



Neutral Citation Number: [2026] EWCA Civ 654

Case No: CA 2025 002112 & CA 2026 000127

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE BUSINESS & PROPERTY COURTS (ChD)
MR JUSTICE MARCUS SMITH
CH 2024 000224

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 May /2026

Before:

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
LORD JUSTICE STUART-SMITH

Between:

THE WINROS PARTNERSHIP
(Formerly known as Rosenblatt Solicitors)

Appellant

- and -

GLOBAL ENERGY HORIZONS CORPORATION

Respondent

Alan Gourgey KC and Jamie Holmes (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the Appellant
Benjamin Williams KC and Matthew Hoyle (instructed by **Eversheds Sutherland (International) LLP**) for the Respondent

Hearing dates: 6 & 7 May 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. These appeals are concerned with two decisions of Marcus Smith J. They both relate to a lengthy and ongoing dispute about the recovery of solicitors' fees under a series of conditional fee agreements ("CFAs"). The first is a "rolled up" permission to appeal hearing with the appeal to follow if permission is granted. In the second, permission to appeal has already been granted.

Background

2. In 2009, the Appellant, the Winros Partnership, formerly known as Rosenblatt Solicitors, ("Rosenblatt") was retained by the Respondent, Global Energy Horizons Corporation, ("Global Energy") in relation to long running proceedings against a Mr Robert Gray. Rosenblatt and Global Energy entered three successive CFAs in relation to Rosenblatt's fees in those proceedings, the last of which was dated 6 March 2013 ("CFA-3"). By a letter dated 24 February 2016, Rosenblatt terminated CFA-3 alleging repudiatory breach by Global Energy and claimed damages which were described as an immediate payment of base fees under CFA-3, payment of the Success Fee under CFA-3 if Global Energy were successful in the litigation against Mr Gray and damages in relation to lost fees (the "Termination Letter"). An action was commenced subsequently in the Chancery Division and is currently stayed.
3. These proceedings were commenced by Global Energy on 31 March 2016. They concern the detailed assessment of three bills rendered by Rosenblatt in the main proceedings, pursuant to section 70 Solicitors Act 1974. Global Energy disputes that it has any liability to pay the bills or alternatively, challenges their quantum.
4. Following a hearing, on 16 June 2016, Master James, sitting as a Costs Judge in the Senior Courts Costs Office, made an order directing the hearing of two preliminary issues with a time estimate of one day (the "2016 Order"). The issues were: the validity of the CFAs; and whether Rosenblatt was entitled to determine its retainer. The Master also directed an exchange of pleadings and the filing of witness statements in relation to the preliminary issues. Once the pleadings were exchanged, Global Energy applied to amend its Particulars of Claim to widen the scope of arguments relating to misconduct and Rosenblatt applied to strike out parts of the Particulars of Claim on the basis that they exceeded the preliminary issues defined by Master James. By an order of 30 March 2017, Rosenblatt's application was allowed, in part, and Global Energy's application was, for the most part, dismissed. Subsequently, Master James made an order permitting cross-examination at the hearing of the preliminary issues. That hearing took place over ten days in December 2018 and March and May 2019 and was followed by further written submissions from the parties in August and September 2019.
5. Master James handed down her judgment on 20 August 2020. She held that the CFAs were unenforceable and that Rosenblatt had wrongfully terminated CFA-2 and CFA-3. By an order dated 16 December 2021, Trower J allowed the appeal in relation to Master James' order, in part. He held, amongst other things, that the CFAs were not unenforceable and that Rosenblatt had been entitled to treat the appointment of Bird & Bird and the refusal to fund further disbursements as a repudiatory breach of its retainer.

6. On 27 May 2022, the matter was remitted to the Senior Costs Judge and the parties then filed points of dispute in relation to the bills. At that stage, Global Energy raised a further defence to liability, which has become known as “Objection 1”. It is that even if the termination of Rosenblatt’s retainer had been lawful (as Trower J had held on appeal), Global Energy was, nevertheless, not liable for the fees because termination had taken place before the conditions to entitlement to payment had arisen under the CFAs.
7. Rosenblatt applied to strike out Objection 1 on the basis that it was an abuse of process because it could and should have been raised before Master James and that it was contrary to the alternative case which had been advanced by Global Energy at that hearing. Senior Costs Judge Gordon-Saker dismissed the application and assessed Rosenblatt’s invoices levied in 2012, 2013 and 2016 at nil. In relation to the question of whether there was an abuse of process, he held, amongst other things, that:

“38. . . . it is the oddities of this case which weigh heavily in the broad, merits-based judgment which the court must make. Had the Claimant raised Objection 1 before the preliminary issues hearing, the Costs Judge may have expressed the view quoted at paragraph 17 above or she may have been persuaded by the Claimant’s argument or expressed no view. However, it would not have resulted in a different order. The order was based on the finding that the Defendant had repudiated the retainer. The result of the preliminary issues hearing would have been the same.

39. On an appeal from the order, Trower J’s conclusion that the client had repudiated the agreement would not necessarily have resulted in a decision as to the consequences of that conclusion. He may well have left it to the costs judge, as he left the Claimant’s argument that CFAs 2 and 3 are unenforceable on the grounds of illegality.

40. That itself is significant. Although the illegality issue has since been abandoned, as at the conclusion of the appeal before Trower J there was still an outstanding issue as to liability.

41. The Claimant can be fairly criticised for not raising Objection 1 earlier. However, there would still have been a preliminary issues hearing and there would still have been an appeal. It may be that some of the costs since the appeal would have been avoided, but any prejudice caused by that can be remedied in costs.

42. Raising the objection in the points of dispute simply followed Trower J’s conclusion on repudiation. I cannot conclude that raising it in that way at that time involved unjust harassment of the Defendant. In all the circumstances, I cannot say that it is an abuse of process.”

He, then, considered the merits of Objection 1. In doing so, he referred to clause 14.3 of CFA-3 which is set out at [44] below. He concluded:

“63. 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. In my experience there are similar provisions to clause 14.3 in most conditional fee agreements, almost certainly for this reason.

64. In the present case, at the point of termination, the solicitors had a choice. They could “stick” and elect for their basic fees and disbursements under clause 14.3 (but lose the success fee) or they could “twist” and claim damages for their loss of basic fees and success fees.

65. In my judgment the Defendant was not entitled to deliver the 2016 bill and the Claimant was not liable to pay it. Trower J has already found that there was no right to payment of the 2012 bill at the time that it was delivered.

66. The purpose of a Solicitors Act assessment is to determine the amount payable by the client in respect of the bill which is the subject of the order for assessment. If nothing is payable when the bill is delivered, the bill must be assessed at nil.”

It was these two aspects of the Senior Costs Judge’s order (abuse of process and the merits of Objection 1) which were appealed to Marcus Smith J.

