Case No: HC-2016-003314
SCCO Ref: CCD 1703316

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/19

Before :

DEPUTY MASTER FRISTON
- -

Between :

(1) PAUL ANDREWS
(2) CHRISTOPHER SMITH **Claimants**

- and -

(1) RETRO COMPUTERS LIMITED
(2) DAVID LEVY
(3) SUZANNE MARTIN
(4) JANKO MRSIC-FLOGEL **Defendants**

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Mr Richard Wilcock (instructed by **Clarion Solicitors LLP**)
for the **First Claimant**
Mr Sean Middleton (instructed by the **Defendants** via direct access)

Hearing dates: 6 December 2018
- -

Approved Judgment

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

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DEPUTY MASTER FRISTON

Deputy Master Friston:

Introduction

1. This judgment deals with an application made on 1 October 2018 for partial or total disallowance of the Claimants' costs pursuant to rule 44.11(1)(b) of the Civil Procedure Rules 1998 (CPR); the Defendants allege 'gross misconduct before and during the proceedings'. The application was made part way through an assessment of the Claimants' costs, that assessment having been conducted by way of a post-provisional hearing that took place on 12 September 2018 and 11 October 2018.

2. Whilst the application has been drafted by the Second Defendant, it has actively been supported by the First, Third and Fourth Defendants, all of whom were either present or represented at the hearing of the application on 6 December 2018. The Second Claimant has played no active part in this application, although I understand that he has been made aware of it and of the fact that he will be bound by any findings that I make.

3. For most of the time, the Defendants have been acting in person, but at the hearing on 6 December 2018, they were represented by Mr Middleton of counsel. The First Claimant was represented by Mr Wilcock of counsel.

4. I would like to pay tribute to Mr Middleton and to Mr Wilcock, both of whom did their level best to ensure that submissions were made in a measured and courteous manner. I would also like to thank Mr Rose (the First Claimant's solicitor) and the Defendants personally for the fact that they took the trouble to cooperate with each other for the purposes of ensuring the correspondence with the court was relevant and well-mannered.

5. I should say, for the sake of completeness, that at times the Defendants have overstepped certain boundaries, but this has always been when they have been acting in person. I have made allowances for this. In particular, shortly after counsel had made their closing submissions, I received an email from one of the Defendants that was marked 'private and confidential' and that was addressed solely to me. This was highly irregular, but I have simply disregarded it. Mr Middleton had no involvement in the sending of that email.

Background

6. The First Defendant was incorporated on about 3 January 2014. At various times the other parties have been either directors of the First Defendant or have acted as consultants to it.

7. The First Defendant wished to manufacture a handheld gaming console known as the ZX Spectrum Vega+. This was intended to be device that was reminiscent of the Sinclair ZX Spectrum—an 8-bit personal computer that was first sold in the early 1980s.

8. On 24 November 2014, the Claimants signed a shareholders' agreement ('the Shareholders' Agreement') that provided for each of them, together with the Second Defendant and Sinclair Research Limited to hold 25 percent of the shares in the First

Defendant. I should make it clear that Sinclair Research Limited (which is a well-known company) has had no involvement in the matters described below.

9. In 2015, the First Defendant produced a crowdfunded games console known as the Vega. This proved to be a relatively successful commercial venture, so in early 2016, it sought further crowdfunding for the purposes of producing the aforesaid ZX Spectrum Vega+. In due course the Third Defendant was engaged as a public relations consultant.

10. I am told that monies were successfully received via the crowdfunding site Indigogo; I have not been taken to any evidence in this regard, but Mr Wilcock mentioned the figure of £500,000. Perhaps the precise figure does not matter, but what may be relevant is the fact that there are many persons who have crowdfunded the ZX Spectrum Vega+ and who may, therefore, have reason to take an interest in the way in which the First Defendant conducts its affairs. I shall refer to those persons as 'the crowdfunders'.

11. Things started to go wrong in March 2016. I do not need to set out the details, but there was a dispute about how much the directors of the First Defendant should be paid and whether it should terminate its consultancy contract with the Third Defendant.

12. On 8 April 2016, the Claimants resigned as directors of the First Defendant. They continued, however, to retain their shareholding (that being half of the shares in the First Defendant). The Defendants say that the Claimant (and the First Claimant in particular) has set up a rival company to the First Defendant; they claim that he has an interest in preventing the First Defendant from successfully trading.

13. During the summer of the 2016, the First Claimant claimed that he was subject to defamation and harassment via social media.

14. For reasons that are not relevant, shortly after the events referred to above the Second Defendant (a director of the First Defendant) claimed that the Claimants had repudiated the Shareholders' Agreement; he claimed to accept that repudiation with the effect of rendering that agreement void. None of this was accepted by the Claimants.

15. In addition, the Second Defendant sought to appoint the Third Defendant and the Fourth Defendant as directors of First Defendant. As I understand matters, this was not acceptable to the Claimants.

16. The relations between the parties deteriorated to a significant extent. I do not need to set out the details, but in September 2016 the Second Defendant accused the Claimants of having colluded with a company who was involved in the supply of the (original) Vega console; it was said that as a result of that collusion, a five-figure sum had been misappropriated from the First Defendant. That company was Cornerstone Media International Limited ('Cornerstone').

17. On 14 October 2016, the Defendants issued a call notice demanding repayment of about £55,000 which they said that the Claimants had misappropriated via Cornerstone; they threatened forfeiture of the Claimants' shares in default of payment.

The First Defendant issued a notice of intended forfeiture on about 2 November 2016. That notice set a forfeiture date of 19 November 2016.

18. This prompted the Claimants to apply for injunctive relief. On 17 November 2016, the Defendants became aware of that application; I do not need to set out the details, but I note that there were claims of harassment, defamation, intimidation, and other such matters. I will call those allegations 'the Conduct Issues'. Those allegations were denied. In addition, the Claimants sought a declaration that their shares in the First Defendant were not forfeit.

19. I pause here to say that as a result of having assessed the Claimants' costs prior to this application being made, I have had the benefit of seeing a large part of the file of papers belonging to the Claimants' solicitors. I referred to this fact during the hearing and there was no suggestion that this was something that I ought not to take into account. In the context of this being an application made under CPR, r 44.11 which was made part way through an assessment, I take the view that I am both entitled to and required to take what I have seen into account.

