Appleby (Guernsey) LLP v Patricia Maud
Royal Court
10th November 2016

JUDGMENT
46/2016

Preliminary issue/amended defences.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **APPLEBY (GUERNSEY) LLP** **Plaintiff**

-and-

PATRICIA MAUD **Defendant**

Date of hearing of the Preliminary Issue: 17th August 2016

Decision handed down: 10th November 2016

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Plaintiff: **Advocate A C Williams**

Counsel for the Defendant: **Advocate S Dingle**

Cases, Texts & Legislation referred to:

Hughes v Metropolitan Railway Company (1877) 2 App Cas 439
China National Foreign Trade Transportation Corporation v Evlogia Shipping Co SA of Panama [1979] 1 WLR 1018
Jefcoate v Spread Trustee Company Limited [2013] GLR 220

The Royal Court Civil Rules, 2007
Marett v Marett 2008 JLR 384
Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 3) [1979] Ch 506
Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160 (at para. 17)
Thoday v Thoday [1964] P 181
Fidelitas Shipping Co. Ltd v V/O Exportchleb [1965] 2 WLR 1059
Tilling v Whiteman [1980] AC 1
Cherub Investments Limited v The Channel Islands Aero Club (Guernsey) Limited (unreported, 13 January 1982)

Introduction

1. By way of background, an application for leave to amend the Defences dated 27 June 2016 was dealt with by a Consent Order dated 1 July 2016. Para. 2 of that Order further provided that para. 2 of the Re-Amended Cause and responsive para. 4 of the Amended Defences were to be determined as a preliminary issue, "*namely whether the Defendant was the Plaintiff's client and thus liable for its fees, as pleaded by the Plaintiff, or not*". It is this preliminary issue with which the Court is currently seized.

2. The Plaintiff's Cause was first tabled on 15 March 2013. It was an action by the then partners of a firm of advocates to recover unpaid professional fees billed to the Defendant. (It remains an action to like effect, but the firm has become a limited liability partnership, so the identity of the Plaintiff has changed to reflect that new status.) Defences were settled by the Defendant's then Advocates and tabled on 19 April 2013. Materially, paragraphs 1 to 3 of the Cause were admitted. Para. 2 has consistently asserted:

> "*During the course of 2012 the Plaintiff was engaged by the Defendant to provide legal services in relation to a company called Amoudi Bay Consultadoria E Participacoes Unipessoal LDA ("Amoudi Bay") in a dispute with the administrators of PropInvest Group Limited ("PGL") further to inter alia accusations of dishonest assistance on the part of Amoudi Bay to alleged breaches of duty by the directors of PGL in the novation of a share pledge and guarantee over assets belonging to a subsidiary of PGL.*"

   Consequently, the Defendant's case at the time of tabling her Defences rested on the quantum of the fees billed rather than the principle of whether there was any obligation to settle them. The Plaintiff was put to strict proof as to the value of the legal services allegedly provided.

3. The Court directed the parties to complete a form of Scott Schedule in respect of the fees claimed by the Plaintiff in order to identify any work undertaken by the firm on behalf of the Defendant which was actively contested by the Defendant and the reasons for doing so. This exercise resulted in an application for summary judgment being made by the Plaintiff, which was then granted, in respect of £19,395.34. This amount reflected the aggregate of those items where, although not agreed, the real opposition to paying them had, it seemed, disappeared. That decision was made by me on 20 February 2015.

4. At the time of entering that summary judgment against the Defendant, she was no longer represented by her original Advocates, but an Affidavit sworn on 6 February 2015 by her estranged husband, Glenn Maud, whose affairs appear to be at the root of the matters in which these parties are involved, had been lodged on her behalf. At para. 13, he states that "*Mrs. Maud's case remains that the Plaintiff's [sic] have been more than adequately remunerated for*

the work they undertook on behalf of Amoudi Bay and that any proper examination cannot help but conclude that nothing further could in any circumstances be due to the Plaintiffs in their action against Mrs. Maud and in any Interlocutory proceedings in relation thereto." There was no suggestion from Mr Maud that the Defendant herself had not engaged the Plaintiff firm, although he did refer in para. 8 to the letter of engagement specifying "*Providing Guernsey advice in relation to the enforcement of the share pledge and any impact of the freezing order*", noting the absence of any mention of Amoudi Bay.