8. By an order dated 1 August 2025, the judge dismissed Rosenblatt’s appeal in relation to the question of whether raising Objection 1 when it did, Global Energy had been guilty of an abuse of process. The neutral citation for his judgment in this regard is [2025] EWHC 2044 (Ch) (the “Abuse of Process Decision”). It had been intended that both the question of whether the raising of a further defence had been an abuse of process and if not, the underlying issue on the merits of Objection 1 should be heard together. In fact, the time estimate proved insufficient to hear both matters and the merits hearing was adjourned to a hearing in November and December 2025. As a result, there is a separate judgment in relation to the merits issue, the neutral citation for which is [2025] EWHC 3362 (Ch) (the “Merits Decision”). By an order dated 19 December 2025, the judge dismissed the merits aspect of the appeal.
9. By an order dated 23 October 2025, Zacaroli LJ adjourned Rosenblatt’s application to appeal the Abuse of Process Decision to a rolled up hearing with the appeal to follow if the application is successful, to be listed after the Merits Decision had been handed down. Lewison LJ granted Rosenblatt permission to appeal in relation to the Merits Decision in March 2026. As the appeal in relation to the Abuse of Process Decision was not rendered academic by the Merits Decision, we have heard the application for permission to appeal in the Abuse of Process Decision and the appeal de bene esse and the Merits Appeal.

The decisions below in more detail

(i) *The Abuse of Process Decision*

10. The judge noted that the parties accepted that the Senior Costs Judge's decision had been evaluative and, as a result, it was for him to determine whether no reasonable judge could have come to the conclusion he did or whether the decision was legally indefensible rather than to substitute his own decision. He also stated that but for Global Energy's Respondent's Notice, he would have allowed the appeal [21]. He had stated: at [16] that he could see "no clearer case of a *Henderson v Henderson* type abuse of process" and that looking only at the decision, that "to hold that there was no abuse of process [was] so wrong as to be perverse"; that Objection 1 could and should have been raised before Master James [18] and that it was "incomprehensible that Objection 1 should not have been heard along with any and all other "liability" issues" [19]; and had Objection 1 been dealt with at the earlier hearings, then the later stages of the proceedings would have been unnecessary [20].
11. The judge went on to reject the second point in the Respondent's Notice which was that Objection 1 should not be struck out because the Senior Costs Judge had applied an appropriate sanction in costs [22] and [23]. He allowed the appeal on the primary point in the Respondent's Notice, however. It was that the Senior Costs Judge's decision could be upheld on the grounds that Global Energy could not properly be criticised for raising Objection 1 as late as it did.
12. In coming to this conclusion, the judge examined the procedural history of the costs assessment in some detail. At [25 i) and ii)] he noted that from the start, Rosenblatt had contended that issues of liability should be resolved first and that this was the usual practice. At [25 iii)] he described the 2016 Order as having been made "without reference to or hearing from the parties" and concluded at [25iv)] that it was "a major procedural error on the part of the court acting of its own motion". He stated: at [25iv) (a)] that the court had disregarded Rosenblatt's suggestion "made in accordance with the court's usual practice" that all questions of liability should be dealt with first; instead directed that only two such issues should be heard [25iv)(b)]; that the court failed to require the parties to set out their contentions on liability in pleadings and then make appropriate case management directions but instead, gave case management directions "blind" [25iv)(c)]; and concluded that case management preceded pleadings with the result that the true issues between the parties were never identified until it was too late [25iv)(d)]. As a result, he concluded at [26] that the explanation for raising Objection 1 when it did was that Global Energy was following the direction of the court and it would have been improper to try to "shoehorn" additional issues into the preliminary issue hearing. As a result, there was nothing in Global Energy's conduct worthy of criticism and it would be unfair to prevent them from taking Objection 1 at the later stage.

(ii) *The Merits Decision*

13. The judge stated that the Senior Costs Judge had framed Objection 1 in the terms of a question in the following terms:

"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 fee had been achieved?”

He had answered that question in the negative and his conclusion was based, in part, upon clause 14.3 of CFA-3 [13] and [14].

14. Having made clear that it was agreed that CFA-3 was the only relevant agreement [20] and that it was common ground that CFA-3 was an entire contract [23], the judge noted that the parties were agreed as to its operation and set that out in the following way:

“25. . . .

i) CFA-3 defined “winning the claim” as the case where Global Energy’s claim was finally decided in its favour: (clause 1 (definitions)).

ii) If Global Energy “won”, it would be liable for Rosenblatt’s fees at the normal rates, together with disbursements and the “Success Fee”: (clause 5.1). The Success Fee was a percentage uplift (clause 1 (definitions)) set at 100% of Rosenblatt’s normal rate fees (clause 7.1)).

iii) If Global Energy “lost” (which comprised all cases where Rosenblatt did not “win”), then Rosenblatt would retain an “Advance Fee” of £300,000 and Global Energy would be liable for any outstanding disbursements: (clause 6).

26. It was common ground between the parties that there had been no “win” within the meaning of clause 5.”

15. Having considered the termination of a retainer other than through performance at common law, the judge went on to state that in this case, the retainer between solicitor and client may contain specific provisions as to termination and payment and that in the case of CFA-3 these were contained in clause 14. Those terms displaced the “default” position. However, in this case, it was common ground that:

“34. . . .

i) Rosenblatt could have ended CFA-3 in reliance upon clause 14.3.

ii) However, Rosenblatt did not avail itself of clause 14.3, so as to bring CFA-3 to an end and thereby cause an obligation on Global Energy to pay Rosenblatt’s fees up to that date and any disbursements to accrue.

iii) As a result, no obligations accrued against Global Energy.”

Instead, Rosenblatt accepted Global Energy’s repudiatory breach of CFA-3 and it was common ground that, in doing so, Rosenblatt had brought CFA-3 to an end and could no longer avail itself of clause 14.3 and that it had a claim in damages [37].

16. Rosenblatt argued that the Senior Costs Judge had erred in assessing their bill at nil because Rosenblatt was entitled to a restitutionary quantum meruit because of a failure of basis. At [40], the judge defined the issues he had to decide as “(i) was there a total failure of basis?; (ii) even assuming there was a total failure of basis, could the Senior Costs Judge properly make an assessment of the bill other than nil?”
17. Having set out passages from *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, [2022] 1 All ER (Comm) 1244 and *Barton v Morris* [2023] UKSC 3, [2023] AC 684 the judge noted that in both those cases the contracts were performed and were not discharged by breach. He added that:

“50. . . 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. In Photo Production Ltd v Securicor Transport Ltd, [1980] AC 827 at 849, Lord Diplock described the effects of an accepted repudiatory breach:

Where such an election is made (a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged...

Lord Diplock made clear that these secondary obligations consequent on breach could be “excluded or modified by the express words of the contract” (at 849).”

He went on as follows:

“51. 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. Of course, it is far harder for a contract to anticipate, and cater for, the circumstances arising in a case of breach; and that is why claims in unjust enrichment where the unjust factor is failure of basis are much more common in the case of discharged contracts. 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.”

He held, however, that in this case, there was “no room for a claim in unjust enrichment” [52]. He concluded that:

“53. CFA-3 made detailed provision in anticipation of problems arising prior to the Claim’s resolution in clause 14. In one sense, it was a complete code in that it anticipated a number of risk contingencies: (i) “buyer’s remorse”, where

Global Energy wanted to stop the proceedings; (ii) “rejection of settlement advice”, where there is an offer to settle, which (contrary to advice) Global Energy refuses; (iii) “client’s non-performance”, where Global Energy fails to perform its clause 13 responsibilities; and (iv) “seller’s remorse”, where Rosenblatt come to the view that Global Energy no longer has reasonable prospects of success.

