Neutral Citation No. [2022] EWHC 2311 (SCCO)

SCCO Ref: JJ1606313
SC-2016-DAT-006201

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 24 August 2022

Before:

COSTS JUDGE JAMES

- -

Between:

MR JUGMOHAN BOODIA (1)
MRS DEORANEE BOODIA (2)

Claimants/Paying Parties

- and -

RICHARD SLADE
T/A RICHARD SLADE & CO SOLICITORS

Defendant/Receiving Party

- -
- -

Mr Mark Carlisle (instructed by **W Davies Solicitors)** for the Claimants
Mr Ben Williams QC (instructed by **Richard Slade and Co Solicitors)** for the Defendant
Hearing dates: 11 December 2020, 10 June 2022

- -

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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COSTS JUDGE JAMES

Costs Judge James:

Introduction

1. This matter was first heard as long ago as 11 December 2020 and I apologise sincerely for the lengthy delay in producing this Judgment. Several factors, including the global pandemic, have been involved, but the parties deserved the certainty of a decision much sooner than this and have been (quite rightly) anxious to hear from me. In fact, as will become clear, a further Hearing took place last week (10 June 2022) and that Hearing has moved matters forward significantly, but that is really by a side wind and in no way compensates for much less excuses the delay.

2. The application for detailed assessment was issued over four years ago, in November 2016 and relates to Bills going back to February 2013, issued under a retainer agreement entered into in January of that year. The case has already been the subject of repeated hearings in the Senior Courts Costs Office, as well as successive appeals to the High Court, the Court of Appeal and (abortively as permission was refused) to the Supreme Court: see paragraph 6 below for the substance of that Appeal.

3. On 11 December 2020 I had to deal with the 'Preliminary Issue' as defined at numbered paragraph 1 of the Order of 22 June 2020 **[139[1]]**, namely:

    a. whether the Claimants signed the Retainer with informed consent to the provisions within the retainer providing for interim statute Bills; and
    b. if they did not, whether, for this reason, the Defendant's invoices, either individually or collectively, are or are not Bills for the purposes of s.70 of the Solicitors Act 1974.

4. I was also being asked to address liability for the costs for the period from 6 December 2019 to 22 June 2020 (which were reserved in paragraph 5 of the same Order at **[140]**) and summarily to assess the Claimants' costs of the Third-Party Debt Order proceedings, including the Claimants' application to dismiss the TPDO, pursuant to paragraph 3(ii) of Master McCloud's Order of 27 August 2020 **[238]**.

5. As I understood it at the Hearing on 10 June 2022, these issues are, if not in abeyance, certainly not to be addressed in this Judgment. There was mention (as long ago as 11 December 2020) of an Appeal against Master McCloud's Order (and indeed to a stay by Swift J **[242]**). Further, both parties recognise that even this Judgment will not be the end of this matter. Therefore, there was agreement that these issues may be held over until a later Hearing, to be listed in early course. The intention is that the hand-down of this Judgment should be used as an opportunity to list and perhaps give Directions for any consequential matters (including these issues) at a convenient date.

The Preliminary Issue and whether it was still open for consideration by this Court

6. I had determined that the contract of retainer in this case allowed for the delivery of interim statute Bills (my Judgment of 17 March 2017 **[135]** and Written Reasons dated 5 June 2020 **[180]**). I had, however, decided that the Bills in question were not interim statute Bills, because of the separation of

[1] References such as these are to the PDF Hearing Bundle prepared by the Claimants.

costs versus disbursements so that a Bill to a certain date, was not necessarily a Bill for everything due and owing up to that date, I was, ultimately, overturned on Appeal and that point is therefore no longer open for argument, as I believe is now common ground between the parties.

7. The question of whether other factors operate to prevent the Bills from being interim statute Bills, remains a live issue between the parties and is one which (again, as I understand it) the Claimants wish to pursue whichever way I decide the Preliminary Issue: at the most recent Hearing Mr Mark Carlisle for the Claimants made reference to the possibility of a Chamberlain Bill, as well as the possibility of 'Special Circumstances' existing so as to enable the Bills to be opened to scrutiny even if they were interim Statute Bills. Mr Benjamin Williams QC accepts that a small number of the Bills are sufficiently proximate in time to the bringing of this claim, so that a claim under 'Special Circumstances' would be technically possible although this has yet to be argued before the Court.

8. The Preliminary Issue is as stated at numbered paragraph 1 of the Court's order of 22 June 2020 **[139-140]** and repeated at paragraph 3 above. The Defendant's original submissions (in December 2020) were that the Preliminary Issue goes to whether the Defendant's retainer allowed it to submit interim statute Bills; if 'informed consent' is a relevant consideration in these circumstances (which the Defendant disputes), the absence of informed consent would mean that the Defendant was not (in contract) entitled to render interim statute Bills.

9. A complicating factor is that the Defendant asserted that here, the Court had already decided that the Defendant's retainer did permit it to render interim statute Bills and the new point therefore cut directly across that decision and was an invitation to the Court to reverse its previous decision on a ground not previously raised, adding that (for the reasons that follow – see paragraphs 38 to 56 on Res Judicata/Issue Estoppel, Waiver and Procedure below) that was impermissible.

10. The second limb of the Preliminary Issue (per the Defendant) addressed not the character of the Bills, but to the character of the contractual relationship between the Claimants and the Defendants: was it a relationship which permitted the Defendant to raise interim statute Bills? The answer to the Preliminary Issue would turn not on the Bills, but on events antecedent to the Bills, namely the written terms of retainer, and the information available to the Claimants before it was executed: the Bills themselves need not even be looked at for the purposes of determining the Preliminary Issue.