5. After judgment for that part of the Plaintiff's claim was entered against the Defendant, the remainder of the claim was progressing towards a trial. Another firm of Advocates assisted the Defendant in the preparation of her witness statement dated 2 April 2015. In this witness statement, the Defendant raised for the first time that she was not the Plaintiff's client, but that the proper client was Amoudi Bay Consultadoria E Participacoes Unipessoal LDA ("Amoudi Bay"), a company in which she was and remains the sole shareholder. Shortly thereafter, the Defendant ended her retainer of that second firm of Advocates. It was agreed between the parties that the trial should be listed for a quasi-taxation hearing.

6. The Defendant then instructed the Advocates who continue to represent her today. Those Advocates recognised that the issue as to whether or not the Defendant was the Plaintiff's client had not been pleaded and so could not be advanced at the trial. As a result, the procedural steps that led to the hearing of the preliminary issue on 17 August 2016 were undertaken by agreement between the parties.

Raising of estoppel

7. The Plaintiff's primary case on the preliminary issue identified by the parties is that the Defendant is estopped *per rem judicatam* from asserting that she was not the firm's client and so responsible for the fees in respect of which the action seeks payment. This estoppel arises from the summary judgment decision. In the alternative, the Plaintiff argues that the facts support their claim. This was set out in the Re-Amended Replique dated 20 July 2016.

8. At the hearing, I expressed my concern that this line of argument was being advanced. Whilst I appreciated that the Defendant had articulated her opposition to the preliminary issue being decided in her favour in this manner, it struck me that neither party had properly addressed their minds to the consequences of the Consent Order giving leave to amend the Defences to include this opposition whilst leaving in place the judgment in favour of the Plaintiffs. On the one hand, the Plaintiffs wished to rely on the summary judgment as being determinative of the issue of whether the Defendant was the firm's client and on the other hand it had agreed to the Defendant having leave to advance a new defence, which I took to infer that the Plaintiff was in some manner waiving its entitlement to rely on the judgment. Equally, the Defendant had raised the line of defence in the knowledge that it was doing so at a time when judgment was still entered against her. Paragraph 3 of the application of 27 June 2016 sought an order that, if the preliminary issue were determined in favour of the Defendant the Court would revoke the judgment with costs given on 20 February 2015. However, the only mechanism by which this Court could do that would, in my view, be by way of the presentation of a requête civile. In the absence of such a procedure being followed, the summary judgment entered in respect of part of the debt meant that this Court became *functus officio* in relation to that matter and the judgment could only be reversed on appeal to the Court of Appeal. In short, the parties could have agreed to set aside the judgment entered by way of an agreed process under a requête civile, ie, invited the Court to grant permission to present the petition and then grant it, possibly on terms, so as to put the parties into a position where there was no opportunity to claim that an estoppel existed

and the preliminary issue would be determined on the facts or, if the Plaintiff wished to rely on the estoppel, as it became clear from Advocate Williams' submissions that it wished to do, the time to invoke that point was before agreeing to the request from the Defendant to amend her pleading. Instead, the parties have proceeded in a way which leaves the possible estoppel created by the summary judgment available, but the Defendant's Defences now make a claim in general terms that she was not the Plaintiff's client.

9. I did not regard the position as satisfactory at the hearing. I left open the opportunity for both parties to lodge further materials seeking to persuade me about the basis on which I should determine the preliminary issue or whether I would have to unravel what had happened to date before the estoppel claimed could properly be relied upon. Both parties availed themselves of that opportunity. The Plaintiff lodged a Supplementary Skeleton Argument dated 25 August 2016. The Defendant then lodged her own Supplemental Skeleton Argument dated 31 August 2016. The Plaintiff took upon itself to lodge a written response to the Defendant's materials dated 1 September 2016. I am afraid that it has taken me longer than I would have wished to find the time to assimilate what both sides have now submitted and to decide what the outcome should be. I apologise to all concerned for that delay.

