IN THE SENIOR COURTS OF ENGLAND AND WALES COURT OF APPEAL CIVIL DIVISION

Appeal No. CA-2025-002112
Chancery Appeal No. CH-2024-000224
Case No. SCCO-2016-DAT-00275

In respect of a second appeal from the High Court of Justice (ChD)
The Hon. Mr Justice Marcus Smith

B E T W E E N:-

GLOBAL ENERGY HORIZONS CORPORATION

Claimant/Respondent

-and-

THE WINROS PARTNERSHIP
(formerly known as ROSENBLATT SOLICITORS)

Defendant/Appellant

RESPONDENT'S SKELETON ARGUMENT OF 15.12.25 FOR THE ROLLED-UP APPEAL HEARING LISTED BETWEEN 6 – 7 MAY 2026

In this skeleton argument:
- *References to RS's Grounds of Appeal take the form **RS GoA/#***
- *References to RS's Skeleton Argument take the form **RS Skel/#***
- *References to the Core Bundle take the form **Core/Tab/Page#***
- *References to the Supplemental Bundle take the form **Supp/Tab/Page#***

A. Introduction

1. This is the skeleton argument of the Respondent (**GEHC**) in respect of the application of the Appellant (**RS**) for permission to appeal the order of Marcus Smith J (the **Judge**) of 1 August 2025 (the **Dismissal Order**) [Core/7/81-82], following his judgment of the same day (the **Judgment**) (the **PTA Application**), in which he upheld the judgment of Senior Costs Judge Gordon-Saker (the **SCJ**).

2. These proceedings concern the detailed assessment of three invoices levied by RS to GEHC in 2012, 2013 and 2016, RS having been retained by GEHC in 2009 to act in an

earlier claim (the **Gray Action**) and having successively entered three CFAs in respect of that Action.

3. At first instance, the SCJ ultimately assessed those invoices at nil. In the Judgment, the Judge upheld the decision of the SCJ that GEHC's 'Objection 1' – that RS had no contractual right to render an invoice because it had already elected to terminate its retainer for repudiation and claim damages – was not an abuse of process, and consequently dismissed RS's appeal on that ground.[1]

4. On 24 October 2025, Zacaroli LJ adjourned RS's application for permission to appeal, to be considered in a rolled-up hearing [Core/9/96-97]. For the reasons explained below: (a) RS's PTA Application does not meet the criteria for a second appeal, and permission should be refused; (b) the Judgment was in any event correct and should not be disturbed; and, alternatively (c) the dismissal of RS's appeal should be upheld for the additional reasons set out in GEHC's respondent's notice (**RN**) [Core/5/56-64].

B. Background

5. The background to this appeal is extremely involved, and has been bedevilled by extreme delay (some of which is referred to further below), none of it attributable to GEHC. The following summary is as condensed as reasonably possible.

I. The Gray Action, the CFAs and the Termination Letter

6. The core facts which underpin Objection 1 are common ground. GEHC entered into three CFAs with RS in respect of the Gray Action over the course of the retainer, being (i) CFA1 dated 8 December 2009; (ii) CFA2 dated 31 October 2010; and (iii) CFA3 dated 6 March 2013.

7. GEHC was initially successful on liability in the Gray Action (see the judgment of Vos J dated 21 December 2012), and RS immediately rendered a bill on that same date in the sum of over £3.2 million (the **2012 bill**). But on the subsequent, unappealed, finding of Trower J,[2] RS had no contractual right to charge that sum, as a 'win' under CFA2 had not then been achieved. RS also then required GEHC to enter CFA3 –whose terms were significantly more onerous than those of CFA2 and which also required GEHC to make

[1] A second ground of appeal, relating to the substance of Objection 1, was heard by the Judge at a resumed hearing in November 2025, with judgment reserved.