20. I have, in particular, seen most, if not all, of the correspondence between the First Claimant and the Claimants' solicitors. Having had the benefit of this, I am firmly of the view that the reason that the Claimants applied for injunctive relief is not because of any form of grandstanding or mischief, but because the First Claimant overreacted to what he believed to be threats made by the Defendants. Put another way, I take the view that whilst the First Claimant was, to a certain extent, seeking to obtain the upper hand, he was—in general—doing this in a reactive rather than proactive way.

21. Regardless of this, the Defendants had to deal with this matter at very short notice. Indeed, they had to instruct new solicitors, this being because their original solicitors had insufficient capacity to deal with the matter. I think that is fair to say that at this point (mid-November 2017), both parties felt besieged. This, no doubt, contributed to the deterioration in relations.

22. The matter came before Proudman J the following day (ie 18 November 2016). I am told that the court was not impressed by the fact that the Claimants had made the application without having given the Defendants adequate notice. In any event, the Claimants informed the court that they were not intending to proceed with the Conduct Issues. (As a result, the Defendants ultimately became entitled to the costs of those issues: see below).

23. Whilst I have yet to assess their costs, I have seen a copy of the Defendant's Bill of Costs; this is relevant because in the narrative to that Bill of Costs, the Defendants say this:

> 'The Defendants can only conclude these claims [regarding the Conduct Issues] must have been designed to simply cause the Defendants significant costs and distress, rather than being a legitimate attempt to commence a claim for disputes the Claimants wanted the court to determine.'

24. Having seen how the Defendants have conducted themselves during the assessment of the Claimants' costs I have no hesitation in finding that they genuinely believed that

the Conduct Issues had been raised 'simply [to] cause the Defendants significant costs and distress'. I also find that they were in a position to make submissions on this point from about the middle of November 2017 onwards.

25. I return to the chronology of events. At the hearing on 18 November 2016, the Claimants gave certain undertakings. Proudman J made an order that the First Defendant would not declare the shares of the First Claimant to be forfeit. Costs were reserved, and a return date of 23 November 2016 was set. That hearing took place before Norris J, but for reasons that are not relevant, little progress was made. Costs were reserved.

26. I understand that the Defendants made an application on 1 December 2016 and that the matter proceeded to hearing on 20 January 2016; again, however, little progress could be made at the hearing.

27. The final hearing took place on 9 February 2017. The court made an issues-based order that, in essence, required the Defendants to pay costs generally, but with the costs of the Conduct Issues (and one or two other issues) being the Defendants. I do not have a transcript or note of what happened at that hearing, but I make as a finding of fact that both parties were in a position to deal with Conduct Issues at that time.

28. In due course, the parties served Notices of Commencement. The procedural history of the assessments is not as straightforward as it could be, but there is no need for me to set out the various twists and turns in this judgment. It is sufficient to say that whilst the assessment of the Claimant's costs had originally been allocated to Senior Master Gordon-Saker, it was transferred to me (this being by way of an order that I made on 11 October 2018).

29. The Defendants' costs have yet to be provisionally assessed, but I provisionally assessed the Claimants' costs on 20 June 2018. The Defendants were not content with my provisional findings, so they requested a post-provisional hearing, that being a request that I allowed on 9 July 2018.

30. The post-provisional hearing took place over the course of two days, namely 12 September 2018 and 11 October 2018. I heard submissions from Mr Rose for the First Claimant and from the Defendants in person. Both sides made helpful and relevant submissions that were of great assistance to the court.

31. Subject to any adjustment I make on this application, the amount I have allowed is £38,392-80 (inclusive of VAT, but exclusive of interest).

32. This application was made on 1 October 2018 and sealed on 2 October 2018, this being after the first day of the post-provisional hearing but before the second. I pause here to say that the question of such application being made was briefly discussed during the first hearing; in view of the fact that the Defendants were, at that stage, acting in person I drew their attention to the relevant rule.

33. At the second day of the post-provisional hearing I ordered the Defendants to serve particulars of their allegations. The reason I made this order is because the application itself was somewhat general in its terms. On 16 October 2018 the Second Defendant lodged a document headed 'Particularization of Allegations on Behalf of Defendants

(1), (2), (3) and (4) for the Misconduct Application Filed on 1 October 2018'. That document ('the Particulars of Allegations') was amended by consent on about 23 November 2018, but the amendments were very minor.

34. By way of the (amended) Particulars of Allegations, the Defendants alleged that the conduct of the Claimants before and during the proceedings was unreasonable for the following reasons:

> '[1] Claimant 1 lied in paragraphs 38 and 39 of his first witness statement dated 17th November 2016, as well as elsewhere in that witness statement
>
> '[2] Claimant 1 lied about the "parked van" incident in paragraphs 59 and 60 of his second witness statement dated 5th October 2018, contradicting what he had already told the police. He also lied elsewhere in that witness statement.
>
> '[3] Claimant 1 has misled the Court by exhibiting as evidence at PA-5 a redacted version of a letter, by which crucial evidence relating to that letter was concealed. He compounded this with a smokescreen report to the SRA, to further mislead the Court.
>
> '[4] In the section "Allegations of Harassment / Online Abuse" in paragraphs 21-31 of his second witness statement, Claimant 1 has misled the Court and lied about his involvement in the campaign of online abuse against all four of the Defendants, including inciting others to participate in that campaign.
>
> '[5] Claimant 1 arranged the transfer of control of Defendant 1's websites www.retrocomputers.co.uk and www.zxvega.co.uk such that those sites could be and were used maliciously by participants in the online abuse campaign to intimidate, denigrate and defame the Defendants.
>
> '[6] Claimant 1 knowingly used intercepted ("hacked") emails, including emails to and from the police (referring to a Section 9 police statement), and to and from Defendant 1's solicitors, and he made (or enabled to be made) such emails publicly available online.
>
> '[7] Claimant 1 abused his position as Managing Director of Defendant 1, and attempted to abuse his position as a shareholder in Defendant 1, in order to aid in the misappropriation by Defendant 1's sales agent of revenues for sales of Defendant 1's product.
>
> '[8] Claimant 1 personally, and both Claimants through their solicitor, wrote to various trading partners and professional advisors of Defendant 1 attempting to prevent Defendant 1

> from pursuing its business effectively, and then they attempted to charge for those letters in their bill of costs.
>
> '[9] The Claimants raised allegations to support points 2, 3 and 4 of their Claim, which allegations they knew to be false.'

35. The Defendants say that the matters referred to above amount to unreasonable behaviour within the meaning of CPR, r 44.11(1)(b), and that as a result, some or all of the Claimants' costs ought to be disallowed.

