Neutral Citation Number: [2025] EWHC 1319 (Admin)

Case No: AC-2024-LON-001606

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/05/2025

Before :

DAVID PIEVSKY KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

AINA KHAN LAW LTD	**Claimant**
- and -	
THE LEGAL OMBUDSMAN	**Defendant**
- and -	
CXV	**Interested Party**

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Gemma Lindfield (instructed by **Aina Khan Law Ltd**) for the **Claimant**
Stephen Kosmin and Leo Davidson (instructed by **Tobias Haynes, in-house solicitor for The Legal Ombudsman**) for the **Defendant**
The Interested Party was present but not represented and made no submissions

Hearing dates: 6 March 2025 and 12 May 2025

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on Thursday 29th May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

David Pievsky KC :

Introduction

1. By this claim for judicial review, the Claimant law firm challenges a decision of the Defendant dated 12 February 2024, upholding aspects of a complaint made to it by the Interested Party ("the IP"),[1] and requiring the Claimant to repay to the IP the sum of £51,192.60 ("the Decision"). The main reason for the Decision, and the focus of this judicial review claim, as I explain in more detail below, was the Defendant's conclusion that the Claimant had not adequately assessed the IP's capacity, when taking her on as a client and carrying out work on her behalf.

2. Permission was granted on three of the five pleaded grounds for judicial review by Vikram Sachdeva KC sitting as a Deputy High Court Judge on 25 November 2024.

Factual background

3. The Claimant is a firm of solicitors. Its sole director is Aina Khan OBE ("Ms Khan"), an experienced solicitor specialising in Family Law.

4. On the morning of Monday 8 September 2020, the IP contacted the Claimant to ask for urgent assistance and representation, following the breakdown of her marriage and the commencement of proceedings by her husband. An initial meeting was held. There was an attendance note. Of particular relevance for the purposes of this claim, the attendance note recorded the following:

    i) The IP described her husband as a "*manipulator*" who was "*coercive and controlling*". She said that she believed that he had gained access to her emails and was about to dissipate the family assets, and that he had recently been sexually abusing their daughter (who was at that time 5 years old). She said that her daughter had been "*dropping hints*" about sexual abuse, calling her father a "*bad man*" and making unusual comments about him, and describing "*pains*" which had "*disappeared*" now that her father had left the home. The IP said she had raised the allegation of sexual abuse with social services, who had not believed it; and that there was to be a meeting with social services on the following day. She said that she "*blamed herself*" for not having reported it earlier.

    ii) The IP had recently been seeing a psychiatrist, Dr Dannhauser. She had also been seeing her GP since March 2020, when lockdown had upset her greatly. She had later been diagnosed with adult ADHD, and had been prescribed amphetamines since 4 April 2020. She said that her husband suspected that this medication was causing her to be psychotic. She also said that he "*project*[ed]" his own mental illness onto her.

    iii) The Claimant described the IP in the note as "*emotionally raw*", and needing "*a lot of support*".

[1] For the reasons set out at §43 below, I granted an anonymity order in relation to the IP and her children.

iv) The note described what the IP said she wanted: "*a divorce, financial settlement, and the children to live with her… freezing orders because he will spend all their money… an injunction and occupation order so she can live in the house without him coming back*…[and] *advice from a specialist criminal solicitor because she wants her husband prosecuted for the abuse*…"

5. On the following day, Ms Khan discussed the case with leading counsel whom she anticipated instructing. Ms Khan told him about the IP's allegations of sexual abuse. She told him that each party in the dispute was accusing the other of being "*mentally ill*", and that the IP had said that she was seeing a psychiatrist, but only for ADHD. Ms Khan's view, as recorded, was that the IP could give and take instructions well, but was over-dramatising and that any allegations would need to be set out and evidenced carefully. Counsel is recorded as having advised, in relation to capacity, that "*there is no evidence that the husband is correct in making allegations of mental health and it appears* [the IP] *does not lack capacity so we should act for her until there is a full review*."

6. On 14 September 2020, the IP called the Claimant for further advice. The attendance note records the following:

i) The IP said that her husband had "*had to drug her to get full control*".

ii) In relation to the allegations of abuse: "*Nobody believes her allegations. Will brief QC if she wants to get in the driving seat and all parties to be aware we fully believe her case and she is lucid in giving instructions*".

iii) There was a discussion about the serious risks inherent in making allegations of child abuse. The IP said that "*she was convinced*" that such abuse was occurring. Ms Khan responded: "*I said there is no evidence but I believe she is telling the truth and she must be allowed to put her case forward*".

iv) There was also a discussion about the IP's health. She was seeing a psychiatrist who "*helps her a lot*". The IP again referred to her husband's allegation that her medication was causing her to be psychotic.

7. On 17 September 2020, there was a remote hearing before HHJ Gilbertson. Directions were made for hearings to take place on 15 October 2020 (to deal with the issue of interim child arrangements) and 15 December 2020 (to deal with various other matters including: "*whether to order a psychiatric assessment of the parties or either of them*").

8. In or around October 2020, Ms Khan began to have heightened concerns about the IP's welfare. Ms Khan says that she would sometimes call out of hours, did not take advice easily and came across to Ms Khan as "*troubled*" or "*paranoid*". On other occasions, she was much calmer. The Claimant was sent a letter dated 9 October 2020 from Dr Dannhauser. He said that he had seen the IP on 2 October 2020. The Claimant points out that he did not say in this letter that the IP lacked capacity, instead stating that she "*gave a good account of herself*", had "*good insight*" and "*was able to consent to treatment*". She was also "*able to consider alternative*

explanations for events". On the other hand, the same letter stated that the IP had continued to "*struggle with legal proceedings*". It also described a very recent "*incident*" in which the IP had become unwell at home after opening a bottle of vinegar, had gone to hospital, and had asked for the bottle to be "*tested*". Whilst Dr Dannhauser does not say in terms that this incident made him think that the IP was imagining or misinterpreting events, the fact that he described it suggests that he may well have had such concerns.

9. On 12 October 2020, the IP and Ms Khan spoke. The attendance note of the meeting states that the IP was "*very upset*" about the possibility that she would lose contact with her children as a result of the family proceedings, but also recorded that she was "*much calmer*" than previously and was "*taking all advice on board*".

10. On 13 October 2020, Ms Khan had a conversation with Dr Dannhauser. The attendance note records that the conversation lasted for around 40 minutes. Dr Dannhauser stated that he had diagnosed the IP with ADHD, and had prescribed medication "*to which she responded well*". In September 2020 he had considered that it was "*fine*" for her to continue her ADHD medication because "*she did not show any psychosis*". But he did now have concerns about her "*turning psychotic*" and "*jumping to conclusions*".

