Neutral Citation Number: [2023] EWHC 125 (KB)

Case No: QA-2021-000250

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2023

Before :

MR JUSTICE FREEDMAN

- -

Between :

HOLMAN FENWICK WILLAN LLP

Claimant/Respondent

- and –

WAHID SAMADY

Defendant/Appellant

- -
- -

Christopher Lundie (instructed by **RSW Law**) for the **Defendant/Appellant**
Simon Forshaw (instructed by **HFW LLP**) for the **Respondent/Claimant**

Hearing date: 8 November 2022
Further written submissions: 15 November 2022;
Judgment sent in draft: 12 January 2023.

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Approved Judgment

This judgment was handed down remotely at 12noon on 6 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MR JUSTICE FREEDMAN

MR JUSTICE FREEDMAN :

I Introduction

1. Mr Samady appeals against the grant of summary judgment by Master Cook ("the Master"). in a sum of £417,000 plus interest in respect of solicitors' fees. I heard the appeal on 8 November 2022. In view of various arguments referred to below, the Court gave directions for further written submissions which were exchanged and filed on 15 November 2022. The Court is grateful to the parties for their written and oral submissions and for the assistance provided to the Court.

2. Between 2018 and 2020, Mr Samady personally and companies controlled by him instructed either the Claimant ("HFW") or an associated Abu Dhabi entity, namely Holman Fenwick Willan MEA LLP ("MEA LLP") in a number of legal matters. The companies comprise CNM Estates (Tolworth Towers) Limited, CNM Estates Limited and CNM Estates (Red Lion Management) Limited (collectively the "CNM Entities"). Some of the instructions were by Mr Samady personally: he instructed MEA LLP. HFW was instructed in a Commercial Court matter by CNM Estates (Tolworth Tower) Limited in respect of what was called the Tolworth Towers litigation. As of 31 July 2020, there was a net balance due to HFW (according to HFW) in respect of that litigation in a sum of £415,967.91. There was an agreed contingency in respect of that litigation in a sum of £114,336.02, which contingency was to be paid at the end of the Tolworth Towers litigation to be paid out of the settlement sum or the judgment amount. The balance owed after the contingency was a sum of £301,631.89.

3. A payment schedule was agreed in a letter dated 9 November 2019, which payment schedule had not been complied with save for payment of a sum of £109,274.89. In a letter dated 31 July 2020 ("the July Letter") from HFW to Mr Samady, there were set out 11 matters giving rise to invoices said to be currently outstanding totalling a sum of £598,965.03. Some of the invoices were from HFW and some were from MEA LLP. The invoices to Mr Samady personally were all from MEA LLP.

4. Disclosure had been a long process. Mr Samady referred to a case management order dated 9 July 2019 and various orders and extensions thereafter. This culminated in an unless order made on 17 July 2020 that the claim in Commercial Court would be struck out unless disclosure was completed by 31 July 2020.

5. By July 2020, a decision had been made for the work of Mr Samady and the CNM Estates including the Tolworth Towers litigation to be transferred to Howard Kennedy. Mr Samady said that he had lost confidence in the work being done by HFW. It was agreed that HFW would complete disclosure on the Tolworth Towers litigation in accordance with the Disclosure Protocol as per an order dated 9 July 2019 and that a disclosure certificate would be prepared for Mr Samady's signature and confirmation that the disclosure obligations had been complied with. A further invoice for work done on disclosure in a sum of £7,500 and the preliminary trial issues of £2,500 plus VAT would be raised. Upon disclosure being completed, the retainer would be terminated, and Howard Kennedy would take over conduct of the Tolworth Towers litigation.

6. A payment plan was agreed to pay the outstanding invoices in a sum of £442,000, and subject to payment on time and in full, there would be a discount in a sum of £50,000 on the final payment. It is apparent that there was a significant discount from the invoiced sums to the payment plan even before the discount. The payment plan was to be sums of £10,000 by 3 August 2020, sums of £20,000 per month by the end of August, September and October 2020, a sum of £186,000 by the end of November 2020 and a further sum of £186,000 (from which the discount would be taken subject to prompt payment) by the end of December 2020.

7. The foregoing was recorded in the July Letter, which contained the following:

> *"In consideration of our agreeing the payment plan set out below for our outstanding fees you agree and confirm that you are personally liable for and guarantee to HFW all of the payments set out in this letter. Accordingly you hereby, jointly and severally, unconditionally and irrevocably, guarantee to us the prompt and complete and performance when due in full of all payments owed by both CNM Estates (Tolworth) Limited, CNM Estates Limited and CNM Estates (Red Lion Management) Limited to us."*

8. The July Letter then set out the payment schedule and stated:

> *"We expect payment dates to be adhered to. In the event that they are not all outstanding payments will become due immediately."*

9. The July Letter, which was signed by Mr Samady *"personally and for and on behalf of the CNM Entities"*, set out the current outstanding invoices comprised a sum of £598,965.03. There is evidence raising some detailed questions relating to this computation. Even taking into account that evidence, the amount of the invoices even after adjustments was more than the sum payable under the payment plan, even before the discount of £50,000 for prompt payment. It was therefore the case that an overall reduction was obtained for the promises contained in the July Letter.

10. In breach of the payment plan, the second instalment of £20,000 due to be paid by 31 August 2020 was not paid on time or in full. By 7 September 2020, a total sum of £25,000 was paid, and so there were arrears of £5,000. There have been no further payments of the sums referred to in the payment plan. It appears that at the time of the drafting of the July Letter, the disclosure certificate remained outstanding, but by the time of the execution of the July Letter, the disclosure certificate had been completed and signed.

11. On 20 August 2020, Eversheds on behalf of the Defendants in the Tolworth Towers litigation wrote that the Claimants had failed to comply with the provisions of an agreed disclosure protocol and Practice Direction 51U. It was alleged that there had been a document dump rather than a proper disclosure exercise. In a witness

statement of Mr Neil Adams dated 26 May 2021 at para. 26(2), it was stated that Mr Damian Honey, the partner who had conduct of the Tolworth Towers litigation, believed that the disclosure exercise had been conducted properly. Mr Honey spoke briefly with Howard Kennedy regarding the Eversheds letter, who were not concerned by its content and did not express any concern that it was not possible to send a robust response addressing all issues that had been raised by Eversheds. HFW and Mr Adams did not hear again further from Howard Kennedy on the issue of the Eversheds letter.

12. In his witness statement, Mr Samady says that there was irrelevant documentation in the disclosure comprising about 8,000 documents and more than 500 privileged documents which had been provided to Eversheds. At para. 28, he said that *"Howard Kennedy were…instructed to resolve the disclosure issues…"* and *"approximately £90,000 in additional costs were incurred in dealing with those costs."*

13. It should be noted that:

(i) There is no evidence of any application to the effect that the disclosure was not completed on time or to give effect to the unless order.

