Neutral Citation Number: [2023] EWHC 2963 (KB)

Case No: KA-2023-000100

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
KINGS BENCH APPEALS
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
ORDER OF COSTS JUDGE JAMES DATED 22 AUGUST 2023
AND ON AN APPLICATION FOR PERMISSION TO APPEAL
AN ORDER OF COSTS JUDGE JAMES DATED 18 MAY 2023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2023

Before :

MR JUSTICE FREEDMAN

- -

Between :

(1) JUGMOHAN BOODIA
(2) DEORANEE BOODIA

Claimants and Appellants

- and –

RICHARD JOHN SLADE
(t/a Richard Slade and Company)

Defendant and Respondent

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- -

Erica Bedford (instructed by **W. Davies Solicitors**) for the **Claimants and Appellants**
Benjamin Williams KC (instructed by **Richard Slade and Company**) for the **Defendant and Respondent**

Hearing date: 4 July 2023
Judgment handed down in draft: 9 November 2023

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Approved Judgment

This judgment was handed down remotely at 12noon on Tuesday 21 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

I Introduction

1. This is an appeal against a judgment from Costs Judge James ("the Costs Judge") dated 24 August 2022. It is brought with the permission of Sir Stephen Stewart. The matter arises in a dispute between solicitors and a former client and relates to detailed assessment proceedings under section 70 of the Solicitors Act 1974. The Costs Judge rejected a contention of the Appellant that the bills of the Respondent were not statutory bills because of a lack of informed consent.

2. This is also an appeal for permission to appeal a further judgment of the Costs Judge dated 18 May 2023 on the right to advance a consumer rights issue, to which this judgment shall return.

II Background-

3. This is a dispute between a solicitor ("the Respondent") and former clients ("the Appellants") in detailed assessment proceedings under section 70 of the Solicitors Act 1974 ("s.70"). The Respondent and the Appellants entered into a written retainer agreement dated 24 January 2013 incorporating the standard terms of business of the Respondent. The Appellants countersigned their acceptance to the terms on 30 January 2013.

4. There was a term in the retainer letter which entitled the respondent to serve bills each of which would be final for the period to which they related. That term states:

> *"Bills are rendered monthly in arrears. Our bills are detailed bills and are final in respect of the period to which they relate, save that disbursements (costs and expenses which we incur on your behalf) are normally billed separately and later than the bill for our fees in respect of the same period."*

5. The standard terms of business contained a provision which stated:

> *"Entitlement to Assessment*
>
> *17. The client may be entitled to have RSC's charges reviewed by the court in accordance with the provisions set out in the Solicitors Act 1974"*

6. The respondent relies on the retainer and on the standard terms of business so as to render interim bills. Without this, a contract between a solicitor and a client is prima facie an entire contract such that payment would only become due at the end of the retainer. The consequence is that the time for assessment, if required, is to run from the point of the bills rather than from the end of the case. Since the right to assessment is subject to time limits provided for in s.70, time runs from the date of

each bill with the consequences that the statutory right to a detailed assessment may depend upon making the challenge on each bill to which exception is taken at the time and not leaving it to a challenge at the end of the last bill or the end of the retainer. This relates only to the important statutory rights, but is without prejudice to other challenges by reference to contractual and fiduciary rights and obligations.

7. The Respondent acted for the Appellants between January 2013 and October 2016 predominantly in a right of way dispute. During this period, the respondent delivered 61 bills to the Appellants in accordance with the agreed terms. Thereafter, the relationship broke down and the Appellants applied for assessment of the respondent's bills pursuant to s. 70. These proceedings were brought in the Senior Courts Costs Office ("SCCO") and were allocated to the Costs Judge.

8. The first issue which arose in the proceedings was whether the bills delivered by the Respondent were statutory bills, each triggering the s.70 timetable. This potentially raised two questions: (i) did the retainer allow the Respondent to deliver statutory bills, and (ii) if so, were the invoices delivered actually statutory bills? These have been referred to respectively as (i) the contractual entitlement issue, and (ii) the classification issue. These terms will be adopted in this judgment.

9. It was common ground that if the Respondent's bills were statutory bills, then the right to assess the vast majority of them had been lost. Hence, the issue was of importance to the scope of the assessment proceedings. The Costs Judge dealt with this as a preliminary issue giving judgment on 17 March 2017.

10. The decision of the Costs Judge on the contractual entitlement issue was that the Respondent had the right to deliver interim bills as statutory bills. However, the classification issue was resolved by the Costs Judge in favour of the Appellants. She found that the invoices delivered were not statutory bills because they did not deal with the entirety of the costs. They only related to profit costs and postponed disbursements until a later stage. The Costs Judge held that this precluded the bills from being statutory bills.

11. The Appellants did not challenge the original ruling of the Costs Judge on the contractual entitlement issue but the Respondents did challenge the classification issue. This may be relevant to the submissions referred to below that the application which is the subject of the appeal was barred on res judicata/Henderson v Henderson/abuse of process grounds (collectively referred to by way of shorthand as "res judicata grounds").

12. An appeal by the Respondents against the decision of the Costs Judge on the classification issue was dismissed by Slade J. There was no cross appeal on the contractual entitlement issue. A second appeal on the classification issue was brought against the decision of Slade J. This was allowed by the Court of Appeal which held that the fact that the disbursements were not billed with the profit costs did not prevent the bills from being statutory bills.

13. Slade J's decision is reported at [2018] 1 WLR 2037. She recorded that the Costs Judge had rejected the argument that the Respondent had no contractual right to deliver interim bills. At [3] of her judgment, Slade J summarised how the argument

had been rejected in the second paragraph of the judgment of the coasts Judge on 17 March 2017, in the following terms:

> *"3. The question of whether the retainer permitted the rendering of interim statute bills was an issue before Master James. By para 2 of her judgment, the master recognised that the agreement in the retainer was "somewhat ambiguous between payments on account monthly and [statute] bills monthly". She noted that the retainer referred to a Solicitors Act assessment and a complaints procedure. Master James held that she "would be reluctant to make a finding of a fatal flaw in the retainer". The master held "it does seem to me that the retainer does what it needs to do or has potential to do what it needs to do". The claimants' point had been that the retainer did not provide for interim statute bills. This argument was rejected. The master went on to observe at para 3: "The claimants' second point, however, is a much stronger point …"*

14. Slade J then identified that the second point raised by the Claimants was that the 61 invoices were not interim statute bills in that none of them included both a charge for profit costs and for disbursements, the charge for disbursements being postponed. Later in the judgment at [15], Slade J recorded:

> *"Mr Dunne for the Claimants pointed out that Master James did not find that there was no entitlement in the retainer for the Defendant to render interim statute bills. I agree. The Master rejected the Claimants' argument that the retainer did not provide for the rendering of interim statute bills. The Master considered whether the bills rendered were bills within the scope of the Solicitors Act 1974 Sections 69 and 70 and so within the terms of the agreement between the parties."*

This confirms how the contractual entitlement was decided and then from there Master James went on to consider and rule on the classification issue, that is whether the bills delivered were actually statutory bills.

15. The Court of Appeal's decision is reported at [2019] 1 WLR 1126. Here again, the Respondent's contractual entitlement to deliver interim bills was not challenged. The only issue was the classification issue – whether the invoices in fact delivered were prevented from being statutory bills given that they did not bill disbursements. The Court of Appeal allowed the appeal and held that they were valid bills, rejecting the argument that their treatment of disbursements invalidated the bills: see the judgment at [38]. On 22 May 2019, the Supreme Court dismissed an application by the Appellants for permission to appeal and the case was therefore remitted to the Costs Judge.

16. At this point, some 3 years after the original assessment application, it appeared that the courts had ruled that: (i) the Respondent had the contractual right to deliver statutory bills (the Costs Judge's ruling on the contractual entitlement issue, which was never challenged); and (ii) the Respondent had actually delivered such bills (the Court of Appeal's ruling on the appeal on the classification issue). All that remained was for the bills to be assessed, to the extent that the time limits had not expired under s. 70.

