Neutral Citation Number [2024] EWHC 441 (SCCO)
Case No: SC-2016-DAT-002725

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29th February 2024

Before :

SENIOR COSTS JUDGE GORDON-SAKER

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Between :

GLOBAL ENERGY HORIZONS CORPORATION	**Claimant**
- and -	
THE WINROS PARTNERSHIP (FORMERLY ROSENBLATT SOLICITORS)	**Defendant**

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Mr Benjamin Williams KC and **Mr Nico Leslie** (instructed by **Eversheds Sutherland (International LLP)**) for the **Claimant**
Mr Alan Gourgey KC and **Mr Dan Stacey** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Defendant**

Hearing dates: 24th to 26th January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29th February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SENIOR COSTS JUDGE GORDON-SAKER

Senior Costs Judge Gordon-Saker :

1. This judgment sets out my decisions on:

    1) The Defendant's application to strike out Objection 1 in the Claimant's points of dispute as an abuse of process.

    2) Objection 1: that the Defendant's bills, which are the subject matter of these proceedings, should be assessed at nil because the Defendant had no right to payment when they were delivered.

    3) Objection 3: whether the Defendant is entitled to payment for work done in the period between December 2012 and March 2013.

    4) Objections 6 and 7: whether the Claimant is liable under the second conditional fee agreement for work done during the currency of, but which was outside the scope of, the first conditional fee agreement.

    5) Whether the 5 per cent postponement success fees under the first and second conditional fee agreements are reasonable.

2. These issues are not preliminary issues as such. Over what was listed as an 8 day detailed assessment, it had been intended to cover the first 8 objections in the first 3 days, which would then leave 5 days for the line-by-line assessment. In the event the line-by-line assessment had to be adjourned until March. Of the other general objections: Objection 2 was disposed of by an agreement that the Defendant's bill dated 1st February 2013 should be the subject of detailed assessment at the adjourned hearing; Objection 4 (misconduct) was abandoned; and Objections 5 (interest) and 8 (the success fee under the third conditional fee agreement) were stood over to the adjourned hearing.

A brief history of these proceedings

3. The Defendant, a firm of solicitors then practising as Rosenblatt, acted for the Claimant in proceedings in the Chancery Division against one of its former associates, Mr Robert Gray, in respect of the alleged misappropriation of an opportunity to develop innovative technology ("the Gray action"). The Claimant was successful in the Gray action, but less successful than it had hoped. In December 2012, Vos J (as he then was) granted declarations that Mr Gray was in breach of fiduciary duty and liable to account to the Claimant. In July 2015, Asplin J (as she then was) ordered Mr Gray to pay £3.6m to the Claimant and ordered further enquiries as to the value of certain assets. However Arnold J (as he then was) valued those assets at nil and found that no further sums were payable by Mr Gray. On an appeal in these costs proceedings, Trower J commented that "the limited recoveries so far made, appear to have played no small part in the breakdown of the relationship between" the Claimant and the Defendant.[1]

4. The Defendant was retained under 3 conditional fee agreements:[2]

[1] [2021] EWHC 3410 (Ch) at para 15
[2] Work done before 30th September 2009, the operative date for CFA 1, was charged as fixed fees.

1) The first ("CFA 1") is dated 8th December 2009 and covered the drafting of a letter of claim, review of the letter of response, drafting of a reply and mediation. It is not now argued by the Claimant that CFA1 did not result in a "win".

2) The second CFA ("CFA 2") is dated 31st October 2010 and covered "the claim … against Robert Gray". Despite the standard definition of "win"[3], the parties treated the liability judgment of Vos J as a watershed for funding.

3) The third CFA ("CFA 3") is dated 6th March 2013. That covered "the claim", which was defined as "the client's claim against the opponent in relation to accounts and enquiries and other relief ordered by Mr Justice Vos on 17 January 2013".

5. Each of the agreements provided for an advance payment which would be retained by the Defendant whether or not the Claimant succeeded in the claim. Under CFA 1 it was CAN$315,000, under CFA 2 £1m, and under CFA 3 £300,000. Each of the agreements also provided for a success fee of 95% plus 5% for deferment of payment.