Procedural matters

10. The fact that this issue has spawned the amount of material that it has is, in my view, most unfortunate and perhaps indicative of the inability of both parties to take a step back and try to agree a pragmatic way out of the corners into which both have backed themselves. Although I will address the arguments each has raised, it strikes me as incumbent on the Plaintiff, if the firm wishes to rely on the estoppel, to be prepared to do so in opposition to an application for leave to amend the Defendant's Defences. It should, therefore, have acknowledged that it had taken a wrong turning when agreeing on the one hand to the amendment sought and then seeking to rely on the judgment already obtained as being an unanswerable contention that the preliminary issue had to be decided in its favour. Alternatively, the Plaintiff could have dropped its reliance on the estoppel and left the preliminary issue to be resolved on the facts, which is how I had expected the preliminary issue to proceed when I made the Consent Order on 1 July 2016. Similarly, if the Defendant wished to avoid the consequences of the judgment already entered against her, she should have taken steps, possibly with agreement from the Plaintiff, to set it aside or appeal it.

11. In its Supplemental Skeleton Argument, the Plaintiff seeks to rationalise what took place by reference to a form of waiver, either by estoppel or by election. In relation to the former, it recognises that this involves a form of promissory estoppel (and refers to *Hughes v Metropolitan Railway Company* (1877) 2 App Cas 439). The Plaintiff submits that there was no representation, or certainly no clear and unequivocal representation, on its behalf that it would not seek to rely on estoppel *per rem judicatam*. In relation to the latter, the Plaintiff submits that the Defendant would need to show that the Plaintiff was faced with two mutually exclusive courses of action, one of which was to run the estoppel argument and the other was to abandon it, and then choose between them and communicate that choice to the Defendant in such a way as to lead the Defendant to believe that there was a completed election. The Plaintiff refers to *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co SA of Panama* [1979] 1 WLR 1018 in support of that analysis.

12. In making these submissions, the Plaintiff has also drawn attention to the way in which it says it approached the Defendant's request to amend. The case on amendments to the Cause in this jurisdiction to which the Plaintiff refers is *Jefcoate v Spread Trustee Company Limited* [2013] GLR 220 and, in particular, the summary set out by the Bailiff in para. 52. The Plaintiff took the

view that the hurdle to resisting an application for leave to amend is a high one. In effect, only an unmeritorious amendment, in the sense of it being to introduce a proposition that is unarguable, will be disallowed. Accordingly, having regard to the overriding objective in rule 1 of the Royal Court Civil Rules, 2007, the Plaintiff consented to the amendments sought firmly believing that its position on its estoppel argument could still be advanced.

13. The Defendant's Supplemental Skeleton Argument rehearses the contact had between Ogier, the new firm of Advocates instructed by the Defendant, and the Plaintiff in the run-up to the hearing of the preliminary issue. In doing so, the Defendant deals with the Plaintiff's Re-Amended Replique, which she says needs to be viewed in the light of the other demands being made at the time by the Plaintiff. This was covered in a Consent Order made on 29 July 2016. On the question of the approach to be taken to Consent Orders, the Defendant refers to the decision of the Jersey Court of Appeal in *Marett v Marett* 2008 JLR 384, in which it was held that a consent order could only be varied or set aside in exceptional circumstances. This is because such an order should be viewed as a contract and so the focus for setting it aside should be on grounds that invalidate the underlying contract between the parties. In that case, the Court of Appeal drew attention to the power in the CPR, r. 3.1(7), which has been introduced in a similar fashion in rule 50(7) of the 2007 Rules: "*A power of the Court under these Rules to make an order ... (b) includes a power to vary or revoke that order*". The Defendant further submitted that this Court should not exercise that power in relation to the Consent Order dated 1 July 2016 because the Plaintiff has not requested that the Court do so. The Defendant also responds in this Supplemental Skeleton Argument to the contentions of the Plaintiff on waiver.