(ii) There was no statement from Howard Kennedy to corroborate or provide further details about the above.

(iii) There were no documents exhibited from Howard Kennedy, including but not limited to their identification of the problems, the steps undertaken to put them right and the additional costs incurred in so doing or any evidence to support the additional costs of £90,000.

14. Mr Samady says (para. 31 of his witness statement) that at the point when he made the first two instalment payments under the payment plan, "*the full extent of HFW's default at that stage was not readily apparent to me and advice was being taken from Howard Kennedy, who will have been at an early stage of reviewing the disclosure exercise."*

15. The issues which now arise are as follows:

(i) Mr Samady submits that the July Letter was a guarantee, whereas HFW submits that it was a contract of indemnity and guarantee;

(ii) The consequence according to Mr Samady is that as a contract of guarantee, it was subject to all defences of the primary obligors including any failure to comply with statutory formalities in particular under the Solicitors Act 1974. He also submits that to the extent that there are defences of set off and cross claims such as discharge or diminish the primary obligations, Mr Samady is entitled to rely upon them.

(iii) HFW submits that HFW is entitled to sue on the July Letter, whereas Mr Samady submits that some of the invoices were issued by MEA LLP

and not HFW, and so to this extent HFW is not entitled to bring an action.

(iv) Mr Samady submits that it was an implied term of the July Letter that the disclosure exercise was carried out and would be completed with reasonable skill and care. HFW denies the existence of the implied term and contends that the only duty was that of HFW to CNM Estates (Tolworth Towers) Limited.

(v) Mr Samady submits that HFW was in breach of the implied terms with the consequence that on the basis of a guarantee, Mr Samady was discharged.

(vi) Alternatively, the breach was a repudiatory breach with the effect that Mr Samady was entitled to treat himself as discharged from the July Letter whether it was a guarantee or an indemnity.

(vii) Alternatively still, the effect of the breach was that Mr Samady was able to treat himself as discharged to the extent of damages of £90,000.

II Ground 1: construction of the July Letter: was the promise of Mr Samady an indemnity?

16. HFW submits that since the promises were at least in part of indemnity that Mr Samady is not entitled to avail himself of any defences only available to guarantors.

17. The argument of HFW is derived from the words in the July Letter which states that "*you are personally liable for and guarantee to HFW all of the payments set out in this letter."* In order to give effect to the words "personally liable", it must have a meaning of something other than a "guarantee". This must mean a primary liability, that is to say an indemnity. Likewise, the obligation being joint and several, that must connote that the liability was of the same nature as of a primary obligor, and further it is said consistent with its unconditionality for it not to be conditional on the existence of an obligation of another obligor.

18. The argument of Mr Samady is that the language of guarantee is used twice in the operative clause, and it must mean what it says. It is said that it is reading too much into the words "personally liable" to find something other than a guarantee. If an indemnity had been intended, it would have said so. The July Letter was drafted by lawyers, namely HFW. The term "personally liable" was not inconsistent with a guarantee because a guarantee gives rise to a personal liability.

19. In my judgment, the key to the construction of the July Letter is the words seen in their context. The first aspect is that some of the liabilities comprised invoices directed to Mr Samady alone comprising a sum of about £127,000. It follows that in making a promise about what was previously his own liability and the liability of his companies, he could not be treated as a guarantor at least to the extent of his own primary liabilities. I have then considered whether it could be said that Mr Samady

would be a guarantor to the extent of the liabilities of CNM Entities, and they would be guarantors to the extent of Mr Samady's obligations.

20. The difficulty then would be to ascertain to what extent the liabilities taken on would be their own or those of another. The effect of the July Letter was to replace the old invoices with a payment plan which was not referable to specific invoices. At the core of the new arrangement was a contract which replaced the old invoices. There was a benefit to the paying parties in that there was a significant reduction in what would be payable. There was a benefit to the receiving party or parties in that there was not a series of promises from single entities, but the total sum payable would be the subject of joint and several liabilities of each of the CNM Entities and Mr Samady.

21. The effect then was that if and to the extent that the old obligations remained, they could be the subject of guarantees. However, they did not remain. The payment plan was not by reference to the invoices. Once created, the original invoices had been subsumed and extinguished by the contract comprised in the July Letter.

22. It is this context and background that enables one to understand the words "personally liable for and guarantee". It is to be understood as being both in the nature of indemnifier and guarantor. Another interpretation would be that although the word "guarantee" is used, in reality it means that there is a personal promise in the nature of a primary obligation. This applies with greater force in the next sentence. Here too, whilst the word "guarantee" is used, it is not possible to identify who is guaranteeing whose liability. On the contrary, by making each person having a joint and several liability, each person is primarily liable, and the word guarantee can be given effect by finding that each person is at the same time as being a primary obligor a guarantor of the other parties in respect of the obligations under the July Letter.

23. The construction is therefore contextual. Whatever terms have been used by the parties, Mr Samady's liability is at least in part that of a primary obligor not only to the extent of whatever was his prior obligation, but to the full extent of the payment plan. Against this background, the words "personally liable" are not redundant or tautological, but state as often happens in commercial documents including agreements of lending or other forms of credit, that the liability is both that of primary obligor and guarantor.

24. The first ground of appeal was that the Master erred in construing the July Letter as a contract of indemnity rather than a contract of guarantee. I find that the Master did not so err. It is also said that this issue was not identified in the application, but its importance became central upon the late identification of the defence by reference to the Solicitors Act 1974.

25. The effect is that the liability under the July Letter did not depend on whether the invoices were compliant with the requirements of the Solicitors Act 1974. The payment plan replaced and subsumed the prior invoices and liabilities. It therefore follows that attempts on the part of Mr Samady to rely on defences only available to a guarantor must fail.

III Ground 2: Was it an answer to summary judgment that the indebtedness to MEA LLP was not dealt with in the July Letter or in the summary judgment application?

26. The second ground of appeal is that the Master erred in granting summary judgment and/or there was a procedural irregularity. This was in that the HFW's claim as advanced at the summary judgment hearing was said to involve a multi-party settlement of a claim for fees by the HFW and MEA LLP when no such claim had been pleaded in the Particulars of Claim and no such settlement was identified in the evidence filed in support of the application for summary judgment.