36. The allegations are weighty, but at no stage has there been a request for a trial of the issues. In view of the fact that the Defendants were acting in person, I gave thought to the issue of whether I should make such an order of the court's own initiative. Whilst I heard no submissions on the point, I decided against this. This is because I wanted to deal with the matter in a summary way, at least in so far as circumstances allow.

37. I held a telephone case management hearing on 21 November 2018. This was for the purposes of ensuring that the parties had fully prepared for the hearing (which originally was due to be heard over the course of two days, starting on 5 December 2018); it is not necessary for me to set out the directions that I gave, but I ought to record the fact that I made it clear that I expected the parties to confine their submissions to the issues set out the Particulars of Allegations. Whilst I did not make an order that there should be a trial of the issues, I gave both sides the opportunity to cross examine any person who gave evidence in respect of the application.

38. In the event, the hearing began on 6 December 2018 rather than on 5 December 2018. It is to counsel's credit they were able to complete their submissions during the course of that one day (albeit a very long one).

The evidence: general observations

39. The First Claimant and the Second Defendant gave evidence. I will refer to the witnesses (when acting in that capacity) by their names rather than their statuses as parties.

40. The written evidence comprised a statement given by Dr Levy dated 28 November 2018 (which had exhibited to it a number of lengthy exhibits) and a statement of Mr Andrews also dated 28 November 2018 (which also had a number of exhibits).

41. Mr Wilcock chose not to cross-examine Dr Levy. Mr Middleton submitted that this meant that the Claimants must be taken to have accepted everything that Dr Levy had said in his evidence. I agree, but only to a limited extent.

42. In my view, it was appropriate for Mr Wilcock to save court time by dealing with the matter in a way that was, in many ways, summary. In my view, Mr Wilcock was entitled to do this, this being because the hearing was not a 'trial', but was 'any other hearing' within the meaning of the use of that phrase in CPR, r 32.2. This being so, the fact that Mr Wilcock did not cross examine Dr Levy is, in my view, merely a factor that I should take into account when gauging the weight that I should give to Dr Levy's evidence.

43. That said, the fact that Mr Wilcock chose not to cross examine Dr Levy is, in my view, close to being determinative of one aspect of the matter, namely that the case advanced by Dr Levy is one that he *believed* to be factually correct. In my view, if Mr Wilcock had wanted to impugn Dr Levy's honesty, he was under an obligation to do so in cross examination. Little turns on this, however, as Mr Wilcock did not pursue any such allegation. Whilst it has had no bearing on my decision, I would like to record that having already had the benefit of having heard extensively from Dr Levy during the course of the assessment, I formed the strong impression that he was an honest and straightforward individual.

44. Mr Middleton, in contrast to the approach taken by Mr Wilcock, cross-examined Mr Andrews at some length. The case that Mr Middleton was instructed to advance was ambitious. One of the points that Mr Middleton advanced was that Mr Andrews was a liar; indeed, Mr Middleton began his cross examination by asking the court to ensure that Mr Andrews had been made aware of his right not to incriminate himself. This was a robust way of presenting the Defendants' case, but I have no doubt that Mr Middleton was simply acting on instructions. I am grateful to Mr Middleton for the fact that he did not slavishly counter every single contentious point in Mr Andrews' evidence. In my view, this was appropriate (in just the same way that it was appropriate for Mr Wilcock to show restraint by not cross-examining Dr Levy).

45. Mr Middleton helpfully explained his case, both in opening and closing submissions. In essence, he said that the weight of the evidence—taken as a whole—pointed to Mr Andrews being an habitual liar. In view of the somewhat wide-ranging nature of that case, I would like to make one or two general observations about Mr Andrews as a witness.

46. Subject to one point that caused me concern (which I deal with below at paragraphs 49 to 54), I found Mr Andrews to be a credible witness. I had the opportunity to observe him closely; his answers were fluent and spontaneous, and his posture and demeanour gave me no cause for concern. There were minor inconsistencies in his evidence, but if anything, these merely confirmed that Mr Andrews was relying on imperfect recollections rather than advancing a self-serving case. It is fair to say that he occasionally asked for questions to be put again, but this was appropriate, and in my view was not an attempt to buy 'thinking time'. There were, on three occasions, brief attempts to avoid answering Mr Middleton's questions or to change the topic, but this did not concern me. This is because Mr Andrews immediately gave coherent and relevant answers when the same questions were put by the court; in my view, those attempts were nothing more than an attempt to spar with Mr Middleton.

47. I should, for the sake of completeness, note that there was one occasion when Mr Andrews felt it necessary to emphasise that he was telling the truth (which can be a 'red flag' that a witness is doing precisely the opposite), but this was in circumstances in which this was appropriate, namely, being challenged by the court in a fairly forthright way. Again, this did not concern me.

48. In summary (and subject to the points I make below), the impression I got was that Mr Andrews was a truthful witness who was simply doing his best to assist the court.

49. The only point that caused me concern was Mr Andrews' response when asked about a letter that he wrote on 3 September 2017. This was a letter that Mr Andrews had

written to the Defendants' then solicitors, Michelmores LLP. The contents of that letter are not relevant for present purposes (although I deal with them later on), but what is relevant is the fact that it appeared to give the impression that it had been written by a firm of lawyers when, in reality, it had not. In this regard, it bore a made-up name of a firm. Mr Andrews readily accepted that he was aware of this, and, without any prompting, he apologised and accepted that it was inappropriate. He (or, more accurately, Mr Wilcock) pointed out, however, that no-one could have been misled, as the letter gave Mr Andrew's home address as being the correspondence address.

50. That may be so, but Mr Middleton took Mr Andrews to a screenshot of the letter as displayed on an Apple iPhone. That screenshot prominently displayed an SRA number. In response, Mr Andrews claimed not to have been aware of the existence of this text (which he described as being a footer). This caused me some concern.

51. On direct questioning from me (as well as at paragraphs 13 to 17 of his statement dated 28 November 2018), Mr Andrews explained that one of his employees had downloaded a template letter from the Internet (in rich text format or RTF), and that he did not realise that it contained, in hypertext mark-up language (HTML), a footer that contained an SRA number. I pause here to record the fact that Mr Andrews' works in information technology, so he was able to give this technical explanation. I also note that he refers to the fact that the information technology department of the Claimants' solicitors had helped him to look into the matter.

52. Mr Andrews said that when the template had been opened in MS Word prior to it being sent to the Defendants' solicitors, that SRA number would not have been visible. I was concerned about this as I did not understand how an RTF document could contain style sheets that would allow the SRA footer to be shown only in a browser but not in MS Word. I therefore pressed Mr Andrews for an explanation. He was unable to offer any explanation, save for the one I have already outlined.