14. In its reply, the Plaintiff has referred to *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 3)* [1979] Ch 506. In doing so, Advocate Williams submits that a party faced with an allegation affected or potentially affected by an issue estoppel is entitled to raise it in its pleading and have it dealt with at trial. The party is not obliged to raise it to have the claim affected by it struck out. This is on the basis that the Court might still allow the matter to go to trial. Accordingly, the Plaintiff submits that there was no unequivocal representation made by agreeing directions for the hearing of the preliminary issue that the Plaintiff would not rely on any available estoppel and the course it adopted through raising it in its Re-Amended Replique and leaving it to be resolved at the hearing is supported by the various authorities to which it has referred.

15. I am not persuaded by the submissions of the Plaintiff that I am obliged to allow the estoppel argument to be entertained on this preliminary hearing. Advocate Williams seems to forget that this Court is not the High Court. There is no authority, as such, to which he can turn to found an argument that it would be an improper exercise of the Court's discretion to conclude that the Plaintiff needed to raise the estoppel it now clearly wishes to raise as a means of resisting the Defendant's new claim that she was not the Plaintiff's client when she sought leave to introduce that into her Defences. In my judgment, it is artificial in the extreme for the Plaintiff to agree at one moment that the Defendant can raise that line of Defence and then in almost the next procedural breath to assert that she is precluded by the existing judgment from doing so. This is a different situation from any of the cases to which the Plaintiff now refers. In any event, I think that the Plaintiff's reliance on established doctrines in English law, which may have some equivalent in Guernsey law, is misplaced and misunderstands the position that has been reached through it overlooking the consequences of agreeing to the Defendant's proposed amendment.

16. It is unnecessary for me to deconstruct what took place any further than to recognise that, in permitting the Defendant to advance the defence that she was not personally responsible for the professional fees that form the subject-matter of the application, the only proper inference to draw is that the Plaintiff should be regarded as being prepared to step back from relying on the

summary judgment it had obtained. If it is right that the summary judgment creates the issue estoppel on which it wishes to rely, it is clear to me that the time to take that point should be in opposition to the application for leave to amend. If justice dictates that the real issue the Defendant wants addressed is whether she was the Plaintiff's client, the amendment may well be allowed, but it would be on terms that ensure that this issue can then be addressed without there being any spectre of an issue estoppel preventing the argument being developed further. Equally, as I have already indicated, the Defendant must have realised that it is arguable that she could not advance the argument that she was not the Plaintiff's client whilst there was a judgment against her predicated on that position. As such, the options for there being an effective agreement as to how to proceed once the Defendant had made that claim in her witness statement were to invite the Court to rule on that question on the facts, which appears to have been the way the Defendant thought it would happen, or to test whether the existing judgment amounted to the issue estoppel the Plaintiff says it is, which is how the Plaintiff's primary case is put. The impression I have formed is that both sides have laboured under a mistake as to what the effect of the Consent Order of 1 July 2016 is. The approach of the Plaintiff has been that it means the issue estoppel can still be advanced and, recognising that there might be some question as to whether an issue estoppel arising in the same action is available, would have the matter dealt with on the facts in the alternative. The approach of the Defendant has been that this was a preliminary issue to be determined only on the facts. Accordingly, there has not been a complete meeting of the parties' minds when it came to the basis for putting that Consent Order to the Court. In such circumstances, it appears to me that it is open to the Court to set aside that Consent Order and return the parties to the position they were in beforehand.

