Neutral Citation Number: [2026] EWCA Civ 1027

Case No: CA-2026-001134

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)
His Honour Judge Bird (sitting as a Judge of the High Court)
[2026] EWHC 876 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2026

Before :

LORD JUSTICE BEAN
Vice-President, Court of Appeal (Civil Division)
LADY JUSTICE ANDREWS
and
LADY JUSTICE COCKERILL

- -

Between :

(1) CLIFFORD STEWART LAY **(2) JACQUELINE SUZANNE LAY**	**Claimants/ Appellants**
- and –	
INDEPENDENT VETCARE LIMITED	**Defendant/ Respondent**

- -
- -

Charles Béar KC, **Paul Strelitz** and **Rob Hammond** (instructed by **Broadfield Law UK LLP**) for the **Appellants**
Nigel Tozzi KC and **Richard Hanke** (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing date: 7 July 2026

- -

Approved Judgment

This judgment was handed down remotely at 2.30pm on 31st July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Lady Justice Andrews:

Introduction

1. The question at the heart of this appeal is whether the counterclaim pleaded in response to a claim for the outstanding moneys due under an agreement with the claimants, Mr and Mrs Lay, for the purchase of shares in their company, Easy Direct Debits Ltd ("EDD"), should have been struck out as an abuse of process or as otherwise bringing the administration of justice into disrepute, because the defendant ("IVL") was seeking to adopt a position wholly contradictory to the position it had taken in relation to the same issue in earlier proceedings for unfair dismissal ("the ET proceedings") brought by Mr Lay in the Employment Tribunal ("the ET").

2. The defence and counterclaim asserts that on 28 October 2020, the date of completion of the share purchase agreement ("SPA"), EDD's business was operating unlawfully in breach of the Payment Services Regulations 2017 ("the Regulations"). It is alleged that EDD required authorisation by the Financial Conduct Authority ("FCA"), and that Mr and Mrs Lay were therefore in breach of warranties given under the SPA, in particular a warranty that the business of EDD had been conducted in accordance with all applicable laws and regulations ("the conduct warranty").

3. The Employment Rights Act 1996 ("ERA") confers certain rights upon workers, including employees, who make protected disclosures (commonly referred to as "whistleblowers"). A protected disclosure is a qualifying disclosure as defined by Section 43B of ERA. That includes disclosure of information which, in the reasonable belief of the person making the disclosure, tends to show that a person has failed or is likely to fail to comply with any legal obligation to which they are subject. It is unnecessary to descend into any greater detail for the purposes of this judgment, because Employment Judge Cadney ("the Employment Judge") has found that it is "by no means impossible" that Mr Lay will be held to have made one or more protected disclosures.

4. Section 47B(1) of ERA provides that:

> "A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

Section 103A of ERA provides that:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

5. In the ET proceedings, Mr Lay was seeking an interim order for his reinstatement as managing director of EDD, having been summarily dismissed from that post on 7 June 2023. Mr Lay's case is that he had made protected disclosures to IVL raising concerns about EDD's regulatory compliance post-completion and urging that EDD should seek FCA authorisation, and that this was the true reason for his dismissal.

6. EDD was Mr Lay's employer, but despite this, the letter of dismissal was written by IVL and signed by IVL's CEO. IVL contends that as sole shareholder, it had authority to take such action on behalf of EDD. Section 47B(1A)(b) of ERA makes an agent of the employer, acting with the employer's authority, liable in their own right for causing any detriment to a worker because of a protected disclosure. IVL is a respondent to the ET proceedings. Although Mr Lay's claim for interim relief was brought against EDD, as his employer, IVL is responsible for the conduct of the defence of the ET proceedings and the stance taken by EDD in them. IVL and EDD claim that Mr Lay was dismissed for gross misconduct and not for whistleblowing.

7. In response to Mr Lay's claim for interim relief, IVL asserted that EDD's business had been conducted lawfully in all respects both before and after its acquisition by IVL. IVL's Group General Counsel and Company Secretary, Vanessa French, made a witness statement in which she asserted that IVL bought a business "*which was not, and was not required to be, regulated by the FCA*." She relied on the warranties given in the SPA, and said that it was IVL's understanding that there was no legal or regulatory imperative for EDD to become FCA regulated *because it can rely on the support of regulated firms* or it can rely on exemptions from regulations. She said that Mr Lay "*clearly knew this to be true. He had already warranted that this was true*," and that Mr Lay's motivation for seeking that EDD be authorised by the FCA was "*purely financial.*" [Emphasis added].

8. HH Judge Bird ("the Judge") was satisfied that clearly inconsistent approaches were adopted in the two sets of proceedings, and that the position adopted by IVL in the ET proceedings was a material factor in the decision taken by the Employment Judge to refuse Mr Lay's claim for interim relief. Despite this, he found that IVL's change of position did not bring the administration of justice into disrepute because it had been brought about because of a material change in circumstances, namely, a change in legal advice based upon a change in IVL's understanding of the facts.

9. Both parties appealed to this court. Mr and Mrs Lay appealed on four grounds, primarily on the basis that IVL had not waived privilege in respect of the legal advice on which it sought to rely, and therefore the Judge was not equipped to carry out the "broad evaluative assessment" that the authorities require. IVL served a Respondent's Notice cross-appealing on the basis that the Judge was wrong to find a clear inconsistency between the two positions, but even if he were right about that, the earlier position adopted by IVL made no material difference to the outcome of the interim relief application in the ET.

