Court of Appeal Case: CA-2025-02112

Appeal Case No: CH-2024-000224

SCCO Case No. SCCO-2016-DAT-00275

IN THE COURT OF 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 APPELLANT SEEKING PERMISSION TO APPEAL FROM THE DECISION OF MR JUSTICE MARCUS SMITH OF 1ST AUGUST 2025 (SECOND APPEAL)

References to the Core Bundle are in the form [CB/Tab/Page]

References to the Supplemental Bundle are in the form [SB/Tab/Page]

A. Introduction and Overview

1. This skeleton argument is filed in support of the application of the Appellant ("**Rosenblatt**") for permission to appeal from the judgment of Marcus Smith J of 1st August 2025 (the "**Judgment**") [CB/8/83] in which "for reasons … which are not the reasons of the Senior Costs Judge[1]" ("**SCJ**") (Judgment at [28]) he upheld the decision of the SCJ of 29th February 2024 **(**the **"Decision**") [CB/28/289] to the effect that the raising of a new liability defence ("**Objection 1**") by the Respondent ("**Global Energy**") was not an abuse of process.

2. This application is for permission to make a second appeal and is accordingly subject to the requirements of CPR 52.7. In Section E below, we set out the principles relevant to second appeals. In Section F below, we address the grounds of appeal (the "**Grounds**") [CB/2/13] as well as to why the CPR 52.7 requirements are satisfied in this application for permission to bring a second appeal.

3. Both the Decision and the subsequent Judgment were delivered in proceedings commenced by Global Energy seeking assessment of bills rendered by Rosenblatt in connection with litigation conducted on behalf of Global Energy. Rosenblatt's retainer was governed by a series of conditional fee agreements ("**CFAs**") [SB/1/1, SB/2/9, and CB/22/203]. In those proceedings, Global Energy disputed that it had any liability to pay those bills and alternatively challenged the quantum of those bills.

4. On 16 June 2016 (the "**June 2016 Order**") [SB/10/60] and following a hearing at which she heard submissions by the parties and which in turn followed the filing of evidence and skeleton arguments, Master James directed the hearing of two preliminary issues. As recorded by the SCJ in paragraph 26 of the Decision, these preliminary issues (the "**Preliminary Issues**") were intended to deal with "liability" (i.e., whether Global Energy had any liability at all to pay the bills under challenge). This is in accordance with the practice in costs assessment proceedings where liability is in dispute of determining liability as a preliminary issue to the question of whether an order for assessment should be made[2].

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[1] Senior Costs Judge Gordon-Saker.
[2] A practice recorded by the SCJ in his decision at para. 31 [CB/28/296-7].

5. In a judgment delivered by Master James in August 2020 following a 10 day hearing [SB/14/146], she found against Rosenblatt on both of the Preliminary Issues. Rosenblatt were successful in overturning that decision on an appeal before Trower J, judgment being handed down on 16th December 2021 [SB/15/227].

6. This led to the next phase of the costs proceedings, namely Points of Dispute to the bills [CB/32/318 and CB/33/356]. Global Energy's first point of dispute ("**Objection 1**") was a further defence on liability. Previously, on the Preliminary Issues, Global Energy had argued that it had no liability because (a) the CFAs were unenforceable as in breach of s 58 of the CLSA 1990 and/or (b) Rosenblatt had wrongly terminated its retainer. Having succeeded on those arguments in front of Master James but failed before Trower J, Global Energy sought to advance by way of Objection 1 a new ground of defence on liability, namely that even if the termination was lawful (as Trower J found), Global Energy still had no liability because termination took place before the conditions to an entitlement to payment under the CFAs had been satisfied.

7. Rosenblatt applied to strike out Objection 1 as an abuse of process on the basis that Objection 1 could and should have been raised at the Preliminary Issues stage, being a defence on liability, and that it was contrary to the alternative case advanced by Global Energy at the Preliminary Issues hearing.

8. The strike out application failed before the SCJ. Whilst determining that Global Energy could and should have raised Objection 1 at the Preliminary Issues stage, the SCJ held that there was no abuse of process because there had been no prior decision on the merits of Objection 1, and had it been raised earlier there would still have been a Preliminary Issues hearing and appeal, and because the failure to raise Objection 1 until after the judgement of Trower J did not constitute "unjust harassment." [CB/28/298]

9. On appeal, the learned Judge (Marcus Smith J) held that "on the facts as stated by the SCJ in the Decision itself I can see no clearer case of a *Henderson v Henderson* type abuse of process. It seems to me - looking only at the terms of the Decision – that the decision that there was no abuse of process is so wrong as to be perverse" (Judgment at [16] [CB/8/92]).

10. However, the Judge went on, having regard to the Respondent's Notice [CB/27/285], to hold that the SCJ was wrong to hold that Global Energy should have raised Objection 1 earlier. On the contrary, in the Judge's view (see Judgment at [25], [26] [CB/8/93-5) was that:

    a) In directing the Preliminary Issues, there was a "major procedural error" on the part of Master James, making an "order of her own motion", by which she gave directions for Preliminary Issues "blind, directing preliminary issues when it was unknown what the issues between the parties actually were" with the result that the "true issues between the parties were never identified until it was too late" [CB/8/94];

    b) The Master wrongly considered there were only two possible issues going to liability, when there was also Objection 1 [CB/8/94];

    c) Master James should instead have directed pleadings on liability and only then made case management directions. She committed a major procedural error by giving directions prior to pleadings [CB/8/94];

    d) As a consequence, "the explanation for the late-raising of Objection 1 by [Global Energy] is that [Global Energy] (and Rosenblatt) were quite properly following the direction of the court" (at [26]) [CB/8/94]; and

    e) Global Energy could not be criticised for raising Objection 1 late because "the Courts expect their orders to be obeyed and it would have been improper for Global Energy to shoehorn (or attempt to shoehorn) additional issues into what was expressly a preliminary issue hearing" [CB/8/94].

    f) It follows from the above and the Judge's remarks at [24] that he considered Objection 1 "had been raised late consistently with due process." [CB/8/93]

11. It is respectfully submitted that the learned Judge's decision was flawed as a matter of principle and practice, as well as on the facts, and that his decision on the appeal is plainly wrong.