17. In reaching such a conclusion, I do not consider that I am obliged to shoehorn the present circumstances into any of the doctrines derived from English law to which Advocate Williams has referred. However, I am satisfied that the Plaintiff's agreement to the Defendant having leave to amend her Defences in the way proposed so as to challenge the very fact of her being the Plaintiff's client can properly be equated to the Plaintiff waiving any entitlement it had to rely upon the summary judgment for the purposes of the identified preliminary issue. In my view, this is apparent from looking at the entirety of the Defendant's application because, as I have already noted, para. 3 sought an order that, if the preliminary issue were determined in her favour, the judgment entered against her would be revoked. Accordingly, I am satisfied from the steps envisaged by the Defendant that the question for resolution was intended to be determined on the facts and with the possibility of re-visiting the outcome of the summary judgment if it turned out that the facts supported her contention. To that end, it would potentially be open to me to reject without further consideration the Plaintiff's issue estoppel argument and determine the preliminary issue solely by reference to the facts.

18. However, I am also satisfied that it would be unjust to the Plaintiff to do that when it is quite clear to me that the Plaintiff wishes to raise this issue estoppel. I am satisfied that the Plaintiff genuinely believed that this course of action was left open to it. As a result, it would be a significant blow to the way Advocate Williams presented the case for the Plaintiff if this option were denied to it on what it no doubt considers to be a technicality. In that situation, it seems that the most sensible course of action is to unwind what has happened procedurally to get the parties back to where they would have been had the issue estoppel been raised by the Plaintiff at the point I think it should have been. In this way, the position of the Plaintiff can be preserved so that its primary contention remains available to it. Equally, if the Defendant recognises that the existence of the summary judgment could create a barrier to her mounting the defence she now wishes to pursue, she can decide what steps, if any, to take before seeking leave to amend her Defences.

19. When this judgment was circulated to Counsel in draft on 2 November 2016 pursuant to Practice Direction No. 1 of 2012, Advocate Dingle drew attention in his response to a Third Affidavit of Gavin Ferguson sworn on 27 July 2016, which exhibited correspondence between the Advocates acting during the preceding week relating to a number of matters, which included whether or not the Amended Replique could be re-amended by consent to include mention of the estoppel *per rem judicatam* to which I have referred. At para. 9 of that Affidavit, Advocate Ferguson acknowledged that this step could have been taken when the Amended Replique was settled earlier that month but explained that that had not happened "*because the Plaintiff had not recognised the implications of the judgment at that time and that is the reason the plea does not appear*". Advocate Williams replied questioning whether this was an appropriate matter to raise at this stage, querying whether further submissions might be needed. I do not consider that further submissions are necessary because, rather than changing my view, this exchange prior to the hearing of the preliminary issue endorses my conclusions that the Plaintiff did want to raise the issue estoppel and genuinely believed that this was a course still open to it. Whether or not the Plaintiff had overlooked the way of achieving this does not affect the outcome that follows, namely that it is just to allow the issue estoppel point to be taken by the Plaintiff rather than rejecting it out of hand, but to reinstate the parties' pleaded cases to the position they were in at the time before the Defendant decided she wished to resist the Plaintiff's claim on the basis that she was not the Plaintiff's client. Accordingly, apart from adding this paragraph, the judgment remains as it was when circulated in draft. Having regard to the other matters addressed in the correspondence exhibited to this Affidavit also reinforces my view that the Advocates appear to revel in engaging in procedural squabbling rather than focusing on the real issues of dispute that need to be adjudicated upon. These are matters that can best be left until there is a sweep-up of by whom the costs incurred by all of these false steps are to be paid.

20. I have also given consideration to the possibility of resolving at this stage whether the Plaintiff is able to advance the issue estoppel that the firm wishes to raise as a valid reason for the Defendant's application for leave to amend being rejected. If that were the case, the action would then be tried on the basis of the unamended pleadings as the form of the quasi-taxation process that the Court had directed. I have, though, decided that the Defendant should properly now have the chance to consider whether an alternative route should be taken with a view to avoiding there being any possibility of the Plaintiff having the basis for such an estoppel. This might be achieved through petitioning by way of requête civile or through an appeal (although neither of those options looks particularly attractive, especially an appeal), or the Defendant might consider some more imaginative course of action, eg, staying the current proceedings and seeking a form of declaratory relief along the lines of the preliminary issue carved out of the current action. I also recognise that neither party has presented any arguments as to why leave to amend should be granted or refused outside of the bare issue of whether the issue estoppel can be raised successfully. In those circumstances, it seems to me that I should properly allow the parties to take stock and discuss between them which is the preferred course of action in order to progress their dispute.