54. In another sense, clause 14 is not a complete code, because of course the common law remedy of damages for repudiatory breach of contract remains, in addition to the clause 14 “code”. Had this common law remedy been excluded by the contract (it was not), then it is clear that a claim in unjust enrichment would not have been maintainable. Eliminating the common law remedy, would have obliged Rosenblatt (if they wanted to end the contract) to rely upon clause 14.3, which specifies precisely what Rosenblatt is to be paid in the event of Global Energy not meeting its responsibilities.

55. 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.”

Grounds of Appeal and Respondent’s Notices

Abuse of Process

18. In summary, the grounds of appeal in relation to the Abuse of Process Decision are that: (i) the judge erred in principle and practice and reached a conclusion contrary to the facts in determining that in making the 2016 Order Master James had made a “major procedural error” and should have obliged the parties to set out their contentions by way of pleadings and erred in fact in holding that the court had acted “of its own motion” and gave case management directions “blind”; (ii) he erred in principle in holding that it would have been improper for Global Energy to “shoehorn”, or attempt to shoehorn additional issues into the hearing before Master James; (iii) he erred in holding that there was nothing in Global Energy’s conduct to criticise because it was incumbent on the parties to raise all matters which could sensibly and efficiently be dealt with as preliminary issues, including alternative defences; and (iv) as a result of his errors in relation to the procedural history of the matter, there is a compelling reason why an appeal should be heard.
19. By a Respondent’s Notice dated 20 November 2025, Global Energy contends that the judge’s decision should be upheld on an additional ground or an alternative ground.

The additional ground is that Master James' judgment of 30 March 2017 reveals an absence of any intention to have a preliminary determination of all liability issues. The alternative ground is that even if the judge was wrong to hold that there was no abuse of process, he was right to affirm the Senior Costs Judge's refusal to strike out. A finding of abuse of process does not entail an automatic strike out; the proportionate response would be a costs sanction; and striking out Objection 1 would be a disproportionate response.

Merits

20. There were five grounds of appeal in relation to the Merits Decision. During the hearing, Mr Gourgey KC, who appeared with Mr Holmes on behalf of Rosenblatt, abandoned the third ground. I will, nevertheless, retain the original numbering. First, it is said that the judge was wrong as a matter of law to hold that there was no failure of basis. In particular, he was wrong to hold that there was no category difference between unjust enrichment claims where the contract is discharged and those where it is regularly performed. Secondly, it is said that the judge failed to identify and address the circumstances in which the termination of an entire contract (for services) will give rise to a failure of basis. In particular, it is said that the judge failed to cite, refer to or address Rosenblatt's case or the authorities on which it relied. As I have already mentioned, the third ground is no longer pursued. Fourthly, it is said that the judge was wrong in law to find that there is no room for a claim in unjust enrichment in the present case, because of the inclusion of clause 14 within CFA-3. In particular, it is said that he was wrong to rely upon: the fact that CFA-3 had already articulated what is to happen in the event of termination; that Rosenblatt's claim in unjust enrichment would be duplicative of clause 14.3; and that Rosenblatt's claim in unjust enrichment would upset the considered exercise in risk allocation expressly contained in CFA-3. Fifthly, and lastly, it is said that 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.

Permission to appeal in relation to Abuse of Process and if granted the merits of the Abuse of Process appeal

Permission to appeal in relation to Second appeals

21. CPR r52.7(2) provides that in a second appeal, such as this, the court will not grant permission to 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.”
22. The rule was considered in *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, [2005] 1 WLR 2070. Dyson LJ, as he then was, observed at [17] that a first appeal is generally considered to be final and that a second appeal is “exceptional”. This reflects the need for “certainty, reasonable expense and proportionality”. Furthermore,

he held that the reference to “an important point of principle or practice” in CPR r 52.7 is to an important point of principle or practice which has yet to be established. It does not include the correct application of a principle or practice which has already been established by a higher court [18]. He also made clear that CPR r 52.7(2)(b) concerns an appeal which does not raise an important point of principle or practice. It requires “compelling” grounds which reflects the exceptionality of second appeals [19]. In determining whether this test is met: (i) a reason is unlikely to be compelling unless the prospects of success are very high (although this is unlikely to be sufficient in its own right) [24(1)]; (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) [24(2)]; and (iii) another compelling reason would be a real possibility that there was some procedural irregularity rendering the first appeal unfair [24(3)].

23. In their written argument, Mr Gourgey and Mr Holmes also referred us to the Court of Appeal decision in *JD (Congo) v Home Secretary* [2012] 1 WLR 3273 at [16]–[17]. In that case, this court made clear that the reversal of a decision by the first appeal court cannot itself constitute a “compelling reason” because that would “effectively oust the second-tier appeal test altogether”. Furthermore, the Court of Appeal considered at [19] the Supreme Court’s decision in *R (Cart) v Upper Tribunal* [2012] 1 AC 663 and stated at [22] that whilst 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”.

Principles in relation to abuse of process

24. It is helpful to have the principles in relation to abuse of process in mind. The authoritative modern statement of the principle is set out in the speech of Lord Bingham of Cornhill in *Johnson v Gore Wood* [2002] 2 AC 1, 30H–31F:

“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. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. 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. . . While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse that to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances.”

25. Lord Millett, in a concurring speech said at 59A-E that the principle had the same purpose as cause of action and issue estoppel, which was to bring finality to litigation and avoid subjecting a defendant unnecessarily to oppression, but went on to emphasise an important difference:

“It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression.”

26. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536C, Lord Diplock described the abuse of process jurisdiction as:

“the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to the litigation before it, or would bring the administration of justice into disrepute amongst right-thinking people.”

27. The court is required, therefore, to come to a broad merits based judgment which takes account of private and public interests and all the facts of the case. When reviewing such a decision, the Court of Appeal will give considerable weight to the views of the judge. This point was made by Thomas LJ, as he then was, in *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748 in the following way at [16]:

“an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only

interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion which was impermissible or not open to him.”

28. The principles apply just as much in relation to interlocutory hearings as they do to final hearings. Popplewell LJ, with whom I agreed (Moynan LJ dissenting), made that clear in *Koza v Koza Isletmeleri* [2020] EWCA Civ 1018, [2021] 1 WLR 170. That was a case in which it was alleged that the application for an interlocutory injunction was an abuse of process because it was a collateral attack on the Court of Appeal’s previous decision in relation to a funding application and that, in any case, if the injunction application was to be brought at all, it could and should have been brought in the context of that prior application. At [42], Popplewell LJ held as follows:

“ . . . The *Henderson* and *Hunter* principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court’s duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in *Johnson v Gore Wood & Co* [2002] 2 AC 1 that it is not sufficient to establish that a point *could* have been taken on an earlier occasion, but a recognition that where it *should* have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive. The dictum in *Woodhouse v Consignia plc* [2002] 1 WLR 2558 that the principle should be applied less strictly in interlocutory cases is best understood as a recognition that because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is

there a different test to be applied to interlocutory hearings. In every case the principles are those identified in paras 30–40 above, the application of which will reflect that within a single set of proceedings, a party should generally bring forward in argument all points reasonably available to him at the first opportunity, and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions.