12. The Judge's reasoning appears to flow from a misunderstanding as to the circumstances in which Master James came to direct Preliminary Issues, following the practice on costs assessments to determine liability as a preliminary issue to the question of whether an order for a detailed assessment (followed by a Bill of Costs, Points of Dispute and Points of Reply) should be made. As detailed further in section F below, Master James was not engaged in some frolic of her own or, as the Judge put it at [25(iii)] [CB/8/94], making the June 2016 Order without reference to or hearing from the parties. On the contrary, Master James made the June 2016 Order after hearing from the parties, and after they had each filed skeletons and witness statements in which defences on liability were identified and proposals for preliminary issues ventilated.

13. Furthermore, contrary to the Judgment at [25(iv)(b)] [CB/8/94], in making the June 2016 Order, Master James was not conjecturing as to "possible issues going to liability"; rather she was identifying the defences on liability that had been identified by the parties. So the criticism made of Master James concerning her failure to identify Objection 1 as a possible issue is unfair.

14. Further the learned Judge erred as a matter of practice and principle in the following respects:

    a) Contrary to the Judge's view as to required practice, there is not and should be no requirement in costs assessment proceedings where liability is in dispute for the Court to require the parties to plead out their cases on liability before giving case management directions. Such a step is unnecessary where legally represented parties have identified the defences of liability.

    b) Contrary to the Judge's view on principle and practice, "obeying" the June 2016 Order did not require Global Energy to refrain from raising alternative defences on liability and from seeking to persuade the Court to include them within the scope of the Preliminary Issues hearing. Moreover pursuit of such a course of action would not "improper": cf Judgment at [26] [CB/8/94-5].

    c) The Judge should have determined as a matter of principle and in line with the SCJ's Decision at paragraph 26 [CB/28/296] that where there was an intention that the Court

would deal with liability at a preliminary issues hearing (which is the practice in costs assessments where liability is in issue), it is "incumbent on the parties to raise all matters which could sensibly and effectively be deal with as preliminary issues. That would include any alternative cases on liability."

15. For these reasons, as developed further below, the Judge erred in principle and in practice and on the facts, and his decision on the appeal was plainly wrong. Further, it is submitted permission to appeal should be granted as (a) the appeal raises important points of principle and/or practice which have not previously been established (see the Grounds of Appeal at paragraphs 7, 10 and 12 [CB/2/14-16]) and (b) there are other compelling reasons for the Court to hear this appeal: namely (i) the appeal has a very high prospect of success (ii) the Judge has strongly (and it is submitted unfairly) criticised the conduct of the case by the judge in the lower court in directing the Preliminary Issues and (iii) whilst this is a second appeal, it only arises because the learned Judge disagreed with the SCJ who found that Objection 1 could and should have been raised at the Preliminary Issues stage.

16. The remainder of this skeleton is divided up as follows:

a) Factual Background.
b) Decision of Senior Costs Judge.
c) Judgment of Marcus Smith J.
d) CPR 52.7 - Relevant Principles
e) Grounds of Appeal
f) Conclusion

B. Factual Background

17. The learned Judge set out the factual background and retainers at [1] – [7] of the Judgment [CB/8/84-6]. The Court is referred to those paragraphs which are not repeated here. The abbreviations in those paragraphs are adopted in this skeleton.

18. In late February 2016, Rosenblatt terminated CFA3 and its retainer on the grounds of Global Energy's repudiatory breach.

19. On 1st April 2016, Global Energy sought to initiate a detailed assessment of the fees of Rosenblatt in standard Part 8 form [CB/31/315]; and Rosenblatt served subsequently an Acknowledgment of Service.

20. On 15th June 2016 a directions hearing in respect of the detailed assessment took place before Master James. She received evidence in the form of two witness statements from David Flack of Eversheds for Global Energy (the first of which is at [SB/6/25] and one witness statement from Justin Nimmo of Rosenblatt [SB/7/37]. She also received written submissions from Counsel for Rosenblatt [SB/8/52] and from Global Energy [SB/9/57].

21. On 16th June 2016 Master James ordered (order sealed on 20th June 2016) [SB/10/60] that:

"(l)The following shall be determined as preliminary issues to be heard on 23 November 2016 commencing not before 10:30 a.m. time estimate 1 full day:
(a) Whether the CFAs entered into between the Claimant and Defendant were valid;

(b)Whether the Defendant [Rosenblatt] was entitled to determine the retainer."

22. By the same Order Master James directed pleadings and witness statements in respect of the Preliminary Issues. Statements of case were duly served in which each party set out its position (e.g., Re-Amended Particulars of Claim dated 1st May 2018 [SB/13/93]).