11. On 14 October 2020 there was a conference with junior counsel, attended by the IP and Ms Khan. The purpose of the conference was to discuss the next hearing in the family proceedings listed for the following day. The attendance note records that this was an intense and difficult meeting. One of the issues discussed was whether the IP should undergo a psychiatric assessment. The note states that she "*reluctantly accept*[ed] *that if ordered by the judge, she must have a psychiatric evaluation along with the father, to put to bed his allegations that she is mentally ill*". The note also records that "[Ms Khan] *warned* [the IP] *that it is her duty to tell* [the IP] *that she is now presenting as dramatic and confused and not taking our legal advice. It appears these proceedings are taking a toll on her. She is getting angry with us and counsel and we need to be sure she can cope. If the psychiatric report states that she has lost litigation capacity, we will need to work with somebody independent as her next friend.* [The IP] *said she was perfectly fine and just furious at the system.*"

12. On 22 October 2020, Dr Isaacs was instructed as a single joint expert in the family proceedings.

13. At the beginning of November 2020, it seems that the IP's condition deteriorated. An attendance note dated 3 November 2020 stated: "[Junior counsel] *believes that* [the IP] *is having a manic episode and is not in any state to give instructions. I agree with him… I have left messages with Dr Dannhauser… but he is not replying. I am concerned whether he even knows how she is presenting to us. She may be presenting differently to him… There is a concern that she may be drinking, as well. All these indications have caused me to advise strongly that she should stop drinking as much… She needs to be well enough to see Dr Isaacs, who will be meeting her next week…* [Junior counsel] *said that* [the IP] *is lucky to have* [the Claimant]. *Most other firms would have taken her to a 10 day plus fact-finding and she would have lost. We are doing an amazing job…*".

14. On 12 November 2020, Dr Isaacs completed his report. His stated opinion was that the IP had a "*paranoid psychosis*" and that this had probably been caused by the amphetamines which she had been taking. He disagreed with the approach that had been taken by Dr Dannhauser. He advised the IP to stop taking amphetamines, and to take antipsychotic medication instead, and said that he expected her condition to improve (and resolve within 1-2 months) if she did this. The Claimant submits that the 12 November 2020 report did not expressly state that the IP lacked capacity. It did, however, state that she was not currently able to "*fully engage with the proceedings before [the] Family Court*", as she was of the opinion that anyone who did not believe her was part of a conspiracy against her. Later evidence (namely a later letter from the Claimant to the Defendant dated 23 October 2023) suggests that the Claimant had, at the time, interpreted the 12 November 2020 report as confirmation that the Claimant had been right to suspect that the IP lacked litigation capacity at this point.

15. On 20 November 2020, there was a hearing before Recorder Saxby at which, among other things, the issue of the IP's capacity was considered. The Court ordered that Dr Isaacs should be jointly instructed to undertake a capacity assessment. The Claimant contends that the Judge made other orders progressing the case, suggesting that he must have been satisfied that the position had not (or not yet) been reached that the IP lacked capacity. The Claimant wrote to the IP saying that Ms Khan wanted "*to make it clear that I do consider that you have capacity at the moment, but in the past I feel you have perhaps lacked capacity at certain points, on and off*".

16. On 24 November 2020, the Claimant wrote to the IP (acknowledging that she might not read the letter for the time being) and referred to a conversation which had taken place the previous week, in which the Claimant had informed the IP and her sister that its fees were now in excess of £65,000 plus VAT; that the IP had not been surprised at this; and that the Claimant duly needed to revise the original estimate in relation to costs to be incurred up to the December hearing. The new estimate of the Claimant's fees would be £75,000 plus VAT. This was correspondence which, as I shall explain in due course, led to separate criticism by the Defendant.

17. On 4 December 2020, Dr Isaacs completed and signed a capacity certificate:

    i) The certificate stated that following a further interview and assessment of the IP, Dr Isaacs had concluded that the IP lacked capacity.

    ii) The printed certificate indicated, in particular, that he agreed that the IP had a relevant impairment or disturbance in the mind or brain, which he identified as a "*paranoid psychosis, probably amphetamine induced, that results in a complex delusional system*".

    iii) The printed form then stated "*This has lasted since…*", and Dr Isaacs completed that sentence by writing "*August 2020*".

    iv) He also ticked the printed box marked "*the person is unable to use or weigh the following information as part of the process of making the decisions in the conduct of the proceedings*", adding these words: "*her delusional system,*

centred on her husband and in particular her belief that he has been sexually abusing their daughter and poisoning [the IP] *herself, prevents her from weighing the information regarding her daughter's wellbeing, needs and wishes appropriately*".

v) He stated that a change in medication would be likely to result in a complete resolution of the psychosis within approximately 1-3 months.

vi) In a covering letter, he confirmed that the IP was an "*intelligent individual*" who had no trouble in terms of three of the four factors relating to capacity (i.e. she could understand relevant information, could retain information, and could communicate her decisions), but the problem was with the fourth relevant factor (i.e. weighing up information appropriately). He reiterated that her capacity was "*very likely to change, with appropriate treatment in the very near future*".

18. On 22 December 2020, the Claimant sent a costs review letter to the IP's sister (who had by this time been appointed as her litigation friend). The Claimant explained that the total costs were now in excess of £89,000 plus VAT (not including disbursements).

19. On 27 April 2021, the IP's sister made a complaint to the Claimant about the level of fees it had charged. The Claimant replied to the complaint to the effect that its fees were justified, particularly given the very intense demands of the IP and the complex allegations that had been made about her husband.

20. I do not need to set out further details of the finance and children proceedings. The allegations of sexual abuse, discussed with the Claimant in September 2020, were not ultimately maintained in those proceedings. On 7 June 2021, the IP instructed the Claimant to file a consent order discharging the proceedings.

The complaint to the Defendant

21. On 28 October 2021, the IP made a complaint to the Defendant. On 20 January 2023, the Defendant invited the Claimant to respond and provide evidence about certain matters. On 7 February 2023, the Claimant responded, contending that it had not provided a poor service as alleged.

22. On 3 April 2023, one of the Defendant's investigators, Ms Melberg, issued a "Case Decision". The overall conclusion in that decision was that the IP's complaint should not be upheld, on the basis that the service provided to her by the Claimant had been of a reasonable standard. In particular, Ms Melberg stated that:

i) The Claimant had not charged excessive costs for the work completed as alleged. The work required had been substantial. The IP had been kept up to date about the level of costs and had not raised any concerns. Her complaint that her husband was charged less by his own solicitor was not a valid one.

ii) The Claimant had not failed to assess the IP's litigation capacity as alleged. It had acted reasonably and with proper regard to the IP's welfare throughout the retainer.

iii) The Claimant did not unreasonably charge the IP for unsolicited courtesy and welfare calls as alleged.

iv) The Claimant did not act unreasonably in exercising a lien over the IP's passport, in circumstances where fees had not been paid.

v) The Claimant had not communicated with the IP in a passive aggressive, or manipulative manner, during five particular conversations, as alleged. The Claimant had used professional and empathetic language throughout all of these calls.

23. The 3 April 2023 case decision explained that if both parties accepted it (or did not respond to it), the case would be treated as concluded.

24. The IP asked for a review.

25. On 4 August 2023, a different decision maker within the Defendant, Ms Vaughan (an ombudsman), issued a "Provisional Decision" reaching a different conclusion on the complaint. The conclusion was, in summary, that (i) the Claimant had not adequately assessed the IP's litigation capacity, and (ii) the costs which had been charged to the IP had been excessive. The decision-maker concluded that the Claimant should pay the IP the sum of £35,500 plus an award for "*distress*" in the sum of £1,000.