10. I am satisfied that the Judge was right to find that there was a clear inconsistency between the two positions adopted by IVL. However, I consider that he should not have accepted that IVL was entitled to adopt an inconsistent stance in the present proceedings, and that by doing so it was not abusing the process of the court, for two reasons. First, if a party in IVL's position wishes to rely upon changes in the legal advice it has received over time, it cannot in fairness do so whilst maintaining privilege over that advice. Since the court and the opposing party have no means of testing them, its bare assertions should carry little or no weight in the assessment. Secondly, when the policy underlying the rule that a party cannot approbate and reprobate (as it is sometimes termed) is taken into consideration, a change in legal advice would rarely, if ever, be sufficient in and of itself to justify a volte-face of this nature. There would have to be at least some evidence that the advice on which the

party now seeks to rely would not have been available at the time when the initial stance was taken. In this case, IVL sought to rely on an allegedly incomplete understanding of the facts, but having now been taken through that material in very great detail, it is possible to see that the evidence before the Judge as to what was missing (or what had changed) was, at best, negligible, and lacked any specificity. Accordingly, it was insufficient to provide a sound justification for the change in stance.

11. The outcome of this appeal and cross-appeal therefore turns on whether IVL's original position was a material factor in the dismissal of Mr Lay's application for interim relief in the ET. I agree with the Judge that it was. That application depended on Mr Lay satisfying the Employment Judge on the evidence then adduced that it was "likely" that (i) he had made protected disclosures and (ii) these had been the true reason for his dismissal. On consideration of the reasons given by the Employment Judge for his decision, it is clear to me that IVL's case that there was no need for EDD to obtain FCA authorisation in order to operate its business lawfully contributed significantly to his conclusion that, at that stage, Mr Lay had not shown that it was "likely" that he would establish at trial that he made protected disclosures. Whilst it is true that the Employment Judge was also not satisfied that there was a sufficient causal link between the making of any protected disclosures that might be established in due course, and Mr Lay's dismissal, a different evaluation of the likelihood of establishing the protected disclosures could well have had an impact on that aspect of the application. I am not persuaded that the claim for interim relief would inevitably have failed, whatever stance IVL took concerning the lawfulness of the business models operated by EDD.

12. For those reasons, I consider that this is a paradigm case for the principle of estoppel by conduct to apply, and that the Judge should have struck out the counterclaim as an abuse of process.

Background

13. EDD provides subscription services to veterinary practices to help them receive direct debit payments from their pet-owner clients. That requires access to the Bankers' Automated Clearing Services system ("BACS"). There are two ways in which a business could gain such access, namely, by contracting with a BACS-approved payment services provider ("PSP") to provide the relevant services ("the indirect model"), or by providing them itself ("the direct model"). The direct model requires compliance with the BACS scheme rules and sponsorship by a BACS approved bank. It would also entail obtaining FCA authorisation, unless EDD could rely upon an applicable exemption.

14. Prior to the date of completion of the SPA and thereafter until around March 2021, EDD only operated the indirect model. EDD used two PSPs, GoCardless Ltd ("GCL") and Bottomline Technologies Ltd ("BTL") (which at some point changed its name to Bottomline Payment Services Ltd) to access BACS. GCL and BTL were both regulated by the FCA. EDD was not.

15. In pre-sale due diligence, Mr and Mrs Lay were asked to "please confirm if an FCA approval is needed [to operate EDD's business]?" Their response was: "FCA approval

is not required for current business. TBC whether it will be required moving forward."

16. After completion, as anticipated by the "reserved matters" in the SPA, Mr Lay remained in post as managing director and Mrs Lay continued as marketing manager of EDD. From about March 2021 onwards, EDD operated on what the Judge described as "a twin track". It continued to use the indirect model for existing clients, but when dealing with payments for new clients, all of whom were veterinary practices within the IVL group, it adopted a direct model, submitting payment requests directly to BACS instead of via the PSPs. This saved EDD money because it did not have to pay for the services of the PSPs.

17. The direct model only came into play after IVL had acquired the shares in EDD, and therefore the question whether that aspect of the business was operated in compliance with the Regulations is of no direct relevance to the breach of warranty claim. It is of relevance to the whistleblowing claim, because Mr Lay's concerns and all the alleged protected disclosures relate only to the direct model. Mr and Mrs Lay have always maintained that EDD did not require FCA authorisation in order to operate the indirect model. At the time of Mr Lay's application for interim relief, that was also IVL and EDD's position.

18. The SPA set a contractual deadline of 2 years after completion for the making of any claims for breach of warranty. IVL left it to the very last moment, and then sought to protect its position by serving a letter dated 28 October 2022 giving notice of warranty claims, including under the conduct warranty, the full details of which it said were still being investigated. IVL sought to "reserve the right" to amend those claims on the basis that it had an incomplete understanding of the position. The question whether that letter did enough to avoid the contractual time bar is not something we need to resolve.

19. Suffice it to say that IVL sought to hedge its bets in this manner, and in October 2022 it was taking the position that there was a breach of the conduct warranty. However, by the time Ms French served her witness statement in answer to Mr Lay's claim for interim relief on 28 June 2023, IVL having by then had a further 9 months in which to investigate the position, IVL was maintaining that the business was and always had been operating lawfully, and that the warranty given by Mr Lay accurately reflected the position at the time of completion of the SPA. That was the clear and unequivocal stance from which it seeks to resile in the counterclaim. IVL's explanation to the Judge, recorded in his judgment at [39], was that Mr Lay had operated EDD within "a black box", so that it was only in October 2023 that it was able to determine that the indirect model was non-compliant with the Regulations.