29. The application of *Henderson v Henderson* principles to interlocutory matters was also made clear by this court in *Orji v Nagra* [2023] EWCA Civ 1289. Coulson LJ, with whom Stuart-Smith and Nugee LJJ respectively agreed and concurred, explained at [41], that there were two issues on that appeal. The first, which is relevant here, was whether the rule in *Henderson v Henderson* is generally applicable to a case where there has been no prior determination of any substantive issue by the court. He went on to state, as follows:

“46. There can be no doubt, therefore, that both *Henderson v Henderson* and *Johnson v Gore-Wood* are primarily concerned with a party seeking to raise in subsequent proceedings an issue which had either already been decided in earlier proceedings, or which could and should have been raised in those earlier proceedings. However, it is not necessary for there to be two different sets of proceedings for the rule to apply. If a single set of proceedings involved a binding determination at an earlier stage, then the rule in *Henderson v Henderson* may apply to subsequent stages of the same litigation. Thus, in *Seele Austria GmbH v Tokio Marine Insurance Ltd* [2009] EWHC 2505 (TCC), the judge refused to allow the claimant to amend its pleadings to allege that the defective windows were a matter of design, in circumstances where, at an earlier stage of the litigation, Field J had concluded that the defects were a matter of workmanship, and the same point had been determined by the Court of Appeal. Accordingly, the claimant could not raise a contradictory case by way of a subsequent amendment.

47. It follows that the rule in *Henderson v Henderson* can apply, not only to one set of proceedings, but to earlier interlocutory decisions in those proceedings: see *Seele*, and *Koza Ltd v Koza Altin Isletmeri AS* [2020] EWCA Civ 1018, [2022] 1170 at [41] – [42] per Popplewell LJ. But it is crucial to remember that, whenever it arises, the rule in *Henderson v Henderson* requires a previous determination by the court. As Lord Hobhouse put it in *In Re Norris* [2001] UKHL 34 at paragraph 26: “It will be a rare case where the litigation of an issue which has not *previously been decided* between the same parties or their privies will amount to an abuse of process” (emphasis supplied). More recently, Nugee LJ reiterated in

Wilson and Another v McNamara and Others [2022] EWHC 243 (Ch) at [57], by reference to *Henderson v Henderson* itself, that “the principle does not arise if there has not been a previous adjudication” by the court.”

Discussion and conclusions in relation to abuse of process

30. Mr Gourgey accepted in oral argument that the 2016 Order does not state that **all** issues of liability were to be dealt with at the hearing in November 2016. He also accepted that it was open to the parties to raise preliminary issues in addition to those identified in the 2016 Order as long as they were heard at the hearing scheduled for the end of 2016. He says, however, that if one looks at the witness statements and the skeletons arguments which were before the Master, there was no disagreement between the parties. It was agreed that there should be a trial of preliminary issues. The only issues which had been identified, and which were being canvassed were those which the Master ordered to be determined. The only dispute was as to the correct forum. Rosenblatt favoured a stay of the detailed assessment proceedings and a transfer of the claim to the Chancery Division for determination of the dispute on liability whereas Global Energy was content for the matter to be heard where it was.
31. Mr Gourgey also took us to Global Energy’s Particulars of Claim. He referred, in particular, to paragraph 1 and to paragraphs 141 – 143. Paragraph 1 contains a summary of Global Energy’s alternative defence that if CFA-3 was enforceable, Rosenblatt’s termination of it was wrongful and that it was not entitled to recover any remuneration. At paragraphs 141 – 143, Global Energy pleaded that matter in more detail. It stated that CFA-3 was invalid and/or unenforceable, that as a result of Rosenblatt’s wrongful termination of CFA-3 it was not entitled to recover any remuneration, including on a quantum meruit basis and alternatively, that even if Global Energy was in repudiatory breach of CFA-3, Rosenblatt was only entitled to fees for the work done to the termination date and disbursements pursuant to clause 14.3.
32. Mr Gourgey accepted that the Particulars of Claim had been amended after Master James’ decision in 2017 and that, subsequently, it had been re-amended. He submitted, however, that Objection 1 was closely connected with what was being advanced and should have been dealt with at the hearing in November 2016. He stated, therefore, that even if the hearing in November 2016 was not described as a hearing of **all** the issues on liability, Objection 1 should have been raised and dealt with on that occasion.
33. Although I disagree with the judge’s reasons for dismissing the appeal from Senior Costs Judge Gordon-Saker, I do not consider that the substance of Rosenblatt’s proposed appeal has a real prospect of success. As Mr Gourgey accepted, Master James did not order that all preliminary issues as to liability be heard at the hearing before her in November 2016. That is clear both from the order itself and from the witness statements and skeleton arguments to which we were referred. It seems to me that it was neither agreed nor assumed by the parties or the court that the hearing before Master James was intended to encompass all liability issues.
34. Although, as Popplewell LJ pointed out in the *Koza* appeal, a party should generally bring forward in argument all points reasonably available to him at the first

opportunity, there is no hard and fast rule which must be applied and the question of whether there is an abuse of process is a broad merits based one. As a case progresses, pleadings are often amended and both claims and defences evolve. The Particulars of Claim were amended and re-amended in this case, the amendment taking place after Master James had dealt with Global Energy's application to widen the scope of arguments in relation to misconduct in 2017. The fact that the court contemplated that application and that Rosenblatt did not object on the basis that all issues in relation to liability had already been dealt with is indicative of the fact that it was not necessarily intended that all liability issues be dealt with at the hearing in November 2016.

35. Objection 1 arose naturally from the decision of Trower J on appeal. He decided that the termination of CFA-3 had been lawful. That led to a new defence. That issue had not been decided already and there was no hard and fast rule or requirement that it be raised and dealt with at an earlier stage. As Lord Millett explained in *Johnson v Gore Wood*, it is one thing to refuse to allow a party to relitigate a question which has already been decided. It is quite another to deny him the opportunity to litigate it for the first time. Furthermore, as Senior Costs Judge Gordon-Saker observed, it is not clear that court time and expense would have been saved had Objection 1 been formulated earlier and heard by Master James in 2016.
36. In the absence of either an agreement or a requirement that all liability issues be dealt with before Master James in 2016 and given the broad merits based decision with which we are concerned, I do not consider that there is a real prospect of success in arguing that there was an abuse of process in failing to raise Objection 1 at the hearing in late 2016.
37. It follows that in my judgment, the abuse of process appeal has no real prospect of success. As a result, CPR 52.7(2)(a) cannot be satisfied. Had it been necessary, I would also have decided that the grounds of appeal in relation to the Abuse of Process Decision do not raise important points of principle or practice. Although the judge concluded otherwise at [25iv)], there is no hard and fast rule that pleadings are necessary before directions can be given in relation to liability. Nor is there an important point of principle or practice in that regard. The position is well known. The same is true about the judge's statement that it would have been wrong of Global Energy to seek to "shoehorn" new matters into the preliminary issues on liability. It is equally well understood that the position is flexible and will depend on the circumstances. There is a general duty to assist the court. The way in which that arises and the way in which it is fulfilled will depend upon the circumstances of the case.
38. Even if one were to encapsulate the alleged important point of principle as whether *Henderson v Henderson* type abuse can arise at an interlocutory stage, that too would fail the test. That is clear from the Court of Appeal decisions in both the *Koza* and the *Orji* cases referred to above. It has already been decided that the *Henderson v Henderson* principle can apply to interlocutory matters.
39. Although Mr Gourgey did not press this point, I should add that I do not consider that there is a compelling reason why an appeal should be heard in this case. There is nothing which might approximate to a compelling reason and in any event, it is usually necessary that there be a very strong prima facie case before the court will

exercise its discretion to give permission for a second appeal on this ground. I have already explained that the substantive appeal has no real prospect of success.

