

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LONDON CIRCUIT COMMERCIAL COURT (KBD)
ORDER OF HHJ BIRD dated 23rd APRIL 2026

BETWEEN:-

MR CLIFFORD STEWART LAY
MRS JACQUELINE SUZANNE LAY

Appellants/Claimants

-and-

INDEPENDENT VETCARE LIMITED

Respondent/Defendant

APPELLANT'S SKELETON ARGUMENT FOR PERMISSION TO APPEAL

Bundle references: [Core Bundle (“CB”) or Supplemental Bundle (“SB”)] / Tab / Page].

A. Introduction

1. This is the Claimants’ (the “**Lays**”) skeleton for permission to appeal in respect of HHJ Bird’s 23 April 2026 judgment (the “**Judgment**”), dismissing their application of 11 December 2025 (the “**Application**”) for strike out of the Defendant’s (“**IVL**”) counterclaim in these proceedings (the “**Counterclaim**”).
2. The case started as a simple debt claim. The Lays seek the second earn-out payment pursuant to a Sale and Purchase Agreement dated 28 October 2020 (the “**SPA**”), by which they sold the shares in their business, Easy Direct Debits Limited (“**EDD**”) to IVL, and in which they both continued to work following its sale. EDD’s business involves assisting veterinary practices to receive payments from clients. IVL’s Counterclaim asserts that when it purchased the Lays’ shares in EDD it was operating unlawfully, in that it was in breach of the Payment Services Regulations 2017 (the “**PSRs**”). IVL therefore claims that the Lays were in breach of their SPA warranties.

3. The Application arose from a direct contradiction between IVL’s Counterclaim and its earlier position in Employment Tribunal whistleblowing proceedings (the “**ET Proceedings**”) brought by Mr Lay against IVL and EDD (the “**Contradiction**”). IVL’s position there was that EDD’s business had been conducted lawfully in all respects. As the Court found, that position was material to Employment Judge Cadney denying Mr Lay interim relief on 30 June 2023 (the “**Interim Application**”), which had it succeeded would have effectively reinstated him as EDD’s MD, pending the determination of the ET Proceedings (“**EJ Cadney**” and the “**ET Hearing**” respectively).¹ As below, IVL’s success in preventing Mr Lay from obtaining interim relief at the ET Hearing had profound adverse consequences for Mr Lay.
4. When the Counterclaim was later pleaded, IVL adopted a volte-face and claimed EDD’s business had been conducted unlawfully at the date of completion. The Contradiction therefore concerned the lawfulness of EDD’s trading models. When asserting, at the ET Hearing, that EDD’s business had been conducted lawfully in all respects, IVL did not distinguish between EDD’s two trading models – the “**Direct**” and “**Indirect**” models, which are explained below.
5. At the Application hearing on 26 March 2026, IVL’s primary positions were:
 - a. There was no Contradiction;
 - b. EJ Cadney did not rely upon the case advanced by IVL on the lawfulness of EDD’s business; and
 - c. If which was denied, there was any Contradiction, it was cured by a subsequent amendment to the Grounds of Resistance, after they had successfully resisted Mr Lay’s application for interim relief. The learned judge comprehensively rejected all these arguments.²
6. As a fall-back position, IVL sought to justify the Contradiction by reference to the receipt of changing legal advice. The fall-back position occupied little time in

¹ The ET Hearing was on 30 June 2023 and EJ Cadney’s Written Reasons are dated 28 January 2026: [SB/21/175].

² Judgment, §§61 and 64 [CB/5/52].

submissions. HHJ Bird accepted that fall-back position and, on that basis only, dismissed the Application. The subsequent order of 23 April 2026 (the “**HHJ Bird Order**”) also denied the Lays permission to appeal.³ Permission is therefore sought on the basis of four grounds. In summary:

- a. Ground 1: The Court failed to take proper account of the fact that all of IVL’s legal advice from its solicitors DLA Piper (“**DLAP**”) was withheld on grounds of privilege. As a result, the Court was unable to conduct properly the “*broad, merits-based assessment*” with which it was tasked;
 - b. Ground 2: The Court further failed properly to consider Mr Chris Finney’s (of Fox Williams LLP) 21 June 2023 email advice to EDD (not IVL) (the “**Finney Email**”) in its entirety. It therefore failed to conduct the above assessment properly;
 - c. Ground 3: The Court impermissibly took account of an immaterial factor by considering what facts or legal advice IVL asserted it received after it pleaded the contradictory case; and
 - d. Ground 4: Without prejudice to the above Grounds and notwithstanding the broad, merits-based assessment, changing legal advice should not be a determining factor in that assessment, save in the clearest of circumstances. Such circumstances do not apply here, such that the Court erred in finding the Contradiction to be justified.
7. The HHJ Bird Order further ordered the Lays to make an interim payment on account of costs in the sum of £150,000. 28 days were given, expressly to enable the Lays “*to seek a stay on enforcement from the Court of Appeal at the same time as seeking permission*”. Trial is listed for 9 November 2026, witness statements are to be exchanged on 29 May 2026, with other deadlines falling shortly thereafter. Should the Application succeed, all that will remain is the Lays’ simple debt claim. The face of the litigation will be substantially altered and costs reduced accordingly. The Court is therefore invited to grant a stay on enforcement of the interim costs order and of the underlying proceedings.

³ HHJ Bird Order §5 and Reasons [CB/4/41-42].

B. Background

8. To assist the Court of Appeal in understanding the Judgment's conclusions, it is necessary to explain something of the background to this matter; EDD's Indirect and Direct business models; and the position adopted by IVL at the ET Hearing.
9. This litigation is truly a dispute between "*David and Goliath*". In 2015, the Lays set up EDD to assist veterinary practices sign-up their pet owner clients, by devising an online technical services platform/dashboard. As stated above, the Lays sold their shareholding in EDD pursuant to the SPA. The majority of IVL's consideration was to be paid to the Lays as earn-outs, linked to EDD's future financial performance. Mr Lay continued as EDD's MD post-completion, and was joined on EDD's board by two IVL appointees. Mr Lay intended to remain in post to ensure that EDD achieved its earn-outs. At the date of completion of the SPA, EDD only carried on business by the Indirect Model.
10. The Lays' available financial resources are derived almost entirely from the sums they were paid under the SPA (the totality of which, by the Counterclaim, IVL sues to recover). They are otherwise of modest means. By contrast IVL's revenue for y/e 30th September 2023 is reported in filed accounts at £1.1 billion with gross profit of £519 million. It employs many thousands of veterinary surgeons and nurses across its 1,026 sites. Its immediate parent-co reported in its filed accounts for y/e 30th September 2023 net assets of £2.46 billion.
11. On 7th June 2023 – i.e. c.2.5 years into the 4-year earn out period under the SPA – IVL unceremoniously sacked Mr Lay from his role as EDD's MD. Mr Lay therefore commenced the ET Proceedings, for automatic unfair dismissal in relation to protected disclosures (i.e. "*whistleblowing*" in respect of EDD's activities).⁴ To succeed on the Interim Application and be reinstated in his job with EDD, Mr Lay had to establish – to a standard that it was "*likely*" to be found ultimately at

⁴ Judgment, §§25-37 for the Court's summary of the ET proceedings [CB/5/47-48].

trial – both that he had made a public interest disclosure; and, that his dismissal was solely, or principally, because of it.⁵

12. Throughout the ET Proceedings, IVL and EDD were represented by DLAP (who also represent IVL in these proceedings), with Ms Diya Sen Gupta KC appearing as Leading Counsel at the ET Hearing. By the date of the ET Hearing, EDD was carrying on business through both the Indirect and Direct Models. IVL argued and led evidence at the ET Hearing, seeking to demonstrate that EDD’s operations were lawful, in their entirety.

13. On that basis EJ Cadney dismissed the Interim Relief Application.⁶ IVL’s success at the ET Hearing meant that Mr Lay was prevented from returning to work at EDD, which he had both founded and for which he had recruited all staff. He was also unable to oversee EDD’s financial affairs during its SPA earn-out period. The Lays’ concerns about the financially adverse effect of Mr Lay’s dismissal have been proven right. In contrast to the 100% and >99% earn-out calculations for years 1 and 2, for years 3 and 4 IVL have asserted £nil calculations. As stated, that has had dramatic adverse financial, psychological and reputational consequences for Mr Lay and his family.⁷

14. Pertinently, when it asserted at the ET Hearing that EDD’s business model operated wholly lawfully, IVL drew no distinction whatsoever between the two different models by which EDD operated (i.e. Indirect and Direct). On the contrary, to achieve its desired outcome, IVL argued without qualification that EDD operated lawfully. In fact, as HHJ Bird correctly found:

“There are two routes in: EDD could contract with a BACS approved payment service provider (“a PSP”) who would deal with access to BACS for EDD (“the indirect model”) or EDD could access BACS directly (“the direct model”). To operate the direct model EDD needed to be sponsored by a BACS approved bank and to comply with the BACS scheme rules.