27. Insofar as it is said that HFW cannot sue on the payment plan because MEA LLP might subsequently sue on its invoices thereby exposing Mr Samady to double jeopardy, this does not provide a defence to the current action. The reason for this is that the payment schedule had replaced the invoices, and the claim is brought under the July Letter and not under the invoices. The obligations of Mr Samady and the CNM Entities were to pay HFW. Although MEA LLP was not expressed to be a party to the agreement, the clear inference is that this must have been with the knowledge and approval of MEA LLP. This did not require pleading, but it needed to be dealt with after Mr Samady had raised the point in argument.

28. The Master at para. 22 of his judgment took into account the background in coming to the conclusion that HFW and MEA LLP *"were acting together, or in combination Page 1 comprised the amounts outstanding between HFW and MEA LLP."* These were two connected HFW entities. The Master's approach was justified on the evidence before the Court.

29. It is unthinkable that MEA LLP would wish to sue on their invoices in the events which have occurred. The clear inference is that there will be an apportionment between these associated entities upon receipt of money. It is unnecessary to require such a discharge because it is obvious that it has occurred. If belt and braces are required, the discharge can no doubt be confirmed by MEA LLP before dismissing the appeal that this will be forthcoming.

30. In evidence to be referred to below, it is suggested that there has been confusion in HFW's case between MEA LLP and HFW (Middle East) LLP, a different limited liability partnership. This would not affect the conclusions in the paragraphs immediately above save to read for MEA LLP the words "MEA LLP and/or HFW (Middle East) LLP". The acting together of HFW with MEA LLP and/or HFW (Middle East) LLP and the apportionment would be expected to be between those entities and the checking before dismissing the appeal can be with MEA LLP and/or HFW (Middle East) LLP.

IV Possible additional ground: is there a defence under the Solicitors Act 1974

31. It follows from the above that as result of the July Letter, the invoices are subsumed by the payment schedule. The action is brought under the contract comprised by the July Letter and not under the invoices. The question which then arises is whether the provisions of the Solicitors Act 1974 apply in respect of a claim brought under a

contract as opposed to pursuant to invoices, and especially where the contract is one of compromise following non-payment of invoices. Mr Samady submits that it does apply and that the invoices are non-compliant with the Solicitors Act 1974 as a result of which the action must fail and in any event summary judgment ought to have been refused.

(a) Preliminary procedural issues to the Solicitors Act 1974 defence

32. It is necessary to consider the procedural history of this defence in some detail because it has given rise to some procedural issues. The history is as follows:

(i) The Solicitors Act 1974 did not feature in the defence;

(ii) In the draft amended defence served shortly before the hearing before the Master, it was stated that the invoices were not final bills required in order to bring proceedings (section 69) and if they were final bills, Mr Samady was entitled to a detailed assessment (section 71).

(iii) Until the reply stage of the appeal, Mr Samady relied on the Solicitors Act 1974 only in the event that the Court were to find that Mr Samady's obligations under the July Letter were in the nature of guarantees. The argument would then be that to the extent that the principal obligor would have had a defence under the Solicitors Act 1974, such defence would enure to the benefit of the guarantor.

(iv) In the course of the reply in the appeal, the argument was run for the first time that even if and to the extent that the obligation of Mr Samady was as principal obligor (that is under an indemnity), HFW could not thereby evade non-compliance with the Solicitors Act 1974. If the bills were not compliant with that which was required of final bills, then the action could not succeed whether under a guarantee or an indemnity.

(v) By this stage, HFW had advanced evidence since the hearing before the Master to show that the bills were compliant and with a view to defeating defence under the Solicitors Act 1974 whether the July Letter was a guarantee or an indemnity. However, there was no application to adduce that evidence. In the course of the hearing, Mr Forshaw for HFW indicated a willingness to proceed without applying for the further evidence to be admitted.

(vi) Mr Samady submitted through Counsel that the submission now made in respect of the Solicitors Act 1974 defence was not a new point which was being made in the appeal.

(vii) The Court asked for further submissions in writing about (a) the extent to which the claim could be made whether on a guarantee or an indemnity to the extent that there had been non-compliance with the Solicitors Act 1974, and (b) the effect of a breach of an implied term to use reasonable

skill and care in and about disclosure on the obligations to meet the payment schedule.

(viii) Since the hearing of the appeal, Mr Samady has submitted in a written submission that there was no new point and that HFW ought not to be permitted to adduce new evidence, and to the extent that new evidence is adduced, he ought to be able to rely on his fourth witness statement.

(ix) Since the hearing of the appeal, HFW has submitted that this is a new point which is not available to Mr Samady at this late stage, and that it would be prejudiced by its late admission. If the point is allowed to proceed, then HFW makes application (informally) to have admitted the first witness statement of Mr Jones.

33. On the procedural matters, I have a concern about how closely inter-related the matters are. I shall at this stage consider the matter de bene esse as if all the material was before the Court. I shall then reconsider the matter in case irredeemable prejudice arises out of consideration of any new material at a late stage.

(b) Does the Solicitors Act 1974 apply to cases where the claim is made under a contract rather than a bill?

(i) Relevant statutory law

34. The relevant sections are as follows (emphasis added):

> **"Section 69**
>
> **Action to recover solicitor's costs.**
>
> (1)Subject to the provisions of this Act, **no action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a bill of those costs is delivered in accordance with the requirements mentioned in subsection (2);** but if there is probable cause for believing that **the party chargeable with the costs**—
>
> (a)is about to quit England and Wales, to become bankrupt or to compound with his creditors, or
>
> (b)is about to do any other act which would tend to prevent or delay the solicitor obtaining payment,
>
> the High Court may, notwithstanding that one month has not expired from the delivery of the bill, order that the solicitor be at liberty to commence an action to recover his costs and may order that those costs be assessed.
>
> (2)The requirements referred to in subsection (1) are that the bill must be—

(a)signed in accordance with subsection (2A), and

(b)delivered in accordance with subsection (2C).

(2A)A bill is signed in accordance with this subsection if it is—

(a)signed by the solicitor or on his behalf by an employee of the solicitor authorised by him to sign, or

(b)enclosed in, or accompanied by, a letter which is signed as mentioned in paragraph (a) and refers to the bill.

(2B)For the purposes of subsection (2A) the signature may be an electronic signature.

(2C)A bill is delivered in accordance with this subsection if—

(a)it is delivered to the party to be charged with the bill personally,

(b)it is delivered to that party by being sent to him by post to, or left for him at, his place of business, dwelling-house or last known place of abode, or

(c)it is delivered to that party—

(i)by means of an electronic communications network, or

(ii)by other means but in a form that nevertheless requires the use of apparatus by the recipient to render it intelligible,

and that party has indicated to the person making the delivery his willingness to accept delivery of a bill sent in the form and manner used.

….