26. On 24 October 2023, the Claimant made representations to the Defendant and provided further materials.

27. On 28 November 2023, Ms Vaughan issued a "*Revised Provisional Decision*" in which the complaint was upheld, and the compensation award increased from £36,500 to £51,192.60. The findings and reasoning set out in this document are of critical importance because they were expressly adopted in the (February 2024) Decision. They may be summarised as follows.

i) From the outset, the IP should have been considered "*vulnerable*". There were indications of "*issues with mental health*" (§1.3).

ii) The 8 September 2020 attendance note recorded that the IP was being treated by a psychiatrist, was "*taking amphetamines*" and *"had suspected psychosis*" (§1.3.1).

iii) Along with the IP's stated belief that she was being drugged by her husband, these were "*signals that consideration needs to be given and an assessment made to establish if the client has capacity to act or needs support*" (§1.3.2).

iv) Similarly, the 14 September 2020 attendance note had referred to the IP suffering with mental health issues, that she had been seeing a psychiatrist

since February 2020, that she had problems with alcohol, and that her husband was drugging her (§1.3.3).

v) The Claimant had acknowledged in its letter to the IP on 19 November 2020 that she had lacked capacity at certain points (§1.3.4).

vi) The discussion which the Claimant had with Leading Counsel on 9 September 2020 was insufficient to show that it had discharged the responsibility to assess capacity adequately. Counsel did not actually meet the IP. His advice was provided on the basis of the Claimant's own opinion of the IP's mental health (§1.4).

vii) The fact that the Court on 17 September 2020 did not at that point order that the IP should be assessed by a psychiatrist was not "*evidence that* [the IP] *was not suffering from mental health issues*" (§1.5).

viii) The Claimant had contended that it was reasonable for it to have relied on advice given by Dr Dannhauser in October 2020 in continuing to proceed on the basis that the IP had capacity. Ms Vaughan stated: "*I am not satisfied with this comment as it was confirmed on 9 October 2020 by* [Dr Dannhauser] *that there was an issue of mental health and if there wasn't, I am not sure why at that point* [the IP] *was taking amphetamines and was seeing a psychiatrist if a mental health condition was not present*". (§1.8).

ix) The Claimant itself had recognised that, by 18 October 2020, it was already apparent to the firm (and to counsel) that the IP's behaviour was (in the firm's words) growing "*erratic*" and that on some days she was "*paranoid and delusional*". This reinforced the Defendant's view that "*from the point of instruction*" there were issues that "*indicated that* [the IP] *was suffering from mental health issues*" (§1.9).

x) Dr Isaacs on 12 November 2020 advised that the IP was suffering from a "*paranoid psychosis*", and was "*not able to engage fully with the proceedings*". The report also stated: "*it is my opinion that* [The IP's] *delusional system would prevent her from weighing up information appropriately*." (§1.10)

xi) Dr Isaacs on 3 December 2020 stated in terms that the IP lacked capacity, due to paranoid psychosis and that "*this had lasted since August 2020*" (i.e. before the Claimant was instructed), which was said to have confirmed Ms Vaughan's "*view that* [the IP] *did not have capacity to act from the outset*". (§1.11)

xii) The Claimant should have adequately assessed capacity at the point of instruction, but did not do so. It should also have encouraged the IP's family members to be involved with her case, before November 2020 (§1.14).

28. In relation to the complaint about charging excessive costs:

i) The Claimant on 19 November 2020 had told the IP that the costs she had incurred were already at around £65,000 plus VAT and would be likely to reach £75,000 plus VAT by the time of the December hearing. That was a significant increase from the £43,500 budget originally discussed and agreed. The Claimant knew or should have known by this point that the IP lacked capacity. These fees were not understood, agreed and accepted (§2.6). Similarly, the Claimant could not fairly rely on an instruction from the IP to "*keep working*" on 7 December 2020, when the IP "*clearly could not make decisions on* [the] *costs implications of what they were instructing*" (§2.10).

ii) There was no evidence that the Claimant kept the IP (or a suitable litigation friend) fully informed of the costs incurred and future costs (§2.15). The Claimant had told the Defendant that it had provided the IP with weekly telephone updates about costs, but it had not produced attendance notes proving this (§2.16). The Claimant's further contention that the IP had repeatedly told the Claimant not to discuss costs with her at such a sensitive time could not be accepted (§2.18).

iii) Costs reviews were carried out too late, and too infrequently. The first such review took place on 19 November 2020, by which time the costs incurred (£65,000) had already exceeded the estimate originally provided (£43,500). That was too late. The review should have taken place once the costs had reached £43,500 (i.e. on or around 7 October 2020) (§2.20). Similarly, when a subsequent costs estimate (of £75,000) was exceeded, the IP was not provided with a further costs review until the costs had already reached £89,000 (§2.21).

iv) The IP was not in a position to make decisions about how the costs incurred were being managed. In addition to her mental health issues, she was disadvantaged by the Claimant's failure to keep her updated about how and why the costs had significantly increased (§2.27).

29. As to the IP's complaint about the Claimant maintaining a lien over her passport until the IP paid all outstanding fees, the Defendant's view was that this had been illegitimate "*in circumstances* [where] *there is the potential the retainer was invalid from the outset*". The costs were not properly incurred because the IP "*did not have capacity*" and they "*exceeded the estimates provided*" (§4.4)

30. In a concluding section, Ms Vaughan addressed the question of remedy. She concluded that:

i) There should be an award of £35,500, as a "*refund of the costs paid as a remedy for the impact of the firm's poor service relating to costs*", made up of (a) a refund relating to the poor service described at §2.20 of the Revised Provisional Decision and (b) a refund relating to the poor service described in §2.21 of the Revised Provisional Decision; and

ii) There should also be a further fee reduction of £15,692.60, calculated as 20% of £78,463 (the net fees paid by the IP to the Claimant after accounting for the proposed reduction of £35,500), reflecting the conclusion that "*from the outset*,

[the IP] *did not have capacity to act and therefore did not have the ability to enter into a contract*"; and

iii) There would be no additional award for the stress and distress resulting from the Claimant's failure to release the IP's passport, on request.

iv) The appropriate remedy was therefore a total award of £51,192.60 (i.e. £35,500 plus £15,692.60).

31. The Revised Provisional Decision concluded by inviting further comments from the Claimant. On 15 December 2023 and 12 January 2024, the Claimant provided the Defendant with further representations and contemporaneous documents.

32. On 12 February 2024 the Defendant formally made the Decision which is under challenge in these proceedings. It "*adopted*" the 28 November 2023 Revised Provisional Decision "*in its entirety as my Final Decision*", and addressed and rejected the Claimant's recent submissions.[2] In particular:

i) If there had been any doubt about capacity, the Claimant should have "*completed a risk assessment and suggested another family member was present to support* [the IP] *in making her decisions*". The Claimant needed, said the Defendant, to "*show that they had established capacity*" in light of the issues they had been made aware of at the time of the initial instruction.

ii) The Defendant repeated that its finding was that "*from the outset* [the IP] *did not have capacity to act (which is reinforced by* [Dr Isaacs'] *report of 4 December 2020) and therefore did not have the ability to enter into a contract, which impacts the validity of any agreement to pay fees due*".