⁵ Judgment, §§27, 30 [CB/5/47].

⁶ See EJ Cadney’s Written Reasons §§21-25, 28 [SB/21/180-182] and the Judgment, §§35-37 and 64 [CB/5/48, 52].

⁷ See Lay3, §§14-17 Section C “Consequences of Interim Relief Being Refused at the ET Hearing” [SB/30/294-295].

[...] Before Completion, EDD employed the indirect model and used 2 PSPs to access BACS: GoCardless Limited (“GCL”) and Bottomline Technologies Limited (“BTL”). [...] Until about March 2021, EDD continued to operate via the indirect model. Thereafter it operated a hybrid model; dealing with some veterinary practices on the indirect model and some on the direct model. [...] When dealing with new payments for practices owned by the Defendant, from about March 2021, EDD submitted payment requests directly to BACS without relying on the PSPs (Mr Lay is said to have moved around 500,000 subscriptions from the PSPs). [...] This was an important and far-reaching change in the business model because it involved a shift from the indirect model to the direct model. [...] When dealing with practices not owned by the Defendant, EDD continued the pre-Completion indirect model using PSPs. EDD’s business therefore operated on a twin track, using the direct model and the indirect model.”⁸

15. As detailed below, this distinction is relevant to the proper interpretation of the legal advice received by EDD, on which IVL relied at the Application. This is particularly true of the Finney Email (referenced in the Grounds and above) on which IVL strongly relied during the Application.

16. Finally, by way of background, it is also relevant to note that – contrary to IVL’s present position that its contemporary legal advice suggested to it EDD was operating lawfully – IVL’s Counterclaim continues to rely on a breach of warranty notice (as required under the SPA, the “**Warranty Notice**”) dated 28 October 2022. It was served long before the ET Hearing and has never been retracted. IVL therein asserted the unlawfulness of EDD’s business, using the Indirect Model, in clear terms, prior to the ET Hearing.

⁸ Judgment, §§5-6, 12-15 [CB/5/44, 45-46].

The Judgment

17. As above, the Application was heard by HHJ Bird on 26th March 2026. It was hard-fought and IVL's staunch dedication to its primary positions took up the vast majority of its submissions and evidence. Importantly, and for seemingly the first time in modern law reports on the topic:

- a. HHJ Bird found the Contradiction existed between IVL's successful position at the ET Hearing (EDD's business model was lawful) and its position in the Counterclaim (alleging its unlawfulness): "*I am satisfied that clearly inconsistent approaches were adopted in June 2023 before the ET and in these proceedings*";⁹
- b. HHJ Bird found that the Contradiction was being run by IVL against Mr Lay, who were the same parties to the litigation in both the first forum (the ET Hearing) and the second (in the London Circuit Commercial Court); and
- c. HHJ Bird found that EJ Cadney had relied upon the Contradiction in reaching his decision to dismiss the Interim Application. Thus, Mr Lay suffered an adverse outcome in the ET Hearing materially because of the Contradiction.

18. HHJ Bird therefore found that IVL had approbated and reprobated, having secured an advantage (and Mr Lay a commensurate disadvantage) on an earlier contradictory case.¹⁰ As stated previously, IVL's victory at the ET Hearing caused the Lays severely adverse consequences.

19. HHJ Bird then considered whether, in those circumstances, the Counterclaim should be struck out.¹¹ At §66, HHJ stated "*Why has the Defendant now changed its stance? In my view the change of stance, on the evidence I have considered, came about because the advice changed.*" He went on to conduct the assessment without any appellate guidance on the circumstances in which, and to what extent, the justification of a change of legal advice should be taken into account

⁹ Judgment, §61 [CB/5/52].

¹⁰ Judgment, §§61, 68 [CB/5/52].

¹¹ Judgment, §67 [CB/5/52].

when undertaking the necessary “*broad, merits-based assessment*”. Regrettably that caused the Judge to fall into error, as set out in the Grounds.

C. The Existing Cases

20. This is a novel case, in that of all the authorities cited to the Court, none address the scenario whereby a change in legal advice is asserted to be a sufficient justification for pleading a contradictory case.