23. It was contended by Global Energy at the Preliminary Issues hearing that the CFAs failed to meet the conditions of Section 58 of the Courts and Legal Services Act 1990 and so were unenforceable. It was also contended by Global Energy that Rosenblatt wrongfully terminated the retainer and was as a consequence not entitled to any payment. Before Master James, both contentions succeeded (see judgment of 20th August 2020 [SB/14/146], but were overturned on appeal to Trower J (judgment of 16th December 2021 [SB/15/227].

24. The further defence advanced by Global Energy on the Preliminary Issues hearing (but not identified within the Preliminary Issues directed) was that CFA3 was entered into as a result of misrepresentation. Master James upheld that ground in her judgment (at paragraph 329 [SB/14/226]), going on to hold that as a result CFA3 was "tainted". That finding was also overturned on appeal by Trower J.

25. Trower J concluded (a) that the Advance Fee provided for in each of the CFAs was to be retained by Rosenblatt whatever the outcome of the litigation and (b) that none of the CFAs were unenforceable under section 58: [53]-[54], [69]-[71] [SB/15/239, 242-3]. He also concluded that Rosenblatt was entitled to terminate the retainer for repudiatory breach by Global Energy[3].

26. Subsequent to the hearing before Trower J, the detailed assessment was sent to be determined by the SCJ. Directions were given in the usual way for service of Points of Dispute by Global Energy.

27. At this point (in the Points of Dispute dated 21st April 2023 [CB /32/324]) Global Energy raised a new argument described as "Objection 1" (see the next paragraph) which was objected to by Rosenblatt as an abuse of process in that that, if it was to be raised at all, it should have been raised at the Preliminary Issues stage [CB/33/367]. Rosenblatt also defended Objection 1 on the merits [CB/33/371].

C. <u>Senior Costs Judge – Decision on Objection 1</u>

28. The SCJ described Objection 1 as a contention that "[Rosenblatt's] bills should be assessed at nil because, when they were delivered, [Global Energy] was not liable to pay them and/or they were delivered after the termination of the retainer when [Rosenblatt] had asserted a claim for damages … As at the dates of the bills, the fees were contingent. Trower J had found that the 2012 bill was not a statute bill because, at the time it was rendered, [Rosenblatt] was not entitled to payment under CFA-2. Applying the principle that a non-statute bill becomes a statute bill only when a final bill is served, and given that [Global Energy] was not liable to pay the 2016 bill, both bills must be assessed at nil." [CB/28/292]

29. The SCJ upheld Objection 1 and rejected the argument of Rosenblatt that it was an abuse of process to raise it so late.

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[3] The Judge found [CB/8/87] that Trower J held that (i) CFA-3 had been terminated (ii) not pursuant to the provisions of clause 14, but (iii) by Rosenblatt's acceptance of General Energy's repudiatory breach (citing pars [103] to [104], [116] of Trower J's decision [SB/15/251-3]).

30. The SCJ held (in a passage summarised by the learned Judge at [15 iii)] [CB/8/89]) that:

> "[26] Clearly there was an intention that the court would deal with "liability" at the preliminary issues hearing, at which oral evidence might be given. While the court controlled the agenda of that hearing, it was incumbent on the parties to raise all matters which could sensibly and efficiently be dealt with as preliminary issues. That would include any alternative cases on liability.
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> …
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> [28] In my judgment, therefore, [Global Energy] should have pleaded what is now Objection 1 in the Particulars of Claim and, insofar as may have become necessary, sought appropriate directions from the court as to its determination at the preliminary issues hearing." [CB/28/296]

31. Rosenblatt submitted before the Judge that the SCJ should then have gone on to find an abuse of process. The reason the SCJ did not follow that course can be seen from his Decision at paragraphs 29 to 42 [CB/28/296-8], principally that:

    a) Objection 1, while the subject of judicial comment, had not been the subject of a decision (para. 37 [CB/28/298]).

    b) The result of the Preliminary Issues hearing would have been the same even if Objection 1 had been raised earlier and there would still have been an appeal (paragraphs 38 and 41 [CB/28/298]).

    c) Raising Objection 1 late did not constitute unjust harassment of Rosenblatt (para. 42).

32. The SCJ went on to uphold Objection 1, with the consequence that an order was made with potentially severe consequences for Rosenblatt. See the Order at [CB/29/310] providing for a nil assessment on its bills over the course of 6 years of litigation and requiring repayment of over £5.5m plus interest.

D. Marcus Smith J - Judgment

33. Both elements of the Decision (on abuse of process and the merits of Objection 1) were appealed to the learned Judge. The learned Judge heard submissions on abuse of process.

The appeal in respect of the upholding of the SCJ's decision on the merits of Objection 1 was adjourned to 10th and 11th November 2025. He recorded that: "The parties were, however, agreed that it would helpful if I could hand down, in advance of this hearing, a decision in regard to the abuse of process point. This is that decision. Nothing in this decision affects in any way the determination of the appeal in relation to Objection 1, which will be the subject of a separate judgment." [CB/8/88]

34. With respect to the abuse of process appeal, the Judge stated that:

a) "On the facts as stated by the [SCJ] in the Decision itself, I can see no clearer case of a *Henderson v. Henderson* type abuse of process. It seems to me – looking only at the terms of the Decision – that the decision to hold that there was no abuse of process is so wrong as to be perverse" (at [16] [CB/8/92]).

b) "on the facts as stated by the SCJ this was a clear case where Objection 1 could and should have been raised before Master James and determined by her so that determination could have been considered by Trower J on appeal. That course would likely have brought these proceedings to an end some years ago and rendered the hearing before the SCJ and this appeal wholly unnecessary" (at [18] [CB/8/92]).

c) He continued that the reasoning in Decision [35] to [41] ([CB/28/297-8]) did not justify the conclusion that Objection 1 is not an abuse of process (par [20] [CB/8/92]). But for Global Energy's Respondents' Notice "I would have allowed the appeal for the reasons set out above" (at [21] [CB/8/92]).