17. On remission to the Costs Judge, the Appellants submitted that the retainer agreement was not effective to grant a right to deliver interim bills because this required informed consent and this had not been granted. This issue is recorded by the costs judge's case management order of 22 June 2020, where para. 1 provided that this will be determined as a further preliminary issue as follows:

> *"(i) whether the Claimants signed the Retainer with informed consent to the provisions within the Retainer providing for interim statute bills; and*
>
> *(ii) 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 Solicitors Act 1974."*

18. This issue was then argued on 11 December 2020, but there was argued at the same time whether the Appellants were not able to argue this due to res judicata grounds, the matter being one which should have been taken at the same time as the contractual entitlement issue and/or the classification issue before the Costs Judge or at least raised on the appeals if not by then too late.

III The Judgment dated 15 June 2022

19. As the judgment now under appeal records, the arguments were pursued both of a procedural nature (the res judicata grounds) and a substantive nature (the informed consent ground). The Costs Judge ultimately disposed of the matter on the merits in a judgment given on 15 June 2022. She recited at length the procedural objections without deciding them [6-14] and [39-56].

20. After argument was heard in December 2020, there was then a lengthy delay in giving judgment. This appears to have been largely attributable to the Costs Judge's difficulties during the pandemic. During this period, there was another case decided at High Court level as to whether informed consent was required. It was a decision of HH Judge Gosnell sitting as a Deputy Judge of the High Court in *Erlam v Richard Slade* [2022] Costs LR 489. The Costs Judge found that she was bound by that decision, and she therefore determined that for the purpose of sending a valid statutory bill, there was no requirement to obtain informed consent.

21. The Appellants now appeal the decision of the Costs Judge, saying that it was incorrect. The Respondent, by a Respondent's Notice, submits that the Costs Judge was precluded by the Court's earlier and unappealed ruling on the contractual entitlement issue. The Appellants sought to argue further issues under consumer protection legislation. The last lines of the judgment [75-76] read as follows:

> *"75….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."*

IV The Judgment dated 18 May 2023

22. This then led to an exchange of pleadings on consumer law issues. The Costs Judge then decided this issue on 18 May 2023. She decided that it was not open to the Appellants to raise these issues. At paragraph 16 of her judgment, the Costs Judge said that the Court of Appeal had remitted the matter to her to give decisions as to whether any particular bill was not a statutory bill for a reason other than that identified in the preliminary issue. The reasons identified in the preliminary issue were *"whether, by virtue of them being final for the period covered by them only insofar as they relate to profit costs, the bills raised by the Defendant to the Claimants as set out in the claim form constitute interim statute bills under Part III of the Solicitors Act 1974, and if they are not such interim statute bills whether they are capable of being treated as a series of on account bills culminating in a statute bill dated as per the last in the series."*

23. The Appellants contended that "the underlying retainer was therefore a contract to which at the time it was entered into, both the Unfair Terms in Consumer Contracts Regulations 1999 ("the UTCC regs") and the Consumer Protection from Unfair Trading Regulations 2008 ("the CPUT regs") applied": see the Claimants' Statement of Case pursuant to the order of the Costs Judge dated 24 August 2022.

24. The argument was that it contravened the requirements of professional diligence and that it materially distorted or is likely to materially distort the economic behaviour of the average consumer with regard to the product: see Reg 3 of CPUT regs at (3)(a)

and (b). It was also alleged to contravene the requirements of professional diligence in that it failed to achieve the following mandatory outcomes required under the Solicitors Code of Conduct, especially under O(1.13) that clients receive the best possible information, both at the time of engagement and when appropriate as their matters progresses, about the likely overall cost of their matter; and O(1.14) clients are informed of their right to challenge or complain about their bill and the circumstances in which they may be liable to pay interest on an unpaid bill.

25. The allegation was that the Defendant ought to have spelt out the consequences in respect of the loss or reduction of rights to obtain a statutory assessment of the bills under s.70 of the Solicitors Act 1974. It was also alleged to have been an unfair term because it caused a significant imbalance in the parties' rights and obligations. It was alleged to have resulted in a diminution and/or loss of the Claimants' rights to have an assessment under the Solicitors Act after the conclusion of the matter in which the Defendant was acting and, if understood, would require the claims to challenge their own solicitors at a time when they were *'facing another enemy'*: see Jacob J (as he then was) in *Harrod's (Buenos Aires) Ltd v Another* [2014] 6 Costs LR 975.

26. The response was to oppose the introduction of this challenge on the res judicata grounds. They should have been raised and determined at the time of the decision on contractual entitlement or years earlier. In any event, they did not contravene the requirements of professional diligence or the duty of a solicitor to comply with the SRA mandatory outcomes. The terms were commonplace in solicitors' retainers and would or ought to have been understood as such. The retainer referred to the relevant provisions of the Solicitors Act 1974 and the term was clear. The Appellants obtained a benefit from the term because they could be certain that no further charges would be made for the period covered by the bills and the Respondent could not retrospectively revisit or increase those charges at a later date (as it could have done had it rendered an *'on account'* bill): see para 16 of the Respondent's Reply. It was not required of a solicitor to spell out the legal consequences.

27. The Costs Judge said at [16] with reference to the contractual entitlement issue:

> *"What did not run as far as they Court of Appeal was the issue of whether the Defendant's retainer permitted it to raise Interim Statute Bills at all; I decided that it did. Slade J upheld that finding and the Claimants took it no further. The time to have raised the Consumer Rights Issues would have been then, not years later, In plain terms, I find that this is not an argument about the bills (per se) it is an argument about the retainer. It should have been made much earlier and has already been considered and decided by the Court, such that the Res Judicata issue estoppel applies."*

V The Issues to be considered in this Judgment

28. In this judgment, there will be considered the following issues, namely:

(i) the substantive appeal against the decision of the Costs Judge in which she found that there was no requirement to prove informed consent in connection with the validity of a statutory bill ("the Informed Consent Ground");

(ii) whether the Court should give permission to appeal on the related matter in which the Costs Judge refused to permit the Appellants to pursue consumer rights and related grounds as an answer to the statutory bills; ("the Permission to Appeal application").

(iii) if permission to appeal is granted, the full appeal on the related matter ("the Appeal in the related matter").

VI The Informed Consent Ground

29. In *Erlam*, HH Judge Gosnell decided that a clear contractual turn reserving the right of a solicitor to deliver an interim statute bill sufficed without the need to spell out what the legal consequences of such a term would be applied. At [25-26], he said the following:

> *"25….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.*
>
> *26. Both counsel advised me that there are no regulations either connected with the Solicitors Act or Code of Conduct, arising from their obligations as a solicitor, which would oblige solicitors to explain to clients that the effect of the service of an interim statute bill (properly authorised by the retainer) would be to start the clock running for a potential Solicitors Act assessment and that there are different time limits depending on the circumstances."*

30. At para 28 the Judge held as follows:

> *"…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.".*

31. At the heart of the appeal is the following question. If and to the extent that the decision of the Costs Judge turned on *Erlam*, should this Court follow *Erlam*? The Court is not bound to follow *Erlam*, being a decision of a court of co-ordinate jurisdiction. A judge in the High Court will generally follow another decision in the High Court as a matter of consistency or judicial comity unless convinced the decision is wrong: see *Re Spectrum Plus* [2004] 1 All ER 981 at [7]-[9].

32. The Appellant's reason for urging the Court to depart from *Erlam* is that it is said to be contrary to other authorities, and it is said that either the other authorities should be followed or the underlying reasoning of those authorities should be applied, and not that of *Erlam*. In any event, it is submitted that *Erlam* was wrong, and that the Court should not follow it.

33. Before considering the line of authorities, it is necessary to consider the circumstances in which a solicitor may be entitled to render a statutory bill. There are three circumstances, namely:

    (i) express consent;
    (ii) a natural break in the proceedings; and
    (iii) agreement or acquiescence resulting from conduct of the parties.

34. The instant case is one of express consent. The argument despite this is that express consent is not sufficient because a solicitor has a duty to obtain informed consent having regard to the fiduciary nature of the relationship and the requirements of the Solicitors' Code of Conduct. It is urged upon the Court that the loss of an entitlement to object in the middle of the retainer unless an assessment is sought is onerous.

