Court of Appeal Case: CA-2026-000127

Appeal Case No: CH-2024-000224

SCCO Case No. SCCO-2016-DAT-00275

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

MR JUSTICE MARCUS SMITH

CHANCERY APPEALS (ChD)

BETWEEN:

THE WINROS PARTNERSHIP (FORMERLY KNOWN AS ROSENBLATT SOLICITORS)

Appellant/Defendant

- and -

GLOBAL ENERGY HORIZONS CORPORATION

Respondent/Claimant

SKELETON ARGUMENT OF THE APPELLANT SEEKING PERMISSION TO APPEAL THE DECISION OF MR JUSTICE MARCUS SMITH OF 19 DECEMBER 2025 (SECOND APPEAL)

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Section 1. Introduction

1. The judgment appealed is the second part of a two-pronged appeal of the decision of Senior Costs Judge Gordon-Saker (the "**SCJ**"), both parts of which concern the Claimant/Respondent ("**GEHC**")'s 'Objection 1' that no sum is due under the retainer between GEHC (as client) and the Defendant/Appellant (as solicitor) ("**Rosenblatt**").

2. The first part of that appeal concerns Rosenblatt's argument that the raising of Objection 1 is an abuse of process. Marcus Smith J (the "**Judge**") gave judgment on that part of the appeal by an Order **[CB/7/81]** and judgment ([2025] EWHC 2044 (Ch)) dated 1 August 2025 (the "**Abuse Judgment**") **[CB/8/83]**. The Judge dismissed the appeal. Rosenblatt applied to the Court of Appeal for permission to bring a second appeal **[CB/1/1]**. On 23 October 2025, Zacaroli LJ directed that there be a 'rolled up' hearing of a second appeal **[CB/9/96]**, which has been listed for one day on either 6 or 7 May 2026.

3. The second part concerns whether the SCJ was right to uphold Objection 1 on the merits. The Judge dismissed that part of the appeal by a judgment ([2025] EWHC 3362 (Ch) ("the **Merits Judgment**")[1] **[CB/19/184]** and Order dated 19 December 2025 **[CB/16/176]**.[2] This is an application seeking permission to bring a second appeal on that issue. In giving reasons on two costs issues on 20 January 2026, the Judge stated in his reasoning that: "… *this matter is already before the Court of Appeal (albeit on a "rolled up" basis) as regards the abuse of process point, (ii) it seems extremely likely that Objection 1 will also come before the Court of Appeal in short order*" **[CB/18/183]**.

4. The abuse issue was heard over 2 days on 25-26 June 2025. The merits issue was heard over 2 days on 10-11 November 2025. A third issue was raised by the Judge during the November 2025 hearing, concerning the appropriateness of the costs jurisdiction to determine the merits issues. Because the Judge dismissed the appeal on the merits issue, this point did not need to be decided.[3] The Judge held *obiter* that had the point arisen for determination, he would have stayed these costs proceedings, with the merits

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1 The Merits Judgment [3] **[CB/19/185]** adopts the definitions, terms and abbreviations from the Abuse Judgment.

2 The Judge appears mistakenly to have re-issued this Order on 20 January 2026 **[CB/17/179]** when making a further Order of the same date on two costs issues **[CB/18/182]**.

3 Merits Judgment [57], [63] **[CB/19/195 and 197]**.

issues to be determined in proceedings that Rosenblatt has brought against GEHC in the Chancery Division and which are presently stayed.[4] This is referred to as the 'case management' issue since the Judge made clear that this was not a question of jurisdiction in the sense of power to hear.[5]

5. Rosenblatt does not consider that it needs to seek leave to appeal on this third issue. The effect of the Judge's (obiter) decision, if he had agreed with Rosenblatt on the merits of Objection 1, would have been to allow Rosenblatt's appeal and then impose a stay. If this Court were to grant permission and allow the appeal on the merits, Rosenblatt would invite this Court to remit the proceedings to a first instance costs judge to give directions in relation to assessment. In the alternative, in order to protect its position, Rosenblatt seeks permission to appeal on this third issue also. This is the subject of Ground 5.

6. This skeleton argument addresses the following in turn:

   a. The factual and procedural background and other matters (**Section 2**), which were common ground before the Judge;

   b. Summary of Rosenblatt's case on unjust enrichment as advanced before the Judge (**Section 3**);

   c. The Judge's decision on the merits issue (**Section 4**);

   d. Rosenblatt' grounds of appeal on the merits issue (**Section 5**);

   e. The decision below of the Judge on the case management issue (**Section 6**);

   f. Rosenblatt's grounds of appeal on the case management issue (**Section 7**); and

   g. In conclusion, the Orders that the Court is invited to make (**Section 8**).

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4 Merits Judgment [12], [37], [39] and [58]-[63] **[CB/19/187, 192 and 195-7]**.

5 Merits Judgment [63] [**CB/19/ 197**].

Section 2. The factual and procedural background and other common ground

2A. Factual background

7. The core factual background was common ground before the Judge.[6] The parties relied on an agreed chronology **[CB/21/200]**, on which Rosenblatt will rely on this appeal.

8. GEHC retained Rosenblatt to act as its solicitor in proceedings against a third party: Mr Robert Gray. Rosenblatt was retained under three CFAs, however it was common ground before the Judge that the third ("**CFA3**") **[CB/22/203]** is the only relevant set of contractual terms for the purposes of these appeals.[7] With respect, Merits Judgment [20] is not right to say that the parties agreed that CFA3 "*replaced*" the earlier 'CFA2'. Rather, the agreed position for the purposes of the appeal was as follows:

   a. There was a single retainer for the provision of services by Rosenblatt under the terms of CFA3, and CFA2 as amended by CFA3.

   b. The retainer provided that Rosenblatt would act for GEHC until the end of the claim, which by the terms of CFA3 must be taken to continue until the disposal of any claim and any appeal.

   c. The payment terms were governed by clauses 5 and 6 of CFA3.

9. Rosenblatt was initially retained in July 2009 and the proceedings against Mr Gray were brought in December 2010. In those proceedings, GEHC alleged breaches of fiduciary duty concerning an investment opportunity, claiming an account and alleged profits. Following a 12-day trial on liability, Vos J found in favour of GEHC in December 2012. Following a 21-day trial on the account, Asplin J gave judgment in 2015 ordering Mr Gray to pay £3.6m to GEHC, but held that she was unable to resolve all of the issues, which would require a further hearing.