[2] [2021] EWHC 3410 (Ch).

a further advance payment of £300,000. Again on the unappealed findings of Trower J, RS had no right to require GEHC to enter CFA3, as CFA2 already covered the whole of the Gray Action.

8. Subsequently, GEHC obtained further orders before Asplin J relating to her judgment dated 28 July 2015 (the **Asplin Judgment**). In late 2015, however, relations between RS and GEHC began to deteriorate owing to disputes over what was to happen with the costs of £2.5m Mr Gray was ordered to pay, known as the **Gray Monies**.

9. Ultimately, on the basis then asserted by RS that the Aplin Judgment constituted a win under CFA3 (a representation now accepted by RS to have been false), and a claimed need to cover future disbursements based on absurd cost budgeting assumption (which have since proved impossible to defend), the entirety of the Gray Monies was retained by RS. At that point, GEHC instructed Bird & Bird as additional advisers in the conduct of the Gray Action, and Evershed Sutherland to challenge RS' retention of the Gray Monies.

10. On 24 February 2016, RS terminated CFA 3 by letter, alleging repudiatory breach (the **Termination Letter**). Trower J subsequently held that, whatever the merits of the dispute that had arisen between the parties over the Gray Monies, RS was entitled to treat GEHC's instruction of Bird and Bird and its direction that RS, and not GEHC, should fund future disbursements, as a repudiation of CFA3;, and that RS had validly accepted that repudiation via its Termination Letter. By that letter, RS claimed payment of damages.

11. On 4 March 2016 however, despite having elected to treat CFA3 as discharged and claim damages, RS sent an invoice dated 29 February 2016 (the **2016 bill**) claiming base fees for the period 2 January 2013 to 24 February 2016 of £3,384,840.08. This was despite it being the case (as RS now accepts – see paragraph 17 below) that it had no contractual right to bill for that sum, as no "win" had been achieved under CFA3. Nevertheless, RS subsequently purported to set off the Gray Monies against the supposed debt and, after also appropriating other money from GEHC which it held on account, sought payment of a balance of £562,000.08.

II. The assessment proceedings

12. In response, GEHC commenced proceedings under s. 70 of the Solicitors Act 1974 for RS's (purported) 2012 and 2016 bills to be assessed. Further to the issue of those

proceedings on 31 March 2016, and before any pleadings had been filed, a directions hearing was held on 16 June 2016. Notwithstanding the early stage at which that hearing occurred, having regard to the parties' competing positions in correspondence, Master James, a costs judge (the **Master**), directed the determination of two preliminary issues: the validity of the CFAs and "*Whether the Defendant was entitled to determine the retainer*".[3] The Master then directed an exchange of pleadings relating to these preliminary issues only.

13. Once these pleadings were exchanged, GEHC applied to amend its Particulars of Claim to widen the scope of arguments relating to misconduct, RS applied to strike out parts of the POC on the basis that they exceeded the preliminary issues defined by the costs judge. RS's application was allowed in part and GEHC's application largely dismissed (judgment of 30 March 2017[4]). It was clear from that judgment that the court anticipated that significant liability issues would remain once the preliminary issues were determined and this was also accepted by RS's counsel.[5]

14. However, the hearing of preliminary issues came to be extended on the basis that cross-examination would be allowed. Substantial delays to the listing and then hearing were caused by a series of events beyond the control of GEHC (chiefly the non-availability of RS's then counsel) and in the event preliminary issues were heard across 10 days across December 2018 and March and May 2019.