The claim

33. The claim was commenced on 13 May 2024.

34. The Statement of Facts and Grounds was lengthy. §32 was preceded by the heading "Statement of grounds". It said that the Defendant had:

i) "*exceeded its remit*" in various respects (Ground 1).

ii) "*discriminated*" against the Claimant, a small firm, by making an award against it that was "*disproportionate*" to its turnover (Ground 2).

iii) "*acted unfairly and discriminated against*" Ms Khan personally, given that there were other lawyers and professionals who dealt with the IP who did not conclude that she lacked capacity (Ground 3).

[2] described, perhaps ungenerously in the circumstances, as "*the raft of comments made by the firm on my* [provisional] *decision*" [emphasis added]. The Claimant had (and had been afforded) the right not to accept the proposed decision and to make whatever comments it saw as appropriate, and it may be thought unsurprising that it exercised that right fairly vigorously, in circumstances where the Defendant's views between April 2023 and November 2023 had changed so significantly.

iv) acted irregularly by allowing the IP to "*re-open a Decision out of time*" (Ground 4).

v) made a decision that was "*so fundamentally flawed and unreasonable that no Regulator should be allowed to impose such judgments, particularly when there is no right to appeal*" (Ground 5).

35. On 25 November 2024 the claim was considered by Vikram Sachdeva KC, sitting as a Deputy Judge of this Court. The Deputy Judge granted permission on Grounds 1, 2, and 5, and refused permission on Grounds 3 and 4. There was no renewed application for permission in respect of Grounds 3 or 4. I say no more about them.

36. On 16 January 2025 the Defendant filed Detailed Grounds of Resistance, and a witness statement from Ms Vaughan dated 16 January 2025. At §24 of that statement Ms Vaughan explained that the "*essence*" of her Decision had been that "*further expert assessment was necessary*"; it was unreasonable for the Claimant to proceed as it did when taking on the case without such further assessment of the IP's litigation capacity.

37. On 6 March 2025 the matter came on for a substantive hearing before me. There was a core hearing bundle running to only 124 pages and which had been filed a few days earlier (several weeks after the date set out in Mr Sachdeva KC's case management directions). I considered the following applications made by the Claimant to introduce new evidence:

i) An application to rely on two witness statements, from junior and leading counsel in the IP's family proceedings ("the first new evidence application"); and

ii) An application to rely on a "*supplementary bundle*" running to 438 pages of contemporaneous material (not in date order, and with no indication of what material was or was not before the Defendant when the Decision was made) ("the second new evidence application"). The Claimant submitted that it was "*essential for the Court to admit the evidence that* [the Defendant] *considered in making its decisions*".

38. Having heard from counsel, I refused the Claimant's first new evidence application, for two reasons. First, the witness statements sought to be introduced related to events taking place during late 2020 and early 2021. There was no good reason for the Claimant not to have obtained such evidence before filing the claim form, still less for seeking to admit them so late in the day. Secondly, and more fundamentally, the Claimant had not established that the witness statements were relevant. They postdated the Decision. They were not and could not have been materials which the Defendant had considered.

39. However, I decided to grant the Claimant's second new evidence application, and admit the supplemental bundle, subject to compliance with further case management directions. This was a more finely balanced decision.

40. On the one hand, it was plainly unacceptable for the Claimant to have filed so many documents, said to be relevant and essential, shortly before the substantive hearing. PD54, at §4.4(1) and (2) provide that a JR claim form "*must*" be accompanied by "*any*" written evidence in support of the claim, and copies of any documents on which the Claimant wishes to rely, unless this is not "*possible*" in which case the reasons must be explained. There was no good reason for the Claimant's failure to have complied with that rule when filing the claim, nor its failure to have remedied this problem within a reasonable time thereafter. The format in which the documents were presented to the Court on 6 March 2025 was also, unfortunately, inappropriate. There was no sensible ordering. There was no useable index. There was no witness statement formally exhibiting the documents. Some of them had not been before the Defendant at the date of the Decision, but it was not clear which ones. All of this could potentially have justified refusing the application.

41. On the other hand, I was being told by counsel that the documents were of potentially critical relevance to the fate of the JR claim. I considered that refusing the Claimant's application would result in the Court having to decide this case in the dark. It would have been very difficult, for example, to resolve a dispute about whether there was a rational foundation for a particular conclusion set out in the Decision, without an adequate understanding of the material the Defendant actually had before it at the moment of the Decision. On this basis, albeit not without some misgivings, I concluded that the application should be granted.

42. It was not possible or sensible to continue with the substantive hearing. The parties' skeleton arguments had not addressed the documents sought to be introduced, and there was now insufficient time for the completion of oral submissions. I adjourned the case to 12 May 2025, requiring the Claimant to file and serve a witness statement identifying and exhibiting the documents in the supplemental bundle, distinguishing between (a) those that were sent to the Defendant prior to its Decision and (b) those which were not, and explaining the basis upon which the Claimant wished to rely on the latter category of documents. I made other case management directions (and reserved the question of costs).

43. At the resumed hearing, on 12 May 2025, I heard from Ms Lindfield for the Claimant and Mr Kosmin for the Defendant. The IP was present. She confirmed, having not filed any statement of case or a skeleton argument, that she was attending as an observer. Having heard from all of the parties, I made an anonymity order in relation to the IP and her children. I agreed that naming the IP and thereby revealing the children's identities in a public judgment would be contrary to their best interests and could cause them real harm, particularly in light of the allegations of abuse that had been made; and that this convincingly outweighed the normal (and fundamental) starting point of open justice.

Claimant's submissions

44. On behalf of the Claimant, Ms Lindfield made wide-ranging and forceful submissions criticising the Defendant's entire approach and its conclusions. Of the three JR Grounds that had permission, Ground 5 (irrationality / unreasonableness) took centre stage in her presentation of the case to me.

45. There were some aspects of her submissions which I found unpersuasive. I can deal with those at the outset:

    i) She sought to introduce a number of new points, relating to whether the Defendant was required by fairness or rationality to have asked for particular documents that were never in fact sent to it. These criticisms, amounting in effect to a Tameside complaint,[3] were not pleaded as JR Grounds, nor were they set out in the Agreed List of Issues. Permission had not been granted. There had been no application to amend. As I said during the hearing, I had very considerable doubts about whether it could possibly be right to resolve those new points. In fairness to her, Ms Lindfield did not press them. They are in any event devoid of merit. It was for the Claimant, having been given numerous opportunities, to submit whatever materials it wished the Defendant to consider. It sent the Defendant a significant amount of documentation. The Defendant was not arguably required to ask for more. I refuse permission to advance these points and refuse the implied application to admit documents which were not before the Defendant at the relevant time.

    ii) Ms Lindfield referred to §38 of Ms Vaughan's witness statement, in which Ms Vaughan explained that she was "*familiar with capacity issues from* [her] *professional experience of disability rights tribunals and adult social care*", and invited the Court to draw an inference that Ms Vaughan had inappropriately set herself up as an expert and/or had been unduly influenced by her own experience so as to "*find evidence that points to* [a] *pre-judged conclusion*" (Claimant's skeleton argument, §5.9). I have to say that I found this to be a most unconvincing, and unfair, contention. There is no evidential basis to suggest that Ms Vaughan was doing anything other than seeking as best she could to find the right answer to the complaint that had been made.

    iii) Ms Lindfield occasionally misdescribed the Decision, e.g. by suggesting that the Defendant had required the Claimant to "*decline to act*" for the IP, when what it had actually said was that in light of the IP's mental health issues the Claimant ought to have carried out a more extensive assessment of her capacity than it in fact did and/or obtained more expert advice before deciding *how* to act for her.

    iv) At several times during the course of argument it seemed to me that she Ms Lindfield was contending that the Decision was simply *wrong*. That, of course, is not the issue I have to resolve. I do not need to record all of those contentions.