21. The fundamental principle with which the Application was concerned, is one anchored in public policy. Over a century ago in *Gandy v Gandy* (1884) 30 Ch D 57, Cotton LJ concluded, in respect of a party seeking to change its interpretation of a deed from that adopted in earlier proceedings that:

“It would be wrong in my opinion to allow him to take advantage of a decision on one construction, whether accepted by him or argued by him, and to give another decision in his favour on the ground that this was not the true construction”.

22. In the same case, Bowen LJ reached his own identical conclusion, describing the alternative as “*monstrous injustice*”. Whilst that policy-based doctrine has been considered by the courts to date, as addressed below the core principle remains essentially unchanged.

23. Sir Nicholas Browne-Wilkinson VC in *Express Newspapers PLC v News (UK) Ltd (and Ors)* [1990] 1 WLR 1320 described the following principle as one of “*general application*” where, if “*justice requires*” there is “*no reason why it should not apply*” (at page 1329):

“There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.”

24. That reflected what Bingham LJ, as he then was, had said a year earlier in *Benedictus v Jalaram Ltd* [1989] 1 EGLR 251. There – whilst finding that the matter before him did not fall squarely into the doctrine of approbation and reprobation – Bingham LJ commented that all such doctrines or maxims reflected “*the unwillingness of the courts to countenance inconsistent conduct by one party where this is prejudicial to the other*”. He went on to note that “*It seems to me, as to the judge, that whether the rule is founded on public policy or justice as between the parties this cannot be permitted.*”

25. The leading modern authority on the doctrine of approbation and reprobation (also known as judicial proceedings estoppel and abuse of process by reason of a contradiction) is the Court of Appeal’s decision in *LA Micro Group (UK) Ltd (and Anor) v La Micro Group, Inc (and Ors)* [2021] EWCA Civ. 1429, [2022] 1 WLR 336. Sir Christopher Floyd (giving the only reasoned judgment) drew support from three cases, which illuminate the rationale for his conclusions in *LA Micro*:

- a. The first was *Gandy*, as referenced above;
- b. The second was *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, where Viscount Radcliffe said:

“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”

Viscount Radcliffe proceeded to reach a formulation of the relevant test which required:

“(a) that the party’s stance in the earlier proceedings was the means by which he procured an order, and (b) the circumstances must be such that the court has no option but to hold him to his former stance”.

- c. The third was *New Hampshire v Maine* 532 US 742 (2001), a judgment of the US Supreme Court, in which Justice Ginsburg gave the court’s unanimous judgment approving an earlier statement to the effect that:

“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.”

It is also worthy of note that Justice Ginsburg – as is the case in this jurisdiction – stated that the doctrine was not *“reducible to any general formulation of principle”*.

26. Drawing these threads of principle together, Sir Christopher Floyd concluded that:

“[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 Justice Ginsburg 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.”

27. The Court of Appeal has recently considered the doctrine again. In Malik v Malik [2024] EWCA Civ 1323, [2025] 4 All ER 409, Zacaroli LJ introduced the topic under the sub-title *“Abuse of process / estoppel by conduct”*.¹² He noted that in LA Micro the court had not been taken to the above comments in Express Newspapers but nonetheless concluded that it was unnecessary to rehearse the historic cases. He added that *“ultimately the label is unimportant”* and considered LA Micro to be binding authority in point.

¹² It was common ground before HHJ Bird that nothing turns on the terminology used to describe the relevant doctrine (i.e. approbation and reprobation, judicial proceedings estoppel, a species of abuse of process or some other titular classification).

28. However, despite this issue taxing the Court of Appeal twice in relatively recent times, neither case considered the ambit of the “*broad, merits-based assessment*” in the context of: (i) a contradiction being found, which; (ii) had a real/material influence upon the first tribunal; and where (iii) the parties before both tribunals were the same, such that the justification for the previously successful party’s change in position were analysed and subjected to the broad, merits-based assessment in that context.

a. In *LA Micro* the Court of Appeal found, of relevance, that: (i) there was no sufficient reliance by the first judge (Tipples J) on the contradictory case, with Sir Christopher Floyd describing such a notion as “*far-fetched*”;¹³ and (ii) the cases run by Mr Bell were insufficiently contradictory to amount to an affront justice, despite calling for explanations which had been given and accepted.¹⁴

b. In *Malik*, the Court of Appeal found that the first instance judge, HHJ Gerald, had properly identified clearly inconsistent positions, so that the doctrine was engaged. It was also observed that the Deputy Judge in the first forum (Mr Jarvis QC) found the inconsistent part of the case advanced to be “*clearly of some importance*”.¹⁵ The earlier (contradictory) case was therefore sufficiently connected to the outcome to invoke the doctrine. However, the Court of Appeal did not engage at all with the justification asserted for the contradiction, by the party found to have changed stance from an earlier successful prior outcome. That issue formed no part of the grounds of appeal in that case.