53. I have decided that, on the evidence before me, I unable to conclude that Mr Andrews was being untruthful. Such a finding would have required expert evidence; in particular, the court is not able to determine issues such as how text will be presented on an Apple iPhone or personal computer without such evidence. In this regard, the Defendant offered no evidence to undermine what Mr Andrews had to say. I also give some weight to the fact that the Claimants' solicitors have confirmed the correctness of what Mr Andrews has said (this being after seeking the assistance of their IT department).

54. In any event, even if the SRA number had been visible when opened in MS Word, I am firmly of the view that Mr Andrews did not intend to act in a deceptive way. I do not know whether the truth is that Mr Andrews' hypothesis (that the SRA number was not visible when opened in MS Word) was correct, or whether he (or a member of his staff) simply overlooked its existence, but either way, I am quite sure that Mr Andrews did not intend to rely on the SRA number in an attempt to deceive Michelmores LLP or the Defendants. This is not only because the letter bore Mr Andrews' home address, but also because of his demeanour and general manner when responding to the court's direct questioning.

55. In view of the above, contrary to my initial concerns about Mr Andrews' evidence about the aforesaid letter, I find that he, like Dr Levy, believed that what he was saying was the truth.

56. I pause here to say that this came as no surprise to me, this being for the reasons set out in paragraph 20 above.

57. I now move on to deal with the law.

The law

58. The court has always had the power to disallow costs in recognition of poor conduct. In Victorian times, costs might have been 'expunged for scandal and impertinency' ((1884) Law Times LXXVIII 115/2). The language may now be less elegant, but the court's powers remain.

59. The modern-day provisions may be found in CPR, r 44.11, which reads as follows:

> '(1) The court may make an order under this rule where—
>
> (a) a party or his legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or
>
> (b) it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.
>
> (2) Where paragraph (1) applies, the court may—
>
> (a) disallow all or part of the costs which are being assessed; or
>
> (b) order the party at fault or that party's legal representatives to pay costs which that party or legal representative has caused any other party to incur.
>
> (3) Where—
>
> (a) the court makes an order under paragraph (2) against a legally represented party; and
>
> (b) the party is not present when the order is made,
>
> the party's legal representative must notify his client in writing of the order no later than 7 days after the legal representative receives notice of the order.'

60. As can be seen, there are two limbs to this rule. The first is governed by CPR, r 44.11(1)(a); this concerns failure to comply with rules, practice directions or court orders in connection with the assessment. This can be disregarded for present

purposes as the Defendants do not take any such point. The second limb, however, is relied upon; it is set out in CPR, r 44.11(1)(b) and concerns 'unreasonable' and 'improper' conduct.

61. Unreasonable and improper conduct during the litigation that gave rise to the costs in question is capable of engaging CPR, r 44.11(1)(b). Indeed, I note that prior to April 2013, this was the *only* type of misconduct that could do so. The burden of proof will lie with the person alleging misconduct (see *Gempride v Bamrah* [2018] EWCA Civ 1367 at [26(v)]).

62. A finding of misconduct under CPR, r 44.11(1)(b) is a two-stage affair: first, the court must determine whether the relevant threshold criteria have been met (that is, whether there has been improper or unreasonable behaviour); and secondly, the court must consider whether it would be just to impose a discretionary sanction (*Haji-Ioannou v Frangos* [2006] EWCA Civ 1663, at [10], per Longmore LJ).

63. I deal first with the threshold criteria (see below).

Standard of conduct required

64. CPR, r 44.11(1)(b) does not itself contain the word 'misconduct', but I note that Longmore LJ has found that that word is contained in the title and that this points to the nature of the court's discretion (see *Haji-Ioannou* at [11]). This was in respect of a prevision version of the rule, but in my view, nothing turns on that. Similarly, whilst he too was concerned with a previous version of the rule, I note that Dyson LJ has said (albeit *obiter*) that the word 'unreasonable' is to be construed 'quite narrowly', in much the same way as it is construed in the context of wasted costs (see *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91, at [29]). More recently, Hickinbottom LJ has explained that '"unreasonable" is essentially conduct which permits of no reasonable explanation' (see *Gempride* at [26(ii)]). Hickinbottom LJ has also explained that '"improper" has the hallmark of conduct which the consensus of professional opinion would regard as improper' (see *Gempride* at [26(ii)]).

65. These things being so, it seems to me that guidance can be gleaned from authorities concerning wasted costs. In this regard, I note that in *Ridehalgh v Horsefield* [1994] Ch 205, Lord Bingham MR said that improper 'covers … conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty' (see 232). The allegations in this case are against the First Claimant personally rather than against his solicitors, but in my view, Lord Bingham MR's comments still have resonance in the sense that they give an indication of the seriousness of conduct that is required to engage CPR, r 44.11(1)(b). I also note that Dyson MR has said that the meaning of the word 'unreasonable' should not vary depending on whether it is the client or the legal representative whose conduct is under consideration (*Lahey* at [29]). I also note that mistakes or errors of judgment or negligence, without more, will be insufficient to amount to unreasonable or improper conduct (see *Gempride* at [26(iii)].

66. To the extent that it is relevant, Hickinbottom LJ provided this helpful summary (*Gempride* at [14]):

> '[The] following propositions … can be made.

> …
>
> ii) Whilst "unreasonable" and "improper" conduct are not self-contained concepts, "unreasonable" is essentially conduct which permits of no reasonable explanation, whilst "improper" has the hallmark of conduct which the consensus of professional opinion would regard as improper.
>
> iii) Mistake or error of judgment or negligence, without more, will be insufficient to amount to "unreasonable or improper" conduct.
>
> iv) Although the conduct of the relevant 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 be in breach of any formal professional rule nor dishonest.
>
> v) Where an application under CPR rule 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 the conduct was "unreasonable or improper".
>
> vi) Even where the threshold criteria are satisfied, the court still has a discretion as to whether to make an order.
>
> vii) If the court determines to make an order, any order made (or "sanction") must be proportionate to the misconduct as found, in all the circumstances.'

67. I now turn to deal in more detail with sanctions.

Sanctions

68. To address the topic of sanctions, it is necessary to know something the history of the relevant law. The power to impose sanctions arising out of unreasonable or improper conduct during the claim is a continuation of a long-standing power that—four decades ago—vested only in the judge who made the entitling costs order (see RSC Ord 62, r 28). Following comments made by Megarry V-C in *Re Solicitors* [1982] 2 All ER 683 at 688, that power was delegated in the first instance to Masters and then to all costs judges. The relevance of this is that the power to impose a sanction derives from a power that was originally vested in the trial judge.