46. However, other aspects of Ms Lindfield's submissions were, in my Judgment both cogent and illuminating. Without I hope doing her a disservice, what follows is the essence, as I understood it, of her case as to why the Decision was *irrational*.

47. First, the Defendant had, at several points in the Decision and generally, conflated "*mental illness*" with capacity. This was irrational as well as contrary to legal principle.

[3] Secretary of State for Education and Science v Tameside MBC [1977] AC 1014

48. Secondly, the Defendant had irrationally used hindsight, by relying on assessments leading to a capacity certificate issued on 3 December 2020, and the certificate itself, to reach a conclusion about what the Claimant ought reasonably to have perceived or done in early September 2020.

49. Thirdly, the Defendant had irrationally misconstrued the 3 December 2020 certificate, by thinking that Dr Isaacs was saying that *capacity* had been absent since August 2020, when all he was actually saying was that a *psychosis* had been present since August 2020, and that it had now become so serious (i.e. by 3 December 2020) that capacity was no longer present.

50. Fourthly, the Defendant had irrationally dismissed the relevance of those steps that the Claimant *did* take, including (i) consulting with Counsel, and speaking at length to the IP's own psychiatrist, in order to assess the IP's capacity, and (ii) conscientiously weighing, both at the time of instruction and subsequently, her mental health, as set out in the attendance notes.

51. Fifthly, the Defendant had irrationally failed to appreciate the complexity, difficulty, and nuance of a situation in which (i) capacity and mental health were not only "*hotly contested*", but were potentially being used as weapons by each side in the family proceedings, and (ii) the evidence of a lack of capacity which ultimately proved decisive was, in large part, the "*delusional*" nature of the IP's own factual case in the family proceedings.

52. In relation to the IP's complaint about excessive costs, Ms Lindfield submitted, further, that:

    i) The Defendant's decision was "*infected*" by its flawed approach to the capacity issue.

    ii) There was no evidential basis for the stated finding that the Claimant never had capacity (from the outset), and thus could not even enter into a contract for legal services; still less was it unreasonable of the Claimant not to have concluded this at the outset of the retainer given the information before it at the relevant time.

    iii) It was irrational for the Defendant to require, in effect, that there should have been monthly costs updates.

    iv) The overall award was "*disproportionate*" to the firm's small turnover.

Defendant's submissions

53. The (equally cogent and illuminating) submissions in response from Mr Kosmin and Mr Davidson, for the Defendant, may be summarised as follows.

54. First, there are important preliminary points about the approach the Court is required to take when reviewing decisions made by the Defendant.

i) These decisions are to be read with a degree of benevolence and should not be construed as if they were statutes or judgments, nor subjected to pedantic exegesis. The Court can only intervene if it can properly be said that the Defendant's decision is truly irrational, in the sense that it has gone outside of the very wide range of reasonable decisions open to it.

ii) The Defendant is not bound to apply the law. It is entitled to exercise a broad judgment, using a relatively swift and informal procedure, about what is fair and reasonable, unconstrained by the question whether the conduct complained of would have been considered unlawful by the Courts.

55. Secondly, the Decision, read fairly and with that important guidance in mind, was reasonable. As to the capacity issue:

i) The main focus of the Decision was not the finding that the IP had lacked capacity from the outset, rather that the Claimant had failed to do what was necessary in order to *assess* her capacity before taking on her case and incurring fees.

ii) The Defendant was rationally entitled to conclude, on the evidence before it, that the IP had lacked capacity since August 2020. That is what Dr Isaacs' capacity certificate said, and there is no basis to depart from its detailed and comprehensive conclusions or reasoning. The Claimant had itself adopted that same construction of the certificate in its 23 October 2023 letter to the Defendant, when observing that Dr Isaacs' report and certificate had "*confirmed that we were right to suspect that his client now lacked litigation capacity because of a paranoid psychosis*". It was not realistic for the Claimant to contend for a different construction of the same certificate now (still less to contend that it is the only rationally possible construction of that certificate).

iii) The critical issue was whether the Defendant was rationally entitled to consider that the Claimant had failed to assess capacity adequately at the outset of the retainer. It was far from irrational for the Defendant to have considered that the September 2020 Attendance Notes were damning. They showed that there were indications of various different mental health issues from the outset. The Defendant was entitled to exercise a judgment about how significant those mental health indications were. Its view was that the Claimant ought, at minimum, to have carried out a risk assessment, consulted an expert, and involved the IP's family in the relevant decision-making. That exercise of judgment could not properly be condemned as irrational.

56. Thirdly, and as to the fees issue:

i) There were two separate strands to this issue. The first strand was that there had not been sufficient or timely communication with the IP about the mounting costs, particularly after they had exceeded £43,500. That finding of poor service on the Claimant's part had led to the £35,500 award. The second strand was a (completely independent) decision that there should *also* be a

20% reduction in the overall costs because of the unreasonable manner in which the IP's capacity had been assessed (or not assessed).

ii) There was a wholly justifiable and rational basis for both 'strands'.

The law: the Legal Ombudsman

57. The Defendant was established pursuant to Part 6 of the Legal Services Act 2007 ("the 2007 Act"). It provides an independent and informal complaint resolution procedure for the legal services sector, without the need to resort to the Courts.

58. Decisions of the Defendant are - as Mr Kosmin correctly submitted - to be read with a degree of benevolence. They should not be construed as if they were statutes or judgments, nor subjected to pedantic exegesis (see R (Crawford) v LeO [2014] EWHC 182 (Admin) per Popplewell J at §25). The Court should not underestimate the Defendant's expertise and experience in relevant areas: see R (Williams) v FOS [2008] EWHC 2142 (Admin) per Irwin J at §45.

59. A complaint to the Defendant is to be determined "*by reference to what is, in the opinion of the ombudsman making the determination, fair and reasonable in all of the circumstances of the case*": see s.137(1) of the 2007 Act. That creates a very broad discretion.

60. Mr Kosmin also drew my attention to the rules made under the 2007 Act and in particular Rule 5.37(a), which states that in determining what is fair and reasonable, the Defendant will "*take into account*" but is not "*bound*" by "*what decision a court might make*". Several cases have made the point that an ombudsman like the Defendant is not "*required to determine a complaint in accordance with the common law*": see for example Options UK Personal Pensions LLP v FOS [2024] EWCA Civ 541, per Asplin LJ at §73. As Asplin LJ explained in that case, such a decision-maker is exercising "*a much wider jurisdiction…* [and is] *required to reach an opinion about what is fair and reasonable in the circumstances of the particular complaint*". It is considering a complaint, not a cause of action: see R (Heather Moor & Edgecomb) v FOS [2008] Bus LR 1486 (CA) per Rix LJ at §80. The Defendant would not, for example, be entitled (still less required) to reject a complaint about inadequate advice given by a solicitor, *simply* because that same advice would not have been held to be negligent, applying the relevant common law jurisprudence.