Section 70

Assessment on application of party chargeable or solicitor.

(1)Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.

(2)Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such

terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order—

(a)that the bill be assessed; and

(b)that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed.

(3)Where an application under subsection (2) is made by the party chargeable with the bill—

(a)after the expiration of 12 months from the delivery of the bill, or

(b)after a judgment has been obtained for the recovery of the costs covered by the bill, or

(c)after the bill has been paid, but before the expiration of 12 months from the payment of the bill.

no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the assessment as the court may think fit.

…

Section 71

Assessment on application of third parties.

(1)Where a person other than the party chargeable with the bill for the purposes of section 70 has paid, or is or was liable to pay, a bill either to the solicitor or to the party chargeable with the bill, that person, or his executors, administrators or assignees may apply to the High Court for an order for the assessment of the bill as if he were the party chargeable with it, and the court may make the same order (if any) as it might have made if the application had been made by the party chargeable with the bill."

(ii) Relevant case law

35. In the instant case, there were bills which were issued by HFW and MEA LLP to Mr Samady and the CNM Entities. It is not common ground that they were compliant bills. If a compliant bill is required in order for an action to be brought by a solicitor on the bill, can the parties arrive at a contractual agreement in order for the solicitor to claim fees without the need for a compliant bill and with the action being brought under the contract? In the instant case, the July Letter is a contractual agreement. It is a compromise where a significantly lesser sum has been agreed to be paid than was

originally sought by the bills. HFW claims that the claim is brought under the contract such that the question as to whether the bills were final bills complying with the Solicitors Act 1974 does not arise.

36. HFW relies on a line of authorities on section 71 of the Solicitors Act 1974 and predecessor provisions in earlier legislation. The provision applies only to a person other than the person chargeable on the bill having paid or being liable to pay a solicitor's bill. The assessment provided for in section 71 is an assessment of a solicitor's bill. Section 71 does not apply where the liability is not based on a solicitor's bill.

37. The line of cases cited is as follows:

(i) In *re Morris* (1872) 27 LT 554, the defendant to proceedings brought by a bank, agreed in settlement of those proceedings to pay £200 *"as and for the costs of"* the bank's solicitors. He then claimed a taxation. The Court declined to order taxation since the agreement was to pay a fixed sum rather anything which might be determined on a taxation.

(ii) In *re Heritage (ex parte Docker)* (1878) 3 QBD 726, a dispute between two parties was settled on terms whereby one party (Mr Docker) would pay £200 to the other party's (Mr Heritage's) solicitor in respect of the costs of the action. The Court (Cockburn CJ, Mellor J and Lush J) agreed that in such circumstances the predecessor provisions to section 71(1) Solicitors Act 1974 had no application because the agreement was not of a third party *"to guarantee the clients' costs"*, but to pay sums to a solicitor in respect of a liability *"fixed at a given amount"*.

(iii) In *Ingrams v. Sykes* (unreported, 11 November 1987), in settlement of defamation proceedings it was agreed by Mr Ingrams that there would be various payments made including *"reimbursement of the Plaintiffs' costs in the sum of £20,000…"*. Mr Ingrams then sought taxation of the costs under section 71(1) Solicitors Act 1974. The judge at first instance (Jupp J) declined to order taxation, finding that section 71(1) had no application in the case of a settlement agreement of this type. The Court of Appeal dismissed an appeal. The three judges differed in their analysis. However:

a) Sir John Donaldson MR agreed with the first instance judge that the agreement was a settlement agreement to which section 71(1) Solicitors Act 1974 had no application.

b) Neill LJ decided the case on different grounds but noted in his judgment: *"Clearly there are cases where a party reaches a settlement on the basis of paying a fixed sum towards the other party's costs and where his agreement to pay this sum is demonstrably unconnected with the precise sum due from the other party to his solicitors."*

(iv) A majority of the Court of Appeal therefore agreed that an agreement (not between solicitor and client) for payment of a fixed sum in respect of a solicitor's costs would not be an agreement to which the court would interfere with by directing taxation under section 71(1) Solicitors Act 1974. The right to payment did not arise from a bill, but from a settlement agreement.

(v) In *Barclays Plc v. Villiers* [2000] CLC 616 Barclays was involved in litigation in relation to which it contended it was insured. There then arose a dispute between Barclays and the insurer as to the insurer's liability for the claim. That dispute was compromised on the basis that the insurer would be liable for certain matters, including by indemnifying Barclays in respect of costs. There was no agreement that any fixed sum should be paid in respect of those costs. The insurers sought taxation of the solicitor's costs under section 71(1) Solicitors Act 1974. Barclays (and the solicitor) contended that there could be no taxation as the liability for costs arose in respect of the settlement agreement. Langley J dealt with the argument as follows (with added emphasis):

> "Mr Sumption submitted that s. 71_of the Act does not apply to Equitas at all because Equitas's liability does not depend on the LWD bill or bills but arises only under and is wholly determined by the terms of the settlement agreement. **This submission was founded on authority to the effect that a settlement agreement under which a party agrees to pay a fixed sum of or towards the costs of another party disentitles the first party to any order for an assessment of the actual costs involved**: see Re Morris (1872) 27 LT 554 ; Re Heritage (ex parte Docker) (1878) 3 QBD 726 ; and Ingrams v Sykes (unreported , 11 November 1987, CA) . The last two of these decisions were decided on discretion, but it was also said that such a case fell outside the provisions of the 1974 Act or its predecessor Act. **However that may be, in this case Equitas (or insurers) agreed to indemnify Barclays for 'its own legal costs' (cl. 4(a)(i) and 5 of the settlement agreement) and in my judgment thus became liable to pay to Barclays the sums payable by Barclays on the bills LWD delivered to Barclays for such costs. There was no agreement to pay a fixed sum whether by way of settlement or otherwise.** Insurers did agree to pay the amount certified by Barclays but that amount itself was referable to the costs chargeable to Barclays. In my judgment that is sufficient to bring the liability of insurers within the meaning of subs 71(1) of the 1974 Act. I see no reason to construe that subsection so as to limit it to agreements to pay a solicitor's bill as such."

The judge declined to order an assessment under section 71(1) Solicitors Act 1974 on discretionary principles but found that he had the power to order such an assessment since there had been no agreement to pay a fixed sum.