11. Hence (per the Defendant) the Preliminary Issue went to the question of whether the Defendant was contractually entitled to render interim statute Bills, which the Court had already decided that it was and thus again the Preliminary Issue invites the Court to depart from its previous decision on a ground not previously raised. The Defendant asserted that the Claimants recognised that their new argument addressed not the character of the Bills, but the terms of the retainer, having repeatedly referred to it in shorthand as 'the *Vlamaki* point' (that being a reference to *Vlamaki v Sookias & Sookias* [2015] EWHC 3334) which was, insofar as material, concerned solely with the interpretation of a written retainer.

12. Per the Defendant, not only is this obvious from part B of the judgment (upon which the Claimants rely on for present purposes) but Walker J also states in terms, in the first paragraph of the judgment, that his conclusion turns on the true meaning of written documents, namely the retainer. It is against

this background that the Defendant contends that the Claimants' new point is no longer open to them at this level. Per the Defendant, the reference to a new Preliminary Issue involves a startling misnomer given proceedings to the threshold of the Supreme Court (on the question of whether separate Bills for Costs and Disbursements could be interim statute Bills).

13. Hence, per the Defendant, the 'so-called' Preliminary Issue is one which, if accepted, would render almost the whole of the proceedings to date nugatory as those proceedings concerned whether the Bills subject to the application constituted interim statute Bills as a matter of law, to which the Court of Appeal answered that they did. The Preliminary Issue essentially contends that that enquiry (going as far as the Supreme Court) was otiose since, whether the Bills were or were not interim statute Bills, the Defendant had no contractual right to render them (as the Claimants never gave 'informed consent' to the Defendant's contractual right to raise interim statute Bills).

14. Per the Defendant, this argument would be legally and factually wrong as no test of 'informed consent' applies before clients are contractually bound by their Solicitors' terms of appointment and as such, ordinary contract law applies: here the Claimants freely entered into a contract which allows interim statute billing, plus the relevant contractual terms were made clear to the Claimants so that there is no arguable issue of a lack of informed consent on the facts in this case.

The Question of Informed Consent and Fiduciary Duty – Defendant's case

15. Per the Defendant, the Claimants' Preliminary Issue is misconceived as the issue of informed consent has no place in determining whether the terms of a retainer are effective. 'Informed consent' is an issue which arises in the law of fiduciary obligations and in certain transactions with a fiduciary, 'informed consent' is necessary for the transaction to be effective, due to the usual principle that a fiduciary cannot place itself in a conflict of interest with, or make a profit from its fiduciary relationship with, its principal. A principal (here, the Claimants) can nonetheless allow these things, but will only be bound by its agreement to do so if the fiduciary (here, the Defendant) has given it disclosure of all material which is relevant to that decision.

16. In the context of liability for Solicitors' costs, 'informed approval' has been held to be necessary before a Solicitor can avail itself of the presumptions of reasonableness in CPR 46.9, or (in *Belsner v Cam Legal Services* [2020] EWHC 2755, a case which is still – as I understand it - subject to appeal) before a client is bound by an agreement to contract out of s 74(3) of the Solicitors Act 1974 (which otherwise places a statutory limitation on costs payable for county Court business).

17. However, per the Defendant, 'informed consent' had never been required to the initial terms of a Solicitor's retainer, because the agreement of those terms both precedes and defines the fiduciary relationship. A Solicitor is not acting as a fiduciary when initial terms are agreed, hence ordinary contractual principles apply, subject of course to the Solicitor discharging its obligations under the SRA Codes of Conduct (referring to *Cook on Costs*, §1.1).

18. The most elementary principle of a fiduciary relationship (per the Defendant) is that the fiduciary must subordinate its interests to its principal's interests and cannot allow any conflict of interest to develop. These requirements would be completely unattainable were fiduciary obligations to apply where a

putative fiduciary is negotiating the terms on which it is prepared to accept such an appointment, especially its terms as to remuneration. The Defendant went on to submit that the scope of a fiduciary's obligations is defined by it terms of appointment: *Kelly v Cooper* [1993] AC 205, 213H-215D.

19. The Defendant submitted that it is trite that the default legal position is that trustees and other fiduciaries are not entitled to profit from their position (but added that the commercial world is full of very well-paid fiduciaries – Solicitors being an obvious example). This is no breach of their fiduciary positions, as it is authorised by their terms of appointment, a separate source of authority from informed consent obtained subsequent to the fiduciary obligations arising: *Snell's Equity*, 34th ed, §7-042.

20. The Defendant submitted that its retainer is clear: it was entitled to submit monthly, final Bills and the Claimants signed their agreement to these terms and, as such, are bound by them. No issues of informed consent arose, but even if they had, what information would the Claimants say that they were not given? The Defendant's retainer expressly states a right to render Bills and the right to assessment thereof, and each interim statute Bill rendered also gave notice of that right.

21. If the Claimants' case is that, because the default position at common law is that a Solicitor cannot submit interim Bills, the Defendant was under an obligation to explain that in order to enable the Claimants to seek alternative terms elsewhere. Per the Defendant, any detailed written contract will entail a departure from the common law position, otherwise it is pointless; its purpose is to set out the specific terms upon which the parties have agreed. Here, the Defendant stipulated for monthly Bills, and the Claimants agreed to that; it was always open to them to seek other terms elsewhere. Furthermore, where informed consent is required, a party is obliged to explain the facts, not the law: cf *Knight v Frost* [1999] BCC 819, 828. Here, the fact (of interim Billing) was fully explained, the law (of what that meant re: time limits) was not but, presumably, did not need to be.