61. It does not follow, however, that s.137(1) and/or Rule 5.37(a) mean that the Defendant is entitled, when deciding what is "*fair and reasonable*" in any given case, to make mistakes about the correct and established meaning of legal concepts when it is choosing to apply those concepts in the exercise of its judgment. I put to Mr Kosmin a hypothetical and admittedly extreme case in which, for example, an ombudsman had said in terms: "*A person with mental health issues by definition lacks capacity*". That statement would constitute a basic misdirection of law, capable of undermining the lawfulness of the decision as a whole. It would be very surprising if the position were to be that a public authority is effectively immune from one of the classic and fundamental grounds for judicial review. Mr Kosmin agreed, and I understood him to confirm that it was no part of his case that the Defendant was

entitled to make errors of that sort. He submitted, rather, that there was a very wide latitude within which the Defendant can operate, so long as the conclusions reached are not irrational or perverse. I agree.

The law: capacity

62. The Mental Capacity Act 2005 ("MCA 2005") provides, at s.1(2), that "*a person must be assumed to have capacity unless it is established that he lacks capacity*".

63. A person lacks capacity in relation to a matter if at the material time they are unable to make a decision for themselves in relation to the matter "*because of an impairment of, or a disturbance in the functioning of, the mind or brain*": s.2(1). A person will be unable to make a decision for themselves if they are unable to understand relevant information, retain that information, use or weigh the information as part of the process of making the decision, or communicate their decision: see s.3(1).

64. A lack of capacity cannot be established merely by reference to a "*condition*" which the person has, or an "*aspect of* [their] *behaviour*", which "might *lead others to make unjustified assumptions about* [their] *capacity*": see s.2(3)(b) of the MCA 2005.

65. The capacity to make a decision is very different from the ability to make a *wise* decision. The underlying policy of the Act is avoid concluding that incapacity is established unless truly necessary. A finding of incapacity substantially curtails the individual's right of action and the right of unimpeded access to the law: see per Burnett J (as he then was) in V v R [2011] EWHC 822 (QB) at §10.

66. The fact that someone has lost capacity at a particular moment does not mean they have lost it forever. Capacity can fluctuate. And what matters is not capacity in a 'global' sense, but whether the individual can make the particular decision which is in issue. A person might, for example, have capacity to make a straightforward decision, whilst at the same time lacking capacity to make a more profound or difficult decision about his future. Questions of capacity are thus both "*issue-specific*" and "*time-specific*": Johnston v Financial Ombudsman Service [2025] EWCA Civ 551 per Baker LJ at §39.

67. Whether someone is or is not capable of understanding the issues on which his consent or decision is likely to be necessary during proceedings is to be assessed on the assumption that he will receive a "*proper explanation from legal advisers and experts in other disciplines as the case may require*" (Masterman-Lister v Brutton and Co [2002] EWCA Civ 1889 per Chadwick LJ at §75), and that "*all practicable steps are taken to help the person concerned make the relevant decision*" (V v R at §10).

68. In the recent case of Meric v Navis [2025] EWHC 759 (KB), Bright J noted (at §96): "*…the mere fact that* [a person] *holds delusional beliefs is not sufficient for him to demonstrate a lack of mental capacity under MCA 2005… What matters is whether, because of this, he is unable to make decisions within ss.2 and 3 of the MCA 2005*".

69. A person who lacks capacity under the MCA will be a "*protected party*" under CPR Rule 21, and must have a litigation friend in order to conduct proceedings. The position is the same for family proceedings: see the Family Procedure Rules at Rule 15.2. Practice Direction 15B, at §1.3, states: "…*where a person has an identified difficulty such as a learning difficulty or a mental illness, that difficulty should not automatically lead to an investigation about that party's capacity to litigate*".

70. The Law Society has published guidance entitled "**Meeting the needs of vulnerable clients**". The Defendant referred to this guidance in the Decision. In particular, it quoted that part of the document which stated: "*Under paragraph 3.4 of the SRA's Code of Conduct…, you must consider and take account of your client's attributes, needs and circumstances. As such you must satisfy yourself about their capacity if you have any doubts about whether your client has the capacity to give instructions* [emphasis added]." That guidance also cross-referred to a separate Law Society document entitled "**Working with clients who may lack mental capacity**". However, Mr Kosmin confirmed that the Defendant did not have regard to that latter document.

The law: Irrationality

71. In the recent case of R (KP) v Secretary of State for Foreign, Commonwealth and Development Affairs [2025] EWHC 370 (Admin), Chamberlain J said this:

> "55. In most contexts, rationality is the standard by which the common law measures the conduct of a public decision-maker where there has been no infringement of a legal right, no misdirection of law and no procedural unfairness. It encompasses both the process of reasoning by which a decision is reached (sometimes referred to as "process rationality") and the outcome ("outcome rationality"): see e.g. R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, [98] (Leggatt LJ and Carr J).
>
> 56. Process rationality includes the requirement that the decision maker must have regard to all mandatorily relevant considerations and no irrelevant ones, but is not limited to that. In addition, the process of reasoning should contain no logical error or critical gap. This is the type of irrationality Sedley J was describing when he spoke of a decision that "*does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic*": R v Parliamentary Commissioner for Administration ex p. Balchin [1998] 1 PLR 1, [13]. In similar vein, Saini J said that the court should ask, "*does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion*?": R (Wells) v Parole Board [2019] EWHC 2710 (Admin), at [33].

> 57. Outcome rationality, on the other hand, is concerned with whether – even where the process of reasoning leading to the challenged decision is not materially flawed – the outcome is "*so unreasonable that no reasonable authority could ever have come to it*" (Associated Wednesbury Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, 233-4) or, in simpler and less question-begging terms, outside the "*range of reasonable decisions open to a decision-maker*" (Boddington v British Transport Police [1999] 2 AC 143, 175)."

Irrationality and capacity - Discussion

72. I remind myself of the principles set out above, and the wide latitude which Parliament has undoubtedly given the Defendant to decide what, in its view, is fair and reasonable in all the circumstances of a particular case.

73. Despite the excellent submissions made by Mr Kosmin and Mr Davidson, and the high hurdle required for a finding of irrationality in this context, I am unable to accept that the conclusions about capacity in the Decision were rational.

74. First, I consider that the Decision *did* conflate indications of *mental health conditions* with indications of a lack of *capacity,* or at best failed to keep the critical distinction between those concepts in mind. §1.14 of the Decision specifically recorded that "*it was clear from the outset that (as I have outlined in §1.3)* [the IP] *was suffering from mental health issues from the first meeting on* [8] *September 2020*…". But the mere fact that the IP had "*mental health issues*" begs an important question. In my Judgment the Defendant needed to address and explain, at minimum, whether those "*issues*" had consequences such as to require a reasonable solicitor to have doubts about the potential client's capacity, and if so why.