35. The learned Judge then went on to decide to uphold the SCJ's decision on abuse for different reasons (indeed reasons that were contrary to the findings of the SCJ):

a) He held (with respect correctly) that:

i) it was "sensible and obvious" that (summarising what the SCJ said in his Decision at para. 31) "where there are points that are so fundamental that they go not to the amount of a detailed assessment but whether there should be a detailed assessment at all, these points as to liability… should be heard first" (at [15 v)] [CB/8/89-90]).

ii) "But what was obvious even then [i.e., at the time of the Master's order of 16th June 2016] and without the benefit of hindsight that all of the "liability" issues would need to be determined before any detailed assessment whichever court was seised. That is the usual practice as I have described" [at [25(ii)] [CB/8/93-4].

b) He held that the June 2016 Order represented a "major procedural error on the part of the court acting of its own motion" [at 25(iv)] [CB/8/94].

c) As a consequence, the explanation for the late raising of Objection 1 was that Global Energy was quite properly following the direction of the Court (at [26] [CB/8/94-5]).

d) Courts expect their orders to be obeyed and it would have been improper for Global Energy to shoehorn (or attempt to shoehorn) additional issues into the Preliminary Issues hearing (at [26]).

e) There was nothing in Global Energy's conduct to criticise (at [26]), taking a directly contrary view to that taken by the SCJ.

36. For the reasons set out in the Grounds and in Section F below, it is submitted that the Judge's approach to points of principle and/or practice was flawed and that he proceeded on the basis of a false understanding of the factual background to the order of Master James.

E. Important Point of Principle or Practice / Other Compelling Reason: CPR 52.7: Relevant Principles

37. In addition to the usual threshold for a permission to appeal application of real prospect of success, there are additional requirements for a second appeal. The Court will be familiar with the case law relating to these requirements, which case law is summarised in the White Book at 52.7.6 and 52.7.7.

38. We highlight the following matters:

a) The reference in CPR 52.7 to "an important point of principle or practice" is to an important point of principle or practice that has not yet been established. Where the issue on appeal concerns not the principle or practice but its application within the judgment, that does not satisfy this threshold requirement: see Uphill v BRB (Residuary) Ltd [2005] EWCA Civ 60 at [18].

b) "Some other compelling reason" provides a further and independent reason for entertaining a second appeal. In elucidating this phrase the Court in Uphill provided some pointers (see [24]) (i) A good starting point will almost be a consideration of the prospect of success. There is unlikely to be a compelling reason unless the prospects of success are very high. (ii) This starting point is not necessarily enough. For example, the appellant may have contributed to the failure below by not referring the court to authority of a higher court which rendered the decision wrong. (iii) Conversely, there may be a compelling reason even if the prospects of success are not very high, for example where there is good reason to believe procedural irregularity rendered the first appeal unfair. (iv) "Some other compelling reason" may exist where an appellant has succeeded at first instance but then lost on appeal, such that a second appeal will be the first opportunity to correct the error of law by the first appellate court: see JD (Congo) v Secretary of State for the Home Department [2012] EWCA Civ 327 at [18]. It is submitted that a similar consideration operates where (as in the current case) the first appeal would have been allowed but for reasons found for the first time by the appeal court, being reasons which contradicted the finding below. The first opportunity to challenge those contrary findings is this second appeal.

39. The application of these threshold requirements to the grounds of appeal are addressed:

a) As regards important point of principle or practice, in the Grounds at paragraphs 7, 9 and 12 [CB/2/14-16] and in paras 50, 56 and 61 below.

b) As regards some other compelling reason, in the Grounds at para 23 [CB/2/18] and at para 79 below.

F. Grounds of Appeal and The Judge's Errors

(i) Relevant factual background to June 2016 Order and Preliminary Issues Hearing

40. Before addressing the grounds of appeal, it is helpful to set out the factual background to the June 2016 Order and also some factual background concerning the Preliminary Issues Hearing:

    a) The June 2016 Order [SB/10/60] (in the appeal bundle before the judge) was made the day after an attended directions hearing at which preliminary issues were canvassed.

    b) Counsel for both Global Energy and Rosenblatt (i) had provided skeleton arguments (which were in the appeal bundles before the learned Judge [SB/8/52, 9/57]) which between them addressed the defences which had been advanced by Global Energy on liability which, if successful, would dispense with the need for an assessment, preliminary issues and, in the case of the skeleton argument by Rosenblatt, asked for the proceedings to be transferred to the Chancery Division to determine liability, and (ii) attended and made submissions at the directions hearing before Master James on 15th June 2016.

    c) The June 2016 Order expressly recites "AND UPON HEARING Counsel (Mr Nicol) for the Claimant and Counsel (Mr Munro) for the Defendant" [SB/10/60].

    d) Global Energy's own evidence (Newberry 6 in the Respondent's bundle for the hearing [SB/17/275]) confirmed that a hearing took place at which the Master heard submissions. He stated: "Following submissions, Costs Judge James adjourned and advised that she would consider the position and deliver a judgment. However no judgment was received but rather, on or about 22 June 2016, we received an order which set out the terms of the preliminary issues, and provided for the provision of particulars of claim, defence and evidence, in relation to the preliminary issues".

    e) The skeleton arguments were themselves preceded by witness statements from both Global Energy and Rosenblatt [SB/6/25, 7/37]. These identified the defences on liability that had been raised by Global Energy namely (1) that the CFAs were unenforceable and (2) that Rosenblatt had wrongfully terminated its retainer. As noted by SCJ in his decision at para. 8: "the issue on enforceability was whether the success fee exceeded 100 per cent, contrary to s.58 Courts and Legal Services Act 1990."