35. The argument goes that the terms of the retainer are not adequate. It is necessary for the solicitor to explain to the client what rights were being negotiated and dispensed with by the agreement to permit interim statute bills. The client is entitled, it is said, to an explanation of what the consequential effect is of receiving an interim statute bill. At the very time when the efforts are concentrated on the adversary in litigation, the client might have to make their solicitor the adversary by challenging the bill. A client should be protected against this dilemma, it is said, so that they can generally make any challenge at the end of a case.

36. A frequently cited authority is *Adams v Al Malik* [2003] EWHC 3232, a decision by Fulford J (as he then was) refusing permission to appeal, in which the unsuccessful

appellant appeared in person, there being no attendance (as is usual in a permission to appeal case) by the respondent. A decision in a permission to appeal case may not be cited, unless they clearly indicate that they establish a new principle or extend the present law (which was not said to be the case): see the Practice Direction (Citation of Authorities) 2001 para 6.1. It follows that there has been a departure from the Practice Direction. That said, the case cannot be removed from consideration because of the cases in which it has been cited.

37. The *Adams* case did not contain a retainer letter providing for statute bills or interim statute bills: see Fulford J at [26]. Indeed there was no letter at the outset setting out the terms of the retainer including issues such as billing arrangements: see Fulford J at [46]. It concerned an alleged natural break as a ground for delivering an interim statute bill. It is more difficult in that context to make it known to a client what rights are being negotiated and dispensed with and that the purpose of sending a bill is that it is to be treated as a self-contained bill of costs to date. Fulford J referred to a principle that the natural break principle was *"not to be treated as a ground for delivering a bill except in the clearest cases."* It was in this context that Fulford J refused permission to appeal, saying the following at [48]:

> *"This was the principle applied by the learned master and as a matter of discretion his approach and conclusions are not open to sustainable attack. In particular the party must know what rights are being negotiated and dispensed with in the sense that the solicitor 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 Davidson's v Jones-Fenleigh [1980] 124 SJ 204".*

38. Likewise, the case of *Davidson's v Jones-Fenleigh* was a case where the solicitor did not have a contractual right to submit interim bills, and the alleged right was said to have arisen through acquiescence. Before acquiescence can be relied on, the client must know through clear indications to what the client is being asked to acquiesce. The knowledge is said by a solicitor relying on an acquiescence or conduct to be inferred from the content of the bill and the conduct of the parties, and the Court is often sympathetic to a client saying that there were not clear and unequivocal indications to what the client was supposed to be acquiescing. These cases are therefore different from the instant case where there is an express contractual provision for interim bills (as the Court of Appeal expressly accepted).

39. In *Erlam*, extracts from two cases emphasised the hardship to a client of receiving interim bills whilst being represented in an ongoing adversarial case as follows:

(i) In *Harrod's (Buenos Aires) Ltd v Another [2014] 6 Costs LR 975,* the prejudice involved in receiving interim statute bills rather than requests for payments on accounts was recognised by Mr Justice Jacob:

> *"Much more significantly, it fails to take into account the modern practice of solicitors of sending bills on a regular basis*

> *which are complete bills, not interim bills. That causes difficulty when you have litigation which is ongoing. The client is called upon by these provisions to challenge an interim bill within one month, if he wants to do it as of right; and if he does not challenge it within twelve months then he has to show 'special circumstances' to challenge his solicitors' bill. That puts him in an impossible position. Either he challenges his solicitors' bill – the very solicitor who is now acting for him – and continues using that solicitor at the same time; or he has to change solicitor, all in the middle of litigation when he is facing another enemy. It may well be that the court would regard ongoing litigation as, itself, 'special circumstances'."*

(ii) In *Masters v Charles Fussell and Co* (unreported) Costs Judge Rowley recognised the same problem (and referred back to *Adams*):

> *"The Draconian nature of the time periods in limiting a client's ability to obtain as assessment of a solicitor's statute bill has led the courts to require solicitors to 'make it plain' to their clients if they intend each bill to be a self-contained bill for a period and for which the time limit for challenge begins to run immediately."*

In *Masters*, there was a contractual entitlement to have monthly bills and there was provision about the ability to seek assessments under the Solicitors Act 1974. The case was based on a contractual entitlement to interim statute bills, but the terms did not say, unlike in the instant case or in *Erlam*, that the monthly bills would be final for the period to which they related.

40. There was reference by HH Judge Gosnell in *Erlam* to the case of *Vlamaki v Sookias and Sookias* [2015] EWHC 3334 (QB). *Vlamaki* was different from the instant case in that it was conceded in that case that any ambiguity on a fundamental aspect of the terms and conditions that cannot otherwise be resolved is to be determined against the solicitors: see the judgment in *Vlamaki* at [15-16]. This reflected the approach taken by Spencer J in *Bari v Rosen* [2012] 5 Costs LR 851 at [33-35]**.** In *Erlam*, HH Judge Gosnell recorded without expressing a different view Mr Williams KC's submission that *Vlamaki* at [23] *"is an example of a case where there was ambiguity in the retainer letter and both the Master and the Judge on appeal found that the retainer did not say that each interim bill would be a final bill for the period it covered. There was no additional finding that the client needed to know what the legal effect of that was." Vlamaki* suggests that in the case of an ambiguity, the issue should be resolved against the solicitors, but this does not apply where the retainer is not ambiguous about the right to submit interim statute bills.

41. It was submitted in a note of Mr Mark Carlisle of 29 March 2022 that *Erlam* was decided per incuriam because the Judge did not consider the impact of the UTCC regs. The Court was not addressed about the UTCC regs in *Erlam*. It might be said that the Court is mandated under section 71(2) of the Consumer Rights Act 2015 to consider whether a term is fair even if none of the parties has raised the issue. This does not have application to *Erlam* for the following reasons, namely (a) the original

retainer pre-dated the coming into operation of the Consumer Rights Act 2015 in October 2015, (b) section 71(2) does not apply "unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term" (section 71(3)), and (c) there was no reason for the Court to take this point of its own motion in that such a term is very common, it has advantages to a client (in that finality has an advantage in preventing further bills for the same work) and there might be a significant disadvantage to a solicitor in being unable to raise interim bills in a long term retainer, perhaps over a number of years.

42. As will be seen below, the positive references to *Erlam* in subsequent cases without raising a point about potential unfairness of the term is consistent with the Court not being under an obligation to raise the point about the fairness of the term. This point was referred to by the Costs Judge at [74] in the decision of 15 June 2022. The Costs Judge said that the Judge in *Erlam* had not been directed to the Consumer Rights Act 2015. She said that if it had been raised, it is not a question of the decision being wrong but of the fast-moving law in this area having failed to keep up. It is not clear exactly what was meant by this, but it suffices to say that I agree with the Costs Judge's conclusion that *Erlam* was not decided wrongly, particularly having regard to the matters raised in the preceding paragraph.

VII Erlam and later cases

43. In *Erlam*, the Judge pointed out that the Solicitors Act 1974 did not oblige a solicitor to explain what the actual consequences of the legislation were for the client. The quotations have been set out above from [25], [26] and [28] of Erlam.

44. HH Judge Gosnell held that the provision reserving the right to deliver interim statute bills was clear and contained no room for ambiguity. The clause in the instant case is the same or substantially the same or similar, which is not surprising, given that they are both bills of the same legal firm, Richard Slade. The Judge held that the bills made clear that the bills *"are detailed bills and are final in respect of the period to which they relate"* which was *"sufficient explanation to justify the delivery of an interim statute bill..."*

45. In a case which has been published since the hearing and before the judgment of *Ivanishvili v Signature Litigation LLP*, Costs Judge Leonard said the following which is germane to the instant case:

> ***"Informed Consent***
>
> *74. The Claimant argues that any contractual agreement to the effect that the Defendant's regular invoices would be interim statutory bills would require the Claimant's "informed consent". In this context, that term refers to the proposition that, in order for any such agreement to be effective, the Defendant would have had to make the consequences of such an arrangement clear to the Claimant. That means in particular the loss, through the passage of time, of his right to*

apply for assessment of the Defendant's monthly invoices, even as the Defendant continued to act for him.