10. The relationship between Rosenblatt and GEHC broke down and on 24 February 2016, Rosenblatt accepted GEHC's repudiatory breach of contract, bringing CFA3 and the retainer to an end (Merits Judgment [5]-[7] **[CB/19/185]**). Rosenblatt's entitlement to

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6 See e.g. GEHC's skeleton argument on the appeal to the Judge (20 March 2025) at [12] **[CB/24/239]**.

7 Merits Judgment [5] and [18]-[20] **[CB/19 /185 and 188]**.

terminate was the subject of findings earlier in these proceedings by Trower J, the basis of the repudiatory breach including in particular GEHC's insistence that Rosenblatt should act in accordance with the instructions of another firm of solicitors, while still being responsible for the disbursements.[8]

11. Thereafter in the Gray proceedings, following a further 5-day hearing, Arnold J gave judgment in 2019 valuing the further alleged profits at £0. Mr Gray appealed the orders of Asplin and Arnold JJ, which was dismissed in 2020 following a 6-day appeal.

12. CFA3 is dated 6 March 2013. It was common ground before the Judge that CFA3 defined a 'win' (entitling Rosenblatt to a success fee) and the 'end of the claim' (at which point Rosenblatt would be paid the success fee) such that neither occurred until the dismissal in 2020 of Mr Gray's appeal. This is set out at Merits Judgment [25] **[CB/19/189]**.

13. It follows that as at 24 February 2016, there had been neither a win nor the end of the claim.[9] In practice, by that time, GEHC had achieved considerable success before Vos J in 2012 and Asplin J in 2015. GEHC would also ultimately go on to win the claim as defined in CFA3, albeit in practice GEHC achieved no further success in 2019 or 2020.

2B. Procedural background

14. In April 2016, GEHC brought these proceedings against Rosenblatt in the Senior Costs Court Office (the "**SCCO**") under Section 70 of the Solicitors Act 1974 **[CB/31/315]**. By these proceedings, GEHC seeks a detailed assessment of various invoices rendered by Rosenblatt to GEHC, as set out at Merits Judgment at [9] **[CB/19/186]**.

15. GEHC challenged Rosenblatt's invoices on a number of fronts and filed its original Particulars of Claim on 27 July 2016. There were a number of hearings (including live evidence) and rounds of submissions before Master James, leading to a judgment on 20 August 2020 **[SB/14/146]**. There was then a 2-day appeal on a number of issues to Trower J, who gave judgment on 16 December 2021 **[SB/15/227]**. It is unnecessary to set out these judgments in any detail.

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8 Judgment of Trower J (16 December 2021) at [107]-[108], [112] and [116] **[SB/15/252-253]**.

9 Merits Judgment [26] **[CB/19/189]**.

16. Thereafter, these (costs) proceedings were directed to progress to a detailed assessment hearing. In the meantime, on 23 February 2022, Rosenblatt issued protective proceedings (BL-2022-000318) in the Chancery Division **[SB/16/267]**. Those proceedings are stayed by consent. Merits Judgment [12] **[CB/19/187]** is correct that in those protective proceedings Rosenblatt included a claim for damages, but it is wrong to the extent that it suggests that no other claim is advanced or relief sought. Rosenblatt advances a number of claims therein, including (importantly) a quantum meruit.

17. GEHC filed its Points of Dispute in these costs proceedings in relation to Rosenblatt's bills on 21 April 2023 **[CB/32/318]**. GEHC set out 81 Objections. Rosenblatt's Reply is dated 18 July 2023 **[CB/33/356]**. GEHC's first point of objection ('Objection 1') asserted that the bills should be assessed at nil, because no sums were due under CFA3 from GEHC to Rosenblatt at termination. This claimed that the sums that Rosenblatt had been paid to date are to be returned with interest. As per ¶2 above, Rosenblatt says the raising of Objection 1 is an abuse of process.

18. A 3-day hearing took place before the SCJ, to determine Objections 1, 3, 6 and 7 (aside from on these points, the bills await assessment). The SCJ gave judgment on 29 February 2024 **[CB/28/289]** in favour of GEHC on Objection 1, on the merits and abuse issues.

19. The SCJ made two consequential orders. First, an order by consent dated 29 August 2024 **[CB/29/309]**. Materially, this provides at ¶1 that "*The invoices subject to detailed assessment, being … be assessed at nil.*" and ¶2 "*The court certifies pursuant to section 70(7) of the [1974] Act that nil is due to the Defendant* [Rosenblatt] *in respect of the invoices*." At ¶3, Rosenblatt was ordered to repay just over £5.5m, with interest at 3% over base, from the date of receipt. Those orders to repay were then stayed by ¶¶4-7, save Rosenblatt was to pay £400,000 as an interim payment. The second order is dated 12 September 2024 and concerns costs **[CB/30/313]**.

20. The appeal to the Judge has been summarised procedurally at ¶¶1-5 above.

2C. Other Matters

21. The following further matters were common ground before the Judge.

22. First, the costs bills are effectively rolled into one for the purposes of costs proceedings.[10]

23. Second, a retainer between a client and solicitor is generally an entire contract (whether or not on CFA terms) and this applies to CFA3. This means that complete performance by one party (the solicitor) is a condition precedent of liability by the other (the client). Rosenblatt does not take issue with Merits Judgment [21]-[24] **[CB/19/188-189]** in this regard, to which the Court is referred along with the authority cited there for these propositions.

24. It was also common ground before the Judge that notwithstanding CFA3 being an entire contract, a solicitor does not forego his right to payment where he terminates his retainer early on reasonable grounds.[11] This applies to Rosenblatt's acceptance of GEHC's repudiatory breach. Accordingly, that CFA3 was an entire contract is no barrier to Rosenblatt's case.[12]

25. Third, it was common ground that *Richard Buxton v. Mills Owens* [2010] 1 WLR 1997 (EWCA), at [55], per Dyson LJ is *obiter*,[13] as set out at Merits Judgment [27]-[28] and the first sentence of [29] **[CB/19/189-190]**. The relevant sentences are as follows:

> "*None of the cases cited to us contains a statement of the legal basis for the principle that, where a solicitor terminates his retainer for good reason, subject to any relevant provision contained in the agreement between the parties, he is entitled to be paid his profit costs and disbursements for work done prior to the termination. One possible analysis is that, at any rate in a case such as the present, where the client insists on the solicitor putting forward contentions which the solicitor does not consider to be properly arguable, the client repudiates the retainer and the solicitor accepts the repudiation by terminating. The solicitor may then elect to claim the fees due (if any) under the agreement or on a quantum meruit. It is, however, unnecessary to consider this further, since the common law rule that a solicitor is entitled to be paid for all the work he has done prior to termination if he terminates for good reason has been part of our law for almost 200 years…*"

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10 *Chamberlain v. Boodle & King* [1982] 1 WLR 1443 (EWCA).