40. It follows, therefore, that I would not grant permission to appeal in relation to the Abuse of Process Decision and even if permission were granted, I do not consider that the appeal would have been allowed.

Merits Decision

CFA-3

41. Before turning to the relevant authorities in relation to unjust enrichment, it is helpful to have an overview of CFA-3 in mind. Clause 4 is headed “FEES AND DISBURSEMENTS”. Clause 4.2 sets out the hourly rates by which Rosenblatt’s fees were to be calculated. Clause 4.3 provides for payment of an ‘Advance Fee’ of £300,000 upon entering CFA-3, which Rosenblatt was entitled to retain whether the Claim was successful or not. Clause 5 is headed “WHAT HAPPENS IF THE CLIENT WINS”. By sub-clause 5.1, if Global Energy won the Claim, Rosenblatt was entitled to “fees at the normal rates, together with disbursements and the Success Fee”. The “Success Fee” was defined in clause 1 as “[T]he percentage of Rosenblatt’s fees at the normal rates which are added to the Client’s bill if the Client wins the Claim.” The remaining sub-clauses of clause 5 deal with a variety of circumstances which are not directly relevant here. The Success Fee was addressed in more detail at clause 7. Clause 7 set the Success Fee at 100% of Rosenblatt’s fees, comprising: “(a) 95% of the fees at the normal rates to reflect the risk that Rosenblatt is taking that it will not receive the fees at the normal rates (the conditional fees) if the Client loses (the risk element of the success fee); and (b) 5% of the fees at the normal rates to reflect the postponement of payment of conditional fees until the end of the Claim (the postponement element of the success fee).”
42. Clause 6 addressed the circumstances in which Global Energy lost the action against Mr Gray. In those circumstances, Rosenblatt was entitled to retain the Advance Fee and Global Energy would remain liable for any outstanding disbursements. Further:

“ . . . The Client will not be liable for the Success Fee. Usually, the Client will also be liable for the costs and disbursements of the opponent. The client may be able to take out an insurance policy against this risk (see clause 10 below). In addition, the Client will be liable for any damages and interest awarded or agreed against the client if the Opponent succeeds in any counterclaim against the Client.”
43. It is unnecessary to set out clauses 8, 9, 10, 11 and 12. They relate to Counsel’s fees, VAT, Insurance, a right to apply for an assessment and a lien in favour of Rosenblatt, respectively. Clause 13 is headed “RESPONSIBILITIES”. At Clause 13.1 it is stated that Global Energy’s “responsibilities”:

“ . . . include giving Rosenblatt full, honest and timely instructions, not asking Rosenblatt to work in an improper or unreasonable way, cooperating fully with Rosenblatt in the

preparation of its claim, and paying all amounts due to Rosenblatt within 30 days of receipt of an invoice. “

At clause 13.2, Rosenblatt’s responsibilities are stated to:

“include always acting in the Client's best interests, subject to Rosenblatt's overriding duty to the court, explaining to the Client the risks and benefits of taking legal action, giving the Client the best information possible about the likely costs of the Claim and the different methods of funding those costs.”

44. Clause 14, which is central to this part of the appeal, was headed “TERMINATION”. It covered four situations. Clause 14.1 provided for Global Energy to end the agreement at any time. It was in the following form:

“The Client can end this agreement in writing at any time. If the Client does not continue with the Claim, the client must pay Rosenblatt's fees at the normal rates for the work done to the termination date and disbursements. If the Client continues with the Claim and wins, the Client will also have to pay the Success Fee for that work.”

Clause 14.2 allowed Rosenblatt to end the agreement in certain circumstances and provided for the consequences. It is as follows:

“Rosenblatt can end this agreement if the Client rejects Rosenblatt's advice to accept a reasonable offer from the Opponent to settle this Claim. In those circumstances, the Client must pay Rosenblatt's fees for the work done to the termination date and disbursements. If the Client continues with the Claim and wins, the Client will also have to pay the Success Fee for that work.”

Clause 14.3 provided that:

“Rosenblatt can end this agreement if the Client does not meet its responsibilities. If this happens, the Client will have to pay Rosenblatt’s fees for the work done to the termination date and disbursements.”

Clause 14.4 dealt with another circumstances in which Rosenblatt could end the agreement. It is in the following form:

“Rosenblatt can end this agreement if it believes the Client no longer has a reasonable prospect of success. If this happens, the Client will only have to pay Rosenblatt's fees and disbursements.”

As Trower J observed in his judgment on appeal from the decision of Master James, CFA-3 did not exclude the ability to terminate for repudiation and to claim damages.

45. Clause 17 of the agreement is an entire agreement clause which provides, amongst other things, that the agreement constitutes the “whole agreement between the parties . . .”. The remainder of the clauses of CFA-3 address severability (clause 15), governing law and jurisdiction (clause 16), warranty of authority (clause 18) and counterparts (clause 19).

The authorities

46. The main authorities in relation to unjust enrichment to which the judge referred and which formed the bedrock of Mr Gourgey’s submissions before us were the *Dargamo* case and *Barton v Morris*. The *Dargamo* case was concerned with the proper scope and application of the principle of unjust enrichment in circumstances of alleged total failure of basis. It raised the question as to when a claim in unjust enrichment can succeed in the context of the parties’ contractual allocation of risk under a valid and subsisting contract. The claim was for US\$82.5 million paid as part of a total consideration of US\$950 million payable under a share purchase agreement for the sale and purchase of shares. The sum was said to have been included in the total consideration on the understanding and in anticipation that the parties would enter into legally binding contracts obliging one set of parties to transfer further assets to the other parties. They were never transferred.
47. Carr LJ, as she then was, with whom Sir Timothy Lloyd and I agreed, decided that the judge had been right to reject the unjust enrichment claim in that case. There was no failure of basis amounting to an unjust factor and accordingly no trigger to an entitlement to recover part of the US\$950 million which had been paid. In the course of her judgment, Carr LJ considered the law of unjust enrichment at some length. She summarised the principles in the following way:

“[54] Despite its evolutionary nature, the common law claim in unjust enrichment can, for present purposes, be summarised as follows: a claimant has a right to restitution against a defendant who is unjustly enriched at the claimant’s expense. The purpose of the claim is to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions (see *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66, [2016] 2 All ER (Comm) 259, [2016] AC 176 (at [23]) and *Investment Trust Companies (in liq) v Revenue and Customs Comrs* [2017] UKSC 29, [2017] 3 All ER 113, [2018] AC 275 (‘ITC’) (at [42]) where Lord Reed went on to comment that it ‘reflects an Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted’).

[55] Courts and commentators have broken down the conceptual structure of a claim in unjust enrichment into four elements: (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? (See Goff & Jones at 1–09.)

...

[58] It is the ‘unjust factor’ that distinguishes the English claim in unjust enrichment from the civilian ‘absence of basis’ approach. Examples of unjust factors include mistake, duress, undue influence, failure of consideration, necessity and legal compulsion. These unjust factors are recognised because they establish that the claimant did not intend the defendant to receive a benefit in the circumstances, either because the claimant never had an intent to benefit the defendant in those circumstances or the intent was vitiated or qualified in some way.