69. It is also worth pausing to note that the power to impose a sanction was just that: as Michael Cook said in 1995, it was a power to impose something that was 'not just compensatory … but [also] punishment' (*Cook on Costs*, 2nd edn, London: Butterworths, 1995), p 240). This was entirely in keeping with the fact that the power originally vested in the trial judge. Where a penalty was made prior to the introduction of the CPR, it commonly took the form of a percentage discount or flat reduction.

70. Thus, the pre-CPR law was that misconduct could lead to sanctions in the form of a disallowance of part or all of the costs (which is what is sought in this application). Given the fact that the CPR have preserved the power to impose sanctions (and that the CPR expressly refer to a power to 'disallow all or part of the costs which are being assessed'), one would have expected the court's powers to impose a sanction under the CPR to be no less liberal.

71. This being so, the following comments of Dyson LJ (*Lahey* at [22]) may come as a surprise:

> 'The short answer to the defendant's submission [that the cost should be reduced by a percentage] is that the costs judge has no power to vary the costs order that is deemed to have been made. In our judgment, this is a complete answer to [the paying party's] submissions, whether based on [the-then equivalents of CPR, r 44.3 and 44.4 or 44.11]. It follows that the costs judge has no jurisdiction to make an order of the kind contended for by the defendant in this case.'

72. I pause here to say that Dyson LJ was dealing with a case in which a deemed costs order had been made, but he made it clear (at [1]) that his comments were of general application.

73. At first blush, it seems as if Dyson LJ had ruled out the exact form of penalty that one would expect to be imposed as a result of misconduct (that is, a reduction in the receiving party's costs). This, however, was at a time when the power under what is now CPR, r 44.11(1)(b) was limited to misconduct during the claim itself (see paragraph 61 above). In more recent times, Hickinbottom LJ has had this to say (at *Gempride* at [14]):

> 'The jurisdiction is not compensatory: it is not necessary to show that the applicant has suffered any loss as a result of the misconduct. It is a jurisdiction intended to mark the court's disapproval of the failure of a party or of a legal representative to comply with his duty to the court by way of an appropriate and proportionate sanction.'

This implies that a costs judge has the ability to reduce costs in a way that is discretionary (as opposed to as a matter of assessment).

74. There is a certain tension between Hickinbottom LJ's comment and those of Dyson LJ referred to above, but I take the view that (in the absence of some form of special order: see paragraph 78 below) the latter continue to apply where the alleged misconduct took place during the claim itself (as opposed to during the assessment). This is not only because *Gempride* was dealing with misconduct during the assessment (and is therefore distinguishable on that basis), but also because Longmore LJ has made it clear that the power to disallow costs by reason of unreasonable or improper conduct during the claim is limited to those costs that were incurred as a result of that conduct (see *Haji-Ioannou* at [8]). In my view, the changes to CPR, r 44.11 in 2013 have not changed this.

75. Indeed, I take the view that the changes to the overriding objective in 2013 make Dyson LJ's analysis more rather than less likely to be enduring. This is because when applying the overriding objective, the court must now have regard to the use of its own resources (see CPR, r 1.1(1)(e)). The court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the Rules; or (b) interprets any rule (see CPR, r 1.2). It would, in my view, not be in accordance with the post-2013 overriding objective to interpret or apply CPR, r 44.11(1)(b) in such a way as to allow parties to lengthen detailed assessment proceedings by allowing them to have, what in effect, are second bites at the cherry. In my view, that would be wasteful of the court's limited resources.

76. If I am wrong on this point, on the facts of this case, I reach almost the same conclusion by a different route, at least in so far as certain aspects of this application are concerned. This is because the court has already made an issues-based costs order that dealt with the Conduct Issues. To my mind, this means that the court has already decided certain issues, and this gives rise to issue estoppel in the sense that the court cannot revisit issues that were addressed at the time the costs order was made. In this regard, I bear in mind that it would have been open to the Defendants to have asked the court making the costs order not only to award them their costs of the Conduct Issues, but also to restrict or negate the Claimants' entitlement to costs to take account of the Claimant's alleged poor conduct. In this regard, I refer to the findings made at paragraph 27 above.

77. Counsel drew my attention to Waller LJ's decision in *Ultraframe (UK) Ltd v Fielding* [2006] EWCA Civ 1660. At [50], Waller LJ said this:

> 'It seems to me that consideration of a party's conduct should normally take place both at the stage when the judge is considering what order for costs he should make, and then during assessment. But the court will want to ensure that dishonesty is penalised but that the party is not placed in double jeopardy. Ultimately, the question is one of the proper construction of the order made by the judge. Thus it will be important for the judge, who is asked to take dishonesty into account at the end of a trial when considering the order as to costs, to consider what is likely to occur on assessment. Where dishonest conduct is being reflected in an order made by the trial judge, it must be wise for the future for judges to make clear whether they are making the order on the basis that, on the assessment, the paying party will still be entitled to raise the dishonesty in arguing that costs incurred in supporting the particular dishonesty were unreasonably incurred. Judges may also want to consider whether to make an order under rule 44.14 [the forerunner of CPR, r 44.11] and it would be wise to do that before considering precisely what order to make in relation to the costs of a trial generally.'

78. This, to my mind, supports the notion that the court ought to guard against the possibility of double jeopardy. A costs judge will, of course, consider disallowing costs that have been incurred as a result of any unreasonable or improper behaviour, but even this must be done in such a way as to avoid double jeopardy. In my view, a

costs judge would (in the absence of some special order, such an order expressly reserving certain issues to the assessment) be overstepping the mark if he or she got drawn into making wholesale reductions that would properly be the province of the judge who made the order for costs. Circumstances may exist, I would imagine, in which a costs order could be interpreted as being some form of special order that allowed a costs judge to exercise such powers, but this, in my view, is not even close to being such a case.

79. For all these reasons, I find that even if I were to find that there had been unreasonable or improper conduct, the court's ability to impose the types of sanction sought by the Defendants is limited.

80. The above analyses boil down to what I believe to be a very simple principle, namely, that in ordinary circumstances on assessment, CPR, r 44.11(1)(b) is not to be used in such a way as to allow a paying party to adjust or negate his or her liability for costs for reasons that were or could have been addressed at the time that the costs order was made. Put otherwise, a costs judge is bound by terms of the costs order as properly interpreted, and there is nothing in CPR, r 44.11(1)(b) that allows a costs judge to revisit the formulation of that order.