6. Relations between the Claimant and the Defendant deteriorated in early 2016 with an argument about whether the Defendant was entitled to retain sums paid by Mr Gray and the instructions by the Claimant to the Defendant to fund disbursements and to follow the instructions of another firm of solicitors appointed by the Claimant. Trower J concluded[4] that the Defendant was entitled to terminate CFA 3 by reason of the Claimant's repudiation, which it did by a letter dated 24th February 2016 ("the termination letter").[5]

7. In April 2016 the Claimant commenced these proceedings, seeking an order for the detailed assessment of 4 bills (the first of which was said to incorporate 4 earlier bills). These included a bill dated 21st December 2012 in the sum of over £3.2m ("the 2012 bill") and a bill dated 29th February 2016, shortly after the termination letter, in the sum of over £3m ("the 2016 bill"). In essence the 2012 bill was for work done under CFA 2 (including work done in the period covered by CFA 1) and the 2016 bill was for work done under CFA 3.

8. Following the standard procedure in the Costs Office, the claim was listed for a directions hearing on 16th June 2016, before which the parties filed their skeleton arguments. Recognising that the Claimant's case was that it was not liable to pay any fees, the Defendant sought a stay of these proceedings pending a transfer to the Chancery Division. The Claimant resisted that and sought a "trial of preliminary issues", identifying three: which bills the court could assess, "the enforceability of the CFAs" and the reasonableness of the success fees.[6] It is clear from the first witness statement of Mr David Flack, of the Claimant's solicitors,[7] that the issue on enforceability was whether the success fee exceeded 100 per cent, contrary to s.58 Courts and Legal Services Act 1990.

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[3] "You achieve a settlement or any other benefit arising out of the Claim, or if you do not achieve a settlement and you go on to issue proceedings, the Court orders in your favour and orders your opponent to pay you costs."
[4] [2021] EWHC 3410 (Ch) at para 116
[5] bundle I p.27
[6] Claimant's note 14.6.2016 para 15 [B/11]
[7] 1st April 2016 - Preliminary Issues hearing bundle [D/8, para 32]

9. According to the Claimant's solicitor who attended the hearing,[8] following submissions, Costs Judge James adjourned the hearing to enable her to consider the position and deliver a judgment. In the event, no judgment was given, but an order was sent to the parties (dated 16th June 2016 but sealed on 20th June 2016) directing the determination of 2 preliminary issues (with a time estimate of 1 day):

    1) Whether the CFAs entered into between the Claimant and Defendant were valid.

    2) Whether the Defendant was entitled to determine the retainer.

10. The order included directions for the service of pleadings and witness statements and provision for cross-examination.

11. The pleadings were extensive. The re-amended Particulars of Claim ran to 53 pages and pleaded the breach of s.58, various issues of misconduct, and that the Defendant's termination of CFAs 2 and 3 was wrongful.

12. Following a 10 day hearing and extensive oral evidence, Costs Judge James concluded[9] that the CFAs were unenforceable and that the Defendant had wrongfully terminated CFA 2 and CFA 3. The hearing also dealt with the issue of whether the 2012 bill was a final statute bill ("the scope issue"). The judge concluded that it was not.

13. On the Defendant's appeal, Trower J concluded[10] that CFA 2 and CFA 3 were enforceable and that the Defendant had terminated CFA 3 following the Claimant's repudiation. He decided that the 2012 bill was not a statute bill, but for different reasons from the Costs Judge. The matter was then remitted to me for detailed assessment.

14. No points of dispute or replies were filed before the hearing before Costs Judge James. Following the appeal, the parties agreed that there should be a detailed assessment "of all invoices" in the Gray action "as claimed in the claim form" in these proceedings[11] and agreed directions for the service of breakdowns, points of dispute and replies.

Objection 1

15. As pleaded in the points of dispute, the Claimant contends that the Defendant's bills should be assessed at nil because, when they were delivered, the Claimant was not liable to pay them and/or they were delivered after the termination of the retainer when the Defendant had asserted a claim for damages. (The Defendant has issued proceedings against the Claimant for damages in the Chancery Division.) As at the dates of the bills, the fees were contingent. Trower J had found that the 2012 bill was not a statute bill because, at the time it was rendered, the Defendant was not entitled to payment under CFA 2. Applying the principle that a non-statute bill becomes a statute bill only when a final bill is served,[12] and given that the Claimant was not liable to pay the 2016 bill, both bills must be assessed at nil.

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[8] 6th witness statement of Glenn Newberry 11.10.23 [C/48, para 20]
[9] [2020] EWHC B27 (Costs)
[10] [2021] EWHC 3410 (Ch)
[11] Order sealed 30th May 2022
[12] Chamberlain v Boodle & King [1983] 3 All ER 188

Objection 1 – abuse of process – the submissions

16. The Defendant contends that these points should have been taken, if at all, at the preliminary issues hearing, which was intended to cover the issues as to the Defendant's liability for the bills. Further, these are new points and contradict the Claimant's previously pleaded case.