22. Hence, per the Defendant, even if the informed consent issue were open to the Claimants, it would fail both legal and factually. Legally, there is no requirement for informed consent before a Solicitor's terms of appointment are binding, as those terms pre-date, and define, the scope of the fiduciary relationship, and factually, these Claimants were given a sufficiently clear explanation of the relevant Billing terms.

The Question of Informed Consent and Fiduciary Duty – Claimants' case

23. Per the Claimants, whether or not the Bills delivered are (as a matter of fact and law) to be treated as interim statute Bills, is dependent upon (inter alia) the Claimants' state of knowledge both at the time of entering into the retainer and at the time that the Bills were actually delivered. The Claimants' state of knowledge includes the proposition that (regarding costs in contentious business) the default position is that a final Bill cannot be rendered until the business is completed.

24. Hence it is trite law that all retainers include the potential for delivery of interim statute Bills, either under the *"natural break"* principle or by agreement, but that neither is determinative. Whether Bills purportedly delivered as interim statute Bills are properly construed as such is dependent upon a range of both statutory and common law tests, including the state of knowledge of the clients (informed or uninformed).

25. The Claimants cited from a line of cases on this issue, including *Davidsons v Jones Fenleigh [Costs LR (Core Vol) 70* per Roskill J at **p75** (requiring a Solicitor to *"…make it plain to the client either expressly or by necessary implication that…his purpose of sending in that Bill for that amount at that time* [is so that he can]…*require that Bill to be treated as a complete self-contained Bill of costs to date."* They also cited *Abedi v Penningtons* [2000] Costs LR205 per Lord Justice Simon Brown at **p14,** referring to the judgment in *Re Romer & Haslam* and especially the assertion that, *"Kay LJ reached his conclusion on the basis that 'the intention of both parties was that [the Bills] should be treated as items in statements of account ...'"*

26. Adams v Al Malik [2014] 6 Costs LR 985 per Fulford J at **48** was cited *"…the Solicitor must make it plain to the client that the purpose of sending the Bill at that time is that it is to be treated as a complete self-contained Bill of costs to date (see the judgment of Roskill LJ in Davidsons v Jones-Fenleigh [1980] 124 SJ 204)."* Also cited was *Bari v Rosen* [2012] EWHC 1782 per Spencer J at **para 17** *"Even if there was a contractual right to issue interim statute Bills, it would be a question of fact whether any individual Bill issued to the client was a statute Bill. If there was no contractual entitlement to issue an interim statute Bill, any interim Bill issued could be no more than a request for payment on account"*

27. Great reliance was placed upon *Vlamaki v Sookias and Sookias* [2015] EWHC 3334 (QB) and the Claimants cited an extensive extract from Walker J at **paras 15 – 16** *"In accordance with established principles, I interpret the terms of the contractual retainer by reference to the agreement as a whole and by reference to the factual matrix at the time of the agreement. In addition, I have regard to two concessions which were properly made by Mr Mallalieu: (1) if there were an ambiguity on a fundamental aspect of the terms and conditions that cannot otherwise be resolved then the ambiguity is to be determined against the Solicitors; and (2) the factual matrix was that Mr Mallalieu's client was a firm of Solicitors while Dr Vlamaki was not a lawyer. These concessions reflect the approach taken by Spencer J in* Bari v Rosen. *In that case ambiguities in the retainer were resolved against the Solicitors, with the result that an entitlement to render Bills which the Solicitor required to be paid "by return" was not an entitlement to render interim statute Bills. In reaching that conclusion Spencer J noted the observations of Master Leonard cited above. Those observations underscore the impracticality and unfairness to a client if a retainer has the effect that interim Bills are final in relation to the period that they cover, with resultant drastic limitations on the ability of the client to make use of statutory provisions for assessment. Thus, for example, a client who followed the complaints procedure in clause 11.4 of the present retainers would, without knowing it, be giving up the statutory right to taxation within 1 month of delivery of the Bill. These drastic limitations, and the inevitable recognition of the factual matrix found in concession (2) above, in my view constitute sound reasons for strictly applying concession (1) above. Application of such a concession carries with it a corollary: unless the retainer makes it unambiguous, the client will not be able to say that under the retainer Bills are final in relation to the period that they cover. However, that corollary, to my mind, is unlikely to cause injustice to either side.*

28. The Claimants asserted that, although not binding on this Court, the principle had been applied in a number of decisions, in such a way as to either (a) find that no statute Bill at all has been delivered, or (b) to construe Bills as being a series of on account Bills to be treated for the purpose of assessment as

a *Chamberlain* Bill; the first of those cases was that of *Erlam v Richard Slade & Company Plc* (being a retainer which was for all material purposes the same as the retainer in the instant case – the Defendant in both cases is essentially the same firm and the retainer is the firm's usual retainer as I understand it). Per the Claimants, the principle of a client's *"informed consent"* to the terms of a retainer being required in order for it to be binding, underlies all of these decisions, and is now well established (albeit in differing contexts) in *Macdougall v Boote Edgar Esterkin* [2001] Costs LR 118, *Herbert v HH Law Limited* [2019] EWCA Civ 527 and *Belsner v Cam Legal Services Ltd* [2020] EWHC 2755 (QB).

29. The Claimants assert that these cases demonstrate that the Court can and does intervene in the contractual arrangements between Solicitor and client, where they have been entered to into without the informed consent of the client. The ability of the Court to intervene in terms as to costs as between Solicitor and client, even to the extent of setting aside such terms altogether, forms an express part of the primary legislation in the context of Contentious Business Agreements – see Solicitors Act 1974, s.61(2). It would be illogical (say the Claimants) to conclude that the Court could intervene in a CBA (the statutory purpose of which was to reduce the client's right to assessment) but could not do so in the circumstances of the Claimants' case.