15. Further delay then followed until the Master handed down her judgment on 20 August 2020, concluding that the CFAs were unenforceable, and that RS had wrongfully terminated CFA2 and CFA3. She also made severe criticisms of RS's conduct, stating inter-alia that they had "*left GEHC's best interests in their rear-view mirror*".[6]

16. As noted above, on 16 December 2021 Trower J allowed an appeal against Master James' judgment in part, holding that the CFAs were not unenforceable, and that RS was entitled to treat the appointment of Bird & Bird and the refusal to fund further disbursements as a repudiatory breach and so had validly terminated the retainer. On 27 May 2022 the matter was remitted to the SCJ for further directions. Statements of case were exchanged between February and July 2023, which led to the crystallisation of Objection 1 (along

[3] Supp/10/60 – (1)(a)
[4] Supp/11/62-69
[5] Supp/11/64 – Paras 8 and 9.
[6] Supp/14/191 – Para 191

with a number of other objections), and RS's objection to it on abuse grounds, seeking striking out. The SCJ's determination of those matters in GEHC's favour was then appealed to Marcus Smith J, leading to the Judgment and the Dismissal Order.

17. Subsequently, Marcus Smith J heard an appeal on the merits of Objection 1. At the hearing of that appeal on 10 November 2025, counsel for RS made clear that its case is now put exclusively on the basis that RS had an immediate entitlement to payment of a quantum meruit for unjust enrichment. Any suggestion that it had a contractual right (the contemporaneously claimed basis for entitlement to retain the Gray Monies) has entirely fallen away.

C. RS should not have permission for a second appeal

I. Principles

18. As the Court will know well, pursuant to CPR r52.7(2), the Court of Appeal will not give permission for a second appeal unless:

> *"it considers that –*
> *(a) the appeal would –*
> *(i) have a real prospect of success; and*
> *(ii) raises an important point of principle or practice; or*
> *(b) there is some other compelling reason for the Court of Appeal to hear it"*

19. The meaning and purpose of these rules were explained by Dyson LJ, as he then was, in Uphill v BRB [2005] 1 WLR 2070:

    a. A first appeal will generally be the final decision, and a second appeal "*exceptional*". This reflects the need for "*certainty, reasonable expense and proportionality*" (at [17]).

    b. Rule 52.7(2)(a)(ii) concerns an important point of principle or practice "*which has not yet been established*". It does not encompass the correct application of a principle or practice which has already been established by a higher court, no matter how important that established principle or practice is (at [18]).

    c. Rule 52.7(2)(b) concerns an appeal which does not raise an important point of principle or practice. It therefore requires 'compelling' grounds, a very strong word

reflecting the exceptionality of second appeals (at [19]). In determining whether this test is met:

i. A reason is unlikely to compelling unless the prospects of success are very high (although this is unlikely to be sufficient in its own right) (at [24](1)[7]).

ii. A compelling reason might include a new authority post-dating the first appeal which showed the first appeal judgment was wrong (but not merely an existing authority which the appellant did not identify) (at [24(2)]).

iii. Another compelling reason would be a real possibility that there was some procedural irregularity rendering the first appeal unfair (at [24(3))]).

20. RS Skel/38(b) relies on the decision in JD (Congo) v Home Secretary [2012] 1 WLR 3273 as suggesting that a compelling reason may exist where the appellant has succeeded at first instance but lost on appeal. However, at [16]-[17], the Court of Appeal made clear that reversal by the first appeal court cannot itself constitute a "compelling reason" because that would "*effectively oust* [] *the second-iter appeal test altogether*".

21. Furthermore, the Court considered the Supreme Court's decision in R (Cart) v Upper Tribunal [2012] 1 AC 663 and explained at [19] that – while there is no threshold requirement that the consequences for the appellant be "*truly drastic*" – the Supreme Court had made clear that "*very adverse consequences for an applicant (or per Baroness Hale JSC, the "extremity of consequences for the individual") are capable, in combination with a strong argument that there has been an error of law, of amounting to "some other compelling reason"*". In other words, absent the decision concerning an important point of principle or practice, it is not enough that the first appeal court has made an arguable error of law, much less (arguably) misapplied the law. What is needed

[7] A point later reiterated by this court in Re B (Residence: 2nd Appeal) [2009] 2 FLR 632, [11], where it was said that to treat second appeals with 'strong' prospects of success as of themselves satisfying the test for a second appeal would mean '*... there would be no difference between first and second appeals, and the statute would be deprived of its meaning and effect ... The strength of the case does not, of itself, provide a compelling reason to hear an appeal.*' This point is moot, however, as (for reasons given below) here the prospects of success are anything but strong.

is a strongly arguable error combined with some very significant injustice to an individual (not, as in RS' case, a non-trading corporate entity).