17. The Re-Amended Particulars of Claim pleaded an alternative case[13] that, if CFA 3 was found to be enforceable and the Defendant was found not to have terminated it wrongfully, pursuant to clause 14.3 the Defendant would be entitled to its basic charges (subject to assessment), but not a success fee. That was rehearsed in the Claimant's skeleton argument for the preliminary issues hearing[14] and the Claimant's written closing submissions[15]. This was picked up by Costs Judge James in her judgment on the preliminary issues:[16]

> If the solicitor terminates the retainer without good cause he is not entitled to recover any remuneration either contractually or on a quantum meruit basis (Wild v Simpson [1919] 2 K.B. 544). Conversely, **where a retainer is terminated without breach** or frustration **or is repudiated by the client**, the solicitor is entitled to recover costs for work done up to the date of termination (Re Lane Joynt [1920] I.R. 228; Colgrave v Manley [1823] Turn. & R. 400) (emphasis added).

18. The Claimant's position is that, given the conclusion of Trower J as to the Claimant's repudiation, it is open to the Defendant to sue for damages as it has now done (as to which the Claimant will have defences and a counterclaim). There is therefore a real advantage to the Claimant if the Defendant's claim is for damages for breach of contract, rather than for its fees subject to assessment. The argument that the Defendant is entitled to damages rather than fees has developed only as a result of the decision of Trower J.

19. On behalf of the Claimant, Mr Williams KC argued that Objection 1 is a consequence of the way that the second preliminary issue was finally decided and that any delay in raising it was a consequence of the delays in listing the preliminary issues hearing, the handing down of the judgment and the appeal.

Objection 1 – abuse of process – the authorities

20. The rule in Henderson v Henderson[17] was restated by Lord Bingham in Johnson v Gore Wood:[18]

> 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

[13] para 146.4
[14] B/186 para 46
[15] B/321 para 211
[16] para 302
[17] (1843) 3 Hare 100
[18] [2002] 2 AC 1 at 31

> 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 proceeding 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.

21. The rule can apply not only to sequential proceedings but also to interlocutory decisions within one set of proceedings: Koza Ltd v Koza Altin Isletmeri AS:[19]

> … 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.
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> …
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> … 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

[19] [2021] 1 WLR 170 per Popplewell LJ at para 42

> greater indulgence; nor is there a different test to be applied to interlocutory hearings.
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> …
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> … 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.

22. Generally there must have been a previous determination by the court:

> 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: In Re Norris [2001] UKHL 34 at [26] per Lord Hobhouse.

23. Mr Williams relied on the caution expressed by Coulson LJ in Orji v Nagra[20]:

> 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'… 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…

24. An example of the Henderson rule being applied in relation to interlocutory decisions and where inconsistent cases were being advanced is the judgment of Moulder J in Discovery Land Co v Axis Specialty.[21] There the claimant sought summary judgment having accepted, at an earlier hearing, that proposed amendments to the defence gave rise to an arguable case. The claimant could have raised at the amendment hearing the construction point raised on the summary judgment hearing but had not then thought of it. Moulder J concluded that the summary judgment application undermined the finality of the decision on the amendment application and it was no answer that the construction point now raised would have to be dealt with at trial in any event.

Objection 1 – abuse of process – decision

25. Clearly Objection 1 could have been included in the preliminary issues decided by Costs Judge James. While the Claimant's primary case was that the CFAs were unenforceable and its secondary case was that CFA 3 was wrongfully terminated by the Defendant, it was able to plead an alternative to the secondary case: that, if CFA 3 is enforceable and is found not to have been terminated wrongfully by the Defendant, such termination was pursuant to clause 14.3 and the Defendant was entitled only to its

[20] [2023] EWCA Civ 1289 at para 56
[21] [2022] EWHC 585

basic charges and disbursements.[22] The Claimant could easily have added a further alternative, between these two positions, that if the termination was not pursuant to clause 14.3, the Defendant was not otherwise entitled to its fees for work done.

26. Clearly there was an intention that the court would deal with "liability" at the preliminary issues hearing, at which oral evidence might be given. While the court controlled the agenda of that hearing, it was incumbent on the parties to raise all matters which could sensibly and efficiently be dealt with as preliminary issues. That would include any alternative cases on liability.