75. I believe that Mr Williams is right in saying that "informed consent", in this sense, has no bearing upon the appropriate interpretation of a contract of retainer. Adams v Al Malik , The Winros Partnership v Global Energy Horizons Corporation and other authorities which emphasise the importance of client knowledge, seem to me to address the delivery of an interim statutory bill where that is not authorised by the contract of retainer. The contractual position, in my view, is consistent with the judgment of HHJ Gosnell, sitting as a deputy judge of the High Court, in Richard Slade & Co v Erlam.

76. In Richard Slade & Co v Erlam , HHJ Gosnell (sitting as a deputy judge of the High Court) found that the following provisions in a contract of retainer permitted the delivery of interim statute bills:

> *"Bills are rendered monthly in arrears. Our bills are detailed bills and are final in respect of the period to which they relate, save that disbursements (costs and expenses which we incur on your behalf) are normally billed separately and later than the bill for our fees in respect of the same period."*

77. The logic of HHJ Gosnell's decision was that it was clear, by reference to that contractual provision, that the solicitor's monthly bills (final as they were for the work undertaken in relation to the period covered by each bill) were to be interim statutory bills, final for the work they represented. Although there is an obvious disadvantage to any client whose time to challenge a solicitor's interim statutory bill begins to run whilst that solicitor is still actively instructed, there is no statutory or regulatory obligation upon a solicitor whose retainer incorporates such a clear contractual term to spell out the full legal consequences of the delivery of such bills.

78. Although HHJ Gosnell's decision ultimately rested on the terms of a CFA which he found to have replaced the retainer in question, the conclusion to which I have referred seems to me to have been a part of his chain of reasoning, and not merely obiter. In any event I respectfully agree with him.

79. Whether a contract empowers a solicitor to render interim statutory bills falls, in my view, to be determined upon the normal principles of contractual interpretation. As HHJ Gosnell found, a solicitor and a client can agree that the solicitor may render interim statutory bills without delving into the legal consequences of that agreement. There is no

> *requirement that the agreement itself should do so, and the client's subjective knowledge of the legal position is not to the point. If the retainer provides for the solicitor to deliver complete, final interim statutory bills for a given period, that will be sufficient."*

46. Attention has been drawn also to a decision of the Court of Appeal, namely *Dean Menzies v Oakwood Solicitors Limited* [2023] EWCA Civ 844; [2023] Costs L.R. 1083. Judgment was handed down after oral argument in the instant case. The Court of Appeal referred with apparent approval to the decision of HH Judge Gosnell in *Erlam*, citing the part of the judgment at [25-26] quoted above. At [26] of *Menzies*, Sir Geoffrey Vos MR stated as follows:

> *"Ms Gemma McGungle, counsel for the Client, referred us to a number of paragraphs in the Solicitors' Regulation Authority Code of Conduct. But none of them deal specifically with the form of the bill. The only reference to explaining the client's right to complain about charges applies to the time at which the contract of retainer is made. Like HHJ Gosnell, and as we have already mentioned at [5] above, we consider that the law as it currently stands may fall short of adequate consumer protection."*

47. The reference back to [5] in *Menzies* is to the following:

> *"This is another case, following the recent decisions of this court in Belsner v Cam Legal Services Ltd [2022] EWCA Civ 1387; [2023] 1 WLR 1043 (Belsner) and Karatysz v SGI Legal LLP [2022] EWCA Civ 1388; [2023] 1 WLR 1071 (Karatysz) , which, in our view, highlights the inadequacy of the 1974 Act for the purposes of regulating the relationship between solicitors and clients in relation to the costs of modern personal injury disputes. The 1974 Act restricts the time during which clients can seek court assessments of their solicitors' bills. There are, of course, regulatory requirements outside the 1974 Act, but this case highlights (as did Belsner and Karatysz) that it is for consideration whether there should be further and more up-to-date statutory safeguards to protect clients in relation to the charging and payment of solicitors' fees."*

48. The submission is made by the Appellant that the reference at [26] in *Menzies* to the regulations made a distinction between the right to complain about charges applying to the time of the retainer (which was referred to in the Code of Conduct) and the form of the bill (which was not referred to). Contrary to the Appellant's submission, that does not support the contention that any professional duty to explain to the client about the right to complain about a bill at the time of the retainer is incorporated into

the retainer by way of an implied term. On the contrary, Sir Geoffrey Vos MR referred at the end of [26] to the Court of Appeal's consideration being that *"the law as it currently stands may fall short of adequate consumer protection."*

49. In stating this, the Court of Appeal expressly agreed with HH Judge Gosnell. That is reference to the part of his judgment in *Erlam* that the law did not contain any regulations in connection with the Solicitors Act or the Code of Conduct which would oblige solicitors to explain that the effect of an interim statute bill would be to start the clock running for the purpose of a potential Solicitors Act assessment [26]. There was also the statement in *Erlam* that it was not normal for the provisions to explain the legal consequences of contractual terms to be implied into a contract unless there was an additional statutory or regulatory obligation to do so [28].

VIII Submissions of the parties as to whether there were implied terms as regards informed consent

(a) Submissions for the Appellants

50. Ms Bedford on behalf of the Appellants submitted that there was an implied term in the retainer that the requirements of the Solicitors Code of Conduct would be complied with. It was also submitted that all relevant regulations would be complied with including consumer protection regulations. The result would be to create a 'bridge' and a 'marriage' between the Code and the contract between solicitor and client. It was submitted that HH Judge Gosnell was wrong to say at [28] that it was not normal for provisions explaining the legal consequences of contractual terms to be implied into the contract unless there was a statutory or regulatory obligation to incorporate such provisions into the contract.

51. The Appellants pointed out that compliance with the Code of Conduct was mandatory under s. 176(1) of the Legal Services Act 2007 which provides that:

> *"A person who is a regulated person in relation to an approved regulator has a duty to comply with the regulatory arrangements of the approved regulator as they apply to that person."*

52. The Appellants also relied upon the terms of the retainer which referred at standard condition 37 to the fact that the Respondent was regulated by the SRA and that *"All solicitors are subject to the rules and principles of professional conduct."* The address and website of the SRA were provided. This too was a reason for the submission that the Code of Conduct and professional regulations were incorporated into the contract by implication. It was submitted that the consequences would be a possible remedy in damages. It was also submitted that without compliance, there was no entitlement to issue an interim statute bill.

53. The Appellants submitted that it was unfair to put a client into the situation of receiving monthly interim statute bills with the challenges that that might entail during the solicitor client relationship, being corrosive to the relationship between

solicitor and client and to the detriment of the client, potentially having to deal with litigation on two fronts, against the adversary and the solicitor at the same time. An implied term would, it is said, underpin the policy that the client should give informed consent which would including understanding the difficulties that would arise.

(b) Submissions for the Respondent

54. The Respondent submitted in response that there was no scope for an implied term contended for. The reasons for this were as follows:

(i) It does not follow that from the existence of statutory or regulatory obligations that they should give rise to coterminous contractual obligations. They were enforceable in different ways. This was recognised, as noted above, as regards fiduciary duties and professional duties by Sir Geoffrey Vos MR in *Belsner* at [80]. It is not necessary in order to make the solicitor subject to the requirements of the Code of Conduct.

(ii) It is not clear what are the consequences of such an implied term. It appears in effect to be said that any deviation from what is expected renders the solicitor unable to enforce the interim statute bill (to the extent that informed consent is required). This may go beyond what is necessary in order to give business efficacy to the contract.

(iii) Further, even if it were capable of application on the facts of the instant case, an implied term would potentially have unforeseen consequences in other cases which were unnecessary and went far beyond what was required in order to give business efficacy.

55. These points are supported by the decision of Morgan J in *Mastercigars Direct Ltd v Withers LLP* [2007] EWHC 2733 (Ch) at [107-109] and see the whole of the discussion at [107-111].