II. Analysis

22. The complaint in the PTA Application is transparently that Marcus Smith J either (a) misapplied the extensively elucidated and well-known principles in relation to Henderson v Henderson abuse of process (discussed in Section C) in making his decision on the complex procedural story of this case; or (b) made errors in his fact finding: points which even if made out could not possibly satisfy the test for a second appeal. RS attempts to avoid this fact by three ingenious but ill-founded arguments.

23. First, RS GoA/4-7 and RS Skel/45-48 seek to frame the appeal as concerning the practice of the SCCO. But this appeal does not, and has never been, a (collateral) challenge to the SCCO's practice, or the case management decisions of Master James. Those decisions were made long ago, and no challenge as to the principle applied in making them was ever made (as RS themselves note at RS Skel/69)

24. This appeal concerns whether there was an abuse of process on the particular facts. That is a very different inquiry to an appeal against the case management practice of the SCCO. The fact that a judge considers that the case management process has in hindsight proved problematic, and explains a party's conduct for the purpose of the Henderson-abuse inquiry, does not convert the case into a challenge to or appeal against that case management process and allow indirect review of those decisions.

25. Second, RS GoA/10 and 12 and RS Skel/50-56 seek to recast the application of the Henderson-abuse principles on the facts as points of general principle or of legal right – i.e. whether a party is 'required' or 'entitled' to do or not do certain things in the context of a preliminary issue hearing. But Marcus Smith J's decision does not purport to lay down a rule of law as to the obligations of a party in the detailed assessment process. It is a broad merits-based assessment on the particular facts of this case, having regard to its unique procedural history, not the determination of a point of principle – and much less of an important point of principle.

26. Third, RS GoA/22 and 23 and RS Skel/79 attempt to equate the ordinary grounds for challenging a judge's fact finding on a first appeal (i.e. that it is 'plainly wrong' or misunderstood evidence) with a compelling reason. Even if such an appeal was very likely to succeed (and for the reasons set out below, it is not) it is nothing close to meeting

the additional requirement identified in Uphill (above) and JD (Congo). RS does not even suggest that there has been a procedural irregularity, or that Marcus Smith J acted unfairly towards it in the relevant sense (the example in Uphill at [24(3)] being that the judge did not allow the appellant to present their case). It has never been suggested that a challenge to judicial fact finding or treatment amounts to an allegation that the hearing was unfair, or that such allegations potentially merit a second appeal absent some other compelling circumstances.

27. Ultimately, if RS is to have permission, it would fundamentally undermine the high threshold needed for a second appeal. It has identified nothing which meets the tests in r52.7(2).

D. The Judgment was correct and the decision should not be disturbed

I. Henderson abuse: general principles

28. Although they are not set out or addressed in RS Skel or RS GOA, the Court will be familiar with the principles governing Henderson abuse, the modern statement being that in Johnson v Gore Wood [2002] 2 AC 1, 31:

> *"The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all…*
>
> *It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."*

29. The Court is therefore not focussing on applying a bright line rule, such as 'could the claim or defence have been raised earlier?' or 'was there an obligation on the party to seek to try all the issues at this stage?'. Instead it will take a holistic approach, considering the public and private interests, "*all the facts of the case*" and "*all the circumstances*". A finding of abuse in one case will therefore not set a precedent for a finding of abuse in

similar cases (much less permit general rules for litigants – beyond those set out in the CPR or other rules of court – to be extrapolated outwards).