Arguments on estoppel

21. By taking that course of action, I am expressly leaving open the question of whether the Plaintiff's raising of the issue estoppel has merit. Advocate Williams relied on the summary given by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 (at para. 17). The particular form of issue estoppel had been adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181 and expanded upon by His Lordship in *Fidelitas Shipping Co. Ltd v V/O Exportchleb* [1965] 2 WLR 1059. In response, Advocate Dingle drew attention to passages in those cases, including that it is necessary to look at the particular circumstances of the

individual case and that the doctrine is not to be regarded as an inflexible rule. Normally, an issue estoppel will be relied upon in subsequent proceedings because an issue has previously been litigated and adjudicated upon. Underlying this approach is the principle that the parties should have brought forward the whole of their case in the previous proceedings, with the consequence that there is nothing new to cover in re-litigated an issue already determined. The distinction in the present case is that the Plaintiff wishes to rely on an issue estoppel from the summary judgment given in the present proceedings in respect of part of the whole of the Plaintiff's action.

22. In the context of what has potentially become an evolving case on behalf of the Defendant as she instructs different Advocates over the course of the proceedings, I can see some attraction in an outcome that does not prevent her from articulating the position she now wishes to advance. However, I am conscious that Lord Denning MR explained the principle in the ***Fidelitas Shipping*** case (at page 1065) as being that "*once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances*", which certainly leaves the impression that it matters not that the issue estoppel claimed arises in the same proceedings. Whether, and if so how, the fact that the issue of who the Plaintiff's client was has not been determined, but was admitted in the Defendant's original Defences has not yet been fully explored. Accordingly, the issue of whether or not the issue estoppel raised is likely to have merit appears still to be finely balanced, which is why I consider that the Defendant should have the opportunity to consider whether there is some other route for her to overcome what might be a procedural bar to her now seeking leave to amend her Defences.

Factual considerations

23. Having said that it is premature to decide any question of who might have the merits in their favour, I can also briefly give a provisional indication as to the factors I have had in mind relating to how I could have decided the preliminary issue on the facts had I reached that stage. This may assist the parties in deciding how they now wish to proceed.

24. When the Plaintiff was first contacted on behalf of the Defendant, I am satisfied that the Defendant, and not Amoudi Bay, was the firm's client. This is the more likely position because, as recorded in the letter of engagement dated 31 August 2012, the scope of engagement set out in the Schedule covered providing Guernsey advice in relation to the enforcement of the share pledge and any impact of the freezing order. The initial contact was made by a partner of Berwin Leighton Paisner LLP on 28 August 2012, in which she asked the Plaintiff whether it was "*able to act for the Defendant who is the legal and beneficial owner of a madeiran [sic] company called Amoudi Bay. Amoudi Bay holds the benefit of a share pledge in respect of a Guernsey company, Propinvest Ventures Limited*". That message also explained that "*a freezing order was made on 20 August relating to assets of, amongst others, Glenn Maud (Patricia's husband), Navarro Ventures (the wholly owned subsidiary of Amoudi Bay) and PCL*". Accordingly, I take the view that the initial advice sought related to the shares in Amoudi Bay, which belonged to the Defendant, rather than the position of Amoudi Bay itself. There is no suggestion that the firm of solicitors was purporting to make contact on behalf of the company because, eg, there was no mention made of any director of Amoudi Bay. Moreover, at the time that advice was first sought, there was no litigation in Guernsey in which Amoudi Bay was involved.