27. Mr Williams submitted that both the Defendant and the court had policed the issues which could be raised. While the court did not permit amendment of the Particulars of Claim to include allegations of misconduct, Costs Judge James did allow some re-pleading of the Claimant's case in relation to the termination of the retainer.[23] It was open to either party to ask the court at any time to reframe the preliminary issues or add to them. There was a significant delay between the initial formulation of the issues (June 2016) and the preliminary issues hearing (December 2018), in the course of which the Claimant managed to revise its pleaded case twice. While Costs Judge James might properly have resisted a freewheeling hearing on the Claimant's allegations of misconduct, there is nothing to suggest that she would have resisted any widening of the issues in relation to legal arguments in respect of the consequences of termination of the retainer.

28. In my judgment therefore the Claimant should have pleaded what is now Objection 1 in the Particulars of Claim and, insofar as may have become necessary, sought appropriate directions from the court as to its determination at the preliminary issues hearing.

29. The Defendant contends that the Claimant cannot now raise Objection 1 as it is inconsistent with its earlier pleading and also with its opening skeleton argument and closing written submissions at the preliminary issues hearing. However, it seems to me that Objection 1 could have been pleaded without embarrassment as a further alternative to its pleaded case that CFAs 2 and 3 were wrongfully terminated by the Defendant and the alternative that the Defendant could have exercised its rights under clause 14.3, on the basis that (as is not now in issue) the Defendant did not do that.

30. The skeleton argument (at paragraph 78) set out the general proposition that where a retainer is terminated, the solicitor may recover costs for work done. However, that is not inconsistent with Objection 1 which argues that the general proposition does not apply where the solicitor's right to payment is conditional. The closing submissions reiterated (at paragraph 211) the alternative pleaded case that if, contrary to the Claimant's primary case, CFA 3 was terminated for good cause, the Defendant's remedy lay under clause 14.3. That is not inconsistent with Objection 1, given the common ground that the Defendant did not exercise its rights under clause 14.3.

31. An important factor to which I should have regard is the nature of solicitor and own client assessments, which fall into two stages. In the Part 8 proceedings, the issue is whether the court should make an order for assessment. In most cases, this is agreed. In

[22] Re-amended Particulars of Claim para 146.4 [B/172]
[23] Judgment 20.8.2020 paras 3-5 [F/2]

some cases there is an issue, usually as to the nature of the bills, which may require lengthier determination. In a few cases there will be a conflict, such as in relation to the nature of the bills or the client's liability to pay them, which can be decided only by oral evidence. In some of these cases the clients are seeking the assessment of bills which they say they are not liable for. While that may appear to be paradoxical, the practice[24] is to determine liability as a preliminary issue to the question of whether an order for assessment should be made. If an order is made, the second stage is the detailed assessment proceedings, which follow a similar path to proceedings between the parties following an order for costs, namely the production of a detailed bill, points of dispute and replies, and a request for a detailed assessment hearing.

32. In detailed assessment proceedings between the parties, if the paying party denies its liability for some or all of the costs claimed (for example, because of an apparent deficiency in the receiving party's retainer), the place that will be articulated formally is the points of dispute. There is no earlier point at which it can be raised, except in correspondence. It is not uncommon, in more substantial cases, to have a separate preliminary issues hearing in the detailed assessment proceedings prior to the line by line assessment to determine any issues such as liability for the costs claimed. However it is not usual, in solicitor and own client proceedings, to have a preliminary issues hearing on liability in the Part 8 stage and then another preliminary issues hearing on liability in the detailed assessment stage.

33. The present case broadly followed the path described in paragraph 31. However there were some oddities. The formulation of the preliminary issues after, rather than at, the first directions hearing deprived the parties' advocates of simultaneous input into the drafting. However, the overall delay (in itself unusual) did give the parties ample opportunity to get everything in order subsequently. Although the formulation of the preliminary issues was not widened, the hearing of those issues became wide-ranging, in large part because of the Costs Judge's decision to allow cross-examination on any issue, so as to avoid the witnesses having to attend again. While obviously well-intentioned, freewheeling cross-examination, where the issues between the parties have not yet been identified, is likely to be more expensive to untangle than the cost of transatlantic flights.

34. In the event, the order for detailed assessment was not made until May 2022, six years after the commencement of these proceedings, and Objection 1 was not pleaded until April 2023, seven years after the commencement of these proceedings. While Mr Williams rightly submitted that the overall delays were not the fault of the Claimant, it is equally right to say that the Claimant had ample opportunity to work out its case long before the seventh anniversary of the issue of the claim form.