30. The task contemplated by Lord Bingham in Johnson is not considered the exercise of a discretion because, unlike such an exercise, it usually has only one correct answer.[8] Nevertheless, because the 'broad, merits judgment' involves the balancing of a variety of factors in the particular circumstances of the case, an appeal court will only interfere with the decision if the lower court's judgment on grounds similar to those justifying a review of findings of fact – taking account of irrelevant factors, or reaching an unreasonable conclusion in the Wednesbury sense.[9] That is also a further reason why this issue is inherently unsuitable for a second appeal: the Court is being asked to engage in a close analysis of the decision of a judge conducting that same deferential analysis on the first instance decision in the SCCO. It is effectively equivalent to a second appeal on findings of fact (indeed, 'concurrent'[10] findings of fact in that here both lower courts rejected findings of abuse). It is not a type of appeal that the Court should encourage in any case, still less a case with the procedural history of this one.

II. Analysis – alleged errors raising important points of principle or practice

GoA/4-7 "Major procedural error"

31. The first ground advanced is at RS GoA/4-7 and RS Skel/45ff, arguing that Marcus Smith J adopted an incorrect statement of principle or practice in considering the approach of Master James in ordering the preliminary issues. It is said that that the Judge was in error in criticising the Master's decision to order preliminary issues without first directing pleadings.

32. The main issue in this context, as noted above, is how it treats the Judge's ruling. Not as what it in fact was (a broad holistic decision on whether - in all the circumstances –

[8] Aldi Stores v WSP [2008] 1 WLR 748 at [15]-[16].

[9] Aldi Stores (above) at [16].

[10] This is the language used by the Judicial Committee of the Privy Council when considering second appeals as of right where both lower courts have reached the same conclusion. 'Exceptional' or 'special' circumstances are required for the Judicial Committee to entertain the appeal: Sancus Financial v Holm [2022] 1 WLR 5181 at [2]-[8]. This reflects the same underlying principle as embodied in CPR r52.7(2)

GEHC was guilty not merely of any procedural error or misstep, but of abusing the court's process); but instead as setting down general procedural rules for the SCCO.

33. That is reflected in the fact that at RS Skel/47 it is said that "*A costs judge is perfectly entitled to adopt a less formalistic and potentially less burdensome procedure*". No one doubts that Master James made an order which she had authority to make and might in different circumstances have been an appropriate order to make. Nor can there be any doubt (and RS do not appear to suggest) that requiring issues to be pleaded out was also *an* available course (and ultimately a course taken by the SCJ when the matter was remitted to him). The fact that in hindsight taking the former of those approaches proved to be an error, such that GEHC was not guilty of abuse of process, does not mean that no such order can ever properly be made in the right circumstances. No one can reasonably treat the Judgment as discouraging, much less precluding, a cost judge from ordering trial of a preliminary issue that was properly crystalised in, e.g., correspondence.

34. The issue in the present case was that the issues were not sufficiently crystalised to adopt that course *so as later to hold GEHC culpable of abuse*. That was a finding that Marcus Smith J was perfectly entitled to reach and there is no good basis to disturb it.

GoA/8-10 "Shoehorning additional issues into the Preliminary Issue hearing"

35. The second ground advanced at RS GoA/8-10 argues that the judge was wrong to consider that GEHC was not at (relevant) fault for failing to seek further preliminary issues be added. This is said to be in error because (at RS Skel/55) "*it was incumbent on the parties to raise all matters which could sensible and efficiently be dealt with as preliminary issues*".