20. The Judge set out at [38] of the judgment the grounds on which Mr and Mrs Lay sought to strike out the counterclaim:

> "… the Defendant has pleaded a case in these proceedings that is irreconcilable with, and contrary to, the position it advanced and succeeded upon in separate proceedings (namely [the ET proceedings]) and to do so is to approbate and reprobate and/or is an abuse of process and/or is precluded by judicial proceedings estoppel. To allow the Defendant to act in such a way as it does in pleading the

> counterclaim would be to allow the administration of justice to be brought into disrepute and to be unfair…"

The law

21. The authorities were addressed by the Judge at [43] to [54] of his judgment, and Mr Tozzi KC on behalf of IVL said he did not take issue with his summary of the law. Although Mr Béar KC spent some time taking us through the cases, there appeared to be no controversy about the principle that they establish nor about the approach to be taken by the court in determining whether it applies. Various different labels have been applied to the principle: "judicial estoppel" in the United States of America; "estoppel by conduct" or "the rule against approbation and reprobation" in this jurisdiction, but the principle is the same. One of the clearest expositions is to be found in the judgment of Sir Christopher Floyd in *LA Micro Group (UK) Ltd v LA Micro Group Inc and others* [2021] EWCA Civ 1429; [2022] 1 WLR 336 at [18] to [26]. He began by quoting the well-known dictum of Viscount Radcliffe in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at p.1018:

> "a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned."

22. After considering how this principle was applied in subsequent cases, including by the US Supreme Court in *New Hampshire v Maine* [2001] 532 US 742, which he confirmed reflected the law in England as well as in the United States, Sir Christopher said this at [26]:

> "It is clear, therefore, that this form of estoppel by conduct is one which is approached by means of a broad, merits-based assessment, and is not constrained by strict rules (as for example, issue estoppel). The matters to consider include, but are not limited to, those enumerated by Ginsburg J in the *New Hampshire* case. It is material to ask the question whether it is apparent that the earlier decision was obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings. Absent that factor, whilst the change of position may affect the credibility of the party or the witness concerned, there will not be an impression that one or other court was misled into giving its decision, so that the administration of justice risks being brought into disrepute."

23. The *New Hampshire* case concerned a decree of George II in 1740 which fixed the boundary between the States of Maine and New Hampshire in the "Middle of the Piscataqua River". In a dispute about lobster fishing rights in 1977, the US Supreme Court entered judgment by consent on the basis that this phrase meant "the middle of the main navigable channel". However, the consent decree only fixed the lateral marine boundary and not the inland Piscataqua River boundary. In a subsequent dispute about that boundary, New Hampshire sought to resile from its earlier position and argue on the basis of historical records that the inland river boundary ran along the Maine river shore, so that the whole river belonged to New Hampshire. The US

Supreme Court unanimously held that New Hampshire could not adopt a position contrary to that which had led to the earlier judgment. The court could not interpret "Middle of the River" in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process.

24. Justice Ruth Bader Ginsburg, who delivered the opinion of the court, adopted the description of the doctrine of "judicial estoppel" in *Davis v Wakelee* (1895) 156 US 680 at 689:

> "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

She also quoted from a textbook on Federal practice and procedure which stated that:

> "absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."

She described the purpose of the rule as being "to protect the integrity of the judicial process by prohibiting parties from deliberately changing position according to the exigencies of the moment."

25. Ginsburg J identified three factors which typically inform the decision whether to apply the doctrine in a particular case. First, that the party's later position must be "clearly inconsistent" with its earlier position. Secondly, whether the party had succeeded in persuading a court to accept its earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would "create the perception that either the first or the second court was misled." Thirdly, whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. She stressed that these were not inflexible prerequisites nor an exhaustive formula for determining the applicability of judicial estoppel, but factors which "firmly tip the balance of equities in favour of barring New Hampshire's present complaint."

26. Later in the judgment, at p.753 of the report, Ginsburg J addressed the contention of New Hampshire that the earlier consent decree had been entered into without "a searching historical inquiry into what the language ["Middle of the River"] meant." She gave that argument short shrift, saying:

> "We do not question that it may be appropriate to resist application of a judicial estoppel "when a party's prior position was based on inadvertence or mistake"… We are unpersuaded, however, that New Hampshire's position in 1977 fairly may be regarded as a product of inadvertence or mistake."

She went on to explain that the pleadings in the earlier case showed that New Hampshire *did* engage in a searching historical enquiry at the time of the earlier dispute, but added that in any event "it did not lack the opportunity or incentive to locate the river boundary at Maine's shore" at that time. She pointed out that the historical materials on which New Hampshire sought to rely were no less available 25 years earlier than they were at the time of the current judgment. That passage is of some relevance when IVL's explanation for its change of position in the present case comes to be considered.

27. More recently, Zacaroli LJ succinctly summarised the principle and the policy underlying it in *Malik v Malik* [2024] EWCA Civ 1323; [2025] 4 All ER 409, at [63]:

> "If a party sets out to persuade the court that it holds a certain position, the court is so persuaded, and the court acts on the footing that the party holds that position, then that creates the risks of unfairness and of bringing the administration of justice into disrepute which underpin the estoppel by conduct principle, if that party subsequently adopts the opposite position. This is sufficient to demonstrate "clearly inconsistent" positions, without the need for an objectively unequivocal statement on the earlier occasion."

28. He went on at [81] to say:

> "it is not a requirement of this kind of abuse of process or estoppel by conduct that the party deceived the court as to its intentions on the prior occasion. But in considering all the circumstances so as to consider whether the party's conduct is sufficiently abusive to preclude it from now asserting an inconsistent claim, it is relevant to enquire both what was said on the previous occasion *and with what purpose.*" [Emphasis added].

29. As the Judge in the present case recognised at [49], the appropriate degree of connection between the stance taken by the party in the earlier case and the decision taken by the court or tribunal in that case has been expressed in different ways in the authorities, some referring to the decision being obtained "on the footing of" or "on the ground of" or "because of" that stance, others asking whether it was a "material factor" in the decision (particularly where the decision involved a balancing exercise).