11 GEHC's skeleton argument on the appeal to the Judge (20 March 2025) at [40.(1)] **[CB/24/247]**. The authority for this proposition is the same *Underwood v. Lewis* [1894] 2 QB 310 (EWCA) cited at Merits Judgment [22] **[CB/19/188]**.

12 See further as to this at Merits Judgment [27] **[CB/19/189]**.

13 Maurice Kay LJ and Sir Mark Potter P agreed at [57]-[58] with the judgment of Dyson LJ .

26. As below, Rosenblatt contends that a quantum meruit arises on the basis of unjust enrichment.

27. Fourth, as the Court will be aware, a claim in unjust enrichment has broadly four elements. The following summary is taken from the decision of the Court of Appeal in *Dargamo* [2022] 1 All ER (Comm) at [55], as to which note the guidance at [56]:[14]

> "*... (i) Has the defendant been enriched? (ii) Was the enrichment at the claimant's expense? (iii) Was the enrichment unjust? (iv) Are there any defences? ...*"

28. The only element in dispute before the Judge was the third element,[15] as to which Rosenblatt relies on the unjust factor of 'failure of basis'. As set out at Merits Judgment [38]-[39] **[CB/19/192]**, this language has been used by a number of Courts in preference to that of 'failure of consideration', as is used in older authorities.[16]

29. Fifth, the provisions of CFA3, clause 14 as to termination are set out at Merits Judgment [33] **[CB/19/190-191]**. As to clause 14, and clause 14.3 in particular, it was common ground before the Judge that "*neither the one-time availability of bringing CFA-3 to an end by way of clause 14.3 nor the damages claim brought by Rosenblatt and presently stayed could prevent Rosenblatt from asserting a claim in unjust enrichment*": Merits Judgment [39] **[CB/19/192]**. Furthermore with respect to clause 14.3, the Judge recorded at Merits Judgment [35] **[CB/19/191]** the binding findings of Trower J, including that the fact that Rosenblatt could have terminated CFA-3 in reliance on clause 14.3 was irrelevant.

30. It was further common ground before the Judge both (Merits Judgment [34] **[CB/19/191]**): (a) that Rosenblatt could have terminated CFA3 on the basis of clause 14.3, but did not; and (b) that at the time of termination, Rosenblatt had not accrued any contractual rights against GEHC that might preclude a claim in unjust enrichment. Further common ground is set out at Merits Judgment [37] **[CB/19/192]**.

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14 The Judge was taken to this summary.
15 In particular, GEHC conceded that enrichment is not in dispute.
16 See for example *Dargamo* (cited above), at [77]-[80].

Section 3. Summary of Rosenblatt' case on unjust enrichment before the Judge

31. The Merits Judgment does not set out Rosenblatt's case on unjust enrichment.

32. Rosenblatt advanced its case before the Judge as follows:

    a. Rosenblatt agreed to provide services on terms that it would not be paid unless the retainer was completed, with the Gray proceedings coming to an end or settling, and only in the event that there was a win.

    b. Rosenblatt was prevented from performing its services as GEHC's solicitor through to the end of the action by GEHC's repudiatory breach, which Rosenblatt accepted.

    c. Rosenblatt's services were rendered (for a number of years) on the basis that it would not be unlawfully deprived of the opportunity of completing performance of those services.

    d. That basis totally failed.

    e. Rosenblatt claims a quantum meruit accordingly on the basis of unjust enrichment.

    f. The right to claim quantum meruit was not excluded by clause 14.3 of CFA3. Clause 14 is quoted in full in the Merits Judgement at [33] **[CB/19/190-191]**.

33. At the hearing before the Judge and in support of that analysis, Rosenblatt relied (amongst other matters) on the following:[17]

    a. *Goff & Jones on Unjust Enrichment* (10th ed., supplement, 2025), at [3-38]:

    > "***Repudiation*** *Where the reason for a party being unable to complete performance of the duties it owes under an entire obligation is that it has accepted a repudiatory breach committed by the other contracting party, a claim in unjust enrichment is not denied.[107] As David Winterton and Timothy Pilkington suggest, the best explanation for this exception to the general rule that no claim in unjust enrichment is available in respect of performance falling*

[17] The Judge was also taken to *Barnes v. Eastenders* [2015] AC 1 (UKSC), as to the principles in claims alleging failure of basis; *Dargamo* (cited above); Chitty on Contracts (35th ed., with supplement, 2024) at [33-080]; and Goff & Jones (cited above) at [3-12], [3-15] and [3-40].

short of the contractual specification, is that the basis on which a contracting party commences performance is, implicitly, that the other party will not unlawfully deprive him of the opportunity of completing that performance. The counterparty's repudiatory breach therefore causes the basis to fail ....."

b. Lusty v. Finsbury Securities [1991] 58 BLR 66, at 80-81 and 84: this Court held that an architect was entitled to a quantum meruit following termination at common law for the client's breach of an entire contract for services.

c. A line of authority going back to *Planche v. Colburn* (1831) 8 Bing 14, in which an author who was to be paid £100 for a volume of work was awarded a quantum meruit following discontinuance of the work by the client. Lusty (at 80) describes *Planche* as the leading authority, and held that the judge below (in Lusty): "*was not referred to cases of great authority that a quantum meruit may be awarded, however, where the defendant has in one way or another, wrongfully or not, brought to an end his contract with the plaintiff.*"

d. In *Mann v. Paterson* [2019] HCA 32, a 4:3 majority of the High Court of Australia allowed a claim in unjust enrichment to a builder in respect of stages of work which had not progressed far enough to satisfy the requirements for payment under the building contract, where the reason for the work having ceased was that the clients had repudiated the contract and excluded the builder from the site.[18] The majority comprised two judgments. The Judge was referred (amongst other parts) to the analysis of Nettle, Gordon and Edelman JJ at [162]-[175] (which continues to [200]).[19] The first of the authorities cited at [166] is *Planche* (fn 214), as to which see further [185]-[186].

e. *Dargamo* (cited above) at [66]: "*It was thought at one time that a prerequisite to a claim in unjust enrichment was that any relevant contract must, if initially valid, have been discharged for breach or frustration or be void, unenforceable or incomplete ... This may have been a consequence of the fact that in almost all cases where a claimant seeks restitution for a failure of basis, any relevant contract will be ineffective. And where a contract has been discharged for*

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18 This summary is taken from *Goff & Jones* (cited above) at [3-38].