38. Since these cases are about section 71(1) of the Solicitors Act 1974, they concern third parties who have agreed to pay the solicitor's bill or who have agreed to make a payment in a fixed sum. To the extent that the payments are from third persons, this is capable of having application in the instant case. The argument in this case is that Mr Samady is in the position of a third party. That is true to the extent that he has agreed to pay the sums previously the liabilities of any one of the CNM Entities. It might also be true as regards the sum previously payable by himself in that under the solicitor's bills, this was a sum payable to MEA LLP and never payable to HFW. On this basis, this was not a sum which had ever been payable by Mr Samady to HFW under a bill. Even to the extent that it arose out of a sum payable by him to a connected entity of HFW, that liability had been subsumed by a different liability under the contract. Accordingly, the statements above about third parties falling themselves outside section 71 because they had agreed not to pay solicitors' bills but to make payment pursuant to contract have application to the instant case.

39. It is now necessary to consider whether the effect of section 69 of the Solicitors Act 1974 is different. This is concerned with the solicitor and the client. It appears to make a pre-condition of a claim against the client that a valid bill of costs has been delivered by the solicitor to the client. It therefore raises a question as to whether this pre-condition would apply in circumstances where the claim arises not from the bill of costs but from an agreement to pay a fixed sum of costs. There is a danger of there being a difference in connection with section 69, namely that a solicitor could seek to obviate the protection of section 69 by entering into an agreement for a fixed sum with his client, and thereby remove the protection of an assessment (formerly a taxation).

40. The case law as regards section 69 includes the case of *Turner v Willis* [1905] 1 KB 468, 470-471. In that case an agreement between a solicitor and a client fell outside the predecessor to section 69 of the Solicitors Act 1974. That was because the agreed sum comprised not an agreement of the amount of the fees of the solicitor but an account in which cross claims, one of which was unrelated to the solicitor's bills, were set off so as to reach an overall agreed figure. If it had been an oral agreement to pay a lump sum to a solicitor for past costs, then that kind of bargain was required to be in writing.

41. There was a case where the solicitors and the client were alleged to have agreed a fee of £500: see *Re Fernandes* [1878] WN 57. That did not take it out of the protection of the regime requiring a written agreement. Likewise, it was arguable that a solicitor could not seek to circumvent the provisions of the Solicitors Act 1974 by suing on a cheque tendered by the client in payment of fees: see *Martin Boston & Co v Levy* [1982] 1 WLR 1434 per Warner J at p.1440F.

(iii) Application of the law to the facts

42. The law here is not entirely settled. The difficulty in any one case is working out what falls within a claim for the solicitor's fee having as its origin the bill and what falls outside this because it arises from a contractual compromise of a claim. The latter was evident in the case of *Turner v Willis* because of the stating of an account showing a balance. This was not the case in *Re Fernandes* where the solicitor's fees

from the limited report simply appear to have been an agreed sum. If it had been the case that the application of the law to the facts was in doubt, then a triable issue might arise, but I am satisfied that in the instant case, there is no such difficulty.

43. In my judgment, there is a logic in finding that the facts of the instant case are closer to *Turner v Willis*. That is because there had previously been bills (whether they were compliant with the Solicitors Act 1974 or not is a different question). This was not an attempt to enforce the bills, but a compromise by taking substantial deductions from the original sums and replacing the obligations per bill by an overall payment package and a joint and several liability of the three CNM Entities and Mr Samady. That was no longer a claim in respect of the bills. The liability under the bills had been replaced by an overall agreement, such that an assessment of the bills was no longer relevant in at least two senses. First, the sums to be paid were significantly less than the amounts in the bills. Second, the parties liable were no longer simply the parties to whom the bills were addressed, but various third parties as well as the party to whom the bills had been addressed. In the case of Mr Samady, some of the bills were addressed to him, but they were not from HWF.

44. If the issue had been by reference to third parties alone, then I am satisfied by reference to section 71(1) that the claim would no longer be by reference to the bills and so section 71(1) would not apply. That can be applied to a claim under section 69, save where and to the extent that the claim is in reality for the amounts owed to the solicitors by reference to their retainer.

45. In my judgment, on the facts of this case, the agreement was of a different character. The payment plan was a liability assumed under the agreement and not by reference to the bills. The reasons for reaching this conclusion are as follows:

(i) the very significant difference between the amounts of the bills and the payment plan, involving significant reductions at the time of the agreement and consequent upon prompt payment under the agreement;

(ii) the payment plan was not by reference to the solicitor's bills, but by reference to the overall sum agreed instead of the bills. The overall agreement was such that there was no part of the payments which were any longer referable to any of the bills.

(iii) Mr Samady was not a client of HFW at all, and, to the extent that he was a client of MEA LLP, the majority of what he took on was in respect of liabilities for which he was not previously answerable. The same can be said to a lesser extent in respect of the other CNM Entities.

(iv) there were other obligations in the agreement including the obligation to complete the disclosure process before handover, and other matters which were agreed.

(v) although Mr Samady says that he had no alternative to enter into the agreement, there is no case of duress in respect of the agreement. Mr Samady was in such a substantial way a businessman that one of his companies had a £40 million claim in the Commercial Court. He entered into the agreement of his own free will.

(vi) The agreement was a genuine agreement, and unlike the cheque example above, was not an attempt to circumvent the provisions of the Solicitors Act 1974.

46. I am satisfied in the light of the agreement as a whole that its enforcement was not in respect of solicitor's bills, but under a contract of compromise which fell outside the agreement. There might be other agreements where there would be questions as to whether section 69 might be engaged or at least the Court might be concerned about circumvention. This is not the case in the instant case. It is not necessary to have a trial in order to reach these conclusions, and there is no real prospect that a different conclusion would be reached after a trial.

47. In my judgment, this applies to the analysis of the promises in respect of the July Letter comprising inter alia an indemnity by Mr Samady. It also applies to the analysis about his promises being in the nature of a guarantee. On either construction, the promises fell outside the Solicitors Act 1974, arising as they did out of a contract and not out of solicitors' bills.

(iv) Additional ground of Mr Samady

48. The foregoing is sufficient by itself to show that there is no real prospect of the defence of Mr Samady succeeding. Assume however, for the sake of the argument, that Mr Samady were to succeed that the indemnity argument does not prevail, such that if there were bills which did not comply with the requirements under the Solicitors Act 1974, the claim must fail. This would be because of an argument which had its first airing in the reply in the appeal.

49. HFW submits that the Court should refuse to take such an argument into account on the basis that generally no argument not taken below should be heard on appeal. In any event, the argument should have been aired as a ground of appeal rather than raised during the appeal itself. HFW submitted that the new argument did not appear in the Grounds of Appeal, and a ruling should be made disallowing the ground.