> **"An implied term?**
>
> *"107. Mastercigars submits that there should be implied into the contract of retainer in this case a term that Withers must comply with the 1999 Code and in particular paragraph 6 of it which refers to the solicitor updating the costs information as the matter progresses. This term is said to be one which should be implied in fact in order to give business efficacy to the contract of retainer.*
>
> *108.* ***The first thing to note about the suggested implied term is that it is not necessary in order to make the solicitor subject to the requirements of the 1999 Code. The solicitor is already subject to the requirements of the Code, pursuant to rule 15 of the 1990 Rules. Further, the notes to rule 15 distinguish***

> ***between three different levels of breach of the 1999 Code. If there were implied into the retainer a term that the solicitor would comply with the Code then any non-compliance would be a breach of contract whereas the notes to rule 15 contemplate that there can be some breaches of the 1999 Code which will not be a breach of rule 15 and will not be evidence of inadequate professional services under section 37A of the 1974 Act. Accordingly, the implied term would go further than rule 15 in precisely those cases where the need for an implied term is arguably at its lowest, that is, in relation to non-material breaches of the 1999 Code.***
>
> *109. The next question in relation to the suggested implied term is what would be the contractual consequence of non-compliance? It seems to me that Mastercigars' case was that compliance with the 1999 Code was a condition precedent to recovery of any payment for any work which was not the subject of an estimate complying with the 1999 Code. Mr Farber did not accept the term "condition precedent" when I put it to him but that is what his submission in effect amounted to.* ***That goes beyond implying a term that Withers shall comply with the code and implies a much more onerous requirement that they are not entitled to be paid if they do not comply with the 1999 Code. Formulated that way, it does not seem to me to be possible to say that the implication of a condition precedent of that kind is necessary to give business efficacy to the contract. Non-compliance with the Code carries with it the consequences set out in section 37A of and Schedule 1A to the 1974 Act…."*** (emphasis added).

IX Discussion

(a) The effect of the express term

56. The case law draws attention to how onerous it is to allow an arrangement whereby a client would have to preserve their ability to have a statutory challenge to the solicitors' fees by bringing proceedings against their solicitor whilst they are acting in adversarial proceedings against "an enemy". This has the capacity to impose significant pressure on the client. At the very time when they need the loyalty and commitment of the solicitor, they risk losing all of that by being in battle both with the enemy and with the person who ought to be their friend, namely their solicitor. Further, whilst the pressure of one battle can be great, the pressure of having to wage two battles at the same time might be much greater.

57. These considerations are telling in cases where there is any ambiguity. That might arise in circumstances where there is an ambiguous consent to rendering interim statute bills. It might arise where there is another attempt to say that there was an entitlement to render such bills, such as where there has been a natural break in the proceedings or where conduct, even acquiescence, is said to have given rise to an

entitlement to render such bills. It is in such cases that the impact of being forced to have an assessment of fees against a solicitor has been a telling consideration to the effect that any such right may be limited to be a right to request payments on account, rather than to render interim statute bills. It follows that the situation described in the paragraph immediately above has led to an inability to establish interim statute bills.

58. The Respondent submits, and I accept, that it is necessary to be cautious about attempts to apply dicta in cases where there is no express consent to interim statute bills warning about the difficulties for a client who unknowingly becomes exposed to the difficulties referred to in cases such as *Adams v Al Malik.* There may be a difficulty in a case which purports to contain express consent, but where the words are ambiguous. If a solicitor is to rely on express consent, the wording must be clear enough to show a contractual intention to entitle the solicitor to render interim statute bills which are final for the particular stage of the work. The Court will recognise an entitlement to render such bills.

59. An entitlement based on clear wording is what was found in *Erlam*. It is a particularly pertinent case because the terms are almost identical to the instant case. It is the same firm of solicitors with like terms. A contractual term which is clearly incorporated to the effect that there is an entitlement to render interim bills which are final for the particular stage of the work that is effective. Instead of having an entire contract, the parties are contracting so that there might be stage payments. There is no authority that requires that there should be an explanation of section 70 and how assessments work. The Solicitors Act 1974 (and prior statutes from which section 70 is derived) do not provide any such express obligation, whilst being prescriptive as to what is to be part of a bill. There is likewise no express obligation to this effect in the Code of Conduct.

60. The reasoning that there is no requirement to have informed consent in the Solicitors Act or in the Solicitors Conduct Rules as a pre-condition of an interim bill is telling. The wording of the term is sufficiently clear to tell an informed observer that the solicitor has an entitlement to render monthly bills which are final for the particular stage of work. There was sufficient reasoning in *Erlam* to make this out, even although the eventual finding was that the terms of the CFA replaced the original retainer.

61. Likewise, the reasoning in *Ivanishvili* is telling not just in following *Erlam* and identifying the reasoning in *Erlam* as not being obiter, but in the entirety of the reasoning at [74-79], as quoted in full above. I find persuasive the reasoning of Costs Judge Leonard at [75] that the question of informed consent " *has no bearing upon the appropriate interpretation of a contract of retainer".* Likewise, there is force in the reasoning at [77] to the effect that "*there is no statutory or regulatory obligation upon a solicitor whose retainer incorporates such a clear contractual term to spell out the full legal consequences of the delivery of such bills."*

62. Whilst noting the points made about fighting the solicitor and the adversary at the same time, there are other points which reduce the impact of this, namely:

    (i) if the interim bill is final, the solicitor does not have the opportunity to seek a higher remuneration at a later stage as a result of the bill being final and not just a request for money on account;

(ii) if the bill is to be challenged at the time, then the challenge will occur at a point in time when memories are much more fresh than if the dispute has to be dealt with potentially years later;

(iii) in considering fiduciary duties of solicitors, leaving aside professional and duties under the Code of Conduct which are different, Sir Geoffrey Vos MR stated that solicitors act for themselves in negotiating a new fee arrangement with a client and have the freedom to negotiate a new retainer in their own interests. Enhanced obligations such as informed consent arising from a fiduciary duty relationship do not apply where solicitors are stipulating the terms on which they will act: see *Belsner v CAM Legal Services Ltd* [2023] 1 WLR 1043 at [72]-[81] and especially at [79] and *Motto v Trafigura Ltd* [2012] 1 WLR 657 at [108]-[110] per Lord Neuberger MR. Further, as Sir Geoffrey Vos MR said in *Belsner* at [80] *"…the consequences of the breach of a professional duty, even one given effect by statute, are different from the consequences of breaches of fiduciary duties."*

63. Leaving aside purposive matters, the true construction is that the terms of the contract are sufficiently clear to have the meaning found in *Erlam* and in *Ivanishvili*. In a case where the contract terms are clear, and where the express consent is by the express terms of the contract, the reasoning in those cases seems correct. The purposive approach cannot enable one party (or the court) to re-write the terms of the contract or override the express consent of the parties.

64. Where the retainer clearly stated that the parties had made a retainer on terms enabling a solicitor to issue interim final statutory bills, the Court ought to give effect to the contractually agreed retainer and to the entitlement of the Respondent to have negotiated such terms. I conclude that the Costs Judge was entitled to determine the matter, as she did, namely that to find that (a) there was no requirement of informed consent, and (b) the Respondent was entitled to render interim final statutory bills.