19 Gageler J agreed with the orders proposed by Nettle, Gordon and Edelman JJ (at [108]) albeit for his own reasons (at [61]), including in particular those at [105] as to how the quantum meruit is to be calculated.

repudiatory breach or frustration, the legal enforceability of the contract and the failure of basis are two sides of the same coin."

34. At that stage of the analysis and for the reasons summarised in ¶¶32.a-e above, the Judge should have found that there was a failure of basis and prima facie claim in unjust enrichment. The Judge should then have found (for the reasons set out in ¶¶53-69 below) that clause 14.3 of CFA3 did not exclude or otherwise negate the right to claim quantum meruit on the grounds of unjust enrichment.

Section 4. The decision of the Judge on the merits issue

35. Rosenblatt's appeal before the Judge was in respect of the decision below of the SCJ. That decision was in brief as follows:[20]

    a. The SCJ began the relevant section of his judgment at [43] **[CB/28/298]** as follows: "*As it happens, Objection 1 consists of a fairly neat point of law. Where the retainer is terminated following repudiation by the client (which we now know to be the case), is the solicitor entitled to payment of his fees for work done up to the date of termination if the retainer was a conditional fee agreement and no success had been achieved?*"

    b. *Buxton* (cited above), on which Rosenblatt relied, was distinguished because it did not concern a CFA, and the solicitor would have been entitled to their fees "*whatever the outcome*" (at [62]) **[CB/28/302]**;

    c. "*Where solicitors have accepted the risk that they may be entitled to no fees at the end of the case, it is not clear that they should have the right to deliver a bill where the retainer is determined before the end of the case*." (at [63]); and

    d. the solicitor's remedy was either clause 14.3, or a claim in damages (at [64]).

36. Turning to the decision of the Judge, the Merits Judgment lists two "*points in dispute, and which I need to resolve*" at [40] **[CB/19/192]**. The first of these ("*was there a total failure of basis*") is addressed at [41]-[56]. This concludes at [56] **[CB/19/195]**: "*It follows that there has been no failure of basis. Thus, for substantially the reasons*

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20 See the Merits Judgment at [16] **[CB/19/187]**.

advanced by the Senior Costs Judge, the appeal must be dismissed.". Then at [57]: "*For the reasons given, Rosenblatt's claim, which was put (at least by this stage of the proceedings) as a pure claim in restitution, fails.*" Finally at [64] **[CB/19/197]**: "*As it is, the effective dismissal of the claim by the Senior Costs Judge was entirely right, and I dismiss the appeal against his decision.*"

37. The reasoning begins at [41]-[49] with a series of points that the Judge held to be inter-related, concluding at [49] **[CB/19/194]**: "*The "allocation of risk" analysis is no more than the Obligation Rule described from a different standpoint. The point is that the basis of a contract is as much affected by what is positively agreed as by what is positively not agreed, as Barton itself very clearly demonstrates*." Merits Judgment [41]-[42] **[CB/19/192-193]** considered the decision in *Dargamo* (EWCA, cited above) and what is referred to therein as "the Obligation Rule" (considered further below). Merits Judgment [43]-[46] considered the decision in *Barton* [2023] AC 684 (UKSC), a case about a unilateral contract. Merits Judgment [47]-[48] **[CB/19/193-194]** considered two examples of decisions in which language of 'risk allocation' was used.

38. The first two sentences of Merits Judgment [50] then held as follows (with emphasis): "*Both Dargamo and Barton were cases where the contract was regularly performed and not discharged for breach. Rosenblatt rightly submitted that the fact that a contract had – as here – been brought to an end and discharged by virtue of a breach of contract was a material factor when considering a remedy in unjust enrichment…*".

39. The third sentence of Merits Judgment [50] **[CB/19/194]** quoted a well-known passage from *Photo Production v. Securicor* [1980] AC 827 (UKHL), at 849, as to the effects of a repudiatory breach. A final sentence after the quote then referred to the fact that secondary obligations consequent on breach can be excluded or modified by the express words of a contract.

40. In one of the two key paragraphs of the Merits Judgment, the Judge then held in the first two sentences of [51] **[CB/19/194]** (with emphasis): "*There is, thus, no category difference between unjust enrichment claims where the contract is discharged and those cases where the contract is regularly performed. The test remains the same. …*"

41. The Judge went on in the third and fourth sentences of [51] **[CB/19/194]** to explain why a case of discharge (as opposed to regular performance) was more likely to give rise to

a valid claim in unjust enrichment, that including because: "*A vacuum can be created, where benefits are conferred in circumstances where there is no contractual risk allocation or no Obligation Rule to constrain the restitutionary remedy*". The Merits Judgment considers this further in the context of the present case in the third to fifth sentences of [52] **[CB/19/194]**.

42. At paragraphs [52]-[55] **[CB/19/194-195]**, the Judge explains why: "*In this case, however, I am in no doubt that there is no room for a claim in unjust enrichment*." ([52]). At [53], the Judge sets out his understanding of the four provisions of clause 14 of CFA3. At [54], the Judge is held that "*clause 14 is not a complete code, because of course the common law remedy of damages for repudiatory breach of contract remains, ...*" (emphasis in original). The second key paragraph (on the merits issues), at [55], provides as follows (with emphasis):

> "*The question is whether the existence of a choice for Rosenblatt to end CFA-3 by other means, renders a restitutionary remedy possible. In my judgement, it cannot, because CFA-3 has already articulated what is to happen in this kind of case: see clause 14.3. The existence of the common law right in damages is not to open the way to an alternative restitutionary claim that is duplicative of clause 14.3: that would be to upset the considered exercise in risk allocation expressly contained in CFA-3, dealing with precisely this case. The common law remedy is a "last resort", really intended for those cases not anticipated in clause 14.*"

Section 5. Rosenblatt' grounds of appeal on the merits issue

43. CPR 52.7 provides that this Court will not give permission for a second appeal unless two criteria are satisfied. First, the appeal must have a real prospect of success, this being the familiar test of 'realistic as opposed to fanciful'.[21] Second, the appeal must raise an important point of principle or practice that has not yet been established,[22] or there must be some other compelling reason for this Court to hear it. There are 4 grounds of appeal on the merits issue. Each satisfies the criteria for a second appeal.