29. Unlike the appellate cases above, having found that there was approbation and reprobation HHJ Bird had to grapple with the justification for that change of position as part of the broad, merits-based assessment, for the first time and without precedent. It is respectfully submitted that in doing so he erred. In these circumstances, it would be of considerable assistance for the Court of Appeal to

¹³ §§29-33 *LA Micro*

¹⁴ §34 *LA Micro*

¹⁵ §74 *Malik*

clarify the circumstances in which a change in legal advice can be a permissible factor, justifying approbation and reprobation.

D. Grounds and Permission to Appeal

30. It is respectfully submitted that the Lays' Grounds of Appeal show that there is a real prospect of establishing that HHJ Bird erred in his Judgment and reached the wrong conclusion with respect to IVL's reliance on the justification it advanced.

31. Before developing the Grounds below, the Court is invited to note the following summary of the headline factual matters.

a. To conduct the broad, merits-based assessment in circumstances where a party seeks to justify a contradictory change of case by reference to new legal advice, the court must be provided with the totality of the relevant legal advice received by that party. Accordingly, to prove its case, IVL was required to lift the veil of privilege, rather than selectively cherry-pick advantageous pieces of advice given to EDD, to suit its claim. In the present case, EDD was advised by Mr Finney and Fox Williams, but the advice of IVL's solicitors throughout, DLAP, has never been revealed. As developed below in Ground 1, HHJ Bird was accordingly unable to conduct the broad, merits-based assessment properly, or to reach the conclusions he did.

b. Without prejudice to Ground 1, there was here, in any event, insufficient evidence for him to conclude that there was in fact a clear change in legal advice. In particular, the reliance on the Finney Email to justify the submission of lawfulness by IVL to EJ Cadney, does not withstand scrutiny. As developed in Ground 2, this is because:

i. It ignores that the same advice, known to IVL, was given by Mr Finney regarding the Indirect Model in October 2022, when DLAP was advising IVL. That advice nonetheless did not prevent IVL issuing the Warranty Notice,¹⁶ in which it stated that the Indirect Model was unlawful because "*The scope of the PSRs is such that it is not*

¹⁶ See [SB/11/59-61 esp. 59] and Judgment, §20 [CB/5/46].

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”.

- ii. It fails to pay any attention to the fact that in October 2022 and June 2023, Mr Finney was saying that the Direct Model was unlawful and that this advice, even on its own face, did not support IVL’s submission of complete lawfulness of EDD’s business to EJ Cadney at the ET Hearing.
 - iii. Despite this, at §35 the Judgment correctly found that at the ET Hearing, IVL’s submissions as to EDD’s lawfulness dealt with both models.
 - iv. The attempt to reconcile this in §64, by saying that EJ Cadney “*found, in effect, that the direct model (which required authorisation) could be dropped, and the indirect model was not a regulated activity*”, ignores the reality that no distinction was drawn in EJ Cadney’s reasoning between the Direct and Indirect models, and there was no mention made of the possibility of dropping the Direct Model.
- c. The salient dates for analysing the relevant legal advice to IVL are identified in the Judgment at §18. Looking at those dates (the latter being 6 February 2024, when the Counterclaim was pleaded), there is no evidence justifying HHJ Bird’s finding that the legal advice changed by the date of the filing and service of the Counterclaim. As developed below, in Ground 3, Mr Murdoch’s evidence on IVL’s behalf was that the advice given to EDD, and belatedly relied upon by IVL, was only discovered much later. Given his earlier findings as to the relevant dates, HHJ Bird was, accordingly, not permitted to take into account that evidence when conducting his broad, merits-based assessment.¹⁷

¹⁷ Judgment, §§17-24, 66 [CB/5/46-47, 52].

32. **Ground 1:** The Court failed properly to take account of the fact that all of the legal advice that was given to IVL by DLAP had been withheld on grounds of privilege.