(b) The implied term contended for by the Appellant

65. As regards the implied term advanced by the Appellant, I am satisfied that the implied term contended for does not apply to the instant contract. It is necessary to start the analysis by a reminder as to the requirements for implied terms, and that the touchstone is necessity rather than reasonableness. The case law was brought together by Carr LJ (as she then was) in *Yoo Design Services Limited v Iliv Realty Pte Limited* [2021] EWCA Civ 560. She stated that since the analysis of Lord Neuberger in *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2015] UKSC 72 (at [15] to [31]) "the Supreme Court and Privy Council have consistently made it clear that whether or not a term falls to be implied is to be judged by reference to the test of business efficacy and/or obviousness (see for example *Halllman Holding Ltd v Webster* [2016] UKPC 3 (at [14]); *Airtours Holiday Transport Ltd v HMRC* [2016] UKSC 21; [2016] 4 WLR 87; [2016] 4 All ER 1 (at [38]) and *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2016]

UKSC 57; [2016] 3 WLR 1422; [2017] AC 73 (at [31]). In *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2 at [7], Lord Hughes commented:

> *"It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.*

66. At [51] of the judgment in *Yoo*, Carr LJ said the following:

> *"In summary, the relevant principles can be drawn together as follows:*
>
> *i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;*
>
> *ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;*
>
> *iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;*
>
> *iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;*

v) A term will not be implied if it is inconsistent with an express term of the contract;

vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;

vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;

viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

(c) The application of the law to the instant case

67. I have set out law relating to the "stringent test" in respect of implied terms, because it is the application of the test which underlies the submissions of the Appellant set out above against the implied term. Of particular application to the instant case is that:

(i) an implied term is not to be based on what is reasonable or fair or equitable, but the test is necessity;

(ii) the concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition;

(iii) a term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test. It will be a rare case where the business efficacy and the obviousness tests are not both satisfied;

(iv) the business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence;

(v) the obviousness test will only be met when the implied term is so obvious that it goes without saying.

(d) Discussion

68. The points raised by the Respondent in answer to the implied term are accepted. Without derogating from the generality of the acceptance of the Respondent's case, there are to be highlighted the following points, namely:

(i) To the extent that there are duties to explain the pricing and costs to a client and of their rights in the event of dispute, those are regulatory and statutory duties. It is not a part of those duties that they are to be incorporated expressly into the contract. Hence it is that the Appellant is driven to the implied term. HH Judge Gosnell was right to say at [28] that it was not normal for provisions explaining the legal consequences of contractual terms to be implied into the contract unless there was a statutory or regulatory obligation to incorporate such provisions into the contract. Likewise, Costs Judge Leonard was right to say in Ivanishvili that "*there is no statutory or regulatory obligation upon a solicitor whose retainer incorporates such a clear contractual term to spell out the full legal consequences of the delivery of such bills*….[77] and "*If the retainer provides for the solicitor to deliver complete, final interim statutory bills for a given period, that will be sufficient.* [79]*"*

(ii) Any duty to ensure clients receive the best information about pricing and the likely overall costs of the case are professional duties by statute or regulations. They are different from the common law duties and the consequences of breaches of common law duties. It does not therefore follow that there is scope for implied incorporation. There is an analogy here with *Belsner* at [80], referred to above where Sir Geoffrey Vos MR adopted the same reasoning to refuse to imply into fiduciary duties analogous regulatory duties.

(iii) It is not necessary to imply the term because the solicitor will be subject to sanction for failing to observe the statutory or regulatory duties without incorporating the implied term into the contract. The touchstone of necessity is not therefore satisfied. Or using other words, the tests of business efficacy or obviousness are not satisfied in that there are other ways of procuring compliance. If the statutory and/or regulatory duties were intended to be incorporated into the contracts, then the duties would have required expressly their incorporation as such.

(iv) The implied term contended for would have consequences going far beyond what is intended. It would have the effect of the inability of solicitors to be unable to enforce their entitlement to interim billing however minor the alleged deviation from the statutory or regulatory requirement or the impact on the client or the ability of the client to counteract the alleged prejudice caused by the deviation: see *Mastercigars*.

(v) Whilst breaches of the Code of Conduct have different consequences, the breach of the alleged implied term would be a more blunt instrument, particularly where it is said to be in effect a condition precedent to the ability to enforce the right of interim billing.

69. It is then necessary to turn to the authorities, and the extent to which the Court is bound by previous authority. In my judgment, this Court is not bound by the previous authorities in the sense that there is binding authority which compels the Court to accept the submissions of either side. In *Erlam*, there was an application for permission to appeal to the Court of Appeal, which was rejected, but neither is that decision a binding precedent (having regard to the Practice Direction) nor is it necessarily the case that the refusal meant that the single Court of Appeal judge formed a definitive view about the issue of the existence of the implied term. Nevertheless, the decision to refuse permission to appeal closes off a potential avenue of uncertainty to the effect that the decision of HH Judge Gosnell might be reversed (referred to in para. 13 of the skeleton of Mr Mark Williams of 14 November 2022).

70. In my judgment, without being in way constrained in the decision by the authorities, the Court is able to reject the submission of the Appellant about the implied term. There is no authority which as a matter of the law of precedent constrains the Court not to follow the decision of *Erlam* or to arrive at a conclusion to the same effect.

71. In terms of finding the authorities persuasive, the Court finds the reasoning in *Erlam* and *Ivanishvili* more persuasive than the other dicta in previous cases. The Court does so because they adopt or are consistent with the reasoning about the law of and the application of the law as regards implied terms set out above. In particular, regard is had to the following points, namely:

(i) The Court accepts the reasoning in the instant case where the right to issue an interim statute bill was incorporated expressly and in clear terms into the contract. Previous authorities, insofar as they are said to contain different dicta, are largely about different situations, namely either that it was not an express incorporation of the contractual term or the contractual term was not as clear and unambiguous as in *Erlam* (and this case which contains a condition in substantially the same terms).

(ii) Although the dictum of Fulford J *Adams v Al Malik* has gained some traction in recent years, it was in case about a natural break in the proceedings, and therefore different from a case about incorporation of a contractual term. As noted above, it was also in the context of a permission to appeal case in which only a litigant person (albeit a solicitor) appeared.

(iii) *Erlam* was a reasoned decision which considered earlier authorities, and found that the dictum in *Adams v Al Malik* had been too widely applied. The Respondent submit that the matter is therefore to be treated as settled at first instance as a result of the decision in *Erlam*: see *Re Lune Metal Products* [2007] Bus LR 689 at [9] per Neuberger LJ. That might be pitching it too high, but I am satisfied that there is good reason to follow the decision of

Erlam because it considered the relevant earlier authorities and it contained convincing reasoning. Added to this is the fact that *Erlam* has now been followed by Costs Judge Leonard in *Ivanishvili* (which does not in reasoning set out fully above).

72. The decision of the Court of Appeal in *Menzies* does not in my judgment indicate a different conclusion. If anything, it is supportive of *Erlam* in that it quotes from two central paragraphs without disagreeing with the reasoning. It also at [5] and [26] refers to the statutory protections not being as great as they might be. I reject the submission that the effect of *Menzies* is to show that the Court of Appeal found an implied term as regards the duty to give advice in the retainer. If that had been the case, it would not have made the remarks which it did which appear to be approving of *Erlam*. On the contrary, it would have expressed disapproval of *Erlam* or at least expressed serious doubts as to its correctness. It did not do so, but instead referred to it as above apparently with approval.

73. It therefore follows that without being constrained to follow *Erlam* or *Ivanishvili* (the latter case not being binding or constraining), it is, in my judgment, appropriate to follow the reasoning in *Erlam* on very similar facts (including similar terms and conditions of the same solicitors) and the subsequent case of *Ivanishvili.* I therefore reject the implied term contended for by the Appellant. It therefore follows that the effect of the express term is that the Appellant consented to the term of the retainer.

74. For all these reasons, the Appellants' appeal is dismissed. It therefore follows that the Respondent's Notice does not strictly require consideration. Nevertheless, I shall at the end of this judgment make more reference to the Respondent's Notice. In view of the fact that there is some overlap between the application for permission to appeal in respect of the decision of the Costs Judge in the matter determined in May 2023, I shall consider that first.

X The Respondent's Notice

75. In view of my findings, it is not necessary to rule on the Respondent's Notice. This was to the effect that the informed consent ground should have been ruled out on the basis of the res judicata grounds. It was contended that it was barred by issue estoppel, waiver and the principles referred to in *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313. Submissions to this effect were made to the Costs Judge and are referred to in detail in the judgment in the informed consent ground judgment. The Costs Judge did not rule one way or the other on those submissions, but chose to decide the case on the substantive ground, and in particular to adopt the reasoning of HH Judge Gosnell in *Erlam.*

XI Conclusion

76. For these reasons, it follows that the appeal against the decision of the Costs Judge is rejected on Ground 1.

XII The linked application for permission to appeal on consumer protection

(a) Introduction

77. There is a linked appeal KB-2023-000100 in which it has been claimed that the term providing a right to the Respondent to issue final interim statutory bills is prohibited under consumer protection legislation. The Respondent does not accept that the bills are prohibited, and indeed submits that the substantive arguments as hopeless. The determination of the Costs Judge was not by reference to the substantive arguments, but that the arguments were too late in time. In her judgment, the arguments about the application of the consumer protection legislation were barred on res judicata type grounds, that is to say issue estoppel, waiver and abuse of process (*Henderson v Henderson*).