36. Again (in order to try to meet the second appeal criteria) this ground seeks to characterise a finding by the Judge that something did not amount to abuse in a particular case as a general finding that a party is "entitled" to do something, or conversely a determination there is never an obligation to do that thing. That is a false dichotomy. Plainly, not every breach of a procedural rule or failure to assist the court under CPR r1.3 amounts to an abuse of process. As the Court of Appeal stated in Orji v Nagra [2023] EWCA Civ 1289, [56]:

> *"A party seeking to obtain a finding that there has been an abuse of process faces a high hurdle. Abuse of process has been defined as the use of the court process 'for*

a purpose or in a way significantly different from its ordinary and proper use': Attorney General v Barker*.... It needs to be shown that the conduct of the party in question is so objectionable that they should forfeit their right to take part in a trial…"*

37. Other consequences, such as express or implied sanctions (as recognised by r.3.9) or costs consequences, might follow from a failure to comply with a rule, practice direction or order. Not all immediately entail a finding of abuse (far from it).

38. However, and in any event, there is no general rule of procedure that parties are obliged to push for additional preliminary issues or to attempt to formulate as many preliminary issues as possible. No procedural rule or case law is identified to that effect (other than, potentially, the decision of the SCJ at first instance below). Absent an order or direction clearly requiring the parties to formulate an exclusive list of all possible issues, it is not clear where such a rule would come from. If such a rule existed, how far would it extend? Would a party be required to appeal an unreasonable refusal of a judge to consider a preliminary issue? RS cannot create an important point of principle or practice by pointing to a complete absence of statutory obligation or case law, as that simply tends to demonstrate that the submission is legally ill-founded to begin with.

39. The Judge was perfectly entitled to conclude that GEHC was not guilty of abuse of process for failing to seek an order that all potential preliminary issues, including Objection 1, be tried at the same time. He made no finding as to the existence or not of a general rule to that effect, although such a rule lacks any clear foundation and RS have suggested none. Nor have they explained how GEHC is relevantly culpable for failing to follow a rule that has hitherto never been articulated and cannot be found in the case law, the White Book or any other procedural texts.

GoA/11-12 "Nothing in [GEHC's] conduct to criticise

40. The third ground advanced at RS GoA/11-12, that Master James' "intention" was that the court would deal with liability at the Preliminary Issues hearing (as to which, further submissions are made in Section D.III and E.I below), and it was therefore incumbent on the parties to raise all matters which could sensibly and efficiently be dealt with as preliminary issues. As is clear from RS Skel/60-61, this merely restates the alleged obligation in the second ground.

41. However, it again conflates the existence of a rule or obligation and the consequences of a failure to comply with it. Even if, as at RS Skel/59, Marcus Smith J was outside the

reasonable bounds of evaluative determination in finding that GEHC did not deserve criticism (which for reasons to follow he plainly was not),[11] it does not follow that there has been abuse of process. There are a great many occasions where parties are subject to judicial criticism without any suggestion there is an abuse of process, which as the Orji case shows, requires a "*high threshold*".

42. The Judge was perfectly entitled to find that GEHC could not, in the circumstances of the case, be criticised, or could not in particular be criticised for abuse.

Conclusion on important point of principle or practice

43. In GEHC's submission, none of the grounds identified is well founded, much less affording good reason to interfere with the Judge's evaluative decision based on the principles in Johnson, given the margin to be afforded to such decisions. That would be so even if this was a first appeal; but in given the greatly restricted criteria for a second appeal, such margin is here of even greater importance. It cannot be evaded by RS's attempts to turn fact sensitive findings of culpability into legal rules.

III. Analysis – Other compelling ground(s)

44. Finally, RS GoA/13-22 and RS Skel/62ff allege a series of "*erroneous findings of fact*" which are said to give rise to some other compelling ground to permit a second appeal. In reality, there appears to be only one alleged erroneous finding, as it is clear that all the other alleged errors flow from the first, and do not stand if there was no such first error.

45. That first error is said (at RS Skel/64) to be the Judge's 'finding' (although that is something of a strong characterisation) that the June 2016 Order of Master James directing preliminary issues was "*made without reference to or hearing from the parties*". For the reasons set out in paragraphs 49-53 below, while this may have been imprecise judicial language in describing what had occurred, it did not amount to a misunderstanding of any material fact – such a misunderstanding would, as RS itself says be "*surprising*[]" in light of what was found in the SCJ's judgment.