50. There is generally a strict rule against the new admission of new arguments and evidence on an appeal where the argument was not taken, or the evidence adduced at first instance. Whilst I have some sympathy, the argument is very closely related to the argument which appeared in the draft Amended Defence about the effect of non-compliance with the Solicitors Act 1974. Although the argument could have been taken at first instance and indeed prior to the reply on the appeal, consistently with the overriding objective and just disposal of cases, the Court will allow the argument to be adduced subject to the condition referred to in the next paragraph of this judgment. In *Singh v Dass* [2019] EWCA Civ 360 at [16-18] per Haddon-Cave LJ, the Court of Appeal emphasised that the rule as to raising new points on appeal after a trial on the merits were strict. This strictness may be tempered on interim appeals such as when the issue is whether there is a realistic prospect of defending at a future trial whether on a summary judgment or a strike out application: see *Price v Flatcroft Ltd* [2020]

EWCA Civ 850 and referring to *Aylwen v Taylor Joynson Garrett* [2001] EWCA Civ 1171 at [49].

51. I am only prepared to allow such an argument to be run on the basis that the evidence of HFW dealing with the bills be allowed in as evidence. There might not have been an opportunity to deploy this evidence below due to the Solicitors Act 1974 only being relied upon as a defence shortly before the hearing. Nonetheless, HFW could have then decided to seek an adjournment to adduce this kind of evidence. That it chose not to do so may have been connected with the fact that at that stage the Solicitors Act 1974 was being used as an answer to a case on a guarantee and not on an indemnity. The calculation may have been that HFW could manage without the evidence on the basis of their confidence that the July Letter was an indemnity. However, the position is now different in view of the new argument that the Solicitors Act 1974 applies even where the obligation is an indemnity.

52. I do not accept the argument of Mr Samady to the effect that since the evidence might have assisted below in respect of the argument by reference to a guarantee that it is now too late. In view of the intention now to argue the point of law as an answer also to an indemnity, HFW ought to be able to answer it not only by legal argument, but also by factual evidence. In these circumstances, the test in *Price v. Flitcraft Limited* at paras.44 and 46 is satisfied for the admission of the first witness statement of Mr Jones. In short, it would be contrary to the overriding objective and unfair to allow Mr Samady to take this new point whilst refusing HFW the opportunity to deal with it by evidence. No prejudice would occur to Mr Samady by admitting this evidence because he has prepared a fourth statement to deal with this. That will also be admitted.

53. What does the new evidence of the first witness statement of Mr Jones show? Insofar as it is required in any event, the evidence adduced by HFW answers each of Mr Samady's points. The evidence is to the following effect:

(i) If there was a requirement to provide information explaining the client's right to have the costs assessed, this was contained in paras. 2 and 7.2 of terms and conditions attached to the client care letters: see Jones (1) paras. 22-25. In any event, there was no obligation to remind a client of their rights under the Solicitors Act 1974: see HH Judge Gosnell sitting as a Judge of the High Court in *Slade and Company v Erlam* [2022] EWHC 325, which was followed in *Boodia v Richard Slade* [2022] EWHC 2311 (both declining to follow *Masters v Charles Fussell & Co. LLP* [2021] 1 WLUK 145, referred to in Mr Samady's fourth statement);

(ii) If there was a requirement that the invoices, or covering letters, were signed, this was done. The vast majority of bills were signed on their face and the remainder were sent under cover of a letter or email which in turn were physically signed or signed by virtue of an electronic signature: see Jones (1) paras. 26-29. In any event on a proper reading of Solicitors Act 1974 section 69(2), this is not a requirement for a 'bill' under the Solicitors Act 1974, but rather a requirement to be met before the bill can be sued upon.

(iii) the invoices had sufficient detail and the bills at the time that they were sent were not subject to subsequent adjustment: see Jones (1) paras. 30-34. The subsequent discount and conditional settlement later made in the July Letter does not affect this analysis: see Jones (1) para. 35.

(iv) there was a contractual right to deliver 'interim statute bills' as provided for in para. 7.1 of HFW's standard terms. They are final bills in respect of the work covered by them: see Cook on Costs 2023 para. 2.6. Such bills are final bills for fees during the relevant periods and not subject to subsequent adjustment.

54. Mr Samady made another point which does not assist him. The bills may be challenged in special circumstances years after they had been delivered. However, there are no "special circumstances" to re-open these bills years after their delivery and years after the agreement in the July Letter.

55. Nothing in the fourth statement of Mr Samady provides an answer to any of the above points or even raises a triable issue. There are other points which are raised. It is suggested that the relevant LLP may be not MEA LLP, but HFW Middle East LLP. If there has been confusion here, which might or might not be the case, it does not affect the analysis. In particular, there is no reason to believe that it would affect the inference that there must be adjustments on recovery whether between HFW and MEA LLP and HFW or between HFW Middle East LLP and HFW or between all three HFW entities.

56. At para. 11 of Mr Samady's fourth statement, there are numerous points of detail regarding the invoices, but the points of detail do not show that compliant bills were not sent. There are a number of questions raised as to the invoices particularly at paras. 14.2 and 14.3 of the fourth statement of Mr Samady. They include queries regarding aspects of work in the bills and an aspect in respect of the contingency element, which does not form a part of this claim. In my judgment, none of these points of detail affect the validity of the bills or the claim by reference to the payment plan as agreed in the July Letter. In the case of the validity of the bills, this is because the four major points at para. 53 above are correct and they provide a complete answer as regards the validity of the bills. I am satisfied in the light of the evidence that the bills were compliant with the requirements of then Solicitors Act 1974. In any event, if there were any matters in issue as regards the bills, they provide no answer to the claim which arises out of the contract and not the bills.

(c) Conclusion about the Solicitors Act 1974

57. I am therefore satisfied that:

(i) Without the additional evidence, the Solicitors Act 1974 does not prevent HFW from suing Mr Samady. That might be on the premise that Mr Samady was not a client of HFW and therefore is in the position of a third party who is being sued under a contract and not on the bills.

(ii) Alternatively, on the premise that Mr Samady was a client of MEA LLP or HFW (Middle East) LLP, either (a) he was a third party falling outside the Solicitors Act 1974 being sued on a contract and not on the bills, or (b) he was a client and still fell outside the Solicitors Act 1974 because he was sued on a contract and not on bills and where the contract was not a device to escape the protection for a client under the Solicitors Act 1974. This analysis is correct whether the July Letter is construed as an indemnity or a guarantee.

(iii) With the additional evidence, in the event that despite the above, the invoices had to be compliant with the requirements under the Solicitors Act 1974, the bills were final bills or are to be treated as final bills and the relevant requirements were fulfilled. The premise that the bills were non-compliant was therefore not satisfied.

58. I therefore conclude that there is no triable issue which has been raised by Mr Samady by reference to the Solicitors Act 1974.