5A. Grounds 1 to 3

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21 White Book 2025 at [52.7.5] on page 1870, which appears to intend to cross-refer to [52.6.2] on page 1866, although the reference is in terms to [52.6.3] on page 1867.

22 White Book 2025 at [52.7.6] on page 1871.

44. It is convenient to address Grounds 1 to 3 together, these being respectively as follows:

a. The Judge was wrong as a matter of law to find that there was no failure of basis. In particular (¶40 above) the Judge was wrong as a matter of law to find that there is no category difference between unjust enrichment claims where the contract is discharged and those cases where the contract is regularly performed, such that the test remains the same in both. There is an important distinction between such claims. **[CB/11/110]**

b. The Judge erred in law in failing to identify and address the circumstances in which the termination of an entire contract for services will give rise to a failure of basis. As above, the Merits Judgment does not set out or address Rosenblatt's case on unjust enrichment. **[CB/11/110]**

c. The Judge fell into error in his reliance on *Photo Production v. Securicor* (above), at 849. In particular, the Judge was wrong in law to find that there could be no failure of basis because the breach gave rise to secondary obligations under the contract. **[CB/11/110]**

45. Rosenblatt relies upon the following matters in support of its submission that the Judge erred in law in each of these respects.

46. First, in holding that (with emphasis) *"[t]here is no category difference between unjust enrichment claims where the contract is discharged and those cases where the contract is regularly performed*" (Merits Judgment [51] **[CB/19/194]**, at ¶40 above), the Judge failed to have regard to the fact that the determination of whether there has been a failure of basis can be, and very often is, very different where the claimant has terminated for repudiatory breach, compared to a case where the contract is fully performed. This difference is all the more significant in a case where the contract is an entire contract that has been terminated by the service provider.

a. In the this regard the Judge failed entirely to consider the case advanced by Rosenblatt as to why there was a failure of basis where, as in the current case, an entire contract has been terminated for repudiatory breach. The failure of basis alleged (in line with the analysis in *Goff & Jones* cited at ¶33.a above) is that *"the basis on which a contracting party commences performance is, implicitly, that the other party will not unlawfully deprive him of the opportunity*

of completing that performance". The Judge failed to engage with this, let alone appreciate that such a failure of basis arises precisely because the contract has been terminated by the service provider because of client's repudiatory breach. Self-evidently such an argument cannot be advanced in a case where the contract has been "*regularly performed*".

b. Not only is the Judge's finding that there is no category difference wrong as a matter of law, it also runs contrary with the observation of this Court in Dargamo at [66] (¶33.e above) that: "… *where a contract has been discharged for repudiatory breach or frustration, the legal enforceability of the contract and the failure of basis are two sides of the same coin".* In such a case, the enrichment has been transferred under a transaction that has become ineffective. This is materially different to a case where the enrichment has been transferred under a transaction that is effective.

c. The Judge's reasoning cannot be reconciled with cases such as the decision of this Court in *Lusty* and the decision in *Planche v. Colborne* (¶¶33.b-c above), where a claim in quantum meruit was allowed in circumstances of termination of an entire contract for breach. In this regard, Rosenblatt adopt the analysis in *Chitty* (cited above), at [33-080]. The principle established by such cases (namely, the availability of a quantum meruit on the grounds of unjust enrichment when an entire contract has been terminated for breach before completion of performance by the service provider), was also recognised (albeit with reluctance) in *Elek v. Bar Tur* [2013] EWHC 207 (Ch) at [12]-[13].[23]

47. Second, Rosenblatt's case as put to the Judge on this issue was supported by a significant body of authority (as referred to at ¶¶33 and 46 above). The Merits Judgment does not refer to, consider, or seek to distinguish any of this authority.[24]

48. Rather (¶38 above), third, the section of the Merits Judgment cites two decisions on unjust enrichment,[25] in both of which (as the Judge held) there was no termination.

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23 The Judge was taken to these paragraphs of this decision.

24 A number of other passages in Chitty are cited at Merits Judgment [24] and [38] **[CB/19/189, 192]**, on different points.

25 The Merits Judgment refers at [47]-[48] **[CB/19/193-4]** (¶40 above) to passages from two further authorities which had been cited with approval in *Barton* (cited above). Other authorities are also cited earlier in the Merits Judgment.

With respect, these decisions cannot (and in any event do not) form a sound basis for (a) the distinction drawn by the Judge at ¶40 above, nor (b) the determination of Rosenblatt's claim as above.

49. Fourth, the Judge's finding is difficult to reconcile with the reasoning elsewhere in the Merits Judgment: (a) at ¶38 above, the Judge held that Rosenblatt was right to submit that the termination was a material factor; and (b) at ¶41 above, the Judge referred to a number of reasons why both generally (Merits Judgment [51] **[CB/19/194]**), and on the facts of the case (Merits Judgment [52] **[CB/19/194]**), termination would or might give rise to a failure of basis and a quantum meruit.

50. Ground 1 and Ground 2 raise important points of principle as to the circumstances in which a quantum meruit in unjust enrichment is available following termination of an entire contract (for services) at common law, and the relationship with the authorities in cases in which the contract is fully performed by the claimant.

51. Turning to Ground 3, in supporting his finding as to there being no category difference, the Judge appears to have relied on the decision in *Securicor* (cited above). This appears from the use of the word "*thus*" at Merits Judgment [51] **[CB/19/194]** (¶40 above). With respect, it is not wholly clear what the Judge had in mind and he appears to have fallen into error. *Securicor* says nothing about unjust enrichment.

52. To the extent that the Judge considered that there could be no failure of basis because the breach gave rise to secondary obligations under the contract to pay damages, that was an error of law. It would follow that there can never be such a claim following termination, which cannot stand in the face of the authorities (such as *Lusty*, which is binding on the Judge) at ¶33 above. Ground 3 therefore also raises an important point of principle, namely whether there can be a claim in unjust enrichment following termination of a contract in a case where the claimant has a claim in damages. The answer to that question must be in the affirmative, since there may nevertheless be a total failure of basis as identified above (see for example ¶¶32-33 and 46 above).