41. The June 2016 Order included directions for service of pleadings in respect of the Preliminary Issues and witness statements. The Re-Amended Particulars of Claim served by Global Energy ran to 53 pages, and stated at para 1 [SB/13/93]:

"The Claimant denies that the Conditional Fee Agreements ("CFAs") that it entered into with the Defendant are either valid or enforceable as a result of the CFAs failing to comply with the provisions of the governing legislation and the Defendant's professional obligations. Alternatively, if CFA2 and CFA3 (as defined below) are enforceable, the Defendant's termination of them was wrongful and the Defendant is not entitled to recovery any remuneration in respect of them, or, alternatively in respect of CFA3, the Defendant is only entitled to its basic charges plus disbursements."

42. Thus, in its pleading Global Energy addressed not only the claim for wrongful termination but alleged in the alternative that if the retainer was lawfully terminated, Rosenblatt was entitled to its base fee but not its success fee. So, Global Energy not only failed to raise Objection 1 in the Preliminary Issue section of the proceedings, but also advanced a case on lawful termination which is contradictory to the case now advanced under Objection 1 (i.e., no entitlement to any payment on lawful termination – that is to say the same position as maintained for wrongful termination).

43. Finally, as recorded in the Decision (of the SCJ):

a) "…the practice is to determine liability as a preliminary issue to the question of whether an order for assessment should be made. If an order is made, the second stage is the detailed assessment proceedings, which follow a similar path to proceedings between the parties following an order for costs, namely the production of a detailed bill, points of dispute and replies, and a require for a detailed assessment hearing…The present case broadly followed [this] path…" (paras.31 and 33 [CB/28/297]).

b) "Clearly, there was an intention that the court would deal with "liability" at the preliminary issues hearing, at which oral evidence might be given" (para. 26 [CB/28/296]).

(ii) Errors raising important points of principle or practice

44. There are three separate grounds under this heading.

45. **First, paras 4 to 7 of the Grounds [CB/2/13-14] and the finding of "major procedural error" – Judgment at [25(iv)] [CB/8/94].** This key paragraph of the Judge's reasons for dismissing the appeal contains, it is submitted, a combination of plain errors of fact and an incorrect statement of principle or practice. The errors of fact are addressed at paragraphs 64 to 76 below. The error of principle is addressed here.

46. At [25(iv)(c) and (d)], the key criticism made by the learned Judge was in the following terms:

> "c) The court could and should have obliged the parties to set out their contentions on liability in pleadings, and then (in light of the issues taken in the pleadings) made appropriate case management directions. As it was, the court gave case management directions blind, directing preliminary issues when it was unknown what the issues between the parties actually were.
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> d) In short, case management preceded pleadings, with the result that the true issues between the parties were never identified until it was too late."

47. It is submitted that the Judge was wrong to hold that as a matter of principle and/or practice the Court should not have given directions without first directing pleadings and without those pleadings having been served and considered. There is no necessity for such a course to be followed by the court as a matter of course on a costs assessment where liability is in issue. A costs judge is perfectly entitled to adopt a less formalistic and potentially less burdensome procedure. In circumstances where legally represented parties have identified defences going to liability through correspondence, witness statements and/or skeletons, there is no necessity to require pleadings before giving directions.

48. The procedure for cost assessment proceedings (under Part 8) is not the same as for Part 7 claims and involves different considerations. The learned Judge was wrong to, in effect, equate the practice for identification of preliminary issues in Part 7 proceedings with the practice that should be followed in costs assessment proceedings taking place within Part 8 proceedings.

49. The judge was therefore wrong to find that Master James committed a major procedural error by, amongst other matters, failing to follow his prescribed route.

50. This ground raises an important point of principle and/or practice which has yet to be established: namely whether, in pursuance of the practice of the Court on costs assessments to determine liability first, it is incumbent on the Court to require service of pleadings on liability before giving directions to determine liability

51. **Second, paras 8 to 10 of Grounds [CB/2/15] and the finding that it would have been improper for Global Energy to shoehorn or attempt to shoehorn additional issues into the Preliminary Issues hearing: Judgment at [26] [CB/8/94-5].**

52. At [26] the learned Judge made the following findings which formed a key part of his decision to dismiss the appeal:

"26 Thus, the explanation for the late-raising of Objection 1 by Global Energy is that Global Energy (and Rosenblatt) were quite properly following the direction of the court. Courts expect their orders to be obeyed, and it would have been improper for Global Energy to shoehorn (or attempt to shoehorn) additional issues into what was expressly a preliminary issue hearing. What happened was that both Global Energy and Rosenblatt focussed (rightly) on the preliminary issues ordered, and Global Energy only came to think of Objection 1 late in the day. There is nothing in Global Energy's conduct to criticise, and it would be unfair to prevent Global Energy from taking Objection 1 now."

53. The thrust of this paragraph is that it would have been improper for Global Energy to have raised Objection 1 for determination at the Preliminary Issues stage because Court orders are to be obeyed and, as a consequence, Global Energy was prohibited from even trying to expand the Preliminary Issues to include Objection 1.