30. The Claimants asserted that the words of Mr Justice Lavender at paragraphs 68 to 69 of the judgment in Belsner articulate (possibly for the first time) the principle that underlies such interventions: *"I do not consider that this appeal can be determined by a simple comparison between the wording of CPR 46.9(2) and (3). The requirement for informed consent which applies in cases under CPR 46.9(3) does not arise because of the use of the word "approval" rather than the word "agreement". The requirement for informed consent arises because of the fiduciary nature of the relationship…It goes without saying that an agreement for the purposes of CPR 46.9(2) must be a valid and enforceable agreement. It follows, for example, that an agreement procured by fraud or misrepresentation would not suffice. Nor, obviously, would an agreement whose performance would involve a breach of fiduciary duty. To that extent, therefore, CPR 46.9(2) requires informed consent."*

31. There were submissions regarding Contractual duties; paragraph 37 of the retainer confirms that the Defendant is subject to the rules and principles of professional conduct; per the Claimants, those rules and principles are thus incorporated as contractual duties. As to Regulatory duties, the SRA Code of Conduct was relied upon by the Claimants, stating that, under the Code, the Defendant was obliged to do various things. These included only entering into fee agreements with clients that were legal, and which the Defendant considered suitable for the client's needs/took account of the client's best interests; informing clients whether and how the services the Defendant provides are regulated and how this affects the protections available to the client; ensuring that clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them and ensuring that clients are informed of their right to challenge or complain about a Bill and the circumstances in which they may be liable to pay interest on an unpaid Bill; as well as the Code the Claimants relied upon indicative behaviours which (they asserted) had not been shown here.

32. As to Fiduciary duty the Claimants relied upon *Matthew v Bristol & West Building Society* [1996] EWCA Civ 533 per Lord Justice Millett at **page 18** stating that *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise*

to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

33. The Claimants case was that any failing on the part of the Defendant to ensure that the Claimants consented to the terms of the retainer (such that they purported to depart from the default position of a statute Bill at case end) on an informed basis would amount to a breach of one or more of the above duties and would render any agreement for the delivery of interim statute Bills invalid and/or unenforceable. They asserted that the Court of Appeal in *Herbert v H H Law* made it clear that the burden of showing informed consent lies with the Solicitor (and that Lavender J had followed that in *Belsner*). They asserted that this principle was consistent with the general principle (in cases where the nature of a Bill is disputed) that the burden of establishing that a Bill is a statute Bill lies with the Solicitor.

Evidence

34. The evidence relied upon by the Defendant included the evidence of Mr Richard John Homewood dated 20 July 2020 **[222]**; per the Claimants, RJH gave background information but did not say that he advised the Claimants with regard the retainer. Nor did he say that he explained the concept of an interim statute Bill, nor that he explained to the Claimants what rights they were dispensing with, in an agreement that purported to provide for interim statute Bills. His only express recollection was of a discussion in respect of the hourly rates. Per the Claimants, the high point of RJH's evidence (para 12) is that he *"was aware that the Claimants had had previous dealings with Solicitors' firms and were familiar with the concept of the retainer and what it would cover"*

35. The Claimants relied on their own witness statements in rebuttal; second Claimant at **[226]** and first Claimant at **[236]** asserting that the second Claimant (Mrs Boodia) gave clear evidence that she had no knowledge at the time of the retainer of time limits under the Solicitors Act (para 11) nor of the law or procedure under the Solicitors Act (para 12); she asserts that there was no discussion of any term of the retainer other than hourly rates (para 13) and that, had it been explained to her that the purported terms were a departure from the default "Bill at case end" position, she would have gone elsewhere (paras 17 - 19); it is stated that she justifies why she would have taken that decision. The note on each invoice referring to potential rights under the Solicitors Act was not (she asserts) drawn to her attention at any point, or specifically when, during the course of the retainer she voice concerns over the level of fees (para 22).

36. Per the Claimants, the Defendant has not filed any evidence in response pursuant to paragraph 2(c) of the Order **[140]**, nor has it sought permission to cross-examine either Claimant and (per the Claimants) the Defendant's evidence does not come close to showing that the Claimants entered into the retainer on the basis of informed consent. If there were any doubt the Claimants' evidence, which is unchallenged, confirms that that is so and that had a proper explanation been proffered, the Claimants

would have gone elsewhere. Their evidence further confirms that, even during the course of the retainer when complaints as to Billing were made (which would have been the opportunity for the Defendant to address any ambiguity), the purported status of the Bills and consequent time limits were not brought to their attention.

37. Thus, per the Claimants, the Defendant failed to satisfy the burden of proof (on informed consent) and the Bills should be construed per paragraph 1 of the Claim Form **[3]** as a Chamberlain series in the sum of £207,609.46 delivered on 6 October 2016. The Court was asked to make an Order for Detailed Assessment thereof under s.70 of the Solicitors Act 1974.

Barriers other than 'Informed Consent' (Defendant's case):

38. Per the Defendant, whilst the points on 'informed consent' were sufficient to dispose of the Preliminary Issue on its merits, they are not the only objections, as there are three antecedent barriers to the point which are each submitted to be insurmountable. These are stated as follows:

Res Judicata/ Issue Estoppel

39. The Preliminary Issue is *res judicata*, being precluded by an issue estoppel. The Court has already decided that the Defendant was contractually entitled to submit interim statute Bills, and that is not an issue which can now be re-opened. The Defendant accepted that the Court had not previously decided the Preliminary Issue which is now being advanced (referring for example to the Written Reasons of 5 June 2020 **[180-183]**). However, per the Defendant, that does not mean that the Claimants are free to advance points which are inconsistent with issues which the Court has already decided. The doctrine of *res judicata* (per the Defendant) makes this impossible.