81. Having described the law, I now deal with each allegation in turn.

Allegation One

82. This allegation reads as follows:

> 'Claimant 1 lied in paragraphs 38 and 39 of his first witness statement dated 17th November 2016, as well as elsewhere in that witness statement.'

83. This is an allegation that Mr Andrews attempted to mislead the court; it is a serious allegation, so I read it restrictively. In particular, it read the reference to 'elsewhere in that witness statement' as referring to the facts that reflect or complement what is said in paragraphs 38 and 39 of Mr Andrews' statement. Counsel did not object when I mentioned this during the hearing.

84. The heart of the Defendants' complaint lies in what Mr Andrews had said about a van that had been parked across the driveway of his house on 5 and 6 November 2016. At paragraph 39(b)(i) of his statement of 17 November 2016, Mr Andrews said this (this being under the heading 'Harassment and Other Wrongs'):

> 'A van was parked for more than 24 hours across the driveway of my house despite there being ample parking available on the road. The true measure of the vindictiveness of this action is that my wife suffers from MS and it is extremely difficult for her to move about. This action caused not only inconvenience but pain and suffering to my wife. My wife's condition is well known to Mr Levy and Ms Martin.'

85. Dr Levy, in his evidence pointed to the fact that, in social media and on a residents' association website, Mr Andrews had stated that the van had been owned by a third

party (a company known as Hydrock). Dr Levy pointed to evidence that showed that Mr Andrews had complained both to and about Hydrock. Dr Levy says this (at paragraph 16 of his statement):

> 'It is therefore clear that when making his first witness statement Mr Andrews already knew perfectly well that Ms Martin [the Third Defendant] and I had not been responsible for the parking of the van. But having made that online posting Mr Andrews then lies by using the same parking incidence to embellish his first witness statement, attempting to justify his allegation of harassment by Ms Martin and myself.'

It is implicit in what Dr Levy says that he (and the other Defendants) take the view that Mr Andrews had accused the Defendants, or at least at least one of them, of having had a hand in parking the van in way that Mr Andrews has complained about.

86. I reject the Defendants' allegation of misconduct. This is for three reasons.

i) Firstly, I reject it on the facts. The mere fact that Mr Andrews knew that the van was owned by a Hydrock (and that he had complained about the way it was parked both to and about Hydrock) does not mean that the Defendants had no part to play in the van being parked where it was. For all Mr Andrews knew, the Defendants could have asked Hydrock to park the van where it was parked (although, for the avoidance of doubt, I do not for one moment believe that this is what happened).

ii) Secondly, Mr Andrews did not actually say that the Defendants (or any of them) had been responsible for parking the van where it was parked; he may have *implied* this (or even strongly implied this), but that is not quite the same thing. It is possible to lie by implication, but the court should, in my view, be slow to jump to such a conclusion. In my view, the implied meaning of paragraph 39(b)(i) of Mr Andrews' statement is not that he was accusing any of the Defendants of having had a hand in the matter; instead, he was merely expressing his *belief* that they were involved. In my view, the court would not have been misled by that paragraph, this being because no judge would have concluded that the Defendants had acted wrongly on the basis of that paragraph (or Mr Andrews' evidence as a whole). The court would simply have concluded that Mr Andrews had a (possibly unreasonable) belief that the Defendants had had a hand in the matter.

iii) Thirdly, even if Mr Andrews had expressly accused the Defendants of having parked the van in the way complained of, I do not take the view that this would have reached the requisite threshold. The court has to be alive to the reality of the situation, and at the time that Mr Andrews made his statement, the relations between the parties had become close to toxic. This being so, I would have characterised such an allegation (even if it had been made) as being regrettable and unfortunate, but I would not have gone so far as to say that it was unreasonable or improper. In this regard, I bear in mind the points I have already made at paragraphs 64 to 66 above.

87. I would, however, like to record that I am not impressed by the fact that Mr Andrews said what he said about the van. He can be criticised for both (a) not having made it clear that he was expressing only his beliefs or suspicions and (b) not having mentioned the fact that the van belonged to a third party. These are relatively minor criticisms, however, and they fall very far below the requisite threshold.

88. In any event, the allegations concerning the van was very much one of the Conduct Issues. As such, for the reasons already given, I take the view that even if I had found the allegation of misconduct to have been made out, my powers in relation to sanctions would, on the facts of this case, be limited to disallowing the costs that were caused by that allegation. Such costs would have been minimal.

89. For all these reasons, I reject Allegation One.

Allegation Two

90. This allegation reads as follows:

> 'Claimant 1 lied about the "parked van" incident in paragraphs 59 and 60 of his second witness statement dated 5th October 2018, contradicting what he had already told the police. He also lied elsewhere in that witness statement.'

91. Mr Middleton did not present his case in such a way as to make any real distinction between this and the first allegation. I have carefully read paragraphs 84 to 88 of Dr Levy's statement dated 28 November 2018 (which expands upon this allegation), but I dismiss it for the reasons given in relation to Allegation One.

92. Allegation Two contains the phrase 'He [Mr Andrews] also lied elsewhere in that witness statement'. I note that at paragraph 89 to 84 of the aforesaid statement, Dr Levy refers to certain points that Mr Andrews had made at paragraph 21 to 30 of his first witness statement. In my view, it would not be appropriate to allow the Defendants to make those points, this being because they were inadequately particularised in the Particulars of Allegations. In any event, I am firmly of the view that they have no substance; in essence, Dr Levy invites this court to make findings of fact about certain matters that would properly only be the province of a trial judge (such as who was responsible for Mr Andrews resigning as a director of the First Defendant). This is not the function of a costs judge, and even if it were, there is no evidence of any kind to suggest that the Mr Andrews' version of events was not one which he believed to be true.

Allegation Three

93. This allegation reads as follows:

> 'Claimant 1 has misled the Court by exhibiting as evidence at PA-5 a redacted version of a letter, by which crucial evidence relating to that letter was concealed. He compounded this with a smokescreen report to the SRA, to further mislead the Court.'

This is a reference to the letter I have already referred to at paragraphs 49 to 54 above.