[59] An unjust enrichment claim is not based on a wide ranging and open-ended assessment of fairness (or justice) in the round. Rather, it is a common law remedy requiring a claimant to make out an established category of ‘unjust factor’ in order to trigger the claim. As Lord Sumption put it in *Swynson* (at [22]), it is ‘not a matter of judicial discretion’, referring to the dictum of Lord Reed in *ITC* (at [39]):

‘[it] does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied ...’

48. Carr LJ went on to consider the relationship between liability in contract and in unjust enrichment at [65] – [76]. At [65] she noted that liability in contract and liability in unjust enrichment “play distinct but complementary roles in the private law of obligations.” She went on to state at [66] that:

“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 (see Goff & Jones *The Law of Restitution* (7th edn, 2007) at 1–063 to 1–067; *An Introduction to the Law of Restitution* at p 464 and *Chitty on Contracts* (30th edn, 2008) at 29–058). 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 repudiatory breach or frustration, the legal enforceability of the contract and the failure of basis are two sides of the same coin.”

49. At [70] she described the principle that an unjust factor will not override a valid and subsisting legal obligation of the claimant to confer the benefit on the defendant, as the ‘Obligation Rule’ and pointed to the fact that it had been reaffirmed by the Privy Council in *Fairfield Sentry Ltd (in liq) v Migani* [2014] UKPC 9, [2014] 1 CLC 611 (JCPC) at [18] and *DD Growth Premium 2X Fund (in official liq) v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36, [2018] 3 LRC 146, [2018] Bus LR 1595 (*DD Growth Premium*). She went on:

“. . . As stated in *DD Growth Premium* by Lord Sumption and Lord Briggs (at [62]):

“It is fundamental that a payment cannot amount to an enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right ... The proposition is supported by more than a century and a half of authority ...”

50. The Obligation Rule is not absolute, however, there are limited exceptions. As Carr LJ explained at [73]: “*The Law of Restitution* (at p 328) indicates that the exceptions could be rationalised as follows: (i) On the basis that there may be no undermining of the risks undertaken by the parties and so no inconsistency between contract and unjust enrichment; (ii) 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.”

51. Carr LJ also provided a pithy description of “failure of basis” at [79], in the following terms:

“[79] The core concept of ‘failure of basis’ is that a benefit has been conferred on a joint understanding that the recipient’s right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit (see *Goff & Jones* at 12–01). Whilst failure of basis ranks alongside the unjust factors of mistake, duress and undue influence as a factor negating consent, it differs in that it is concerned with qualification of consent, as opposed to impaired or vitiated consent (see Burrows *The Law of Restitution* (3rd edn, 2011)).”

52. *Barton v Morris* was a case of an oral agreement between Mr Barton and a company which owned a property. It was agreed that should the property be sold for £6.5m to a buyer whom Mr Barton had introduced, the company would pay him a fee of £1.2m. A buyer introduced by Mr Barton did offer £6.5m but, after an agreed price reduction, the price paid on completion was £6m. A majority of the Supreme Court justices (Lady Rose, Lord Briggs and Lord Stephens JJSC) held, amongst other things, that since the judge had found that on the express terms of the agreement the obligation was to pay the specified sum on the happening of the particular occurrence, there was no express term creating an obligation to pay a fee in any other circumstances and it was not possible to imply such a term.

53. Furthermore, for the purposes of unjust enrichment, the fact that the property had sold for less than £6.5 million did not mean that there had been a failure of basis which made the company’s enrichment unjust. On the facts found by the judge, there remained a subsisting contract which stipulated the circumstances which had to occur in order to impose a legal obligation on the company to pay Mr Barton. That excluded any obligation to pay in the absence of those circumstances. The outcome had been provided for by the agreement and any requirement for Mr Barton to be recompensed under the law of unjust enrichment would be at odds with the agreement.

54. Lady Rose considered the effect of the contract on the claim for unjust enrichment:

“88. Judge Pearce records at para 169 of his judgment that during closing submissions he raised with counsel the decision in *MacDonald Dickens & Macklin v Costello* [2012] QB 244 (“Costello”). He regarded that case as establishing a principle that the parties’ mutual obligations in a case in which they concluded a contract should be limited to the obligations which they have defined and allocated in the course of negotiating that contract, and that the court should uphold those contractual arrangements (see para 190). In *Costello*, the claimant builders contracted with a company owned by the defendants for the construction of buildings on land owned by the defendants. The defendants had informed the claimant that for tax reasons they were using their company, Oakwood, to enter into the contract rather than contracting themselves. Oakwood paid the claimant’s first few invoices in full but then stopped paying. The claimant brought a claim in unjust enrichment against the Costellos personally. Etherton LJ (with whom Patten and Pill LJ agreed) said that there could be no doubt that Mr and Mrs Costello had benefited from, or, in restitutionary terms, had been enriched by, the work carried out by the claimants on the site. He described the point of principle that arose in the following terms:

“21. The second point of principle is whether a restitutionary claim should be allowed to undermine the contract between Oakwood and the claimants, that is to say, the way in which the parties chose to allocate the risks involved in the transaction. The parties arranged the transaction as one in which legally enforceable promises were made only between Oakwood and the claimants, even though the benefit of the contract was to be conferred on Mr and Mrs Costello. The obligation to pay for the claimants’ services, and so the risk of non-payment, was contractually confined to Oakwood. If a claim was permitted directly against Mr and Mrs Costello it would shatter that contractual containment. It would also alter the usual consequences of Oakwood’s insolvency, which was one of the risks assumed by the claimants in contracting with Oakwood, since a direct claim against Mr and Mrs Costello would improve the claimants’ position over Oakwood’s other unsecured creditors.”

89. Etherton LJ held that the unjust enrichment against the Costellos must fail (para 23):

“The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties’

autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation. The following cases support its application to the present case.”

90. An earlier warning against relying on unjust enrichment in circumstances where there is a subsisting contract came from an impeccable source in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)*[1994] 1WLR 161. In that case, Pan Ocean, the time charterer of the vessel was seeking to recover an instalment of the time charter hire because the vessel had been off hire for the whole period in respect of which the relevant hire instalment was paid. The claim was brought not against the shipowner but against an assignee of the shipowner’s debt. Lord Goff of Chieveley (with whom Lord Lowry agreed) referred to the “usual practice” in the administration of time charters that where a vessel was off hire from time to time, an adjustment would be made to the next instalment of hire which fell due. Most time charters include express provision for the repayment of hire but if necessary a term would be implied into the contract to that effect. He said at p 164E—H:

“All this is important for present purposes, because it means that, as between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate . . .

“It follows that, in the present circumstances and indeed in most other similar circumstances, there is no basis for the charterer recovering overpaid hire from the shipowner in restitution on the ground of total failure of consideration.”

91. Lord Goff held that the position was no different as regards a claim against an assignee who was a stranger to that contract. He said later (p 166D) that he was well aware that writers on the law of restitution have been exploring the possibility that in exceptional circumstances a plaintiff may have a claim in restitution when he has conferred a benefit on the defendant in the course of performing an obligation to a third party. He went on:

“But, quite apart from the fact that the existence of a remedy in restitution in such circumstances must still be regarded as a matter of debate, it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract.”