30. In *Malik v Malik*, the question posed by the court was whether the earlier stance was "a reason for" the earlier order. In that case the decision reached earlier, a refusal to lift a stay on possession proceedings, required a balancing exercise. The original stance adopted by the party in occupation of the property, V, that if he remained there he would not make a claim under the doctrine of adverse possession, was clearly a factor of "some importance." It was impossible to know how the balancing exercise would have been carried out if V had reserved the right to make such a claim or indicated that he intended to do so. The Court of Appeal was not persuaded that the judge's decision to maintain the stay would inevitably have been the same in those circumstances, and therefore the appeal was allowed on grounds of abuse of process, even though the consequence of striking out the claim for adverse possession was that V would have to leave the property which had been his home for many years.

The judgment

31. After his consideration of the authorities, the Judge concluded at [54] that the "broad merits-based approach requires a careful consideration of all the circumstances including the reason the first stance (that the indirect model was lawful) was taken." He said, and I agree, that that analysis would allow a view to be reached on whether the attempt to resile from a stated position has moved over the threshold from the permissible to the abusive.

32. The Judge accurately summarised the main points raised in argument by the parties before setting out his conclusions. He held that clearly inconsistent approaches to the lawfulness of the indirect model were adopted by IVL in June 2023 before the ET, and in these proceedings. He then held at [64] that the Employment Judge found, in effect, that the direct model (which required authorisation) could be dropped, and the indirect model was not a regulated activity. He accepted that the position adopted by EDD and IVL before the ET was a material factor in that decision, and that it led to Mr Lay not being awarded the interim relief he sought, and so not being reinstated.

33. However, he found that the reason why IVL took the first stance before the ET was because that was the legal advice it had at the time, based on the factual background it was then aware of, and that the change of stance, on the evidence he had considered, came about because the advice changed. He then said that once it was understood that the different positions were adopted because of a change in circumstances (that is, a change in the facts as understood and a change in the legal advice given) allowing the change of position would not lead to an unfair advantage to IVL or an unfair detriment to Mr and Mrs Lay. Since the lawfulness of EDD's pre-completion business model was key to the outcome of the present claim, the administration of justice would not be well served by requiring the outcome of the claim to be determined by a stance adopted on different legal advice obtained without a full understanding of the facts.

Was the Judge's decision plainly wrong?

34. Against that background, I turn to consider the criticisms made by both parties of the judgment. Logically, the first issue is whether the Judge was right to find that IVL took a clearly inconsistent stance in the ET proceedings with regard to the lawfulness of the indirect model, from its pleaded position in the counterclaim. The answer to that is straightforward. Yes, he was right, for the reasons that he gave. It does not matter that the alleged protected disclosures related to the direct model and a period after the SPA. The evidence of Ms French, to which I have already referred, was that EDD did not require authorisation from the FCA either prior to or after the takeover by IVL. It was necessarily implicit in what she said about the warranties in the SPA that IVL's case in the ET proceedings was that they were true at the time when they were given, that Mr Lay believed that the business was being run lawfully at all times, and that his motives for wanting EDD to apply for FCA authorisation had nothing to do with such authorisation being necessary to make the business compliant and everything to do with money. This went to the heart of the question of whether Mr Lay reasonably believed that EDD was not complying with the Regulations, and therefore whether the disclosures were protected disclosures.

35. The position adopted by IVL is put beyond argument by the written reasons for the decision on Mr Lay's interim relief application, which were helpfully provided by the Employment Judge in response to a request by the High Court. It was particularly onerous for him to have to deal with a request which was made two years after the hearing, and I am most grateful to him for taking the time and trouble to produce a document which has proved to be of great assistance to this Court. In paras 23 and 24 of those reasons he records the submissions by EDD and IVL as including the following:

> "In broad outline, they assert that *the SPA does not include or provide any obligation to pursue FCA authorisation for [EDD] and to the contrary contains assertions that operating in the way that it did was in compliance with the existing regulatory framework. Firstly it follows from this that* any assertion by [Mr Lay] of the failure to pursue FCA authorisation for [EDD] was not a disclosure of information tending to show a breach of any legal obligation within the SPA, as none existed. Secondly they contend that *not only did [Mr Lay] assert that the existing operating model of [EDD] that [sic] was in accordance with regulatory requirements, but that that was an entirely accurate assertion*. There is therefore a live issue as to whether the claimant will be able to demonstrate that any of the disclosures on which he relies tend to show any breach falling within s.43B and are protected disclosures within the meaning of the ERA 1996…
>
> …They contend that read as a whole the fundamental proposition being advanced by the claimant was *not that the failure to pursue the objective of securing FCA authorisation for [EDD] itself involved or would involve any breach of the FCA regulatory regime as the existing process was compliant*, but rather his underlying complaint was that the respondent's failure to do so was in breach of the SPA and/or causing him financial loss or harm…" [Emphasis added].

36. The Judge also relied on paras 29 and 37.2 of the Grounds of Resistance in the ET proceedings (as pleaded at the time of the application for interim relief) and para 48b of IVL/EDD's skeleton argument in the ET (which refers to the evidence of Ms French). Para 29 pleaded that "the Claimant was fully aware that [EDD's] use of GoCardless and Bottomline provided fully sufficient authorisation." That could only be a reference to the indirect model. Para 37.2 pleaded that Mr Lay was fully aware that there was no legal obligation upon EDD to become authorised by the FCA and that "he had warranted that [EDD] was fully compliant with law and regulation in the SPA." Again this could only be a reference to the indirect model. The Judge found that the subsequent amendments to the Grounds of Resistance did not affect the position, and (rightly) that finding has not been challenged in the cross-appeal. Therefore IVL's stance in the counterclaim in the current proceedings regarding the lawfulness of the indirect model and the truth of the conduct warranty on the date of completion is a true volte-face.