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[11] The logical conclusion of this submission is that notwithstanding the exercise laid down in Johnson and the deference referred to in Aldi Stores, this court should find on second appeal that the Judge was *required* as a matter of law to find that GEHC was "*deserving of criticism*" and no other option was reasonably open to him.

46. In light of the fact that there was no actual misunderstanding (for the reasons set out below), none of the alleged 'infection' of the Judgment set out in RS Skel/72-77 occurred. This ground of appeal is therefore without merit.

47. Moreover, contrary to RS Skel/79, even if what amounts to a challenge to lower court's fact-finding absent manifest bad faith or admitted error could ever have a "*high prospect of success*" (in contrast to the example of point of law where a new authority has emerged since the appealed judgment), Uphill makes clear that is not sufficient in itself to give rise to a compelling reason. The two additional factors suggested in RS Skel/79 do not provide the necessary factor even if these grounds were well founded:

    a. The fact that an appeal judge has upheld the conclusion first instance judge but for different reasons is simply not the same as a situation where different conclusions have been reached below. As made clear in DR (Congo), real prejudice to an individual litigant is generally required to justify such an appeal, something which is not present here.

    b. Reasonable but allegedly unfair criticism of another judge is very different from unreasonable or unfair criticism of a party or witness (although, even of itself this is not a basis for even a first appeal absent the possibility of the result of the decision being changed). Judges, rightly, expect to face and accept criticism of their judgments. It would be wrong for this Court to suggest judicial reputation was a particular reason for permitting additional allocation of appellate resources.

48. As a result, GEHC submits that there is no merit in these grounds, and no compelling reason to grant permission for a second appeal. They – and all of RS GoA – should be refused permission or, alternatively, dismissed.

E. The Dismissal Order should be upheld for additional or alternative reasons

I. Additional ground

49. Although the Judge's conclusion comfortably stands on the reasons he gave, an additional factor he did not rely on also shows that his conclusion on the absence of abuse is correct. It is therefore raised as an additional ground for affirmation by GEHC's RN (see section 6 at §1). This is the case management judgment of Master James on 30 March 2017. That judgment shows that the premise on which RS's application for a second appeal rests –

that there was an intended "liability" stage of the proceedings before the Master, in which all non-quantum issues should have been pleaded – is false.

50. Prior to that hearing before Master James, GEHC had amended it statement of case on the preliminary issues to raise further points concerning misconduct by RS. RS applied to strike those parts of the statement of case out, on the ground that they went beyond the scope of the preliminary issues defined by Master James. That application in large measure succeeded.

51. The Court will be invited to read the Master's short judgment, which explodes any suggestion that she had provided for (or that RS had anticipated) a distinct liability stage of the proceedings. On the contrary the judgment shows, at [7]-[8], that the Master was anticipating that issues of contractual enforceability would be determined after the preliminary issues; at [9] that the Master had deferred any issue of whether RS's charges should be disallowed wholesale on grounds of misconduct until after the preliminary issues; and at [12] that she had also deferred consideration of other issues of unenforceability and breach of contract. At [13], the Master specifically warned RS that, while she had partially acceded to their application to strike out, this did not mean the deleted issues "*... are dead and buried and may not come back under a different guise in points of dispute.*[12]"

52. This judgment is submitted to expose the factual fallacy in RS's case. What had in fact happened in these proceedings is that – based only on initial and inconclusive correspondence – the Master identified two preliminary issues at an extremely early stage, just 6 weeks after the Claim Form. As has been seen, these were the validity of the retainer (which in effect meant its compliance, as a CFA, with the statutory requirements of s. 58 of the Courts and Legal Services Act 1990 (**CLSA**)), and whether the retainer had been wrongly terminated by RS. Although the Judge may have been imprecise in saying those issues were identified by the Master of her own motion (ref#) when they were in fact canvassed at a short hearing (the point RS criticises (ref#)), they were identified only in an unreasoned subsequent order from the Master, without any