92. The same principle was applied by the Court of Appeal in *Dargamo* cited earlier. There, the parties entered into a written agreement for the transfer of certain assets under a share purchase agreement for a consideration of US\$950m. The assets were transferred and the consideration paid but the claimants sought to recover a proportion of the purchase price on the basis that the parties' common understanding when they entered into the contract was that they would subsequently enter into an agreement to transfer other substantial assets, for which some of the US\$950m was intended to be an advance payment. That subsequent contract was never concluded and the additional assets were never transferred. The claim in unjust enrichment was dismissed. Despite the common understanding, there had been no failure of basis amounting to an unjust factor and so no trigger to an entitlement to a payment. The parties must be held to the express terms of the contract into which they chose to enter. They had both complied fully with those terms and the law of unjust enrichment did not provide a means of subverting that agreement.

93. In applying these principles in the present case, Judge Pearce observed that our legal system recognises the importance to be given to parties to exercise freedom of choice in contractual negotiations so that courts "will look with scepticism at any attempt to use a principle such as unjust enrichment to redefine their rights and obligations" (para 186)."

55. Lady Rose went on at [96] to address what was referred to as "silence":

"... When parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances; both any obligation to pay under the contract and any obligation to pay to avoid an enrichment they have received from the counterparty from being unjust. The "silence" of the contract as to what obligations arise on the happening of the particular event means that no obligations arise as Lord Hoffmann made clear in *Belize* cited earlier. This excludes not only an implied contractual term but a claim in unjust enrichment."

Lord Leggatt (who was not in the minority in this regard) articulated the matter in this way:

"191. Nevertheless, there is also another broader reason why the existence of a contract precludes a claim based on the law of unjust enrichment. This is that there already exists a system of law for determining what rights and remedies contracting parties have in relation to the subject matter of their contract. It

is called the law of contract. In relation to the subject matter of the contract, the law of contract determines, and governs the consequences of, not only the existence but also the absence of an obligation on one contracting party to confer a benefit on the other. To redistribute the allocation of benefits and losses provided for by the law of contract by applying another set of legal principles would undercut this regime.”

Discussion and Conclusions

56. Mr Gourgey submits that CFA-3 was an entire contract under which Rosenblatt was not entitled to payment for its services until it had completed its retainer and even then, only in the event that Global Energy succeeded in its claim. He says that if one takes into account the terms of the contract, its nature and its structure, the underlying and implied basis upon which the services were being supplied was that the provider, (Rosenblatt) would not be deprived of the opportunity of completing performance and earning its fees, including the Success Fee. He says that that is what occurred here. Rosenblatt was unable to go on to earn its Success Fee because of Global Energy’s wrongful repudiation of CFA-3. In such a situation, there has been a failure of basis which entitles Rosenblatt to claim remuneration on a quantum meruit basis. Rosenblatt has been unlawfully prevented from earning its fee.
57. He says that it is necessary to analyse the situation as if clause 14 did not form part of the contract. Would the basis arise if that were the case? He answers that question in the affirmative and goes on to submit that the analysis is no different if one puts clause 14 back into CFA-3. It, and clause 14.3, in particular, does not deal with repudiatory breach at all and does not exclude damages at common law. He says that the judge was wrong to conclude that clause 14.3 applied and that there was no room for unjust enrichment in the circumstances. Unjust enrichment does not impermissibly override the contractual regime in this case.
58. Furthermore, he says that the judge failed to make sufficient distinction between discharged and subsisting contracts. He says that there is a “category difference” in the two circumstances. In this case, the contract had been wrongfully terminated. The services were provided on the basis that Rosenblatt would not be unlawfully deprived of the opportunity to fulfil the entire contract. It was discharged and a claim for unjust enrichment arises more readily in such circumstances. It is for this reason that Mr Gourgey takes issue with the judge’s failure to mention the line of cases including *Planche v Colborn* (1831) 172 ER 876, *Lusty v Finsbury Securities* [1991] 58 BLR 66 and *Elek v Bar-Tur* [2013] 2 EGLR 159 and *Mann v Paterson* [2019] HCA 32 (High Court of Australia). Those were cases in which an entire contract (or in the case of *Mann*, a phase of a contract) was terminated by repudiatory breach and in all but the *Elek* case, a claim in quantum meruit was allowed.
59. The basis for the decision in the *Planche v Colburn* is not entirely clear. In any event, Mr Planche was engaged to write an article for a book series. Payment was conditional upon completion of the book. Before he had completed the article, the work in which it was to appear was cancelled. He recovered a sum in quantum meruit for his services.

60. In *Lusty v Finsbury Securities*, Mr Lusty was employed as an architect in relation to the building of an office block. Under the contract an interim fee of £10,000 plus VAT was payable on receipt of detailed planning permission and consent under the building regulations. The interim fee was paid. The defendant then decided to revise the scheme and Mr Lusty agreed to submit further drawings at a cost of £2,000. In fact, the scheme was never completed. In the Court of Appeal it was held that the extra work came within the scope of the original contract which had been brought to an end and that Mr Lusty was entitled to a sum in quantum meruit for his work. Sir David Croom-Johnson, with whom Balcombe LJ agreed, stated at p80 and 81 of the report that Mr Lusty had been deprived of the opportunity of earning his fee under the contract and was entitled to a quantum meruit of the value of the work.
61. In the *Elek* case, the parties entered into an agreement to collaborate in relation to investment in new student accommodation by way of a joint venture. The parties formed a limited liability partnership in which each had a one third interest, the profits of which were to be divided equally. The claimant was also to receive a priority payment. He agreed to work at his own risk in return for his one third share and priority payment if and when the joint venture was established. The joint venture was established but the claimant withdrew from the arrangements and subsequently made a claim for a quantum meruit payment for his work to date. Mr David Donaldson QC, sitting as a deputy High Court judge, noted at [12] that there was support for the proposition that following termination for repudiatory breach an innocent contractor is entitled in lieu of damages to recover quantum meruit for his part performance in a body of English case law, including the *Planche* and *Lusty* cases. He went on at [13] to say:
- “It is however important to observe the limits of the rule. It addresses solely a situation in which as a result of the wrongful termination or repudiation of the agreement the claimant has failed to complete his contractual performance and has in consequence not reached a point where counter-performance by the defendant has become due. It does not apply where the claimant has performed and has in consequence an entitlement under the contract to payment or a remedy in damages. In this I agree entirely with Cooke J in *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm).”
62. In *Mann & Anr v Paterson Construction Pty Ltd*, a case from the High Court of Australia, the appellants entered into a contract with the respondents for the construction of two townhouses. Under the contract the appellants were required to make stage payments in accordance with a progress payments table. There were also express provisions in relation to variation of the works. During the contract, the appellants orally requested forty-two variations which were carried out without either party giving notice under the agreement. The question was whether remuneration for work done under the contract before it was terminated by the respondent’s acceptance of the appellant’s repudiation was recoverable under the contract or as restitution for unjust enrichment. Nettle, Gordon and Edelman JJ considered restitution upon termination for breach at [164] – [171]. At [164] they distinguished between an “open” contract which is not discharged where, in general, there is no justification for imposing an obligation to pay reasonable remuneration and a “closed” contract, in

particular, where the contract has been terminated for repudiation. At [166], relying in part upon the *Planche* case, they stated that:

“As the law stands in Australia, as it does in England, New Zealand, Canada and the United States, upon termination for repudiation of an uncompleted contract containing an entire obligation (or, as will be seen, divisible stages) for work and labour done, the innocent party may sue either for damages for breach of contract or, at the innocent party’s option, for restitution in respect of the value of services rendered under the contract.”