75. Secondly, the Defendant in its Decision placed reliance on three particular facts as justifying the view that the Claimant should have done more to assess the IP's capacity at the outset of the retainer: (i) the fact that the IP had been "*referred to a psychiatrist*"; (ii) the fact that she was *"taking amphetamines*", and (iii) the fact that she *"had suspected psychosis*". However:

    i) Being referred to a psychiatrist does not of itself indicate anything about capacity. There are a multitude of reasons for seeing a psychiatrist. Many people receiving assistance from a psychiatrist are likely to have capacity to seek and receive legal advice.

    ii) The IP was taking amphetamines for her ADHD. Again, being diagnosed with or treated for ADHD does not come close to indicating a loss of capacity.

    iii) The reference to the IP potentially having "*psychosis*" in the 8 September 2020 Attendance Note was a reference to an allegation being made *by the IP's*

husband. That was, in my Judgment, important and should not have been ignored in any rational analysis of the question of capacity. The IP had told the Claimant that her mental health was being weaponised against her by her husband. Indeed, the context was one in which each party to the marriage was accusing the other of being an unsuitable parent. It was not reasonable, in this context, for the Defendant to rely on the notion that there was a "*suggestion*" of psychosis at the 8 September 2020 meeting (as though that suggestion was coming from a medical professional, or arose from the conduct of the IP herself at the meeting).

76. Thirdly, there is no evidence that the Defendant had regard to or grappled with the following relevant considerations: (i) that the IP had consulted the Claimant on an urgent basis, as a respondent to proceedings very recently commenced by the husband; (ii) that divorce and family proceedings often involve individuals who present from the outset as distressed, emotionally raw, depressed, or even (in some cases) delusional; (iii) that the IP was alleging that her child had been sexually abused, and that she was being controlled or manipulated, by the husband, and that the IP had given the Claimant reasons for holding these beliefs; or (iv) that Ms Khan concluded, in early September 2020, that she could not simply dismiss those allegations out of hand, and told the Claimant that she believed her, although she also knew (and advised) that they would be very difficult to prove. These were in my Judgment obviously relevant considerations. They ought at least to have been considered and addressed, if the Claimant was going to be held to have acted improperly or inadequately. They were not.

77. Fourthly, the Decision does not explain why it was not "*adequate*" or "*reasonable*" for Ms Khan, an experienced family law practitioner, to have considered the IP's mental health for herself, to have considered that the IP did have capacity albeit she was in distress and had some mental health issues, and to have checked her own view with that of leading counsel.

78. I can see no rational explanation in the Decision for the suggestion that an "*expert*" opinion on capacity was necessary, as at early September 2020. However, in due course, the Claimant did consult an expert. On 13 October 2020 she spoke to the IP's psychiatrist, Dr Dannhauser. He advised that while the IP clearly had some mental health issues (anxiety, depression, and ADHD), and he was by that point concerned about her "*turning*" psychotic, she had not in fact shown "*any psychosis*" in or around mid-September, and that it was still the case, as at 13 October, that she could "*parent well*". This was not sufficient, according to the Defendant (§1.8), because Dr Dannhauser's 9 October 2020 letter had confirmed that "*there was an issue of mental health and if there wasn't, I am not sure why at that point* [the IP] *was taking amphetamines and was seeing a psychiatrist if a mental health condition was not present*". This passage of the Decision is in my view a clear example of the errors in logic or reasoning which are described in the cases about irrationality (see at §71 above). The logic is, with respect, difficult to follow. The evidence before the Defendant had made it clear that the IP was taking amphetamines for her ADHD. More fundamentally, the Defendant's focus in this passage is on the wrong issue (i.e. whether or not the IP had "*an issue of mental health*" or "*a mental health condition*" when she instructed the Claimant).

79. Finally, while I am unable to accept the Claimant's broader submission that it was "*irrational*" for the Defendant to have concluded that the IP had in fact lacked capacity "*since August 2020*" - since that very proposition is a permissible interpretation, if not the only possible interpretation, of what Dr Isaacs ultimately said in his 4 December 2020 capacity certificate - I do not think that this saves the Decision from being irrational in the respects I have identified. The criticism of the Claimant in this part of the Decision relates to how the Claimant assessed the IP during September and October 2020, by reference to how she had presented in the initial meetings, the views of counsel, and the views of her own psychiatrist, Dr Dannhauser. It is important not to let hindsight colour an appropriate assessment of the rationality of that criticism.

80. I go back to the statute, the rules and the case law and ask myself whether I am subjecting the Decision to an unduly formalistic analysis, or construing it like a statute or Judgment, or otherwise imposing an unduly demanding standard of review. I do not consider that I am. To my mind, the flaws in the Decision to which I have referred are fundamental, and expose them as irrational in the required sense.

Irrationality and cost updates - discussion

81. The Claimant also contended that the Defendant's decision to uphold the complaint about its cost updates was irrational because it "*disregarded*" evidence of costs updates being provided to the IP which were "*not in a formal standalone communication*". However:

    i) The Defendant's operative finding about costs updates was highly specific: it was that the Claimant on two particular occasions had told the IP that the costs budget for her case had been substantially exceeded, but on each occasion this was inadequate; it should have informed and explained the costs position to the IP at an earlier stage.

    ii) In particular, at §2.20 of the Decision, the Defendant stated that that the IP was originally told that her costs would be £43,500; that the agreed costs of £43,500 were exceeded on or around 7 October 2020; and that the IP was only told that her costs were now in excess of £65,000 on 19 November 2020.

    iii) Similarly, §2.21 of the Decision records that the IP was only told that her costs had now reached and passed £89,000 on 22 December 2020.

    iv) The Defendant's view was, in essence, that failing to keep the IP informed of the fact that the initial budget for fees had been exceeded until long after the event amounted to poor service.

    v) Other than by arguing that the entire Decision was infected by the Defendant's unlawful approach to capacity, the Claimant has not specifically provided the Court with any reason to think that those particular findings were in themselves irrational. I do not consider that they were.

Other JR Grounds: "Remit"

82. The contention that the Defendant "*exceeded its remit*" under what was originally Ground 1 is not, in my Judgment, sustainable.

83. Many of the particulars set out in relation to Ground 1 at SFG §32(a) were, on analysis, complaints that the Decision was irrational. I have already addressed those complaints above.

84. The remaining aspects of Ground 1 are (a) the Claimant's contention that the Defendant exceeded its remit in the sense that it ought not to have been considering issues relating to the IP's capacity, or issues about costs, in the first place, because those were issues for the Court; and (b) the Claimant's contention that the Defendant exceeded its remit by reversing the burden of proof (since capacity is something that under MCA 2005 s.1 must be assumed unless the contrary is established).

85. I am unable to accept either of those contentions. As to the first point, the very purpose of the scheme is that the Defendant can look at matters which could, but for the scheme, be considered at by a Court. I see no reason why the Defendant cannot consider a complaint that a solicitor has wrongly failed to look after a vulnerable client, or has failed properly to consider her capacity where that has become necessary. It is not correct or fair to suggest that the Defendant, in doing so in this case, was "*taking on the role of psychiatrist*".

86. Nor is there any good reason why a complaint about overcharging, or providing insufficient information about fees, should have to wait, as the Claimant suggested, for a costs assessment to be undertaken, or for the determination of a breach of contract claim. The Claimant's reliance on Stenhouse v Legal Ombudsman [2016] EWHC 612 is in this respect misplaced. Stenhouse was a case in which the lack of jurisdiction arose from the fact that the Ombudsman's findings about certain matters had not related to any of the complaints which had actually been made: see per Coulson J (as he then was) at §67.