5B. Ground 4 **[CB/11/110]**

53. Rosenblatt relies on the following 3 points as why the Judge, with respect, was in error to find that "*there is no room for a claim in unjust enrichment in the present case*" ([52]

[CB/19/194]), "*because CFA-3 has already articulated what is to happen in this kind of case: see clause 14.3. … The common law remedy is a "last resort", really intended for those cases not anticipated in clause 14*." ([55] **[CB/19/195]**), "*It follows that there has been no failure of basis*." ([56]).

54. With respect, the correct position was recorded at Merits Judgment [39] **[CB/19/192]**: "*It was common ground that neither the one-time availability of bringing CFA-3 to an end by way of clause 14.3 nor the damages claim brought by* [Rosenblatt] *and presently stayed could prevent* [Rosenblatt] *from asserting a claim in unjust enrichment*". Indeed, GEHC (rightly) conceded below that clause 14.3 of CFA3 did not operate as an exclusion clause.[26]

55. First, the Judge was wrong to find that clause 14.3 (with emphasis): "*articulated what is to happen in this kind of case*". Clause 14.3 did no more than set out what (a) might happen in this kind of case and (b) which did not happen in this case. The clause is set out at Merits Judgment [33] **[CB/19/190-191]**. The first sentence is in permissive and not mandatory terms (with emphasis) "[Rosenblatt] *can end this agreement if [GEHC] does not meet its responsibilities*". The second sentence only applies ("*if this happens*") if the contractual option in the first sentence is exercised.

56. The Merits Judgment correctly found to this effect elsewhere at [14]-[15] and [33]-[35] **[CB/19/187 and 190-191]**. Merits Judgment [34] further correctly records, as was common ground, that Rosenblatt did not exercise the option in clause 14.3. Merits Judgment [54] **[CB/19/195]** further found (correctly) that clause 14 was not a complete code as to termination, because the right at common law remained. As Merits Judgment [55] **[CB/19/195]** (correctly) refers to, there are "*cases not anticipated in clause 14*".

57. To the extent that Merits Judgment [55] finds that common law termination and damages was the only remedy available where the clause 14.3 right was not exercised, or that this is what was "*really intended*", that is wrong (and wholly unsupported). The correct analysis is that clause 14.3 falls out of consideration if Rosenblatt chose not to terminate under it but instead to terminate at common law. In such a case, Rosenblatt has available to it all rights raising upon termination of a contract it has partially

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[26] GEHC's skeleton argument on the appeal to the Judge (20 March 2025) at ¶51(3) "*GEHC does not suggest that clause 14.3 operates as an exclusion clause*" **[CB/24/252]**.

performed, including a claim in quantum meruit. To hold otherwise is to treat clause 14.3 as excluding the right to claim in quantum meruit, a position that was contrary to that taken by both sides on the appeal.

58. Second, Rosenblatt's claim is not "*duplicative*" of clause 14.3 as the Judge held (¶42 above):

a. The second sentence of clause 14.3 gives rise to a contractual claim for "[Rosenblatt's] *fees for the work done to the termination date and disbursements*". That quantification under clause 14.3 ignores entirely the success fee that Rosenblatt would have earned in addition to base fees had the retainer continued to conclusion of the proceedings against Mr Gray and had those proceedings resulted (as they ultimately did) in a win for GEHC. In contrast, a quantum meruit, on the basis of unjust enrichment, would consider the objective value of the enrichment.[27] That objective value would, or at least could, take into account whether the services rendered to date were likely to result in a win, and therefore the uplift in base fees.

b. This "*duplication*" analysis was not put to the Judge by GEHC. Although the Judge was taken (by Rosenblatt) to a passage in *Chitty*,[28] no authority on the point was explored before him. GEHC submitted that "… *quantum meruit in substitution of that right [in cl 14.3] [would lead] to a different and indeed potentially better measure of loss, as in the example I've just given* …".

c. Rosenblatt is not seeking to rely on clause 14.3 by a back door. It is seeking to rely on a different basis of claim; as so with damages at common law.

59. Third, the Judge was wrong to find that Rosenblatt's claim: "*would be to upset the considered exercise in risk allocation expressly contained in CFA-3*" (¶42 above).

60. On the face of the language at Merits Judgment [55], this point falls with the first (¶¶54-54 above), and/or second point (¶58 above) above. It is in any event wrong.

61. The starting point, with respect, is that the analysis in the Merits Judgment does not follow the logical steps in the argument. First, one identifies the relevant 'basis' of the

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27 See for example *Chitty* at [33-086], to which the Judge was taken.

28 *Chitty* at [33-086].

arrangement between the parties. The Merits Judgment does not do this expressly. Rosenblatt set out its case on this (¶45 above), and took the Judge to the clear guidance to this effect.[29] Second, one identifies whether that has failed. Third, one then considers any other live issues in the unjust enrichment claim, the only one in this case being the 'Obligation Rule' (below).

62. The Judge appears to have found that clause 14 articulated or formed part of the relevant basis. The question is what the parties intended in the event that there was a repudiatory breach by the client at a time prior to when the solicitor had the opportunity to earn the success fee; with both any 'win' and the 'end of the claim' being in the future. The Judge held the solicitor was entitled to nothing, unless they had previously exercised clause 14.3, or brought a claim in damages (as Rosenblatt has, protectively, in other proceedings). The only candidates to justify that analysis are the presence of clause 14.3, and the availability of the common law remedy in damages. But clause 14.3 cannot justify that analysis: it was optional. How can an optional clause show the parties intended there be no unjust enrichment claim? And the availability of the common law remedy points against this analysis: as above, it shows that clause 14 was not a complete code, and that another basis of claim cut across it.

63. As the Judge held (¶41 above) there are a number of reasons both generally and in this case why the parties would not have anticipated this outcome as part of the terms of their bargain. The quantum meruit fills the gap, as in *Lusty* and in *Planche* (¶33 above).

64. There does not appear to be any suggestion in the reports that the contracts in *Lusty* or *Planche* contained express (albeit optional) provisions as to termination.[30] In particular if that is the basis on which those cases are to be distinguished from the present case, then the appeal gives rise to an important of principle or practice in this regard also.