37. The Judge found the reason why IVL asserted in the ET proceedings that the indirect model was fully compliant with law and regulation was that that was the legal advice it had received. However, that does not address the correct question, which is what

was the reason why it was taking that stance *in those proceedings*? As Zacaroli LJ explained in *Malik v Malik*, the relevant enquiry is about what was said on the previous occasion and *with what purpose*. IVL was taking that stance in relation to the indirect model because it perceived that it would help to bolster EDD's resistance to Mr Lay's claim for interim relief by undermining his contention that he had made protected disclosures. It is now taking the opposite stance in the current proceedings because it seeks to establish that it is not obliged to pay the full amount prima facie due under the earn-out clause. On the face of it, that is a classic example of a party "deliberately changing position according to the exigencies of the moment" because it now suits its interests to argue that the business was not compliant with the Regulations at the time of completion of the SPA.

38. The explanation of the change in legal advice is similar to New Hampshire's attempt to justify its change of position on the boundary issue by reference to being better informed about the historical documents 25 years after it entered into the consent decree about where the maritime boundary lay. What the judgment in that case makes clear is that it is *not* a legitimate excuse for the party concerned to say that it is now better informed than it was when it took the original stance that it did, if it could have been as well-informed on the earlier occasion had it taken the time and trouble to use the material that was then available to it.

39. In this case IVL undertook extensive due diligence before it purchased the shares in EDD. It knew the identity of the two PSPs used by EDD, and could have investigated the scope of their authorisations from the FCA. It must have known how the indirect model operated, since it would not have wanted to acquire EDD without an understanding of its business model, but if it required further detail it could have asked for it at the time.

40. Moreover, when it served the notice of its warranty claim on 28 October 2022, even though it said at that time that matters were still under investigation, it claimed to know enough to provide details of a claim that it was not possible for EDD to provide the services under the indirect model using the PSPs without itself obtaining FCA authorisation or an exemption. The letter described the indirect model and then said this:

> "Under Regulation 138 of [the Regulations] it is an offence to provide a "payment service" in the UK, or purport to do so, without being appropriately registered or authorised by the FCA. At all material times prior to Completion, in breach of regulation 138 and other related UK financial services law, the Company *provided payment services* in the course of its business. It acted in breach of applicable law despite the services and support of the Regulated Providers. The scope of the [Regulations] is such that *it is not possible to provide services such as the Pre-Completion Services without FCA authorisation even with the support of the Regulated Providers* unless an exclusion is applicable. However, no such exclusion was applicable to the Company at the time."
>
> [Emphasis added].

On the face of it IVL knew enough to be able to assert that the indirect model did not comply with the Regulations in October 2022. How could that be reconciled with the explanation that IVL gave in answer to the strike-out application that it did not know enough to make the same assertion until October 2023?

41. As the Judge acknowledged, the information before him about the legal advice received by EDD was incomplete (and there was no waiver of privilege in relation to legal advice received by IVL). The only direct evidence of any legal advice relating to the lawfulness of the indirect or direct models consisted of advice given to EDD by its solicitors, Fox Williams, *after* completion of the SPA and *after* EDD had started operating the direct model in tandem with the indirect model. No advice given to IVL itself has been disclosed, apart from that which can be gleaned from the March 2022 communications described below.

42. Mr Stuart Murdoch, a partner at DLA Piper, then IVL's solicitors, made a witness statement in opposition to the strike-out application in which he set out in table form a chronology which included references to Fox Williams' advice to EDD from time to time. That was supplemented by documents, including contemporaneous emails, which illustrated the entries in the chronology.

43. In around September 2021 EDD engaged Fox Williams to draft a formal letter of advice on whether EDD was carrying on any regulated payment services and if so, whether any exemptions applied. At one stage before that advice was finalised, on 16 November 2021, Fox Williams expressed concerns about the use of the PSPs in the indirect model being insufficient to secure regulatory compliance. Mr Lay's evidence is that this was based on a mistaken assumption as to the factual premise on which EDD was trading in relation to the flow of funds, and that mistake was corrected by him in a telephone call to the solicitor at Fox Williams who was then responsible for giving the advice, a Ms Mardi McGregor. Mr Murdoch accepts in his evidence that there were "multiple factual clarifications" provided by EDD to Fox Williams between October 2021 and May 2022. The Judge found, and I agree, that the "advice" on 16 November 2021 was superseded by the summary of Fox Williams' advice since October 2021 that was provided by Mr Finney of Fox Williams to Mr McCarthy of IVL in his role as interim managing director of EDD on 21 June 2023.

44. Fox Williams advised EDD by letter dated 19 November 2021 that the *direct* model was probably operating unlawfully. That letter made it plain that an examination of the indirect model was outside the scope of the advice. That advice was passed on to IVL by Mr Lay.

45. In March 2022 Mr Keith Chandler, IVL's M&A director, sent an email to Mr Lay asking, among other matters, whether it would be possible to revert to the indirect model. He asked specifically what "payment services" EDD was performing in that model that required FCA authorisation. He attached to that email a powerpoint slide-deck which he said "was prepared with guidance by our solicitors." The slides bear the rubric "legally privileged and confidential – for IVC internal use only". It is to be inferred that the solicitors referred to were Pinsent Masons, who were then advising IVL.

46. That slide deck drew a distinction between the direct model, in respect of which it recorded that it had been concluded that the intra-group exemption was inapplicable

and therefore "EDD must either change the business model or obtain FCA authorisation", and the indirect model. An analysis of the latter set out in tabular form in the second column on the second page of the slides states that the PSP, and not EDD, is performing the "payment services" for the purposes of the regulations (specifically "execution of direct debits" as a "regular occupation or business activity"). EDD was providing ancillary services. The PSP therefore requires FCA authorisation, but EDD would not. The slide notes that "EDD now believes that it is in fact performing "payment services", but states that EDD "has not adequately explained what "payment services" it believes it is performing in this business model and therefore why this business model cannot continue."