V Ground 3A.1: Mr Samady's claim to avoid the July Letter by reason of a breach of an implied term that the Claimant would exercise reasonable skill and care in undertaking the disclosure exercise.

Ground 3B.2 Mr Samady's claim to rely upon CNM Estates (Tolworth Towers) Limited against HFW for professional negligence in connection with disclosure.

(i) Was there an implied term?

59. Mr Samady's case is that there was such an implied term. He relies on the reference in the July Letter to *"we are completing disclosure on the Tolworth Towers Litigation in accordance with the Disclosure Protocol…and that we will prepare the disclosure statement for your signature…"* He says that this must be a reference to HFW. With such tasks in the contract went an obligation to exercise reasonable skill and care.

60. It became apparent in the course of argument that what was contended for was not only a forward facing promise, but also a warranty that the work done to date was in accordance with reasonable skill and care. HFW takes issue with this. It does not take issue with the notion that HFW owed a duty of care to its client in the Tolworth Towers Litigation under its original retainer and continuing until it ceased to act. However, it does take issue with the notion that it owed a duty of care under the July Letter to each of the CNM Entities and to Mr Samady.

61. Attention is drawn to the principles governing the implication of terms into contracts being strict and not being based on what parties would have agreed if asked, but on what is necessary to give business efficacy to a contract so that no term will be implied if the contract is effective without it and/or so obvious that it goes without saying: see *BP Refinery (Westernport) Pty Limited v Shire of Hastings* (1977) 180 CLR 266 per Lord Simon, *Marks and Spencer v BNP Paribas Securities Services*

Trust Co (Jersey) Limited [2016] AC 742 at para. 21 and *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 at para. 5.

62. In my judgment, there was no reason to imply such a term into the July Letter. Such a duty was already owed by HFW to CNM Estates (Tolworth Towers) Limited, such in the event that any losses were suffered a claim could be made by Tolworth Towers against HFW. There was no reason to extend that duty because Tolworth Towers was going to complete the disclosure part of its retainer due to an obligation in the July Letter such as to impose on HFW a like duty owed also to the other CNM Entities and Mr Samady. It does not suffice, as Mr Samady attempts to do, to say that the existing duty under the retainer does not prevent HFW from owing a concurrent duty to Mr Samady.

63. That conclusion is particularly clear because by the time of the signature of the July Letter at the end of July 2015, the Disclosure had been completed. It therefore follows that the alleged implied term would indeed have to be an implied warranty about the past. It would take very clear wording to impose such a warranty, which there was not. It would also be unnecessary because such a duty was already owed by HFW to CNM Estates (Tolworth Towers) Limited under the original retainer. It follows that there is no real issue to be tried as to the existence of an implied term under the July Letter.

64. The consequence of the foregoing is that on the premise that Mr Samady was providing an indemnity in respect of the payments under the payment plan, which was unconditional, it was tied up to the question as to whether HFW had not performed its disclosure obligations to CNM Estates (Tolworth Towers) Limited. If it had not, and loss followed, there was no reason why that could not be taken up by CNM Estates (Tolworth Towers) Limited against HFW. It was not a matter which could be used as a defence by Mr Samady as indemnifier of HFW. Whatever the position between a creditor and a guarantor, and as was common ground, a creditor's right against an indemnifier was different from the right against a guarantor. Only a guarantor could rely upon defences of set off or cross claim of a principal debtor to extinguish or reduce their liability to a principal creditor.

(ii) Was there an arguable loss as a result of a breach of the implied term?

65. Even if, contrary to the foregoing, there was some duty owed to Mr Samady and even if there was some breach of duty in respect of disclosure, I am not satisfied that there is a case with real prospects of success that there has been loss whether in the sum of £90,000 or at all. It behoves a party alleging such breach or loss to state its case even on a strike out or a summary judgment with particularity. That does not require it to prove quantum, but at least to show that there is a real prospect of success. A bare assertion does not usually suffice. In the case of *King v Stiefel* [2021] EWHC 1045 (Comm) Cockerill J held as follows:

> *"21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It*

> *will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial."*

66. In the instant case, despite changing solicitors to Howard Kennedy, there is no corroborating evidence (whether in the nature of a witness statement from Howard Kennedy or documents from them) to support the bare assertion at para. 28 of Mr Samady's witness statement that loss has been suffered in the sum of £90,000 due to shortcomings in the disclosure. It does not suffice even for a summary judgment application to refer to Eversheds' letter of 20 August 2020 without showing the response. The absence of contemporaneous documents from Howard Kennedy is not explained. Mr Samady relies on his own correspondence in September 2020 to HFW in the face of demands for payment of outstanding fees under the payment plan, doing no more than echoing part of the letter from Eversheds. This referred to document dumping and disclosure of privileged materials, and the threat of a strike out application and huge costs to review the disclosure.

67. Is it a sufficient answer to say that these points are for trial, but for summary judgment purposes the letter of Eversheds and the assertion of Mr Samady suffice? In my judgment, it is not. This is not a question of having to search for corroboration. Mr Samady moved from HFW to Howard Kennedy to take over major Commercial Court litigation. It is obvious that Howard Kennedy or contemporaneous documents of Howard Kennedy would be able, if it were true, to provide at least something to substantiate the alleged loss of £90,000. There is no suggestion in the evidence of any practical obstacle to the production of such evidence. In my judgment, without this kind of particularity, there is insufficient evidence to raise a defence with a real prospect of success by reference to a loss of £90,000 or any loss.

68. If there had been a triable issue raised as regards an implied term, breach and damages, then even absent a repudiatory breach (referred to below), it would be capable of operating as a defence to a claim on a guarantee. It would be capable of reducing the liability of the guarantor by the amount of the damage suffered by the principal debtor, that is pro tanto: see Andrews and Millett on the Law of Guarantees 7th Edition. However, since there is no such triable issue, it follows that even as guarantor, there is no real prospect that Mr Samady's liability is reduced by reference to any alleged loss from the alleged negligence of HFW in the disclosure process.

69. My conclusions to this section are that Mr Samady has no real prospect of a defence in that:

(i) There is no real prospect that the alleged implied term exists, and any liability is owed to CNM Estates (Tolworth Towers) Limited alone.

(ii) Mr Samady was not simply a guarantor but also an indemnifier: on the basis of the indemnity from Mr Samady, Mr Samady's promise is

independent of any obligation on the part of CNM Estates (Tolworth Towers) Limited to carry out disclosure with skill and care, and so his liability is not reduced by reference to any loss of CNM Estates (Tolworth Towers) Limited;

(iii) if there was a breach of an implied term, no case with a real prospect of success has been raised that loss has been suffered in the sum of £90,000 or any loss as a result of alleged negligence.