63. As Mr Hoyle, who dealt with this aspect of the case on behalf of Global Energy, explained the authorities make clear that it is essential to be able first, to determine the basis upon which services are rendered before going on to decide whether that basis has failed. (See Carr LJ at [79] in *Dargamo*, for example.)
64. Further, as Mr Hoyle submitted, it is well known that termination of a contract for repudiatory breach is not a form of rescission, avoiding the contract ab initio. It is entirely prospective in effect and does not affect existing and accrued obligations: *Johnson v Agnew* [1980] AC 367, 396-7 per Lord Wilberforce and *Photo Productions v Securicor* [1980] AC 827, 849. As the judge noted at [36] of the Merits Decision, Cooke J described the consequences of an accepted repudiatory breach of contract succinctly in *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm) at [24] in the following way:

“The decisions of the House of Lords in *Johnson v. Agnew*, [1980] AC 3677, *Photo Products v. Securicor Transport*, [1980] AC 827 and *Lep Air Services Ltd v. Rolloswin Investments Ltd*, [1973] AC 331 establish the position where there is a repudiation of the contract which is accepted or which is effective to bring the contract to an end. In those circumstances the contract is not rescinded ab initio, but future obligations are discharged from the moment the contract comes to an end. All accrued rights remain in being and, so far as executory elements are concerned, the primary obligation is replaced by a secondary obligation to pay damages.”

65. As Cooke J stated, all accrued rights under the contract remain in being. Although a claim for unjust enrichment may be more likely to arise where the contract has been wrongfully repudiated, I agree with Mr Hoyle, that whether it does so is dependent upon the circumstances and the contract itself. It seems to me that no presumption arises to the effect that a remedy in unjust enrichment is available where a contract has been wrongfully repudiated and accordingly, there is no bright line “category difference” between the situation in which there is a subsisting contract and one in which the contract has been repudiated. The fact that such a claim may be more likely to arise where a repudiatory breach has taken place and has been held to have arisen in other cases where the parties had entered into contracts which, inevitably, differ from CFA-3, is of no assistance to us. Each case turns on its own facts both as to the circumstances which have arisen, the terms which were agreed and whether, as a result, an implied basis for the provision of services has arisen. It follows that like the

judge, we gain no real assistance from authorities such as *Planche, Lusty, Mann and Elek*.

66. It goes without saying that the first question which must be answered is what the basis upon which Rosenblatt performed its services was. It must be ascertained objectively. There is no dispute that that basis can be implied. As Mr Gourgey submitted it is necessary to consider the nature and structure of CFA-3 and its terms as a whole.
67. In this case, rather than a simple solicitor's retainer, we are concerned with a sophisticated and highly calibrated conditional fee agreement which allocates risk between the parties and addresses numerous situations. Clause 14.1 enabled the client, Global Energy, to be able to end the agreement at any time and sets out the consequences if it should do so. On the other hand, clauses 14.2 – 14.4 address three situations in which Rosenblatt was entitled to bring the agreement to an end. In each case the consequences are set out.
68. Clause 14.3 deals expressly with the circumstances which occurred. It set out what would happen if Rosenblatt was prevented from completing performance under CFA-3. It forms part of the express basis upon which the agreement was performed. It is common ground that it was open to Rosenblatt to invoke clause 14.3 at the time the Termination Letter was sent. Rosenblatt, however, chose not to do so.
69. In *Barton* at [89], Lady Rose cited the statement of Etherton LJ, as he then was, in *MacDonald Dickens v Costello* to the effect that the general rule should be to uphold the contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations. Such an approach is consistent with Lord Leggatt's approach and with the decision itself in *Barton*. In that case, the contract provided for payment in specific circumstances. Its silence as to the obligations on the happening of other events meant that no obligations arose save in the circumstances provided for. Lady Rose added that: "This excludes not only an implied contractual term but a claim in unjust enrichment." This is all the more so where there is a contractual term which governs the circumstances. Where the very circumstances are addressed in the contract, it seems to me that it is not possible to imply a different basis for the relationship between the parties. As Carr LJ put it in the *Dargamo* case:

"[133] . . . where the basis of the consideration is expressly and unconditionally spelt out on the face of a valid and subsisting contract, as here, there is no proper scope for inquiring into an alternative basis that is plainly contrary to the express basis freely agreed between the parties. . . ."

I cannot see that the position is different where the contract is at an end as a result of repudiatory breach.

70. To put the matter another way, it would not be reasonable on an objective basis to imply Mr Gourgey's basis in the face of the express terms of CFA-3 which governed the relationship between the parties at the time. The implied basis does not go without saying. In fact, the nature and structure of CFA-3 is inconsistent with it. It provided for a carefully calibrated allocation of risk, not unusual in a conditional fee agreement. Clause 5.1 provided for what was to happen if Global Energy won its claim against Mr Gray. Rosenblatt was to be entitled to its fees at the normal rate,

together with disbursements and the Success Fee. If Global Energy lost, however, clause 6 applied. Rosenblatt was entitled to retain the Advance Fee (£300,000 paid “up front”) and Global Energy was liable for any outstanding disbursements but the Success Fee was not due. Clause 7 explains that the Success Fee was set at 100% of Rosenblatt’s fees at the normal rate, 95% of which was to reflect “the risk that Rosenblatt is taking that it will not receive the fees at the normal rates . . . if the Client [Global Energy] loses . . .” It is clear, therefore, that Rosenblatt was taking the risk that it would not receive its fees if Global Energy did not win the litigation.

71. Clause 14 deals with four circumstances in which the agreement comes to an end. Clause 14.3 is concerned with precisely the circumstances which arose. It is inconsistent with Mr Gourgey’s implied basis. I agree with the judge, therefore, that a restitutionary claim would upset the considered exercise of risk allocation expressly contained in CFA-3 and be contrary to clause 14.3 which dealt precisely with the circumstances which arose. As the basis is not established, the question of whether it has failed never arises. The fact that Rosenblatt chose not to avail itself of the remedy available under clause 14.3 does not mean that there was a failure of basis, just that it chose not to exercise the option which clause 14.3 provides. In the circumstances, it is unnecessary to consider the appropriate forum for resolving a dispute on the basis of a claim in quantum meruit.
72. It follows that I would dismiss the Merits appeal.

Stuart-Smith LJ:

73. I agree. I would only add in relation to the Merits appeal that there may be circumstances where silence on a particular point leaves room that may be filled by a process of implication. That, however, is not this case. The basis of the contract included the provision in clause 14.3, which directly addressed the situation that would arise when Rosenblatt can end the agreement because its client does not meet its responsibilities. That situation arose here and clause 14.3 governs the parties’ obligations notwithstanding Rosenblatt’s strategic and tactical decision to terminate the contract by accepting their client’s repudiatory breach. There is no silence and no basis for an assertion that the basis of the contract has failed.

Lewison LJ:

74. I agree with both judgments.