47. The tenor of that communication was that IVL, with the benefit of their own external legal advice, considered the indirect model to be operating lawfully and indeed were considering that reverting to the indirect model would solve the regulatory problems that they had then acknowledged were created by the direct model.

48. On 30 September 2022 there was a remote meeting attended by Mr Finney of Fox Williams, Mr Lay, Mr Murdoch, Mr Mithun Patel (IVL's Group M&A director), and Mr Nishi Tailor of IVL. The focus of the discussion was on the direct model, as the majority of EDD's business was described as being carried on within the intra-group exemption, but in the course of the conversation (which was recorded and transcribed) Mr Lay and Mr Finney referred to a potential argument in respect of the indirect model that EDD was "initiating payments". Mr Lay said this was not something the PSPs had ever flagged up as an issue, but Fox Williams was now saying there was a risk that the regulator would raise it. Mr Finney confirmed this.

49. On 7 October 2022, Mr Finney sent an email to Mr Lay at EDD which Mr Lay forwarded the same day to the two IVL directors who sat on the board of EDD. The email confirmed that Fox Williams were doubtful as to the lawfulness of the direct model, on the basis that an argument that EDD was entitled to rely on the intra-group exemption would probably fail. As to the indirect model, it said that Fox Williams' working assumption was that it was lawful because every regulated payment service was provided by the authorised PSPs. They had not been instructed to check whether this was right, but it was a "reasonable assumption" and Mr Finney could not recall seeing anything that might suggest it was flawed. There was no reference in that letter to the argument about "initiating payments" which had been discussed in the meeting at the end of September 2022, but there is no evidence that IVL came back to EDD or Fox Williams to query that.

50. That was the background against which IVL sent out the letter of 28 October 2022 which made the warranty claim in the terms set out at [40] above. Logically there are only three possibilities: (1) IVL had now received its own legal advice that the indirect model was or might be operating unlawfully (and therefore departed from the advice it appears to have received in March 2022) or (2) IVL was relying on the concerns about "initiating payments" raised in the September discussion, or (3) IVL was making an assertion that the indirect model was operating unlawfully, despite having received legal advice that it was operating lawfully, simply in order to avoid the contractual time bar. The evidence of Mr Phillips, IVL's CEO, was that the letter was based on "suspicions" that Mr Lay and Fox Williams were withholding the full picture on EDD's compliance situation.

51. The Judge did not address the implications of the 28 October 2022 letter for the excuse given by IVL for its change of stance. In the light of what is now known about the background, the letter does create a perception that IVL has no compunction in adopting whatever legal position it considers to best suit its interests in the exigencies of the moment.

52. Further advice provided by Mr Finney to EDD on 21 June 2023, after Mr Lay's dismissal, was to the effect that the indirect payment model was probably lawful but the direct model probably was not (as IVL could not rely on the exemption on which it was seeking to rely). That was consistent with advice he had provided and which had been passed on to the IVL directors on EDD's Board on 7 October 2022, i.e. before IVL wrote the letter of 28 October 2022 claiming that the indirect model was unlawful.

53. The Judge only mentions the part of the June 2023 advice that dealt with the indirect model, at [21] of his judgment. Mr Murdoch's evidence is that "new management of EDD received confirmation in June 2023 that the Indirect Model was compliant." Whilst that is correct, Mr Murdoch wrongly suggests that this was directly contradictory to the "private advice" Mr Finney had given to Mr Lay when he was managing director. There was no such "private advice" because, as the September 2022 meeting indicates, both Mr Finney and Mr Lay were open with IVL about a potential argument that the indirect model was non-compliant. IVL was in a position to take its own legal advice about that argument or to pursue further investigations into it should it have chosen to do so.

54. Mr Finney's advice to EDD in June 2023 does not explain the stance taken by Ms French in her witness statement which was dated 7 days later, because she was maintaining in the ET proceedings that *all* aspects of the business (including the direct model) were and always had been carried on lawfully. There was no suggestion at that juncture that IVL did not have access to all the documentation which would have enabled it or its external legal advisers to form a view about this. Even if it could be inferred that IVL had received legal advice to that effect from some other firm of solicitors than Fox Williams, what is conspicuous by its absence is any evidence of what happened in the period between that date and October 2023 to cause it to change its mind.

55. It is the evidence of Mr Phillips that *by October 2023* IVL had finished its "fact-finding exercise" carried out in the wake of Mr Lay's departure, and taken further legal advice which led it to conclude that EDD's business was non-compliant pre-completion. That timeline is supported by Mr Murdoch's evidence which the Judge quoted at [42] of the judgment, referred to at [57] below. Mr Murdoch's further evidence about information coming to light after Mr Lay's dismissal cannot explain that change of stance. He says that a large quantity of "historic documents" sent to new EDD management by Fox Williams in July 2023 were not reviewed at the time because EDD "did not have the resources" to do so, and that it did not review them until late 2025 at the earliest. He does not explain why IVL did not review them itself. Mr Murdoch also says that IVL was not fully aware of EDD's mode of operation pre-acquisition until it received a detailed explanation in Mr Lay's witness statement of 14 February 2025, and that it did not see EDD's pre-completion marketing materials until late 2024/early 2025. None of that is of any relevance to the broad evaluative assessment, as it cannot provide an explanation of how it was that by October 2023

IVL had concluded that the indirect model was being operated unlawfully. It was that conclusion, on the basis of the legal advice it says it received then, which led to the counterclaim being pleaded and served on 6 February 2024. That was the date of IVL's change in stance which is the subject of complaint.