40. As Professor Adrian Zuckerman puts it (*Zuckerman on Civil Procedure*, 3rd ed, §25.86), '*Issue Estoppel arises from the determination of discrete issues in the course of civil proceedings. A party is not entitled to advance an argument of fact or in law which conflicts with a Court determination of the same issue in earlier proceedings between the same parties.*' See also *Arnold v Natwest Bank* [1991] 2 AC 93, 105E.

41. Here, the Defendant states, the Court has already determined that the Defendant is contractually entitled to submit interim statute Bills. That issue cannot therefore be revisited in the context of a different argument but that is precisely what the Claimants' new point entails. The fact that the Claimants' argument about the terms of the Defendant's retainer now has different footings from their previous argument – *viz* the Preliminary Issue of '(un)informed consent' – is neither here nor there. Issue estoppel applies equally where a particular point could have been, but was not, raised before the relevant judicial decision was made. See *Arnold v Natwest*, p 106B-E, per Lord Keith; issue estoppel has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier.

42. In *Fidelitas Shipping v V/O Exportchleb* [1966] 1 QB 630, 642, Diplock LJ said: *"In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provision enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue.* ***They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined.*** *Their only remedy is by way of appeal from the interlocutory judgment…"*

43. This is one example of a specific application of the general rule of public policy, *nemo debet bis vexari pro una et eadem causa* [no one should be tried twice on the same issue]. The determination of the issue between the parties gives rise to an 'issue estoppel' which operates in subsequent suits between the same parties in which the same issue arises. *A fortiori* it operates in any subsequent proceedings in the same suit in which the issue has been determined.

44. In the present case, says the Defendant, it is beyond argument that the Court has already decided that the Defendant is contractually entitled to submit interim statute Bills. That was the effect of the Court's ruling of 17 March 2017, at §2. Slade J subsequently held in terms that the effect of this ruling was to find that the Defendant was contractually entitled to submit interim statute Bills: *Boodia v Slade* [2018] 1 WLR 2037, §§3, 15, 32, & 34. Neither side appealed against that aspect of the decision – and indeed the Claimants could not have done as they had expressly conceded this to be the position before Slade J herself: judgment, §15. In any event, in §11 of its 'written reasons' of 5 June 2020 **[183]**, this Court itself confirmed that it had already decided the Defendant's contractual right to submit interim statute Bills.

45. The Claimants' new point therefore entails (says the Defendant) a very clear example of an issue estoppel in the sense explained by Diplock LJ in the citation above. At an earlier hearing, the Court ruled that the Defendant had a contractual entitlement to raise interim statute Bills. The Claimants now seek to revisit that issue by raising a new argument – that in fact this contractual right did not arise, this time because of a lack of informed consent. That manifestly entails revisiting an issue that has already been adjudicated and the 'so-called' Preliminary Issue should therefore fail on this ground alone.

Waiver

46. The Defendant asserts that a second barrier is that the Claimants did not challenge the ruling that the Defendant was contractually entitled to submit interim statute Bills and proceeded immediately to a point that was logically after that issue, namely as to whether the Bills submitted (in accordance with that contractual right) were in fact statute Bills. That must have entailed accepting that the Bills in question were validly delivered under the Defendant's retainer as it would be absurd to spend more than two years debating whether the Bills delivered by the Defendant were in fact statute Bills (to the point where the Supreme Court refused the Claimants' application for PTA on 22 May 2019) if the Defendant's very right to deliver interim statute Bills remained in contention.

47. The Claimants accepted the Court's initial ruling that the Defendant was entitled to submit interim statute Bills and moved to the logically posterior argument of whether the Bills submitted were in fact statute Bills in light of their content; this issue consumed very significant resources, including judicial resources and having lost that issue, the Claimants cannot now return, with a new argument, to the antecedent issue of whether the Defendant was entitled to submit interim statute Bills in the first place. By pursuing the logically subsequent argument, the Claimants necessarily waived any right to challenge the right to deliver statute Bills.

48. It is a settled principle of the law that you cannot approbate and reprobate – that you cannot pursue an argument based on one premise, fail, and then revert to a different argument with a contrary premise. As Sir Nicholas Browne-Wilkinson V-C stated in *Express Newspapers v News Ltd* [1990] 1 WLR 1320, 1329G: *"There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."*

49. That (says the Defendant) is precisely what has happened here; the Claimants raised an issue about the contractual right to deliver interim statute Bills, lost it, and moved on the next issue concerning the legal classification of the Bills in fact delivered (on which it is stated that they blew very hot indeed). Having in turn lost that issue, they cannot now return to the cold embers of the first issue and try to blow them hot again.

Procedure

50. Per the Defendant, related to the two previous points, the points now being raised by the Claimants are ones which could, and manifestly should, have been advanced at the outset of these proceedings, in foot with the Preliminary Issues determined by the Court in its judgment of 17 March 2017 which was thereafter subject to the appeals referred to above. It is too late to raise a further Preliminary Issue some 45 months later (on conventional CPR timing principles) and is positively abusive to do so, in the *Henderson v Henderson* sense, in circumstances where the Preliminary Issue now raised goes to precisely the same issues as those previously raised and determined.

51. For these reasons, the Claimants' latest Preliminary Issue was said by the Defendants to be bad on its own merits and a point which simply cannot be entertained at this stage of the proceedings; the Court was invited to dismiss it, and proceed to determine the application for detailed assessment in light of the Court of Appeal's ruling that each of the Bills subject to the application is a self-contained statute Bill.