[12] I.e. the round of pleadings that would follow the preliminary issues, in the detailed assessment proper.

judgment or other explanation of her intentions (such that, in these circumstances, the Judge's imprecision was inconsequential). The key point is that the preliminary issues order did not even encompass any determination of the consequences of the Court's decision on the two issues it had nominated, which were left to be determined later.[13] Still less was there any indication, as RS now asserts, that they were intended to constitute a comprehensive disposal of all issues other than quantum – a proposition which, moreover, the judgment of 30 March 2017 – and RS's prior application to strike out part of the statement of case as going beyond the preliminary issues – shows to be false.

53. The reality is therefore straightforward. Master James identified two preliminary issues, albeit in the somewhat haphazard way that the Judge was entitled to criticise (and the SCJ would also criticise the Master's management of the preliminary issues (at [33])). Other liability issues were always envisaged. When the second of the preliminary issues was resolved in RS's favour, by the judgment of Trower J, the consequences of that issue fell to be worked out in the usual way. It was that which led to Objection 1, which did not arise until Trower J had determined that, far from RS terminating its retainer unlawfully as GEHC had contended, it was in fact terminated lawfully because of GEHC's own repudiation. It might of course be possible in these circumstances to say that, with the benefit of hindsight, both the Court and the parties might have gone about matters in a different way. But to say that they led ineluctably – such that the Judge's contrary decision cannot stand – to the conclusion that *GEHC* is to be singled out, not merely as having fallen short of an ideal standard, but as having abused the Court's process, is submitted to be untenable.

II. Alternative ground

54. Insofar as the Court considers that Marcus Smith J was wrong to reject a finding of abuse, as set out in GEHC's RN, the Dismissal Order should nevertheless be upheld.

55. In Orji v Nagra (above) at [58], the Court of Appeal considered the principles where an abuse was found:

[13] E.g. the Master would find that RS's retainer breached the CLSA (a finding reversed on appeal). But she did not determine the consequences of that: e.g. whether as a result RS would have to refund the advance payments of almost £1.5m they had received under their CFAs.

> *"Striking out a claim is a draconian remedy. Even in a case where abuse may be made out, it does not necessarily follow that the claim should be struck out:* Biguzzi v Rank Leisure PLC *[1999] 1 WLR 1926 and* Walsham Chalet Park Ltd v Tallington Lakes Ltd *[2014] EWCA Civ 1607. The remedy of striking out must be proportionate in all the circumstances. There are obviously numerous alternative remedies, so the striking out of a valid claim should always be the last option."*

56. In GEHC's submission, this analysis is particularly apposite in the circumstances of this case. Given the procedural complexities before Master James noted above, to the extent that GEHC was culpable for failing to bring forward Objection 1 earlier, the level of culpability is substantially lower than in the conventional case of Henderson-abuse (i.e. commencing a second claim on grounds not advanced in the first claim). Striking out Objection 1 would be a draconian remedy and contrary to the public interest in circumstances where:

    a. Significant court and party time has already been spent dealing with it on the merits;

    b. The merits of the Objection have been upheld by Gorden-Saker SCJ;

    c. The allegation in question is that a firm of English solicitors appropriated over £5.5 million from its client account not only without contractual entitlement (which is now admitted on all sides – see paragraph 17 above), but no immediate entitlement at all, such that it committed a significant breach of trust.

57. A much more proportionate remedy which would adequately balance the competing interests and the justice of the case would be to ensure that RS is compensated in costs in dealing with Objection 1 separately to the preliminary issues, which was the approach taken without objection by either party by Gordon-Saker SCJ two courts below.

F. Conclusion

58. For the reasons set out above, GEHC respectfully invites the Court to (a) refuse RS's application for permission for a second appeal; or (b) dismiss RS's second appeal.

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