(b) The decision on consumer protection

78. The Costs Judge said that in a case which had been running since 2016 the consumer protection issue was not set out as an issue until the statement of case whose statement of truth was dated 26 October 2022. That was towards the end of the seventh year spanned by the litigation. In the Statement of Case, the Claimants refer to the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Protection from Unfair Trading Regulations 2008. The Costs Judge stated that those provisions were well established by 2016 and advice could have been taken long before October 2022 whether these provisions might assist them.

79. The Costs Judge referred to a submission made on behalf of the Claimants that consumer protection arguments based upon the 1999 and 2008 Regulations had been flagged up many years ago. In a Note dated 5 December 2019 prepared for a hearing on the next day, reference was made to the contra proferentem rule particularly applied in a relationship between a professional and a consumer. The Costs Judge found that raising an issue about the contra proferentem rule was not the same as raising an issue about the 1999 and 2008 Regulations and whether the terms were fair.

80. The Costs Judge said that if these issues had been raised at the outset, the matters could have been considered by her, by Slade J, and, if necessary, the Court of Appeal at little additional expense. In fact, when the matter reached as the Court of Appeal, the contractual entitlement issue was no longer in issue. The Costs Judge said that that was when they could and should have been raised.

81. When the matter was remitted back to the Costs Judge by the Court of Appeal in November 2018, it was with the expressed wish that the Costs Judge should give directions as to whether it was properly open to the Defendants to contend that any particular bill was not a statute bill for a reason other than that identified in the preliminary issue. The Costs Judge said at [16] that what did not run as far as the Court of Appeal was the issue of whether the Defendant's retainer permitted it to raise

interim statute bills at all. She said that she had decided that it did; Slade J upheld that finding and the Claimants took it no further. She said that the time to have raised the consumer rights issues would have been then and not many years later.

82. The Costs Judge found that this is not an argument about the bills per se. It is an argument about the retainer. That should have been made much earlier and has already been considered and decided by the court such that what she called "*res judicata issue estoppel*" applied. She then said that in moving on to the issue as to whether the bills were interim statute bills (rather than pursuing the question as to whether it was a part of the retainer to deliver interim statute bills), the Claimants waived the right to pursue a consumer argument. They were a part of what was the retainer and the retainer issue had been concluded years ago.

83. The Costs Judge then considered the issue of abuse of process (*Henderson v Henderson*). It is necessary to set out some of what she said at [20] and [23]-[25] as follows:

> *"20. Mr West's Skeleton Argument includes a quote 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..." is said by the Defendant to be 'powerfully relevant' to the Claimants' conduct in these proceedings, listing five separate occasions when the matter was before the Court and the Claimants did not notify either the Court or the Defendant of their intention to run the Consumer Rights Issues. Based upon the dates of the legislation behind the Consumer Rights Issues, the Defendant asserts (and I find) that they were available to the Claimants throughout that time and they could and should have been run as part of their earlier arguments about the retainer."*
>
> ....
>
> *23. I accept that Mr West is right in arguing that it is simply too late to raise the Consumer Rights Issues. The matters remitted to me by the Court of Appeal were to do with whether the Bills rendered are in fact Interim Statute Bills or whether for various reasons (including the Vlamaki test) they are not, and there has been much to-ing and fro-ing about which arguments remain open to the Claimants on that front. Had the Court of Appeal been seised of the Consumer Rights Issues (and for this to happen they would have to have been raised before me and before Slade J) then that Court could have decided those issues when they were considering the Appeal. There would then have been a definitive and binding decision at a high level, long ago.*

> *24. Instead, matters were remitted to me by the Court of Appeal several years ago, on the basis that there was an effective term in the retainer allowing for Interim Statute Bills to be rendered. Matters have proceeded since then on that basis a great deal of time, effort and money has been spent accordingly. To raise at this very late stage, Consumer Rights Issues that go right back to the situation as it was before Slade J and the Court of Appeal ruled, is clearly a step away from goodness and one that should not be permitted to happen.*
>
> *25. If the Claimant's position is that they have had the Consumer Rights Issues in mind for quite some time, for example since Mr Carlisle's note of 5 December 2019 which referred to the Vlamaki test and to contra proferentum then I would find that it is an abuse of process to have addressed that in such an elliptical manner only to bring it into sharp focus several years later. In fact, for the reasons stated in earlier paragraphs of this Judgment, I do not accept that the Claimants flagged up the Consumer Rights Issues on 5 December 2019; the reference in Mr Carlisle's note to matters of ambiguity, has no relevance to the Consumer Rights Issues which have to do with fairness to the consumer. This appears to be a line of argument that has fairly recently occurred to the Claimants and it is in my judgment an abuse of process in the Henderson v Henderson sense to run it now when the question of raising Interim Statute Bills under the retainer was decided and upheld several years ago."*

(c) Discussion on the application for permission to appeal

84. The application for permission to appeal comprises 39 pages. There is no explanation as to why it was necessary to exceed the normal maximum of 20 pages referred to at para. 9.110 of the King's Bench Guide. As the Respondent has stated, the length of the permission to appeal application was particularly difficult to understand given that consumer protection was considered simply by reference to the res judicata grounds (issue estoppel, waiver and abuse of process) in a six-page judgment (albeit with narrower line spacing than the skeleton argument) and comprising only 25 paragraphs. I shall return to the length of the skeleton argument.

85. It is easy to understand the case on a big picture level. The way in which consumer protection has only been pleaded in October 2022 despite the action having been going from 2016 seems most unsatisfactory. Further, the consumer protection, if it is an issue, is at least very closely connected to the contractual entitlement issue.

86. The reasoning of the Costs Judge, put broadly, is that any issue as to the validity of any term of the retainer should have been a part of the contractual entitlement issue. Thus, she held that the time to raise consumer protection was when the Court was deciding the contractual entitlement issue. It was therefore now too late to run consumer protection.

87. There are nonetheless questions as to whether the reasoning is correct, which would benefit from being more closely investigated. There has been reference to the law relating to issue estoppel which was set out in the judgment of the Costs Judge in the case relating to the informed consent argument. The Costs Judge related the arguments in respect of what are in this judgment compendiously referred to as the res judicata grounds. The law relating to issue estoppel was referred to at paras. 39 and following and in particular the oft cited quotation from Diplock LJ *Fidelitas Shipping v V/O Exportchleb* [1966] 1 QB 630, 642 to the effect that even on an interlocutory issue the parties cannot in the same suit say that an issue was wrongly decided at a later stage of the action. The suggestion is that this might apply to the contractual entitlement issue, namely to the extent that the Court determined that the relevant condition permitting interim final statute bills, the Court should not be able at a later stage to find that the contractual clause was in fact void because of consumer protection legislation (or even because of an alleged requirement of informed consent).

88. Mindful about how low the bar is at the permission stage, I would not wish at this stage to express a concluded view as to whether a decision about contractual incorporation which precluded an argument not raised about the application of some legislation e.g. consumer protection legislation. Put another way, and by way of analogy only, a question on a preliminary issue as to whether a decision that an exclusion clause was expressly incorporated might or might not preclude an argument that the clause was nonetheless ineffective under the Unfair Contract Terms Act 1977.

89. Likewise, in respect of the waiver argument, I would wish to consider whether a decision about incorporation and moving on to consider the form of the bills meant clearly and unequivocally that one could not, by reason of a waiver, revert to a question about the validity of the clause under legislation.