52. The CPR place great emphasis on promptness and economy. The protection of Court resources is also a point of particular importance. Hence the cardinal insight of the CPR (since further strengthened by

cases like *Mitchell* and *Denton*) that in making its case management decisions, the Court does not only have in mind the interests of the parties before it, but the interests of Court users as a whole. For these reasons, Courts are far more conscious than they once were about issues of timing. Parties should set forth their case, cards face up, at an early stage.

53. Per the Defendant, the Courts are now impatient of late reformulations. See *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735, §§68-74, where the vivid language of an earlier case in the following terms was approved by the Court of Appeal: *"In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) "mucked about" at the last moment. Furthermore, the Courts are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales."*

54. Per the Defendant, this is an attempt to introduce what is improbably described as a new Preliminary Issue in a case which has been extant for over four years, and an issue that is, moreover, on any view very closely related to Preliminary Issues the Court has already decided and could unquestionably have been decided along with those Preliminary Issues at an earlier stage. Worst of all, if the point raised by the Claimants were accepted, it would mean that the whole course of this litigation to date was pointless – including significant time spent by justices of the High Court, lords justices of appeal and justices of the Supreme Court in determining the status of Bills which, if the Claimants' new point is correct, were always invalid as statute Bills whatever their content. Accordingly, as a simple matter of timing (which Mr Carlisle fairly accepted was a live issue in his note of 21 June 2020 – see §4 **[163]**), the present point should be excluded.

55. The Defendant however goes further. The issue now raised does not simply fall into the category of unacceptably late points in the *Swain-Mason* sense. It is a *Henderson v Henderson* abuse of process. It is an attempt to litigate an issue which clearly should have been advanced as part of the earlier challenges to the Defendant's invoices as statute Bills, as it is inextricably linked to issues which the Court has already heard. The principle in *Henderson* is well-known. Coulson J summarised it in *Seele Asutria v Tokio Marine* [2009] EWHC 255, §21, as follows: '*Henderson v Henderson is authority for the proposition that the Court 'will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case*'.

56. In the equally well-known restatement of the *Henderson* principles in *Johnson v Gore Wood* (cited by Coulson J, *loc cit*, §22), Lord Bingham explained that a broad merits based judgment was required, with the underlying policies being (i) the need for finality in litigation; (ii) the principle that a party should not be vexed twice in the same cause; and (iii) the need for efficiency and economy in litigation, to protect not just the interests of the parties but the public as a whole. Applying these principles to the present case, the Defendant submits that there is no difficulty. The Claimants have already raised the issue of whether the Defendant was entitled to deliver statute Bills under his retainer. The Preliminary Issue is plainly an aspect of that issue. It should obviously have been raised as part of the

Claimants' prior case on the retainer. Allowing the Claimants to raise the issue now risks unpicking the entirety of the proceedings to date, and rendering decisions of the High Court, Court of Appeal and Supreme Court nugatory. In these circumstances, the Preliminary Issue is submitted to be an unequivocal abuse of process in the *Henderson* sense.

Erlam again

57. A (minor) contributory factor in the delay referred to at paragraph 1 above, was the question of the Court's decision at the Hearing on 22 June 2020. I endeavoured to track down a transcript of the 22 June 2020 Hearing, liaising with the SCCO clerks and with CRATU (the Court recording service); as explained during the Hearing on 10 June 2022 it was, after many weeks of trying, possible to ascertain that no BT MeetMe recording existed. In case this matter should go further, those reasons (briefly) were that the Hearing had originally been listed for a different date, and when submitting an EX107 Transcript request, the Defendant inserted the original date, rather than the actual date of the Hearing. Regrettably, when signing the EX107 I did not spot this and when CRATU indicated that there was no Hearing on that date, time was lost trying to track down a recording on the wrong date. By the time everyone began looking for a recording on the correct date, none could be found; during the early days of the pandemic BT MeetMe were only storing recordings for a short time and this one was perhaps lost during the time that the wrong date was being searched. Despite my being in Court on 22 June 2020, the automatic voice recording in Court 95 merely recorded me discussing with my clerk the fact that I would be sitting in my private room that day as I was awaiting a visit from RCJ IT Support and therefore, regrettably, there is not even a 'second-hand' recording in existence.

58. Be that as it may, matters took a turn when the above referred-to first-instance case of *Erlam v Richard Slade & Company Plc* which the Claimants relied upon, in submissions on 11 December 2020, was successfully appealed to His Honour Judge Gosnell (sitting as a Judge of the High Court) in January of this year. In the Defendant's submission, the learned Judge in that case (citation [2022] EWHC 325 (QB)) has now decided the Preliminary Issue in its favour, and I am bound by that decision. As such, per the Defendant there really is nothing left for me to decide, other than to abide by binding authority from a higher Court. The Claimants assert that I am not bound by that decision, for reasons which they enumerated at the recent Hearing on 10 June 2022, to which I now turn.

Issues at the Hearing on 10 June 2022

59. The issues raised on 10 June 2022 were as follows:

    a. Did this Court already decide the Preliminary Issue on 22 June 2020?

    b. If this Court did not already decide the Preliminary Issue, is it bound by the decision in *Erlam?*

    c. Are there other issues which, notwithstanding (a) and (b) above, are open to this Court to decide at this time (specifically issues around Consumer protection legislation as it affects Solicitor/Client relationships)?

Did this Court already decide the Preliminary Issue on 22 June 2020?