54. The learned Judge was wrong as a matter of principle. The June 2016 Order directed the hearing of certain Preliminary Issues. It did not restrain Global Energy from raising with the Court the possibility of expanding the Preliminary Issues to deal with another defence on liability let alone render it "improper". This is *a fortiori* the position even where (on

the Judge's incorrect understanding) the preliminary issues had been directed of the court's own motion and without reference to the parties[4].

55. In circumstances where the Preliminary Issues were intended to deal with liability, it was incumbent on the parties to raise all matters which could sensibly and efficiently be dealt with as preliminary issues, including an alternative case on liability, as the SCJ correctly held: see the Decision at paragraph 26 [CB/28/296].

56. These Grounds raise an important point of principle which has yet to be established: namely whether, in circumstances where a Court orders the hearing of preliminary issues, the effect of such an order is to require a party to refrain from subsequently proposing to the Court a further preliminary issue and/or to render improper any attempt to argue for a widening of the preliminary issues.

57. **Third, paras 11 and 12 of the Grounds [CB/2/15-16] – "There is nothing in Global Energy's conduct to criticise": Judgment at [26] [CB/8/94-5]**

58. Having found that Global Energy was quite properly following the direction of the Court, the learned Judge concluded that there was nothing in Global Energy's conduct to criticise. In making those findings, the learned Judge erred as a matter of principle and/or practice. In particular:

    a) As the SCJ determined (a determination with which the learned Judge did not disagree), the intention was that the court would deal with liability at the Preliminary Issues hearing: see Decision at paragraph 26 [CB/28/296].

    b) That being the case, and as the SCJ correctly determined (Decision at paragraph 26), it was incumbent on the parties to raise all matters which could sensibly and efficiently be dealt with as preliminary issues, including alternative defences. The learned Judge should so have found.

[4] It is trite that such orders must contain a statement of the right for them to be set aside and that any party affected by them make apply to do so CPR 3.3(4) and (5).

59. Accordingly, the learned Judge should, contrary to his finding at [26], have determined that Global Energy's failure to raise Objection 1 at the Preliminary Issues was deserving of criticism.

60. Further, in implicitly finding that that raising Objection 1 late was consistent with due process (which implication arises from a combination of the Judgment at [24] and [26] [CB/8/93-95]), the Judge erred as a matter of principle and/or practice, because due process, in the context of a Preliminary Issues hearing directed for the purposes of determining liability, required Global Energy to raise any alternative cases on liability.

61. The appeal under Ground 11 raises an important point of principle and/or practice, namely whether in the context of a hearing of preliminary issue which is intended to determine liability, it is incumbent on the party denying liability to raise all further or alternative defences on liability or whether, on the contrary, the party is entitled to sit back and remain silent on such defences.

(iii) Judge's decision plainly wrong – Some Other Compelling Grounds: Master James Heard from the Parties

62. Further, the learned Judge's decision was wrong not only by reason of the above-mentioned errors of principle and/or practice, but because he made erroneous findings of fact which individually and/or compendiously and/or taken in conjunction with his errors of principle and/or practice rendered his decision plainly wrong.

63. The said errors are the subject of grounds 14 to 22 [CB/2/16-18].

Errors in Judgment at [25] [CB/8/93-4] - Paras 13 to 20 of Grounds

64. First, the learned Judge held [at 25 ii)] that the June 2016 Order was "made without reference to or hearing from the parties". That was simply incorrect as a matter of fact for the reasons given at paras 40 to 42 above and surprisingly so given that the Decision of the SCJ at paragraphs 8 and 9 [CB/28/291-2] had clearly found as facts (not contradicted by any party at the appeal) that the parties had served skeleton arguments before the directions hearing, that Global Energy had sought a "trial of preliminary issues" and that the Master had adjourned to consider the position and give a judgment but then sent an order directing

the determination of 2 preliminary issues. The Judge erred in his examination of the procedural history, overlooking the fact that both Rosenblatt and Global Energy had made submissions to the Court both before and at the directions hearing, including addressing the Court on the liability defences that Global Energy had advanced.

65. Second, the evidence before the learned Judge demonstrates clearly that the parties had considered the issues that would be discussed at the directions hearing of 15th June 2016, elaborated on this in witness statements and set out their respective positions in written submissions[5].

Written Submissions

66. As to those written submissions (which were in the appeal bundles before the learned Judge):

a) Global Energy's Note for the hearing of 15th June 2016 [SB/9/57]) refers to a "bundle of documents [which] contains … Part 8 Claim Form … and witness statements filed on behalf of the parties". It states that "the matters with which the Court is currently faced are straightforward and save in limited respects uncontroversial" (para 3 [SB/9/57])). Other than an application that the hearing be in private "little else would appear to divide the parties at this stage; both recognise that the Trial of Preliminary Issues are appropriate and both seek directions to that end" (para 9 [SB/9/58])). The Note appears to dispute the relevance of the termination issue raised by Mr Nimmo in his witness statement (para 11 [SB/9/58])) and the need to transfer to the Chancery Division (paras 12 and 13 [SB/9/59])) and suggests directions "designed to permit the speedy and efficient resolution of Preliminary Issues" which "1. should decide the scope of the part 8 proceedings (what invoices howsoever described the court can assess. 2 the enforceability of the CFAs; and the reasonableness/appropriate level of each success fee" (para 15 [SB/9/59])). The court was also asked to set a date for the hearing of the preliminary issues with a time estimate "of no longer than 3 days".