25. Turning to the other end of the Plaintiff's retainer, it appears that it was brought to an end by Amoudi Bay. An e-mail dated 31 January 2013 was sent by the General Manager of Madeira Fiducia, who had previously identified himself as the Director of Amoudi Bay in a letter dated 7

September 2012, informing the Plaintiff that Amoudi Bay was terminating the retainer in relation to the current proceedings in Guernsey. The earlier letter had authorised and consented to the Plaintiff acting on behalf of Amoudi Bay in relation to the enforcement of the security interest agreement that Amoudi Bay held over the shares in Propinvest Ventures Limited and other ancillary matters. That letter authorised the Plaintiff to take instructions from any of the Defendant, the Defendant's son, Nick Maud, and Berwin Leighton Paisner. Although it is not entirely clear, there seems to be an inference from that earlier letter that Amoudi Bay became the Plaintiff's client. Whether this was in place of, or possibly in addition to, the Defendant is something that may only be resolved through a full trial of the matter. Given that the bulk of the work undertaken by the Plaintiff thereafter was to act on behalf of Amoudi Bay in defending the proceedings commenced by the Joint Administrators of Propinvest Group Limited, there is a further inference that can potentially be drawn that the actual client became Amoudi Bay. However, it is unclear as to whether the Defendant continued to be the Plaintiff's client at that time or possibly whether the Defendant had agreed to fund the representation of Amoudi Bay by the Plaintiff. The Plaintiff's Skeleton Argument explains at the outset that "*The Plaintiff's client of record was the Defendant and not Amoudi Bay*" but quite what a "*client of record*" is in Guernsey was not clarified to my satisfaction. Again, these are matters that may only be capable of resolution through listening to evidence or at least considering the witness statements more fully. For the purposes of the preliminary issue, the Affidavit evidence does not seem to me to provide a complete answer to these issues.

26. In these circumstances, despite the Defendant's belief that the determination of the preliminary issue could result in the conclusion that the Plaintiff's action would be dismissed (and the judgment entered against her revoked, and whether that is permissible in any event has not been addressed), I doubt that that would be the outcome. I take the view provisionally that there needs to be a more detailed investigation of whether Amoudi Bay became the Plaintiff's client and, if so, at what time and on what terms, than the written material before the Court enables to take place. It also potentially means that the argument that the Defendant wishes to advance is only partially going to assist her rather than offering a complete answer to the action. Equally, I doubt that the material before me could result in a factual finding that the Defendant remained the Plaintiff's sole client, as the Plaintiff claims, throughout the period in question and so is obliged to settle the fees raised against her personally. It strikes me, if nothing else, that testing the Defendant's apparent ignorance about all these matters through oral evidence will be desirable before what she says can be accepted. It is possible that the more detailed investigation to which I have referred could lead to that outcome, but it does not seem to me that it follows at this stage of the proceedings. This now appears to be an example of where trying to resolve the case through a preliminary issue determined on written evidence has been the type of treacherous shortcut against which Lord Scarman cautioned in *Tilling v Whiteman* [1980] AC 1, to which reference was made by Hoffmann JA in *Cherub Investments Limited v The Channel Islands Aero Club (Guernsey) Limited* (unreported, 13 January 1982).

Conclusion

27. The parties now need to decide how best to proceed with this action, possibly taking into account the indications I have just given. For present purposes, I have decided that the right thing to do is to exercise the Court's power under rule 50(7) of the 2007 Rules to revoke the Consent Order I made on 1 July 2016. This is the making of an order on the Court's own initiative under rule 51, having afforded the parties an opportunity to make representations. The consequence of making this order is that the preliminary issue agreed by the parties for determination becomes a nullity, ie, there is no order from the Court in respect of the preliminary issue. As a further consequence, the Application for leave to amend the Defences remains to be determined. Whether or not the

Defendant now wishes to seek an order for the hearing of the preliminary issue identified is a matter for her. Directions in respect of how to proceed could be agreed by the parties and put into a Consent Order or the matter needs to be re-listed before a suitable Interlocutory Court.

28. Because the Application has fallen away, I am minded simply to reserve the costs of it until such time as the parties wish to seek some order as to the costs consequences of what has happened.