60. The parties were both ad idem that, if I had already decided the Preliminary Issue, I would be functus officio in relation to that issue and it would be at an end so far as this tier was concerned; the Defendant indicated that in that event it would likely seek Leave to Appeal out of time on the basis that *Erlam* would show that I had decided it wrongly. Per the Claimants, the Court decided the Preliminary Issue in their favour on 22 June 2020, and the above very detailed submissions were made on their behalf on 11 December 2020 by way of a 'belt and braces' approach in circumstances that, against a background of decisions being revisited in this matter and despite having decided that issue, the Court was prepared to entertain further submissions thereon from the Defendant.

61. Mr Carlisle for the Claimants referred to his note of 29 March 2022 (at paragraphs 1 through 18) which dealt with that 'decision' and also addressed the fact that the Defendant had (unsuccessfully) tried to Appeal my decision on the Preliminary Issue as formulated on 22 June 2020 and was ruled to have no real prospect of success on that point. In his submission, events on 11 December 2020 were entirely consistent with the Claimants' position, i.e., that informed consent had already been decided.

62. For the Defendant's part, it was argued that the Court had not already decided the Preliminary Issue, hence the Order defining the Preliminary Issue to be heard on 11 December 2020, the very substantial Skelton Arguments and Bundles of Authorities lodged ahead of the Hearing on 11 December 2020 and the full day of submissions (remotely, on MS Teams due to the pandemic) on that date. Also, and with all due respect, Mr Williams QC pointed to the delays thus far in asserting that it was inherently unlikely that this Court would have decided such a complex issue extemporaneously on 22 June 2020 (and, having done so, would have formulated an Order that made no mention of that decision).

Decision

63. I appreciate it is far from helpful that there is no way of obtaining a transcript of events on 22 June 2020 and I can only apologise for that sorry state of affairs but having reread my notes from that date and having considered very carefully the situation both on 22 June 2020 and thereafter, I agree with the Defendant; I did not decide the Preliminary Issue on that date. What I did decide, was that it was an issue that the Claimants could properly raise notwithstanding their unsuccessful Appeal (which, as Mr Williams QC reminded me, had run almost all the way to the Supreme Court) on the question of whether rendering separate Bills for profit costs and disbursements, meant that those Bills could not be interim statute Bills.

64. That does not mean that I decided the Preliminary Issue in the Claimants' favour and nor does it mean that I decided the issues of Res Judicata/Issue Estoppel, Waiver and Procedure in their favour either. I simply decided that the door was sufficiently ajar to allow the Claimants to run their arguments (and to allow the Defendant to run its arguments to the contrary). The Preliminary Issue was duly formulated; it was argued on 11 December 2020 and ought to have been decided fairly shortly thereafter but was not, for which again I can only apologise. By a side wind, during the delay, the decision in *Erlam* was handed down in January 2022 and I now turn to the question of whether I am bound by that decision.

If this Court did not already decide the Preliminary Issue, is it bound by the decision in *Erlam?*

65. Mr Williams QC took me through the decision and made specific reference to paragraph 28 thereof; the learned Judge indicated that he was not convinced that the decision of Mr Justice Fulford (as he then was) in *Adams v Ali Malik* (cited by the Claimants, see paragraph 26 above) is a sufficiently firm foundation to base the proposition that a solicitor has an obligation to his client not only to advise a client of his rights under the Solicitors Act to ask for an assessment but also to explain what the legal consequences of the service of an interim statute bill would be. As a decision on permission to appeal, it is not a legally binding authority, and it does not say that the Solicitor should tell the client that if a complete self-contained bill is delivered then this starts the clock running for the purposes of a Solicitors Act assessment. The learned Judge then adds:

28. I fully accept that Costs Judge Rowley in Masters v Charlies Fussell appears to suggest that a solicitor does bear this additional obligation but I am not convinced that Mr Justice Fulford's decision in 2003 is sufficient authority to support the proposition. I fully accept the practical difficulties for the client in applying for an assessment of his own solicitor's costs whilst still instructing him in the underlying litigation as identified in paragraph 19 above. Perhaps this would be a good reason for amending the legislation or for the Solicitors Regulation Authority to amend the Code of Conduct or introduce regulations to like effect. In the absence of such amendment however the situation remains that there is no statutory or regulatory obligation to advise a client what the legal consequences are likely to be for him or her when a solicitor serves an interim statute bill. It is not normal for provisions explaining the legal consequences of contractual terms to be implied into a contract unless there is some additional statutory or regulatory obligation to do so as a result of a perceived need for consumer protection. Whilst there may be such a need here it has not resulted in any changes to the Act or relevant regulatory reform. In the absence of such, I take the view that if there is a clear contractual term reserving the right of a solicitor to deliver interim statute bills then he is entitled to do so, without having to spell out what the legal consequences of such an act would be for the client.

66. The learned Judge then described the provision reserving the right to deliver interim statute Bills as being clearly worded and (in his judgment) containing no room for ambiguity, making it clear that they "*are detailed bills and are final in respect of the period to which they relate"* which, he asserts, is sufficient explanation to justify the delivery of an interim statute Bill. As well as the retainer in *Erlam* being for all material purposes the same as the retainer in this case, Mr Williams QC pointed out that the case law considered by the learned Judge in *Erlam* was the case law aired before me on 11 December 2020 including *Vlamaki*.