65. More generally, the Merits Judgement (with respect) misunderstands the 'Obligation Rule' (¶37 above). With respect, it may be unhelpful to speak in terms of a rule at all, and *Dargamo* (the case which coined that term) was clear at [72] that the 'rule' "*is not*

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29 Chitty at [33-064]: "*Identifying the basis for the agreement requires careful consideration of the nature and terms of the agreement and the circumstances of the case …*".

30 No such details are provided in the report in *Planche*. The extent to which the terms of the contract in question are set out in *Lusty* is at pages 73-74.

absolute". In any event, the question is simply: is the enrichment justified? This is a separate stage in the analysis, following the consideration of failure of basis as the unjust factor.[31] In other words, assuming there is otherwise a valid claim in unjust enrichment, is the enrichment of B by A justified by something else such as the terms of a contract, so as to defeat the unjust enrichment claim. This was straightforwardly so in *Dargamo*: A paid B for certain shares under the terms of a contract, and A could not claim the same sum back in unjust enrichment (on the premise that certain further shares should, extra-contractually, have been transferred as part of the same price, see Merits Judgment [42] **[CB/19/192-193]**). *Barton* is different, being a unilateral contract, but simpler still. As a matter of construction it was a one-way bet: 'if X, then A receives Y, otherwise nothing happens' (see Merits Judgment [43] **[CB/19/193]**).

66. This analysis does not work as regards cl 14. It would be necessary to say that an option to terminate justified Rosenblatt conferring its services on GEHC for free (subject to the availability of a claim in damages, which as above cuts against this analysis).

67. Perhaps for these reasons, the majority of the Supreme Court in *Barton* at [105] endorsed academic criticism of "*risk taking reasoning*" as: "*circular, ambiguous, inconclusive, incapable of explaining the decided cases and unnecessary. ... risk taking reasoning does not explain how one distinguishes between risks that a claimant runs and those he or she does not run: "Risk-taking reasoning, therefore, always relies on a deeper, unstated analysis.*"". The Merits Judgment was wrong to find otherwise at [47]-[49] **[CB/19/193-194]**. Alternatively, applying such reasoning, Rosenblatt did not take the risk that GEHC would repudiate.

68. For all of these reasons, the Merits Judgment [55] **[CB/19/195]** was wrong to frame the issue as being whether the fact that the common law remedy had not been excluded "*renders a restitutionary claim possible*" or was "*to open the way to an alternative restitutionary claim*". The issues were simply: what was the relevant basis (¶45 above), did it fail (yes), was the enrichment by GEHC by way of receipt of Rosenblatt's services justified by a term of the contract (no).

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[31] *Barton* (cited above), the majority at [85]-[87], then [88] onwards; Lord Burrows at [226]-[236], then [237]-[240]; and (less clearly) Lord Leggatt at [189]-[190]. See also Chitty at [33-017], to which the Judge was taken.

69. Rather, this is a case that fell within the second of the two 'exceptions' to the 'Obligation Rule' to which Dargamo refers at [73]: "*The very need to establish failure of consideration is sufficient to prevent unwarranted subversion of the contract, because if all parties had known that the consideration would fail, the benefit would never have been conferred*".

70. Ground 4 raises an important point of principle, namely whether in circumstances where a contract has been terminated for repudiatory breach, the existence of a contractual termination clause, which provides for both the right to terminate and the consequence and which has not been exercised, prevents a claim in unjust enrichment.

Section 6. The decision below of the Judge on the case management issue

71. The Judge's brief judgment on the issue (see ¶¶4-5 above) seems to have the following primary components:

a. It was not appropriate to address the quantum meruit issue as:

i. the case raised generalised questions more appropriate to separate High Court litigation ([62]) **[CB/19/197]**.

ii. the point should have been heard in a different jurisdiction and the detailed assessment stayed pending the outcome of the point ([63]).

b. There had to be a contractual aspect to the claim **[CB/19/196]**:

i. the process is not one which is appropriate to resolving a claim for unjust enrichment where unjust enrichment is the complete basis for the claim (albeit based upon a contractual failure of basis) ([60]).

ii. It is "*foundational to the process that the solicitor's claim against the party chargeable is founded in contract albeit a contractual claim with a significant "regulatory" overlay*" ([60]).

c. The court's analysis does no more than follow that of Johnson J in *Jones v Richard Slade & Co* [2023] 1 WLR 383 ([61]) **[CB/19/196]**.

72. For the reasons set out below, the Judge erred in his reasoning and the present s 70 proceedings were indeed an appropriate venue for the determination of entitlement to quantum meruit and then its valuation.

Section 7. Rosenblatt's grounds of appeal on the case management issue

7A. Important point of principle or practice

73. **Ground 5**: **[CB/11/111]** the Judge erred in holding (obiter) that it was not appropriate for him to determine the quantum meruit issue because it arose in a s 70 Solicitors Act assessment. This is an important point of principle or practice as it raises questions as to the scope of such an assessment and the nature of the issues which are appropriate to determine in s 70 proceedings.

74. *Jones v. Richard Slade* (upon which the Judge placed some reliance) set out some dicta as to the type of issue which might be appropriate for a s 70 assessment. However: (a) it does not cover or determine the outcome in the present case; and (b) the Court of Appeal has not yet dealt with the issue of the scope of a 70 assessment.

7B. Case Management/Exercise of Jurisdiction Issue

75. The Judge (with respect correctly) recorded that **[CB/19/197]**:

> "*there is no question of jurisdiction – in the sense of power to hear – arising in cases such as this. Both the [SCJ] and I have the jurisdiction to decide such matters. The question is one of the appropriateness of the jurisdiction*" ([63])[32].

76. The decision therefore amounted to a putative case management decision which was *obiter* as the merits appeal was dismissed.

7C. Judge Erred

[32] He was determining (although obiter given his decision on the substantive appeal) "*the appropriateness [emphasis supplied] of resolving issues such as a restitutionary quantum meruit in the course of detailed assessment*" ([57]) **[CB/19/195]**.