56. IVL's case, as now pleaded, on the non-compliance of the indirect model with the Regulations, is that the indirect model encompassed the regulated payment service of "acquiring payment transactions". Assuming that to be different from "initiating payments", there is no evidence currently before the court that Fox Williams ever advised EDD about that potential argument. No explanation has been put forward for why that argument could not have been raised on the basis of what was known to IVL or could reasonably have been ascertained by IVL at any stage prior to June 2023 (including when it sent the 28 October 2022 letter).

57. The Judge came to the conclusion that there was a change in the facts as understood and a change in the legal advice given based on that understanding – taking what IVL said at face value. There was no, or no adequate evidential basis for that conclusion, but even if there had been, the Judge failed to directly address the critical question whether the change in position arose out of matters that IVL could reasonably have ascertained at the time of the ET proceedings. In fairness, however, he was not put in a position where he could properly gauge whether that was the case, because without knowing (a) precisely what factual information is said to have made all the difference to the legal advice obtained in June 2023 and in October 2023 and (b) what the legal advice actually was and the reasons for it, he was not sufficiently informed. Mr Phillips' evidence, taken at its highest, is that "things look different in the light of the detail we now have about the business of EDD." Mr Murdoch's evidence, quoted by the Judge at [42], was vague: "following Mr Lay's departure from EDD, IVL was able to gain access to material which allowed IVL to conclude that the 3rd Party Compliance Solution did not appear to work from around late September or early October 2023." The material is not identified.

58. IVL is seeking to explain the diametrically inconsistent stances it took in the ET proceedings and these proceedings without giving the court, let alone the party complaining of the abuse of process, any opportunity to examine whether that explanation is accurate or satisfactory. In my judgment that is both unfair and wrong in principle; it means that the court cannot properly carry out the broad evaluative assessment it is required to carry out. A party in IVL's position cannot expect the court to take an explanation of that nature at face value without revealing the legal advice, and even more importantly, identifying exactly what new information came to light to cause the change in the advice, because even though this is a strike-out application, the question whether it is an abuse of process to raise the counterclaim will be decided once and for all at this stage.

59. Mr Tozzi contended that it would be open to Mr and Mrs Lay to raise these matters again after a full factual investigation at trial, but as Mr Béar pointed out, the Judge thought he was deciding the issue once and for all. He did not say that IVL had raised an arguable case that it was not abusing the process which it would be for the trial judge to determine finally after a more detailed investigation. In any event, the trial judge is unlikely to be in a better position than this court, since IVL has made it clear that it is not going to waive privilege. Although it is possible to envisage a scenario in which the court considers that it cannot determine the issue of abuse of process

summarily because there are matters of factual controversy which would influence the decision, and therefore it adjourns the issue to be determined at the trial, that is not what happened here.

60. If a party chooses to withhold key information from the court they must live with the consequences. Of course, no presumption of fact arises against a person who asserts privilege in a document. However, it is for IVL to satisfy the court that there is a proper explanation for its change of stance; that much is clear from the *New Hampshire* case. To allow it to benefit from not disclosing the advice it actually received and the information upon which that advice was based would be unfairly prejudicial to the opposing party.

61. A simple change in the legal advice received would never be enough in itself to justify a change in position, unless possibly the state of the law had materially changed in the interim. Finding otherwise would make it easy for a party to escape the consequences of approbation and reprobation merely by finding a new lawyer willing to express a different view, which would erode the public policy underlying the principle. In the *New Hampshire* case, New Hampshire no doubt would have received advice to the effect that the boundary (arguably) ran along the shoreline once it had completed its review of the historical documents, but it could have received the same advice on the basis of a similar review in 1977.

62. In order to justify the change in stance, the change in the legal advice would need to be based on some material change of circumstances, such as information coming to light which could not reasonably have been obtained previously, fraud, mistake or something of a similar nature. In this case there are suggestions that Mr Lay deliberately concealed material information, but that allegation has not been supported by any tangible evidence, and such evidence as is currently before the court is to the contrary. The concerns raised by Mr Finney about the indirect model in November 2021 which were not passed on at the time, and which were in any event overtaken by advice given after factual correction by Mr Lay, have no apparent connection with the legal basis on which IVL now asserts the indirect model was non-compliant with the Regulations. Even if such a connection existed, it was open to them to explore that argument with their external lawyers in September 2022.

63. The critical questions therefore are, what material information came to light between the end of June 2023 and whenever it was in September/October 2023 that the new legal advice was said to have been given, and whether that information was in the possession of IVL before the end of June 2023 or could have been obtained by IVL with reasonable diligence by that date? The answer is, we do not know. IVL has chosen not to tell us. The Judge did not have the advantage of the thorough examination of the material that Mr Béar conducted before us, which made it clear that IVL's explanation based upon an alleged change in its understanding of the facts was just a bare assertion. Despite the fact that the Judge was dealing with an application to strike out, and his understandable caution having regard to the consequences for IVL were he to accede to that application, he was not entitled to assume in IVL's favour, in the absence of critical evidence, that it had a legitimate explanation for the change of stance.

64. That leaves the remaining question raised by the cross-appeal, namely, whether the inconsistent stance adopted by IVL in the ET proceedings was a material factor in the

Employment Judge's decision. It is clear from the authorities that the test is not a "but for" test, and it is enough that the earlier decision was taken "on the footing of" that stance, or that it was a material factor taken into account in an evaluative assessment. However, it is equally clear from *Malik v Malik* that if the party who has changed their stance is able to satisfy the court that the decision would have been the same even if they had not taken the stance that they did, the test will not be satisfied. As *Malik v Malik* itself demonstrates, that is not easy because the way in which a court carrying out an evaluative assessment might have behaved in the counterfactual situation may be almost impossible to predict.