87. As to the second point, I do not consider that the Defendant reversed the applicable burden of proof, as alleged. In any event, this seems to me to be a good illumination of the principle that the Defendant is not bound to apply the law, i.e. bound to transpose a legal standard from one context into the different context of deciding what is fair and reasonable overall. The MCA 2005, s.1, does indeed say that capacity should be assumed, unless the contrary is established. But it does not follow that the Defendant is not entitled to take a nuanced approach to the concept of poor service, and approach a complaint such as the one that was made in this case on the basis that law firms ought to be in a position to satisfy themselves of capacity in a reasonable manner, where a client's capacity is in doubt.

88. Ground 1 therefore fails.

Other JR Grounds: "Discrimination"

89. Ground 2 is that the Defendant "*unfairly discriminated against* [the Claimant] *by making a swingeing award which is disproportionate to its turnover and will*

decimate it; further severe hardship will be caused by having to seek judicial review". (SFG, §32(b)).

90. Ms Lindfield did not, in her written or oral submissions, seek to develop the suggestion, under Ground 2, that there was any differential treatment of the Claimant on a prohibited, impermissible or irrational ground (or a "*discriminatory practice*", as her skeleton argument had put it). She was right not to do so. There is no evidence at all of discrimination in that sense.

91. Ms Lindfield focussed instead on the contention that the award was disproportionate *to the size or turnover of the firm*. However, the latitude described in the cases to which I have referred applies just as much to the Defendant's approach to the *quantum* of the award as it does to whether the *substance* of the complaint should be upheld. The true question for the Court, under this Ground, is not I think whether the award "*was proportionate*" to the small size or turnover of the firm. It is whether the award *irrationally failed to take into account* the small size or turnover of the firm.

92. In my Judgment, it did not. The Defendant would have been entitled, if it had considered this fair and reasonable in the circumstances of the case, to have taken into account the size or other characteristics of the Claimant law firm. But it does not follow that it was irrational not to do so. The Defendant was rationally entitled to base its overall award on other factors.

93. There is no other pleaded attack on the Defendant's approach to calculating the award. Ground 2 therefore fails.

Conclusion, and relief

94. Of the three JR Grounds for which permission was granted:

    i) Ground 5 (irrationality) succeeds, to the extent I have indicated.

    ii) Ground 1 (remit) fails.

    iii) Ground 2 (discrimination / proportionality) fails.

95. The JR claim therefore succeeds in part.

96. In a draft of this Judgment circulated to counsel I invited written submissions on consequential matters. In the event I received submissions on (i) relief, (ii) costs, and (iii) permission to appeal. I deal with these issues here.

97. Relief. The Defendant submitted, in summary, that I should only quash the finding that the Claimant failed adequately to assess the IP's capacity, but I should leave untouched the rest of the Decision, and in particular the decision to award the IP the sum of £35,500, because that was a distinct remedy for the complaint insofar as it related to cost updates, and no specific challenge to that aspect of the decision has been upheld. Alternatively, the Defendant suggested, I could make no quashing order at all, but instead make a declaration that the relevant finding was irrational.

98. The Claimant's position, in summary, was that the entire Decision should be quashed on the basis that, had there not been an irrational conclusion about capacity, the Defendant would not have taken such a dim view of the Claimant's conduct overall, and would not have imposed such a high penalty. The Claimant argued that passages in the Defendant's provisional decisions suggested that there was a significant overlap, in the Defendant's mind, between the various aspects of the Decision. The Claimant also invited me to order that any consideration of the complaint must be carried out by an ombudsman other than Ms Vaughan.

99. I consider that the Defendant is broadly right about relief. The only aspect of the case that has succeeded is the Claimant's challenge to the finding that it failed to assess the IP's capacity adequately. The award to the IP of £15,692.60 is on any realistic view affected by that, and falls to be quashed, as well as the finding itself.

100. The award of £35,500 is not, however, 'infected' by the irrational aspects of the decision that I have described, as the Claimant suggests. It is a stand-alone finding, in the final analysis (see §§29(iii) and 30(1) above) squarely based on the Defendant's view that the Claimant did not provide the IP with timely costs updates. That finding has not been successfully challenged as having been unlawful. I do not consider that it would be right to quash the whole Decision. I would not in any event accept Ms Lindfield's submission that the Court should dictate to the Defendant who, within its organisation, should and should not make such further decisions in this matter. Such a course might have been appropriate had I upheld the suggestion that Ms Vaughan had predetermined the decisions she needed to make, but I have rejected that contention (see §45(ii) above).

101. The quashing order will say this: "*the Decision is quashed in respect of the Defendant's finding that the Claimant failed adequately to assess the IP's capacity, and in respect of the Defendant's decision to award the IP compensation in the sum of £15,692.60 as a result of that finding.*"

102. I decline to make any declarations. The quashing order, along with this Judgment, speaks for itself.

103. Costs. The Claimant has applied for all of its costs, on the standard basis, in the sum of £47,590 (including VAT). The Defendant contends that there should be no order as to costs. Both sides strongly argued for a summary assessment in the event of any costs order.

104. My decision is that the Defendant should pay the Claimant £19,036 (including VAT) by way of costs. My reasons are as follows:

    i) The Claimant has succeeded, but on a significantly narrower basis than sought. Ground 5 has succeeded, in part. All the other grounds have failed.

    ii) The debate between the parties about whether the Defendant's approach to the Claimant's assessment of capacity was rational took up the majority of the Court's time. The Claimant's position on that issue has been vindicated. It would be fair to say, in broad terms, that the Claimant has won.

iii) If the analysis were to stop there, I would award the Claimant 60% of its costs.

iv) However, the costs order also needs, in my Judgment, to reflect the Court's disapproval of the Claimant's failure to have filed the relevant evidence in this case at the appropriate time - a failure which led to the substantive hearing on 6 March 2025 being adjourned, causing cost and delay to the other parties, and inconvenience to the Court: see §§37-42 above.

v) The costs award sought by the Claimant is plainly inappropriate in any event in that it covers work carried out on applications to adduce evidence which partly failed, and other work on bundles which ultimately needed to be replaced because of the failings identified by the Court at the 6 March hearing. Those costs should not on any view be recoverable.

vi) Looking at the matter in the round, the fair and proportionate costs outcome in my Judgment is that the Claimant should be awarded 40% of the costs sought, on the standard basis, i.e. £19,036 (including VAT).

105. Permission to appeal. The Defendant has asked me to grant permission to appeal to the Court of Appeal on three proposed grounds. Ground 1 is that my findings of irrationality are inconsistent with the finding of rationality at §79. Ground 2 is that I have wrongly required the Defendant to apply the law on capacity rather than simply decide what is reasonable. Ground 3 is that in various respects my approach to the requirement of rationality has been unduly formalistic or insufficiently benevolent. Having reflected on these points and the others made in the application, I am not persuaded that there is a realistic prospect of success in the Court of Appeal; nor that there is an otherwise compelling reason for the appeal to be heard. I refuse permission to appeal.