67. At paragraph 25 of his decision in *Erlam* the learned Judge refers to the Solicitors Act 1974 as legislation of some antiquity (at nearly half a century old) which does not appear to have been amended substantially over the years and in particular not to have undergone the sort of transformation which is common when consumer rights are brought into the equation: *"When dealing with a client's right to seek an assessment of costs from his or her solicitors the Act seeks to strike a balance between allowing a reasonable time for a client to question the quantum of costs whilst protecting solicitors from having to deal with stale allegations of overcharging. Whilst the Act purports to regulate those rights it does not go so far as to oblige the solicitor to advise the client of these provisions in terms, nor to explain in plain English what the actual consequences of the application of those terms are for the client.* ***I am personally sympathetic to the argument that it probably should.****"* (my emphasis)

68. Mr Williams QC pointed out that, when it ran in their favour, the Claimants were keen for me to follow the first-instance decision in *Erlam* and asserted that it is contradictory for them now to argue that I should not follow it. Further, he cited several cases in support of the proposition that I must follow the decision of His Honour Judge Gosnell (sitting as a Judge of the High Court) as a coherent system of justice requires a subordinate Court to agree with (or at least to abide by) the decision of an Appeal Court. The learned Judge in *Erlam* has handed down a decision that is binding upon me and I should abide by that decision.

69. Mr Williams QC referred in particular to *Sayce v TNT (UK) Ltd* [2011] EWCA Civ 1583 in which Lord Justice Moore-Bick stated that the rules of precedent require lower courts to accept and apply the decisions of higher courts, even though they may consider them to be wrong, and quoted from Lord Simon in *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443 at page 478: *"It is the duty of a subordinate court to give credence and effect to the decision of the immediately higher court, notwithstanding that it may appear to conflict with the decision of a still higher court. The decision of the still higher court must be assumed to have been correctly distinguished (or otherwise interpreted) in the decision of the immediately higher court. . . . Any other course is not only a path to legal chaos but in effect involves a subordinate court sitting in judgment on a decision of its superior court."*

70. For the Claimants, Mr Carlisle asserted first that the route to an Appeal in *Erlam* has not yet reached its end; the Appeal has been turned down on the basis that the Court of Appeal already decided the issue in *Boodia* but (per the Claimants) the issue already decided in *Boodia* and the issue in *Erlam* are not one and the same. It has not yet reached its end and could, in Mr Carlisle's submission, have been decided wrongly and Mr Williams QC would accept (Mr Carlisle asserted) that I am bound by *Erlam* unless it was wrongly decided or per incuriam.

71. So far as the latter is concerned, paragraph 25 of the decision in *Erlam* sets out the learned Judge's sympathy with the proposition that the rules should require an explanation (albeit they do not currently do so). Paragraph 28 refers to the lack of any statutory or regulatory obligation to advise a client what the legal consequences are likely to be for him or her when a solicitor serves an interim statute bill; per the Claimants, that overlooks the Consumer Rights Act 2015. Although the legislation is seven years old, Mr Carlisle referred to this as a rapidly-developing area of the law and stated that, although it was not raised in *Erlam* clearly it should have been but that there was now another opportunity to address it i.e., before me.

72. Mr Carlisle pointed out that, to date, there had been no Notice to the Claimants regarding cross-examination and that their version of events was, therefore, unchallenged before me. The learned Judge in *Erlam* had said (to paraphrase) that he would have had sympathy if only there had been a Statutory requirement to inform the Claimants at the time of entering into the retainer: per Mr Carlisle there is, in the Consumer Rights Act 2015 and I should now apply it.

73. In response, Mr Williams QC submitted that the Defendant's primary position remains that I am bound by the decision in *Erlam* even if it was 'plainly wrong'. By way of a secondary position, the Defendant asserted that the 2015 Act is not a matter for me to decide in this Judgment; if the Claimants wish to run it at this very late stage they will have to do a great deal more in the way of groundwork and, for example, the Defendant would not accept the proposition that the Claimants were entitled to

'Consumer' protection in these circumstances. The dispute involved a property owned by them and run as a business (a care home I believe) and if they now wished to assert that they had dealt with the Defendant as consumers, there may need to be cross-examination after all. Certainly, per Mr Williams QC, for present purposes there was no evidential foundation for such a claim by them (Mr Carlisle referred to evidence including the fact that Bills were addressed not to the business but to the Claimants themselves, as tending to prove their consumer status).

Decision

74. I agree with the Defendant's primary position, that I am bound by the decision of His Honour Judge Gosnell (sitting as a Judge of the High Court) in the case of *Erlam;* it is a decision at the next tier and is binding upon me even if 'plainly wrong'. Further, I do not think that the decision in *Erlam* is wrong; the learned Judge was not directed to the Consumer Rights Act 2015 despite that legislation predating the case by several years. I do not propose to speculate on what the learned Judge may have decided, had he been taken to that legislation: the point is that, based upon the matters that he was directed to, his decision seems to me to be correct and describing it as 'wrong' would rather put the emphasis in the wrong place. If the Consumer Rights Act 2015 should have been raised in *Erlam* it is not a question of the decision being wrong but of the fast-moving law in this area having failed to keep up.

75. As such, in relation to the Preliminary Issue in my view there is no longer anything to decide as His Honour Judge Gosnell (sitting as a Judge of the High Court) has decided the issue already in *Erlam* and I understand and agree with his reasoning in doing so. This then brings me to the last of the questions addressed on 10 June 2022, namely, are there other issues which, notwithstanding the above, are open to this Court to decide at this time (specifically issues around Consumer protection legislation as it affects Solicitor/Client relationships)?

76. In fact I can deal with that in very short order as both parties were ad idem that this is not the end of the matter as there are questions around Chamberlain Bills, Special Circumstances, Consumer Rights Act 2015 and so on, still to address: I should add that my understanding is that the Defendant has indicated that it will be pressing for all of these to be shut down fairly hard, both on the issue of whether the Claimants dealt as 'Consumers' or not and on the issues of Res Judicata/Issue Estoppel, Waiver and Procedure that have already been canvassed in relation to the Preliminary Issue now disposed of by the decision in *Erlam.*

Date: 15 June 2022
Handed down: 24 August 2022