33. In the Judgment, HHJ Bird rightly found that the:

*“evidence on the legal advice is not always easy to follow. It is presented in the evidence as a dense 8-page chronology presented in a table and it is not complete (because the Defendant has asserted legal privilege in respect of some advice)”.*¹⁸

34. That table revealed that IVL’s election to exercise its right to assert privilege over some, but not all legal advice, was a conscious position of IVL’s own making. This is because – whilst some of the belatedly-discovered legal advice,¹⁹ which was given to EDD, was deployed by IVL in response to the Application – IVL nonetheless took the specific decision to deploy none of the advice given to IVL by DLAP before, during or following the ET Hearing.

35. This decision is all the more surprising in circumstances where the principal witness on IVL’s behalf in response to the Application was Mr Murdoch, a Partner in DLAP, working in its financial services department.

36. Once privilege is established, the holder of that privilege has an absolute right to withhold the document in question. No presumption of fact arises against a person who asserts privilege in a document: *W.C. Wentworth v J.C. Lloyd (and Ors)* [1864] X H.L.C., 589. However, that does not mean that, when conducting the broad, merits-based assessment, HHJ Bird was precluded from considering the evidence that was and, importantly, was not before him. In consequence:

- a. Given IVL’s case that the legal advice it had received justified the Contradiction, IVL’s assertion of privilege deprived HHJ Bird of the evidence he required to perform the necessary merits-based assessment properly because he did not know what DLAP’s advice was and whether or why it had changed;

¹⁸ Judgment, §17, second and third sentence [CB/5/46].

¹⁹ “Belated” in the sense covered in Ground 3, below.

- b. That should have been taken into account when carrying out the broad, merits-based assessment. HHJ Bird was not entitled to assume in IVL's favour that it had changed or why it had changed; or
- c. The strength (or lack of it) of IVL's justification for pleading the Contradiction can be, and should have been considered to have been materially weakened by reason of IVL's refusal to waive privilege.

37. In sum, HHJ Bird correctly identified that – where the explanation for contradictory cases is a change in legal advice – the broad, merits-based assessment must include an assessment of the legal advice that led to the first stance that was run. Although the Judgment identified this as a factor at the first sentence of §65, given the above submissions, HHJ Bird nonetheless failed to realise that he had insufficient evidence to conduct the relevant assessment properly and failed to give any or any proper consideration to the absence of critical evidence.

38. **Ground 2:** The Court further failed properly to consider the Finney Email its entirety.

39. Irrespective of the above issue of privilege, IVL's case before HHJ Bird was that it had been entitled to advance its case at the ET Hearing – on the wholesale lawfulness of EDD's operations – in reliance on legal advice received from Fox Williams' Mr Finney in June 2023,²⁰ i.e. the Finney Email.²¹ As to that reliance:

- a. The Finney Email revealed no change in position in Mr Finney's advice to EDD or IVL on the lawfulness of the Indirect Model. Indeed, as referenced above, he said the same thing in an email of 7 October 2022,²² which IVL received from Mr Lay on the same day.²³ Again, as above:
 - i. Mr Finney's above email advice – that the Indirect Model was lawful – was conspicuously ignored by IVL just 21 days later when it sent the Warranty Notice (which it has never withdrawn and on which it

²⁰ See for example Judgment, §42 [CB/5/49].

²¹ [SB/14/-106-110].

²² [SB/9/46-52], esp. §1.

²³ [SB/9/46].

continues to rely in the present Counterclaim) alleging that the Indirect Model was unlawful.²⁴

ii. It is repeated that the advice separately given to IVL by DLAP's Mr Murdoch at that time (and throughout) has never been revealed. Given IVL's assertion, in the Warranty Notice of the Indirect Model's unlawfulness, it is a fair inference that IVL in fact relied on Mr Murdoch's advice, and that it was contrary to Mr Finney's advice.

b. The later Finney Email did not change Mr Finney's continuing view that the Direct Model was unlawful, as set out in his earlier advice of 4 October 2022²⁵ which was emailed by Mr Lay to IVL on 5 October 2022,²⁶ (with a commercial agent's agreement having no retrospective effect,²⁷ which one of IVL's own directors had accepted as correct).²⁸

c. Despite this, at the ET Hearing, IVL chose to advance a case that the entirety of EDD's business (i.e. both the Indirect and Direct Models)²⁹ was operating lawfully. It did that to achieve the outcome that it pursued in the ET Proceedings, namely, to have the Interim Application dismissed, thereby ensuring Mr Lay was not reinstated as EDD's MD.