77. However it is characterised, it is respectfully submitted that it was (plainly) wrong and that had the appeal been allowed, it would have been (plainly) appropriate for the lower court to deal with the quantum meruit valuation.[33]

78. First, arguments over the existence of an entitlement to quantum meruit (even absent a contractual entitlement) are in fact familiar in s 70 proceedings. In the recent case of *Diag Human v. Volterra Fietta* [2023] Costs LR 1511 (EWCA) solicitors had entered into a CFA with their client which was unenforceable as it provided for a success fee of over 100%. In s 70 proceedings brought by the client the solicitors sought to argue that the offending provision could be severed and that alternatively they were entitled to a quantum meruit notwithstanding the unenforceable CFA. As a consequence, the availability of quantum meruit was canvassed in the SCCO, High Court and CA without any suggestion that it was inappropriate that it be so. See:

    a. in this Court, at [4.(iii)], [67]-[70], per Stuart-Smith LJ; [83] per Andrews LJ;

    b. in the High Court ([2022] Costs LR 1209), at [104]-[106], per Foster J; and

    c. [42]-[43] of the decision of Foster J, which cite the conclusions of Master Rowley in his (unreported) decision in the SCCO on quantum meruit.

79. It was held at all levels in *Diag Human* that the solicitor whose retainer was held to be unlawful could not recover for the work it had done on a quantum meruit: but at no level was it thought to be inappropriate that the issue be addressed by the SCCO or on appeal from the SCCO in the context of a s 70 Solicitors Act assessment. No doubt if the quantum meruit argument had succeeded provision would have been made for the detailed assessment to continue in the SCCO.

80. Further, *Richard Buxton v. Mills-Owen* (above, CA) arose from a s70 assessment as sought by the client ([3]) and at [55] contemplated that the solicitors' entitlement might

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[33] See s 70(1) of the Solicitors Act 1974: "*Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed. S 70(7): "Every order for the assessment of a bill shall require the costs officer to assess not only the bill but also the costs of the assessment and to certify what is due to or by the solicitor in respect of the bill and in respect of the costs of the taxation*".

take the form of a quantum meruit. The court made no comment to the effect that if the right was under a quantum meruit the solicitor had to take separate proceedings before the court could hold it entitled to payment. To the contrary, the court went onto hold that the solicitor was entitled to be paid its profit costs (and disbursements).

81. Second, there can be no question of lack of experience or expertise in the SCCO dealing with quantum meruit issues rendering the issue "*inappropriate*", or that somehow what the Judge called "generalised" questions are outside the scope of an assessment (whether under s 70 or otherwise). Costs Judges are familiar with dealing with such generalised quantum meruit arguments in *inter partes* disputes. The issues raised and determined in the SCCO frequently focus on the "indemnity principle" and address the enforceability of agreements and "fallback" quantum meruit arguments.

82. See for example *Birmingham CC v. Forde* [2009] 1 WLR 2732 (Christopher Clarke J) in which the court considered on appeal from Master Campbell in the SCCO as to whether, if a CFA was invalid and thus unenforceable, a solicitor might nevertheless recover costs from the client on the basis of a quantum meruit ([202]–[206]). The court found that the answer was "No" but there was no issue about such a point being raised and addressed by a costs judge in the SCCO.

83. Third, the Court can order an assessment outside of s70, at common law, where the client is sued and seeks to raise this as a defence. These decisions show that the SCCO is very familiar with costs assessments which in effect assess the value of the services by reference to what is a reasonable sum is for the work done by a solicitor: *Thomas Watts & Co. v. Smith* [1998] 2 Costs L.R. 59 at pp 73-74 (per Sir Richard Scott V.-C, sitting with Schiemann L.J); *Turner v. Palomo* [2000] 1 WLR 37 at 48E-F and 52B-C.

84. Fourth, quantum meruit has been held to be the underlying foundation of a solicitor's right to payment: *Phillips v. Bath* [2013] 1 WLR 1479. See the decision of Lloyd LJ at paragraphs [1] and [14] and at [19].

85. Fifth, as to the contractual element which the Judge found (obiter) to be "*foundational*", this is simply incorrect:

    a. Section 70 does not make reference to a contract or contractual liability and nor does any case law referred to by the Judge require such a 'foundation'.

b. If there is such a necessary foundation, or this is relevant to "*appropriateness*", then the fact that the present claim is (as accepted by the Judge) "*based upon a contractual failure of basis*" is adequate for such purposes.

c. In any event (as the court held) the issue is one of appropriateness and not jurisdiction, and so there is no 'necessary' or "*foundational*" element at play but rather "*appropriateness*" bearing in mind a wide range of relevant factors.

86. Sixth, *Jones v. Richard Slade* (cited above) does not answer or even address the issue raised. It is authority for the narrow proposition that it is not appropriate for s 70 to encompass an application by the client to set aside a *prima facie* enforceable agreement on the grounds of undue influence (an equitable remedy). Its reasoning was limited in its relevance to the decision of the Judge (it does not touch on whether a s 70 assessment could contemplate quantum meruit).

87. As to the 2 cases on which Johnson J chiefly relied in *Jones v Richard Slade*:

a. It is not disputed that wholesale allegations of professional negligence (i.e. the conduct in effect of a professional negligence trial) are not fit for the SCCO: *Drukker & Co v. Pridie Brewster & Co* [2006] 3 Costs LR 439.

b. The decision of Teare J in *Stephenson Harwood v. Geneva Trust* [2019] EWHC 1440 (Comm) was largely one of case management: see [13] and [14].

88. Further, it is wrong, as was asserted in *Jones's* case, that the existence or otherwise of fiduciary duties cannot or should not be addressed in a s 70 assessment. *Belsner v. CAM Legal Service* [2023] 1 WLR 1043 considered at length claims for breach of fiduciary duty which had been raised in a s 70 assessment.

89. As a matter of "*appropriateness*" there is no substantial difference between determining whether there is a binding enforceable CFA (leading to an entitlement to payment) and a quantum meruit (to the same effect). Both determine entitlement to payment.

90. As a consequence, the Judge was wrong to conclude that it was 'inappropriate' to determine a quantum meruit issue of this kind.

Section 7. Conclusion

91. For these reasons, Rosenblatt respectfully submits as follows and invites the Court to so order:

    a. The appeal on the merits issue has (at least) a real prospect of success and raises important points of principle, and permission to appeal should be granted;

    b. The appeal on the merits should be allowed (and GEHC's objection 1 dismissed); and

    c. These costs proceedings should be remitted to the first instance Court to give directions in relation to assessment.

92. In the alternative to Rosenblatt's primary case that it is unnecessary to appeal these matters:

    a. The appeal on the case management issue has (at least) a real prospect of success and (to the extent necessary) itself raises an important point of principle or practice, and permission to appeal should be granted; and

    b. The appeal on the same should be allowed, with the result at ¶91.c above.

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