94. I dismiss this allegation for the simple reason that the letter had little, if anything, to do with either the substantive litigation or the assessment. In essence, the letter was a 'cease and desist' letter concerning certain inflammatory comments that had been posted on social medial and elsewhere in the Internet. It is fair to say that each side believes that the other may have had a hand in posting those comments. In his statement dated 28 November 2018, Dr Levy says this (at paragraph 95):

> 'On September 5th 2017 Mr Andrews wrong to Mr Garbhan Shanks, a lawyer at Michelmore, who were the company solicitors at the time. This was one of a number of attempts by the Claimants to create problems between Defendant 1 and its trading partners, its associates and its professional advisors …'

95. Even if those concerns were true, they would have had no bearing at all on the matters before the court. At paragraphs 96 to 97 of his statement of 28 November 2018, Dr Levy refers to certain tweets that he believed Mr Andrews may have had a hand in tweeting; I make the same point about those tweets.

96. It is true to say that Mr Andrews exhibited the letter (without the SRA footer) to his statement of 5 October 2018 and that it was, therefore, put before the court, but given the fact that that version of the letter omitted the SRA footer, it is difficult to see how it can be said that this was an attempt to mislead the court into believing that it had been written by a regulated law firm. I have already found that Mr Andrews did not act with an intention to deceive when he or a member of his staff wrote the letter (see paragraph 54 above), so I reject any suggestion that Mr Andrews was trying to prevent the court from finding out he had held himself out as being represented by a firm of solicitors that did not exist. For the reasons given at paragraph 51 above, I find that Mr Andrews was not aware of the SRA footer at the time that letter was sent.

97. At the very most, Mr Andrews had tried to redact the letter so that it was presented to the court in a way that reflected the form he believed it to be in when it was sent. Even if Mr Andrews did this in the full knowledge that the SRA footer was visible when viewed in an Apple iPhone browser, I would not characterise this as being unreasonable or improper within the meaning of CPR, r 44.11(1)(b).

98. For all these reasons, I reject Allegation Three.

Allegation Four

99. This allegation reads as follows:

> 'In the section "Allegations of Harassment / Online Abuse" in paragraphs 21-31 of his second witness statement, Claimant 1 has misled the Court and lied about his involvement in the campaign of online abuse against all four of the Defendants, including inciting others to participate in that campaign.'

100. This allegation relates to certain postings on www.retrocomputers.co.uk and www.zxvega.co.uk, as well as on social media. Mr Middleton invited me to find that Mr Andrews was, in some way, partly or wholly responsible for what had been

posted; he submitted that this was relevant to CPR, r 44.11(1)(b) in the sense that if Mr Andrews had done this, he would have lied to the court in evidence.

101. I should explain that the posts alluded to above are not of a type that a costs judge would ordinarily expect to see in the course of a detailed assessment. The following is a sanitized description of only a small selection of what the court has seen or been told about. For the avoidance of doubt, the images that are referred to below are all obviously fake images that do not in any way depict real events.

    i) One image shows the Second Defendant physically threatening a child, this being alongside the caption 'David Levy steals from sick children'. Another shows him on the cover of a fictitious magazine that bears a title that is too offensive to record in this judgment. Other images have implied that he is a paedophile, and there are posts that have explicitly accused him of this. One or two of the posts have had distinctly anti-Semitic overtones; for example, on one occasion the Second Defendant (who is Jewish) was shown in Nazi uniform, and, on another occasion, he was likened to Adolf Hitler. Some of the abuse has even involved the Second Defendant's son.

    ii) The Third Defendant has been subjected to even more repulsive abuse. I would prefer not to set out the details in this judgment. I give just two examples (which are at the milder end of the spectrum of what I have seen): one image falsely depicts her as being grossly glutenous and obese, and another shows her engaging in sexual acts with the Second Defendant.

    iii) The Fourth Defendant and even his elderly parents have also been subjected to abuse, although the nature of that abuse has been less visceral than in the cases of the Second and Third Defendants. That said, the Fourth Defendant is highly respected (as indeed are his parents, one of whom is a former Foreign Minister of Croatia, and the other is professor of biochemistry), so I imagine that from their perspective, they found the experience to be brutal, this being because they would all have been concerned about their reputations.

102. I have no doubt that that Defendants and their families have been profoundly upset by this abuse. They have every right to be. On several occasions during the assessment the Defendants referred to these matters as being a campaign that is being waged against them; I would not disagree with that description. Indeed, I have been shocked and repulsed by what I have seen.

103. Mr Wilcock did not challenge the fact that the abuse had taken place.

104. In evidence, Mr Andrews said (and I accept) that he had not personally posted any of the abusive material and that he had no control over those who had posted it. He was cross-examined extensively on these points and at no stage did I have any concerns that he was not telling the truth. In this regard, I bear in mind that Mr Andrews was represented by highly competent lawyers, and that as such, he must have realised that if he were to lie to the court in circumstances such as an application of this nature, it would have potentially catastrophic consequences for him. He did not strike me as being weighed down by any such concerns; instead, the impression I got was—as I have already said—that he was simply trying to assist the court.

105. No doubt as a result of having realised that Mr Andrews had fared well in cross-examination, Mr Middleton fell back on what he called the 'totality of the evidence'. In essence, he invited the court to find that because Mr Andrews ostensibly had a commercial motive to discredit the Defendants (and because the Defendants had no reason to try to discredit themselves), I should take the 'common sense view' (to use Mr Middleton's phrase) that Mr Andrews was wholly or partly responsible.

106. I am unable to accept those submissions. This is for the following reasons:

    i) First and foremost, such a finding would be inconsistent with my finding that Mr Andrews was a truthful witness.

    ii) Secondly, whilst I have no hesitation in rejecting any notion that the Defendants posted the abusive material themselves, this in no way points to Mr Andrews being responsible. In this regard, I agree with Mr Wilcock's observation that the crowdfunders may have posted the abuse.

    iii) Thirdly, the suggestion that Mr Andrews has a commercial interest in discrediting the Defendants was not pursued in cross examination. Whilst I am happy to afford Mr Middleton some latitude in that regard (see paragraph 44 above), it would be wrong of the court to make such a finding without Mr Andrews having had the opportunity to reply on this point. In any event, the mere fact that Mr Andrews may have had a commercial interest in discrediting the Defendants could not properly lead to the conclusion that he had a hand in doing so.

107. During the course of his closing submissions I asked Mr Middleton what direct evidence he was able to point to that linked the First Claimant with the abuse. Mr Middleton accepted (rightly, in my view) that there was none. He also accepted that his clients bore both the evidential and legal burden of proof in this regard.

108. Notwithstanding Mr Middleton's candid comments, I have looked carefully at Dr Levy's evidence. In particular, I have taken into account all that Dr Levy has said at paragraphs 137 to 251 of his statement dated 28 November 2018 (which, in essence, set out in detail the abuse that he and the other Defendants have experienced). Whilst I pay tribute to Dr Levy for the effort that has gone into writing his statement (which was written at a time when he did not have the benefit of legal advice), I am firmly of the view that Mr Middleton was right to make the concession that he made.