40. IVL's adoption of the Finney Email as a flag of convenience now, does not, therefore, reflect the totality of the advice IVL had at the time, whether:

a. Internally within the Finney Email (asserting that the existing Direct Model customers remained an unlawful operation);

²⁴ See the Warranty Notice at [SB/11/59].

²⁵ [SB/7/36-40, esp. 38] at §1. The same advice on the Direct Model's unlawfulness was also repeated in Mr Finney's above 7 October 2022 email [SB/9/46-52], §2.

²⁶ [SB/2/7-9].

²⁷ See [SB/8/42-44] at §§2-10: even after the commercial agent's agreements were put in place, c.3/4million customers would be left on the Direct Model, being serviced by EDD unlawfully.

²⁸ See 12th October 2022 board minutes at [SB/10/53], where IVL's director "*admits that [the commercial agent's] agreement would not apply retrospectively but going forward, but that it may aid and support the application*" [SB/10/55].

²⁹ Judgment, §35 [CB/5/48].

- b. By Mr Finney himself, given his earlier advice of 4 and 7 October 2022 (which asserted that the Direct Model was unlawful for the same reason);
or
- c. By DLAP, on whose advice IVL relied, contrary to Mr Finney's view on the Indirect Model, at the time of the Warranty Notice.

41. In the circumstances – and without prejudice to the insufficiency of the evidence as per Ground 1 – HHJ Bird did not properly analyse even the available evidence of IVL's changing legal advice. Had his assessment been conducted properly, it would have been bound to reach the conclusion that, at the time of the ET Hearing, there was no settled advice which justified IVL's case on the lawfulness of EDD's Direct and Indirect Models. IVL simply took a cynical and tactical decision to assert the unqualified lawfulness of EDD's entire business, so as to defeat the Interim Relief Application and prevent Mr Lay from returning to his role. As that position has since lost its convenience, IVL has sought to resile from it.

42. **Ground 3:** The Court impermissibly took account of an immaterial factor by considering facts or legal advice that IVL, on its own evidence, received after it pleaded the Contradiction in the present proceedings.

43. In answering the question HHJ Bird posed himself at §66 as part of his broad, merits-based assessment (Why did IVL change stance?), he correctly identified at §18 that:

*“The key [...] is what advice the Defendant had at the key times: when it presented its case to the ET and **when it pleaded** its present case”*
(emphasis added).

44. As above, the Counterclaim asserting the Contradiction was filed and served on 6th February 2024.³⁰ As a matter of logic, the only legal advice relevant in answering this “key” question is that which IVL was aware of prior to that date.

45. The primary witness statement filed by IVL in response to the Application was Murdoch3. In the detailed table he provided specifically to deal with this issue, Mr

³⁰ More specifically, the Counterclaim's plea that EDD was operating unlawfully as at 28th October 2020.

Murdoch set out the “*key information regarding EDD’s regulatory position and approximately when IVL first found became aware [sic] of that information*”.³¹ Save only for one particular document (dealt with in the next paragraph), each and every entry therein confirms, in the right-hand column, that IVL only became aware of the referenced advice well after it pleaded the Contradiction on 6th February 2024.

46. The sole exception is the final entry which – uniquely for that table – is said to have been considered by/known to IVL before 6th February 2024. However, on inspection the entry is described not as “*key information*”, but instead as “*questions **asked by DLA Piper in relation to EDD’s business practices in July and EDD’s responses thereto***” (emphasis added). For reasons best-known to IVL, it chose not to put those documents before HHJ Bird at the Application. Even so, as-described they seemingly add nothing to IVL’s knowledge, as they are questions asked of EDD, as well as their answers to the same. Mr Murdoch’s evidence does not suggest any legal advice whatsoever to be contained within it.

47. IVL must be held to the legal advice that it became aware of following the ET Hearing but before 6th February 2024. On its own evidence, there was none. As made clear by the existing cases, above, the doctrine prohibiting approbation and reprobation seeks to uphold the integrity of the justice system. If, as happened in the 6 February 2024 Counterclaim, a party positively pleads a material contradiction, Micawberism as to future advice or information will not suffice.