b) Rosenblatt's skeleton argument dated 10th June 2016 [SB/8/55] emphasised the need to transfer the resolution of the dispute to the High Court (Chancery Division) but it stated

[5] Not just the Note for Rosenblatt which the Judge cited but written submissions for Global Energy.

at para 18: "Mr Flack's argument appears to be that CFA3 is unenforceable and as a consequence no fees are payable at all … if his arguments that [Rosenblatt] repudiated CFA3 and that no fees at all are payable then no assessment will be required. The arguments on liability to pay costs under CFA3 must therefore be heard first and by a Judge with the benefit of witness evidence and disclosure" and at para 23 [SB/8/56]): "There is no point making consequential directions for detailed assessment under CPR r 46.10 if there is an unresolved dispute as to liability as to whether any costs are payable whatsoever. This matter is not suitable for Part 8 procedure and any detailed assessment procedure is premature and dependent on resolution of the issues of liability."

c) As to oral submissions, although we do not have a record of the hearing, Mr Newberry of Eversheds, acting on behalf of Global Energy, confirms a hearing took place which he attended at which the Master heard submissions. He says (in his 6th w/s [SB/17/20]) – also in the bundles before the learned Judge): "Following submissions, Costs Judge James adjourned and advised that she would consider the position and deliver a judgment. However no judgment was received but rather, on or about 22 June 2016, we received an order which set out the terms of the preliminary issues, and provided for the provision of particulars of claim, defence and evidence, in relation to the preliminary issues".

Witness Evidence

67. The witness evidence (which was not in the bundles before the learned Judge but which is referred to in the written submissions set out above) included the following statements:

a) "[Global Energy]'s contention that [the CFAs] are each unenforceable and that accordingly no sums are due under them. [Global Energy] will set out in detail its arguments as to why this is the case in due course in this assessment but in summary it is [Global Energy]'s position that they are each variously in breach of s 58 [of CLSA 1990] as well as the relevant Conditional Fee Agreement Orders" (w/s of D Flack (of Eversheds for Global Energy) 1st April 2016 at par 32)[6] [SB/6/32]).

[6] It then goes on to address at par 33 [SB/6/32] "even in the event that any of the CFAs are found to be enforceable" that there are "various other issues with them [i.e., the CFAs]" which appear to be "quantum" issues such as the inclusion of success fees which are inconsistent with the true risk of Rosenblatt not achieving a "win" (33.1); the inclusion of a postponement element in the success fees where there were advance fees and payments on

b) Mr Nimmo for Rosenblatt's w/s of 8th June 2016 [SB/7/43]) in response states (at para 13): "it is apparent from Mr Flack's witness statement at paragraph 32 that [Global Energy] does not in fact merely seek a conventional solicitor/client assessment. Rather [Global Energy] wishes to contend that each of the CFAs under which Rosenblatt have acted is unenforceable…." .

c) At para 14 [SB/7/43] Mr Nimmo says: "Rosenblatt accepts that the applications for assessment of the 2016 bills have been brought within the time limits specified by section 70 of the Solicitors Act 1974 … and that the court has jurisdiction to order assessment of those bills. However, what is sought here is quite different to a conventional assessment. Before the court proceeds to any form of item by item assessment two major issues will need to be determined - the validity of CFA3 and determination of whether [Global Energy] has acted in repudiatory breach of the CFA. I deal with the evidence required for those issues below" (and see also para 20 of that w/s [SB/7/44]).

d) Mr Nimmo continues: "if [Global Energy] wishes to … argue that CFA3 is unenforceable then this should be dealt with as a preliminary issue before the parties expend the time and substantial costs in seeking a court determination as to whether or not Rosenblatt's costs are reasonable…" (para 22 of his w/s [SB/7/44-5]) and then "if the court determines that CFA3 is enforceable then the court will need to determine as a second preliminary issue whether or not Global Energy has acted in repudiatory breach of CFA3 and the standard terms" [SB/7/45][7]. He proposed treating the proceedings as a Part 7 claim with pleadings and a transfer to the Chancery Division.

68. Therefore it is evident that:

a) the Master heard submissions on 15th June 2016 and must have read the witness statements and skeleton arguments.

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account (33.2); the application of success fees to sums which were not "at risk" (33.3); and "various solicitor conduct points arising out of and in relation to the CFAs".

[7] He also raised a further preliminary issue as to an oral agreement in August 2015 (at par 25 [SB/7/46]) but this does not seem to have led anywhere.

b) if (as is probable) the parties maintained their written submissions at the oral hearing (i) Rosenblatt submitted that the matter should be transferred to the Chancery Division but also that any detailed assessment procedure would be premature and dependent on resolution of the issues of liability (ii) Global Energy maintained that the matter should remain in the SCCO with preliminary issues being heard first (iii) it was common ground between the parties that arguments on liability were to be decided first and where a result in Global Energy's favour would avoid the need for an expensive detailed assessment; in any event, the Master as a matter of case management evidently reached such a view.

69. The Master's order indicates that she was not persuaded to transfer from the SCCO to the Chancery Division but directed there should be preliminary issues which would resolve the defences on liability which the parties had identified and put in front of her.

70. Read in context then and contrary to the Judge's understanding this June 2016 Order was entirely orthodox, in line with the practice in costs assessment proceedings of dealing with defences on liability first by way of preliminary issues, and was based upon the submissions of the parties. There was no appeal from the decision by either party or attempt to set it aside or ask the Master to reconsider it.