65. Interim relief is available under sections 128-129 of ERA in respect of alleged automatically unfair dismissals contrary to s.103A. The relief is exceptional because it requires the claimant to be reinstated by the employer until the substantive claim for unfair dismissal is determined, and the employer will not be able to recover from the claimant any sums paid to him or her (e.g. by way of remuneration) even if the claimant ultimately loses the case. Relief is only available if it appears to the ET judge hearing the application on the evidence then available that it is *likely* on determining the complaint to which the application relates the ET will find that the reason (or principal reason) for the dismissal is that the claimant made one or more protected disclosures.

66. Unsurprisingly, therefore, the threshold of "likely to succeed", paraphrased in some of the authorities as a "pretty good chance of success", has been described as a relatively high one, which must apply to all elements of the complaint of unfair dismissal for the proscribed reason: see e.g. *Steer v Stormsure Ltd* [2021] ICR 1671. The decision on a claim for interim relief involves the ET judge making a summary assessment of the prospects of success based on the limited evidence before him or her. That means the task of a claimant is all the more difficult if the evidence indicates that there are many areas of factual or legal dispute which the ET will ultimately have to resolve.

67. In this case Mr Lay had to satisfy the Employment Judge not only that he was likely to succeed in establishing that he made protected disclosures, but also that he was likely to succeed in establishing that this was the principal reason for his dismissal. It is clear from the Employment Judge's written reasons that Mr Lay failed to meet the necessary threshold on both limbs, though failure to meet the first limb alone would have resulted in the dismissal of his application.

68. Mr Lay was unable to satisfy the Employment Judge that it was "likely" that he would be held to have made one or more protected disclosures because there were live issues of fact and law which the Employment Judge said made it impossible for him to reach that conclusion. As to the second limb, the Employment Judge took the view that the points made by Mr Lay may be good ones, and he may ultimately succeed, but they were not sufficient to cross the high threshold for interim relief. Whilst he accepted Mr Lay's criticisms of the process by which he was dismissed, he said it did not follow that the tribunal which eventually heard the claim would reject the proposition that the reason given for his dismissal was the genuine reason.

69. I agree with the Judge that IVL's stance in the ET proceedings at the time of the application for interim relief was material to the Employment Judge's decision. IVL's position that EDD's business model (both indirect and direct) operated entirely lawfully both before and after the SPA was plainly a relevant factor in the

Employment Judge's assessment of the question whether Mr Lay was likely to establish, in due course, that he had made protected disclosures. Mr Béar submitted that it was not confined to that aspect of the application, but must have played a part in the Employment Judge's overall assessment that there were too many contested issues of fact and law for him to be able to say that Mr Lay had a strong enough case on both limbs to justify reinstating him. In any event, he submitted that even if IVL's stance on the lawfulness of EDD's business models only went to the issue of whether there were protected disclosures, the Judge was right to find that this was enough to establish that there was an abuse of process and that IVL should be precluded from raising a counterclaim based on the contrary argument. IVL had gained an advantage for itself by taking the position that it did. Moreover, as in *Malik v Malik*, it could not be shown how the Employment Judge would have determined the matter had his evaluative assessment been carried out in circumstances where IVL took a different stance.

70. Mr Tozzi submitted that Mr Lay would have been unsuccessful in his claim for interim relief come what may, regardless of the stance taken by IVL on the lawfulness of the business model. Even if the Employment Judge had been satisfied that Mr Lay was likely to succeed in establishing that he had made protected disclosures, he would still not have been satisfied at that juncture that Mr Lay was likely to establish that they were the principal reason for his dismissal.

71. Would it be enough to engage the principle of estoppel by conduct to show that where an applicant needed to overcome two hurdles in order to obtain the relief he sought, a stance was taken by the opposing party in order to undermine his case on one of them, and played a material part in doing so? My provisional view is that it probably would, since the result was that the claim fell at the first hurdle, but it is unnecessary to reach a definitive conclusion on the matter. The ET plainly "acted on the footing" that IVL's case was that EDD's business operated lawfully at all material times and that Mr Lay knew that, and those matters, which were integrally bound up with the issue about the real reasons for his dismissal, were so contentious that it could not be said at that stage that Mr Lay was likely to succeed on either limb. Applying Ginsburg J's approach in the *New Hampshire* case, IVL gained an advantage in the interim relief application by taking the stance it did.

72. Standing back and looking at the Employment Judge's decision as a whole, it is clear that IVL's assertion that the business of EDD was always operating lawfully and could continue to do so went to the heart of the question whether Mr Lay could establish that he was dismissed for making protected disclosures, which in turn was at the heart of the claim for interim relief.

73. Was it clear that the application for interim relief would have fallen at the second hurdle come what may? As in *Malik v Malik*, the decision was an evaluative one based on many different factors. If IVL had taken a different position the decision may well have been the same, but I am not persuaded that that was inevitable. It is always difficult to evaluate how a court or tribunal might have decided a matter had the arguments before it been presented differently, but there is force in the point that had the Employment Judge concluded that it was likely that protected disclosures were made, that would have made him more receptive to the argument that those disclosures were likely to be the true reason for dismissing Mr Lay without any form of prior disciplinary process.

Conclusion

74. For those reasons, I have concluded that the volte-face by IVL was a classic example of the type of behaviour which is prohibited by the principle of estoppel by conduct, and that when all the relevant factors are taken into account, the balance of equities comes down firmly in favour of striking out the counterclaim. It would plainly be unfair to Mr and Mrs Lay to allow IVL to resile from the position it adopted to its advantage in the ET proceedings. I would therefore allow the appeal and dismiss the cross-appeal.

Lady Justice Cockerill

75. I agree.

Lord Justice Bean, Vice-President Court of Appeal (Civil Division):

76. I also agree.