48. In considering material which IVL became aware of after “*it pleaded its present case*”, the Court allowed IVL to justify the existing Contradiction by retrospective extrapolation. Including such a consideration within the broad merits-based assessment being undertaken is, respectfully, an error of law.

49. **Ground 4:** Without prejudice to Grounds 1 to 3, changing legal advice should not be a determining factor in the broad merits-based assessment save in the clearest of circumstances. Such circumstances do not apply to the present case, such that

³¹ See Murdoch3, §13 [SB/27/266].

the Court erred when finding changing legal advice to be a sufficient justification for the Contradiction.

50. Finding otherwise would open the Court to the prospect of parties selecting new lawyers to provide different legal advice (or one willing to change their advice) to suit that party's new purpose, thereby distancing themselves from a contrary prior case, (successfully) run on earlier advice.

51. Indeed, it is trite that legal advice is seldom capable of only being given in one way on a topic. It is almost always dynamic in response to the passage of time. Even in simple matters, unlike this one, it is often possible to source lawyers with a range of reasonable opinion. In the premises if, in the ordinary case, fresh legal advice were good justification for contradicting an earlier position, the public policy supporting the prohibition on approbation and reprobation would be eroded.

52. In the present case, HHJ Bird identified that – as part of the broad merits-based test – he should assess why IVL took its first stance, and that it was “*also useful to consider why the second stance was taken*”.³² As to the first stance, he identified that it was adopted at the ET Hearing “*because that was the legal advice [IVL] had at the time, based on the factual background it was then aware of*”.³³ As to the second stance, HHJ Bird was equally cursory, saying that “*the change of stance, on the evidence I have considered, came about because the advice changed*”.³⁴

53. Changing legal advice was therefore the key reason for the Judge's conclusion³⁵ that the Counterclaim should not be struck out for bringing justice into disrepute.

54. Even if IVL had revealed the legal advice given to it (it chose not to – as dealt with in Ground 1), policy demands that it should have been required to prove some clear circumstance to be able to rely upon later legal advice. Failing that, depending upon which lawyer it utilises and when, at a later hearing any party could almost always justify a convenient contrary case by mere reference to relying on updated contrary legal advice. To preserve the important public policy

³² Judgment, §63 [CB/5/52].

³³ Judgment, §65 [CB/5/52].

³⁴ Judgment, §66 [CB/5/52].

³⁵ Judgment §§18, 66 [CB/5/46 and 52].

which underlies the doctrine of approbation and reprobation, that should not be permitted.

55. The Court should not, therefore, hesitate to prevent such an outcome by appropriately confining the circumstances in which a change of legal advice will justify approbation and reprobation to the clearest circumstances (such as fraud, or a change in primary legislation that does not permit the primary stance to be run any longer).³⁶ Doing so is a proper level of constraint over a wide-ranging assessment that would otherwise incentivise parties to “*play fast and loose with the court*”.³⁷

E. Stay

56. The 8-day trial of this matter is listed to commence on 9th November 2026. Witness statements are due to be exchanged on 29th May 2026. Preparations for that phase are therefore already beginning, and the remaining trial preparation (including expert evidence) will be undertaken shortly thereafter.

57. If this appeal is successful, it will substantially change the face (and cost) of this litigation. In those circumstances it is submitted that if permission to appeal is granted by this court, then the underlying proceedings should be stayed so as not to (i) further financially disadvantage the parties (principally the Lays, for the above reasons, at paragraph 10), or (ii) risk wasting not only the Parties’ but also the Court’s resources by forcing an 8-day trial to take place, where a simple (short) debt claim may suffice.

58. If such a stay is granted, then it is further submitted that such a stay should also apply to the enforcement of the payment on account of costs on the application, as expressly envisaged by the HHJ Bird Order.

³⁶ And even then, the Court would be required to conduct a proper analysis of the relevant factual matrix.

³⁷ To coin Sir Christopher Floyd’s phrase in his judgment in *LA Micro*.

F. Conclusion

59. In the premises, the Lays respectfully invite the Court to grant permission to appeal on all the Grounds. This is on the basis that they all disclose a real prospect of success. Additionally in relation to Ground 4, the absence of earlier appellate guidance in point is a compelling reason for the appeal to be heard. Further, the Court is invited to promote the overriding objective by granting the above-proposed stays.

Andrew Hochhauser KC
Essex Court Chambers

Paul Strelitz
Gatehouse Chambers

Rob Hammond
Gatehouse Chambers

6 May 2026