109. Indeed, there are serious problems with the case that Dr Levy deposes to:

    i) At paragraph 144 of his statement of 28 November 2018, Dr Levy refers to the 'intimidation created by a group of "trolls"'; he goes on to say (at paragraph 147) that he believes that 'the Claimants, and particularly … Mr Andrews' are responsible, but does not explain why he holds that view (this being a topic I return to in a moment, at paragraph 110 below).

    ii) At paragraph 157, Dr Levy refers to a total of (on my calculation) between 148,000 and 208,000 abusive messages having been sent or re-sent to the Defendants and other persons associated with them. This is an enormous number of messages. It is difficult to see how Mr Andrews could have had

even a peripheral involvement in sending even a tiny fraction of that number. This strongly suggests (at the very least) that persons other than Mr Andrews are responsible for the greater part of the abuse.

iii) At paragraph 204, Dr Levy refers to a number of abusive tweets sent by various Twitter users, yet there is nothing to suggest that Mr Andrews is linked to those persons in any way.

110. The only potentially concrete links between Mr Andrews and the online abuse are those set out in paragraphs 234 and 241 of Dr Levy's statement, where Dr Levy says, for example, that he knows 'with certainty' that one of the 'trolls' (as he calls the abusers) is Mr Andrews' son-in-law, that another is an employee of a company that Mr Andrews runs, and that one of the names used by one of the abusers is a pseudonym for Mr Andrews himself. I have no doubt at all that Dr Levy believes these things, but that does not make them true. At paragraph 242 to 251, Dr Levy explains why he holds these beliefs, but even in his own evidence he acknowledges that Mr Andrews does not accept what he says; for example, Dr Levy acknowledges that Mr Andrews claims that one of his son-in-law's social media accounts was hacked. It was open to Mr Middleton to cross examine on these matters, but he chose not to do so (wisely, in my view).

111. I should add, for the sake of completeness, that the court spent some time hearing about who the registered owners of the aforesaid two domains were, but in evidence, Mr Andrews explained (and I accept) that that registered ownership was not the same as having control over the websites to which those domains resolve. As such, this line of questioning ultimately went nowhere.

112. Finally, I should add that even if the court had found that Mr Andrews had had a hand in the abuse, Mr Middleton would have faced an uphill struggle to persuade me that this should have resulted in a sanction being imposed pursuant to CPR, r 44.11(1)(b). This is because much of the abuse was entirely unrelated to these proceedings.

113. For all these reasons, I reject Allegation Four.

Allegation Five

114. This allegation is put in the following way:

> 'Claimant 1 arranged the transfer of control of Defendant 1's web sites www.retrocomputers.co.uk and www.zxvega.co.uk such that those sites could be and were used maliciously by participants in the online abuse campaign to intimidate, denigrate and defame the Defendants.'

115. This adds little to Allegation Four. It fails for want of evidence. In any event, even if the facts had been proved, it would not have come within the ambit of CPR, r 44.11(1)(b) as this would have been conduct entirely unrelated to the proceeding before the court.

Allegation Six

116. This allegation reads as follows:

> 'Claimant 1 knowingly used intercepted ("hacked") emails, including emails to and from the police (referring to a Section 9 police statement), and to and from Defendant 1's solicitors, and he made (or enabled to be made) such emails publicly available online.'

117. No evidence has been adduced in support of the allegation that Mr Andrews hacked any email accounts. Certainly, he was not cross-examined on this point. To the extent that any such accusation is made, I therefore reject that aspect of Allegation Six.

118. As the remainder of this allegation, I make the same points as I made about Allegation Four. I make the additional point that even if the facts had been proven, such matters are very far removed from the type of conduct that could fall within the ambit of CPR, r 44.11(1)(b).

Allegation Seven

119. This allegation is put in these terms:

> 'Claimant 1 abused his position as Managing Director of Defendant 1, and attempted to abuse his position as a shareholder in Defendant 1, in order to aid in the misappropriation by Defendant 1's sales agent of revenues for sales of Defendant 1's product.'

120. I reject this allegation without considering the facts. This is because it is worlds away from the type of allegation that can properly be regarded as potentially falling within the ambit of CPR, r 44.11(1)(b). It is not the function of this court to make such findings.

Allegation Eight

121. This allegation reads as follows:

> 'Claimant 1 personally, and both Claimants through their solicitor, wrote to various trading partners and professional advisors of Defendant 1 attempting to prevent Defendant 1 from pursuing its business effectively, and then they attempted to charge for those letters in their bill of costs.'

122. Again, I can deal with this in very short order. These were points for the assessment of costs. The mere fact that a small number of items may have been claimed inappropriately would rarely reach the requisite threshold; if it were otherwise, there would be applications under CPR, r 44.11(1)(b) in the majority of assessments. Having already had the benefit if having conducted an assessment, I can say that the threshold has not be reached.

Allegation Nine

123. This allegation is as follows:

> 'The Claimants raised allegations to support points 2, 3 and 4 of their Claim, which allegations they knew to be false.'

124. The reference to 'points 2, 3 and 4' is a reference to the Conduct Issues. As such, the points I have already made at paragraphs 78 to 80 above apply, and for this reasons alone, this allegation must fail (at least in the sense that it would not be open to the court to impose any sanction).

Conclusion

125. The application is dismissed. Subject to any further points that the parties may wish to make, the Claimant's costs stand assessed in the sum of £38,392-80 (inclusive of VAT, but exclusive of interest).

Appendix

126. Shortly after I circulated a draft of this judgment I received certain further documents from the Defendants that they say prove that Mr Andrews was not a credible witness.

127. I have not taken those documents into account. This is primarily because it would not be fair to allow the Defendants to rely on new evidence that goes to credibility when that evidence has been placed before the court *after* Mr Andrews has finished giving his evidence. In any event, on 21 November 2018 I made an order that 'no party may, after [28 November 2018], file further evidence … without the permission of the Court'; at the very least, this ought to have prompted the Defendants to have marshalled all their key evidence prior to the hearing. No adequate explanation has been offered as to why this seems not to have been done.

128. In any event, I have looked at the documents, and I am firmly of the view that, on their own, they would not have had any real bearing on my decision. I am sure that if Mr Middleton had seen one or two of the documents he would have referred to them in his cross examination of Mr Andrews, but the time for such things has long since passed.