(iii) Was Mr Samady discharged from liability by reason of a repudiatory breach of HFW?

70. The case of Mr Samady is taken to a level further, It is submitted on his behalf that "the magnitude and gravity of the error" is such that Mr Samady has a real prospect of establishing that the breach was repudiatory. This is alleged to have the effect that upon acceptance, he was discharged from liability to make any further payment in respect of the payment plan. The case in this regard as first advanced in the skeleton argument of Mr Samady for the appeal was by reference to the July Letter being a guarantee (see para. 52 of the skeleton).

71. In the above circumstances, Mr Samady has no real prospect of success at trial of implying the alleged term into the July Letter or of showing a breach thereof going to the root of the contract for the reasons set out above. If it were repudiatory, it would not discharge Mr Samady in any event from the obligation to pay the payment plan. One reason for this is that even if there were a repudiatory breach, it would not discharge the innocent party from the obligation to pay liabilities which had become due and owing before acceptance of the breach. In the instant case, the non-payment in full of the second instalment on 31 August 2020 had the effect without more of causing the entire balance of the payments to become due.

72. Mr Samady says that acceptance of a repudiatory beach need not take any particular form and a continuing failure to perform its obligations can suffice: see Chitty at para. 27-066. That is the case, but the failure to pay the instalment due on 31 August 2020, and indeed to pay the sum of £15,000 seven days later, provides no indication of an acceptance of a repudiatory breach. No breach had been indicated at that stage, and the later partial payment is an indicator that the contract was still being treated as alive.

73. The relevant law is as follows. Where there has been a repudiatory breach of contract, the innocent party may choose to affirm the contract or accept the repudiatory breach and bring the contract to an end. Thus, until such time as the repudiatory breach of contract is accepted, the contract remains in force and both parties remain bound by contractual obligations: see *Chitty on Contracts* (34th Edition) at para. 27-082.

74. In *Johnson v. Agnew* [1980] AC 367, 396, Lord Wilberforce stated (quoting Dixon J in *McDonald v. Dennys Lascelles Ltd* (1933) 48 CLR 457):

> *" When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach."*

75. The effect is that where an obligation to make a payment under a contract has arisen prior to the date of its determination, the obligation to make that payment survives termination of the contract and the party who was due to receive the payment in question, is entitled to sue to recover the sum. Thus, in *Collidge v. Freeport Plc* [2007] EWHC 1216, where an employer was due to make payments under a settlement agreement, Jack J noted that if the employee's construction of the contractual provision was correct, *"once the date for payment arrived, it became an accrued right. It would not be lost by a subsequent acceptance of a breach of clause 7 as terminating the contract. For, although both parties to a contract are discharged from its further performance when it is terminated by the acceptance of a repudiation, rights which have already been unconditionally acquired are not divested…"*.

76. In the law of contract specifically relating to guarantees, it has been held that the acceptance by a creditor of a debtor's repudiatory breach does not release a guarantor from his obligation to pay damages on the guarantee in respect of those obligations which arose prior to the acceptance: see *Moschi v Lep Air Services* [1973] AC 331. Accordingly, the guarantor's failure to cause the debtor to perform his contractual obligations gives rise to an accrued cause of action for breach of contract which arises prior to the determination of the contractual relationship and can therefore still be relied on by the creditor.

77. There is an exception to this principle arises where there is a total failure of consideration by the guilty party. In that event, any sums payable by the innocent party to the guilty party would be recoverable in a restitutionary claim for total failure to consideration.: see Chitty at para. 27-082. There is no question of a total failure of consideration in this case in that the payment plan was for consideration and the payments are outstanding.

78. Mr Samady also says that no unconditional right to payment had been acquired by HFW because any right was conditional upon the Court assessing what would be reasonable to be paid under the Solicitors Act 1974 or, according to the supplemental submission of HFW, at common law. I do not accept that this is correct for the reasons given above about how the right to an assessment had been lost by the contract comprised by the July Letter.

79. It follows that, in this case, even if Mr Samady were correct that: (i) there were implied terms in the July Letter; (ii) they were breached; and (iii) the breaches were repudiatory; and (iv) he accepted the breaches without irrevocably affirming the July Letter - all of which is disputed by HFW – it is of no moment because:

(i) Mr Samady was obliged to make payment of £20,000 by 31 August 2020, which he failed to do;

(ii) all payment obligations fell due immediately pursuant to the acceleration clause. Mr Samady was immediately in breach of his own payment obligation (if the July Letter was an indemnity) or his obligation to secure payment -by the CNM Entities (if the July Letter was a guarantee);

(iii) there was no acceptance of repudiatory breach on or by 31 August 2020;

(iv) it follows that the acceleration clause had operated to require full payment under the July Letter with the result that HFW became entitled at that point to recover the full sum of £417,000 from Mr Samady irrespective of any subsequent acceptance of any repudiatory breach of the Contract;

(v) there can be no allegation of total failure of consideration here and none has been made.

80. It follows that in my judgment, there is no real prospect of Mr Samady succeeding in this aspect of the case at trial nor is there any other compelling reason requiring this aspect of the case to be considered at trial.

VI Conclusions

81. It follows from the above that each of the matters raised are resolved in favour of HFW such that there is no real prospect of success of Mr Samady being able to succeed at trial in whole or in part. Nor is there any other compelling reason for the case to go to trial. In respect of the arguments raised:

(i) The Master was correct that the promise of Mr Samady in the July Letter was an indemnity (as well as a guarantee).

(ii) It made no difference that MEA LLP or HFW (Middle East) LLP were not parties to the July Letter. The Master was right to conclude that HFW

was acting together or in combination with MEA LLP, and for MEA LLP and/or HFW (Middle East) LLP.

(iii) Whether it was an indemnity or a guarantee, the Solicitors Act 1974 did not provide a defence because the obligations comprised the enforcement of a contract, namely the July Letter, and not the enforcement of the solicitors' bills.

(iv) If, contrary to the above, the Solicitors Act 1974 applied, the solicitors' bills were compliant with what was required under the Act.

(v) There was no implied term contended for in the July Letter.

(vi) The argument of a discharge for repudiatory breach fails. Even if there was a repudiatory breach, the sums set out in the payment plan became due by acceleration on breach prior to the alleged acceptance of the repudiatory breach.

(vii) Even if the liability of Mr Samady was a guarantee and not an indemnity under the July Letter, there was no discharge because there was no implied term and/or if there was a breach, there is no real prospect of establishing any loss, none having been identified with any particularity.

82. In all the circumstances, the Master was correct to find that there was no real prospect of a defence and no other compelling reason to give permission to defend. It follows that the appeal is dismissed.