71. Contrary to what it can be seen from [25] of the Judgment [CB/8/93] that the Judge understood, the June 2016 Order was not made in a vacuum, and was not an instance of Master James embarking on a frolic of her own. It was of course open to either party subsequent to the Order to inform her that she had incorrectly captured the issues relating to liability, but neither did so. That is because her formulation tracked the defences on liability of which she had been notified.

Judge's Errors: Consequent upon his Misunderstanding

72. As a consequence, the subsequent holdings of the learned Judge are infected by this misunderstanding and must be set aside. In short:

a) He further erred in holding [at 25iv)a)] that the court "disregarded" Rosenblatt' suggestion of dealing with all issues of liability first. To the contrary the Master was providing for the relevant liability issues raised by the parties to be dealt with first by

way of preliminary issue. Furthermore, her order in respect of the preliminary issues was intended to address all such "liability" issues as the parties had raised before her in correspondence, written evidence and written and oral submissions.

b) Likewise the learned Judge erred in holding [at 25 iv c)] that the court "gave case management directions blind, directing preliminary issues when it was unknown what the issues between the parties actually were" when as set out above the court was apprised in detail of the issues between the parties and indeed that the parties favoured preliminary issues on liability to be determined before the detailed assessment.

73. In the Judgment at [25(iv)b)], the Judge criticised Master James in the following terms: "Instead, the court directed the hearing of only *two* preliminary issues as to liability. In doing so, the court appears to have considered that these were the only two *possible* issues going to "liability". If that was the court's thinking, it was mistaken, for Objection 1 was not identified."

74. With respect to the learned Judge, this paragraph betrays a profound misunderstanding of the basis on which Master James formulated the Preliminary Issues. She plainly did not approach the exercise by trying to identify every possible liability defence or liability issue. Rather, she started with the defences on liability that had been notified to her by the parties and then turned these, in a perfectly orthodox manner, into preliminary issues.

75. It follows that the finding that the Master's thinking was mistaken because Objection 1 was not identified is simply wrong. The Court formulated preliminary issues based on the liability defences advanced by Global Energy. Master James did not include Objection 1 not because of a "mistake", but because Global Energy had not put forward Objection 1.

76. For all these reasons, the learned Judge was plainly wrong to hold that there was a major procedural error on the part of the Court acting of its own motion.

77. All these errors taken together or in conjunction with his errors of principle or practice identified in the Grounds at paras [7, 9 and 12] [CB/2/14-16], then underpinned his finding at [26] that there was nothing in Global Energy's conduct to criticise. But for such errors, the Judge should have found (in common with the findings of the SCJ) that:

a) The Preliminary Issues were intended to deal with all issues of liability and were formulated to encompass the defences on liability raised by Global Energy.

b) As the SCJ found at paragraph 25 of his Decision [CB/28/295-6]: "…While the Claimant's primary case was that the CFAs were unenforceable and its secondary case was that CFA-3 was wrongfully terminated by [Rosenblatt], it was able to plead an alternative to the secondary case: that if CFA-3 is enforceable and is found not to have been terminated wrongfully by [Rosenblatt], such termination was pursuant to clause 14.3 and [Rosenblatt] was entitled only to its basic charges and disbursements. [Global Energy] could easily have added a further alternative, between these two positions, that if the termination was not pursuant to clause 14.3, [Rosenblatt] was not otherwise entitled to its fees for the work done."

c) As the SCJ held at paragraph 26 of his Decision [CB/28/296] (as more fully set out above at paragraph [30] above): "it was incumbent on the parties to raise all matters which could sensibly and efficiently be dealt with as preliminary issues. That would include any alternative cases on liability."

d) As the SCJ held at paragraph 28 of his Decision [CB/28/296] (as set out above at paragraph [30]): "In my judgment therefore the Claimant should have pleaded what is now in Objection 1 in the Particulars of Claim and… sought appropriate directions from the court as to its determination at the preliminary issues hearing."

78. Given the true factual position the Judge's holdings that there was nothing to criticise in the actions of Global Energy with respect cannot possibly stand:

a) the reason that Objection 1 was not catered for in the Master's order of 16th June 2016 was not because the Master conjured up preliminary issues without reference to the parties but because Global Energy knowing of the directions hearing and its potential catering for preliminary issues on liability failed to raise Objection 1 (whether deliberately or negligently or because they did not think of it is not material – and indeed Global Energy have never explained when the issue was thought of and why it was not raised before the Master).

b) in the circumstances Global Energy are also to be criticised for not raising at any time subsequently for determination by Master James at for example the hearing in 2017 where the Master considered the lengthy statements of case. It was surely not "improper" for Global Energy – given the wording of the order made by the Master – if it had decided to raise Objection 1 to have notified this to the Master for determination.

79. For all these reasons, the appeal has a very high prospect of success. This is not a case where the errors of the learned judge are down to any failing on the part of Rosenblatt. Accordingly, applying the guidance in Uphill, there are "other compelling grounds" for granting permission. A further reason for holding this criterion has been satisfied is that the appeal below would have succeeded but for the judge making findings contrary to those of the SCJ. The first opportunity to challenge those contrary findings is on this appeal. A yet further reason for holding this criterion has been satisfied is that the Judge's decision is founded in large part on a serious criticism of the conduct of the litigation of the judge in the lower court. If that criticism is itself unfounded or it is strongly arguable that it is unfounded, that should constitute a compelling ground to give permission to appeal.

Conclusion

80. The Court is invited to conclude that in respect of its grounds of appeal, Rosenblatt has satisfied the threshold criteria under CPR 52.7 for the grant of permission and accordingly is asked to grant Rosenblatt permission to appeal.

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