90. These issues may turn upon a clearer analysis than that undertaken to date about precisely how the contractual entitlement issue arose. In this way, there will be considered what was and was not decided by the issue. Issue estoppel is not the same as an abuse of process argument, and so it may be narrower than the principle in *Henderson v Henderson*. Likewise, there may be a need for a more intense scrutiny of the ambit of the law relating to issue estoppel and waiver respectively.

91. That then takes the Court on to the principle in *Henderson v Henderson.* Although the broad principles have been considered, there may be scope for more detailed consideration here than has been undertaken thus far. Here too, there may need to be more detailed consideration of the facts in order to decide what ought to have been considered at an earlier stage. This depends on a careful examination on the facts, which may be more controversial than that assumed thus far, bearing in mind the lengthy account in the 39-page skeleton and the more limited facts contained in the judgment about consumer protection. In no sense is this an indication that the Costs Judge was wrong, rather that there is an argument to be run. The other matter which could be developed is the law relating to *Henderson v Henderson* and *Johnson v Gore Wood* [2002] 2 AC 1. It is to be noted in particular that the usual circumstance in which these considerations arise is in a subsequent action, when the question is whether the issue should have arisen in the first action. That is not to say that it is not possible to have a question within the same action, and for the issue to arise in a preliminary issue and then to ask whether it is too late to raise an issue at a later stage

in the same action on the basis that it ought to have formed a part of the preliminary issue.

92. The relevant law was considered in some depth in a recent case not cited before me of Jefford J in *Daewoo Shipbuilding & Marine Engineering Limited (DSME) v. Songa Offshore Equinox Ltd (Songa)* [2020] EWHC 2353 (TCC). The case law indicates that the law is not in all one direction, although the preponderance of law is that the abuse of process argument can be run in the same action where a point ought to have been taken at an earlier stage. An oft cited case which was referred to in the judgment of the Costs Judge and before the Court on the permission to appeal application is that of Coulson J (as he then was) in *Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited* [2009] EWHC 255 (TCC). This in turn relied on an earlier Court of Appeal decision, referred to before me, namely *Tannu v Moosajee* [2003] EWCA Civ 815. I do not propose to have lengthy citation of these authorities, but it will be noted that it is a big thing to preclude someone from pursuing a point which has not been adjudicated upon.

93. Since handing down the judgment in draft, I have been referred to the case of *Koza v Koza Altin* [2021] 1 WLR 170 in which the Court of Appeal reviewed a number of authorities and conclude that issues of *Henderson* abuse may arise within the same proceedings. At [42], Popplewell LJ said that there is no general principle that the applicant in interlocutory hearings is entitled to greater indulgence nor is there a different test to be applied to interlocutory hearings. He said: *"...a party should generally bring forward in argument all points reasonably available to him at the first opportunity, and that to allow him to take them seriously in subsequent applications would generally permit abuse in the form of unfair harassment of the other party in obstruction of the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions."* This late citation exemplifies how it may be necessary on the hearing of an appeal to consider more extensive case law than that which has been cited at the hearing before this Court.

(d) Decision on the linked application

94. On the basis of the above, there is enough to give permission to appeal in respect of the issue of whether the Costs Judge was right to bar the consumer protection grounds on the res judicata grounds (issue estoppel, waiver and abuse of process). In no sense does this judgment indicate anything more than that the low threshold has been established to give permission to appeal.

95. I have been asked, if time allowed, to move on to consider the appeal itself. The parties were right to leave it to the Court whether it was satisfactory to resolve the appeal itself. I have reviewed the written and oral arguments which I have received in connection with the appeal. I have concluded that it is not appropriate to do so having regard to the greater consideration that should take place before the substantive appeal can be determined. I have set out above various areas where the Court might receive more focussed argument for the appeal.

96. It is also to be noted that the paperwork presented in connection with the application for permission to appeal is rather diffuse. It contains numerous documents. Without

setting a long list, it contains skeletons and notes at the various stages of the action in particular in connection with the informed consent stage and the consumer protection stage. The skeletons and notes are from a variety of people, costs draftsman, a solicitor, different counsel. Further, there is a disconnect between the 39-page skeleton and the understandably brief response at this stage on behalf of the Respondent.

97. What is now required is more focussed material for the further consideration of this case. In particular, the 39-page document should be replaced by 20-page document, taking into account some of the matters set out in this judgment. Then a fuller response on behalf of the Respondent is required. Directions are required in order to give effect to the above for the purpose of the full appeal of the linked matter. It would be safest to allow a full day for an oral hearing of the full appeal of the linked matter.

98. The Claimants have suggested that the procedural history is complex and that the appeal court will need a full understanding and overview. It is suggested that there should be witness evidence provided to this end. I shall not order that. There is no reason why that was not produced before the lower court. It is more likely to add to the burden of the Court and the controversies and does not assist in seeking to make the position more focussed with less material. The assistance of the parties in producing a core bundle of manageable proportions is required.

99. In an email dated 13 November 2023 from Mr Mark Williams of the solicitors for the Claimants has reminded the Court that there were before the court 9 grounds which he says are engaged. I have found for the Claimants in giving permission in respect of the core matter, namely that the Costs Judge decided the issue estoppel (Ground 6), waiver (Ground 7) and the abuse of process points (Ground 8) points in favour of the Defendant, and permission to appeal has been granted in that regard. Since there is already an oral hearing due to take place on 30 November 2023 in respect of consequential matters, I shall consider whether there is anything in the other grounds which requires permission beyond the matters in Grounds 6-8.

100. In order to provide focus for the hearing of the consequential matters, without reaching any concluded views, I shall indicate particular matters where clarification is required:

(i) Ground 1 – it is not apparent from the argument how it is that the Costs Judge was barred from dealing with the estoppel arguments which she had specifically said that she would hear in her order dated 27 January 2023 against which there was no appeal. Nor is it apparent why her decision provided a fetter on the then extant appeal, bearing in mind that the appellate court is not bound by her decision.

(ii) Grounds 2-5 – bearing in mind that the Court was not deciding the consumer protection issues, but whether there was a bar to deciding the consumer protection issues at this stage, it is not apparent why these are independent grounds of appeal at this stage. I do not rule out the possibility that there might be arguments that these matters in some way inform in respect of the Grounds 6-8, but it is not apparent why these should be independent grounds of appeal.

(iii) Ground 9 – this might be regarded as part and parcel of the Claimants' challenge as to the effect of the determination about the contractual retainer. If it is something else, this would require explanation.

(e) Grounds 2-4

101. In the various skeleton arguments, there have been touched on arguments about costs orders of the Costs Judge. In view of the large amount of material to cover in the oral hearing, they were not majored upon orally. In the written arguments, it is suggested that some of the arguments might be about to be overtaken by subsequent arguments. The arguments, some of which are about whether orders as to costs are to be stayed and the like, are likely to overlap with consequential arguments about costs in connection with the handing down of this judgment. I shall consider these arguments at the same time as dealing with the other consequential arguments to this judgment. The Court would also benefit from greater clarity as to how the Costs Judge went about making the decisions which she did. It is taken as assumed that the Court will understand this, and the Court may need assistance to understand the process and reasoning of the Costs Judge. In no sense is this a veiled criticism of the Costs Judge's decision.

XIII Consequentials hearing

102. At the consequentials hearing, there will be considered whether permission is required beyond Grounds 6-8 where permission to appeal is granted. The parties are permitted to lodge short skeleton arguments in respect of the scope of permission to appeal limited to 4 pages each, the Claimants to go first by 10am on Monday 27 November 2023 and the Defendants to respond by 10 am on Wednesday 29 November 2023.

103. As regards Grounds 2-4 and any other consequential matters arising from the judgment, there may be written argument limited to a further 4 pages each. Grounds 2-4 and consequential matters appear to be inter-related. The parties shall endeavour to agree what are the agenda items for the consequentials hearing. They should liaise about the timing of the written arguments.

104. In view of the time already allocated to this matter, there must be proportionality in respect of the additional oral hearing. The Court will restrict the time for oral argument.

105. It remains for the Court to thank all Counsel for the assistance which they have provided to the Court in their written and oral submissions.