforo as (i) the hearing on 16<sup>th</sup> May went well beyond its 1 hour listing, and in fact, including my time listening to the recording, took the whole morning; and (ii) the attendance of a grade D fee earner on the 26<sup>th</sup> March when a grade B would have easily been justified has resulted in a lower claim than he might otherwise have reasonably faced. I am satisfied that the sums claimed are both reasonable and proportionate and further that the sums claimed for travel by the solicitors, to which Mr Maduforo appeared to take exception in principle, are reasonably recoverable for solicitors based in Luton.

71. Mr Maduforo took exception to the fees claimed by Mr McCafferty. He has claimed an hourly rate at £250/hour. I don't think Mr Maduforo took specific exception to the rate, nor in my judgment would any attempt to have done so been successful – it is certainly not an unreasonable hourly rate for Counsel to charge. Given that I have already indicated I regard as broadly accurate the hours claimed by the Claimant's solicitors, and by extension Counsel, in respect of the three days of hearings devoted to these issues, I do not agree that Mr McCafferty's fees in those respects should not be recoverable. Including the work on the documents and the necessary consultations with his



instructing solicitor, I am satisfied that the total sum of £2,550 claimed in relation to Counsel's involvement is both reasonable and proportionate.

72. Mr Maduforo objected to, what he suggested was, the excessive amount of time claimed by Messrs Duncan Lewis for work on the documents: 30 mins researching the file in relation to the existence of the Precedent H, 2 hours drafting the application and supporting statement, 30 mins considering the statement of Mr Maduforo and 45 mins preparing Mr Smith's own witness statement. In the circumstances, far from being excessive, I regard the claim in these respects and commendably modest.
73. Overall Mr Maduforo submitted that I should take the view that the total figure claimed by the Claimant was disproportionate to the issues involved and unfair. I disagree, these are issues of the utmost seriousness and I have been greatly assisted by Mr McCafferty and those instructing him in coming to what I regard as the correct conclusions in light of a now full and accurate understanding of the facts. In my judgment, the sum claimed overall is both reasonable and proportionate, indeed in certain respects modest. Nothing in all this can be said to have been unfair to Mr Maduforo who, in my judgment, is entirely the author of his own misfortune.
74. Mr Maduforo will be ordered to pay the wasted costs assessed at £6,809.63 within 28 days.
75. This judgment will be handed down at the County Court at Chelmsford at 10am on 31<sup>st</sup> May 2019. Both parties are excused attendance and the time limits for appeal will begin to run from that date. Unless I hear from either party by 4pm on 7<sup>th</sup> June 2019, I will assume that neither seeks a further hearing or to make further representations in respect of the form of the order or any other matters consequential upon this judgment, and I will draw the final order accordingly.