35. It is unfortunate, although not entirely unforeseeable given the Claimant's skeleton argument, that the legal basis of the issue now raised was the subject of a statement of law by Costs Judge James in the preliminary issues judgment in the context of whether the termination of the retainer by the Defendant was wrongful.[25]

36. However, this passage of the judgment is not part of any decision or part of the ratio. It was simply an excursion into the judge's understanding of the consequences of

[24] Described in Civil Procedure 2023 at 67.2.1
[25] Quoted at paragraph 17 above

wrongful repudiation by the client, which, in the event, was not what she found. Nor was it considering whether the general principle stated did not apply where the client's liability is conditional on an event which had not then happened. While Trower J did find that there had been a wrongful repudiation by the client, the appeal before him did not require him to adjudicate on the consequences of that conclusion.

37. Thus Objection 1, while the subject of judicial comment, has not been the subject of a judicial decision.

38. It seems to me that 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.

Objection 1 – merits

43. As it happens, Objection 1 consists of a fairly neat point of law. Where the retainer is terminated following repudiation by the client (which we now know to be the case), is the solicitor entitled to payment of his fees for work done up to the date of termination if the retainer was a conditional fee agreement and no success had been achieved?

44. There is no issue that at the time that the 2016 bill was delivered there had been no success under CFA 3. Clause 5.1 provided that "If the Client wins the Claim, the Client will be liable for Rosenblatt's fees at the normal rates, together with disbursements and the Success Fee." "Wins the claim" was defined as the "claim is finally decided in the Client's favour, whether as a result of the court making an order for damages in the Client's favour or the Opponent agreeing to Damages". "Finally" was defined as including the determination of any appeal by the opponent. Mr Gray's appeal against the order of Asplin J was not dismissed until December 2020.

45. Nor is there any issue that the Defendant did not seek to exercise its contractual right of termination under clause 14.3 (which would have entitled it to basic charges and disbursements up to the termination date).[26] By not exercising its right under clause 14.3, subject to Objection 1, the Defendant would be entitled also to a success fee under CFA 3, following the subsequent win.

46. By the termination letter,[27] the Defendant maintained that it was "entitled to damages" as the result of the Claimant's repudiatory breach of CFA 3 and continued:

> Damages in this context are (a) immediate payment of our base fees incurred under the CFA; (b) payment of the Success Fee in the event that GEHC is successful (as defined by the CFA) and (c) damages in respect of lost fees.

47. That, it seems to me, is inconsistent with the exercise of its self-contained right under clause 14.3. The letter articulated a claim for liquidated damages in respect of (a).

48. The 2016 bill, which was raised the same day, claimed "base cost fees for the period 2 January 2013 to 24 February 2016". While it may well be that would be met by an argument that, as at the time of termination, the Defendant would be entitled only to damages for loss of a chance (success then not being certain), the 2016 invoice claimed a debt, being the cost of work done up to termination.

49. The contract of a solicitor who accepts a retainer in respect of litigation is, in the absence of agreement to the contrary, an entire contract to conduct the case until it is finished: Underwood, Son & Piper v Lewis.[28] In the course of giving judgment, A L Smith LJ observed:

> I should say that, when a solicitor is in a position to shew that the client has hindered and prevented him from continuing to act as a solicitor should act, then upon notice he may decline to act further; *and in such case the solicitor would be entitled to sue for the costs already incurred*.[29]

50. That was not the issue in Underwood, but it was the issue in the much later decision of the Court of Appeal in Richard Buxton v Mills-Owen.[30] The solicitors terminated the retainer for good reason and submitted a bill for work done to date. The client sought a detailed assessment. The costs judge held that the solicitors were not entitled to terminate the retainer and could recover only their disbursements. That was upheld on the first appeal. On the second appeal, it was held that the solicitors were entitled to terminate their retainer as a result of the client's instructions and that, even though they had not completed their entire contract, the solicitors were entitled to be paid their profit costs and disbursements for work done prior to termination.

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[26] "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."
[27] 24th February 2016 [I/27]
[28] [1894] 2 QB 306 (CA)
[29] at 314 (emphasis added)
[30] [2010] 1 WLR 1997

51. At paragraph 53 of his judgment, Dyson LJ (as he then was) said:

> It has long been established that, where a solicitor terminates an "entire contract" before completion and does so for good cause or on reasonable grounds, he is entitled to be paid for the work that he has done. In Vansandau v Browne (1832) 9 Bing 402, it was held that an attorney is not compelled to proceed to the end of a suit in order to be entitled to his costs, but may for reasonable cause and on reasonable notice abandon the conduct of the suit and recover his costs for the period during which he was employed.

52. Referring to Underwood, Dyson LJ said (at paragraph 54):

> They ordered a retrial. It was implicit in the decision to order a retrial that, if the solicitors were able to show that they had a reasonable ground for terminating the retainer, their claim for costs would in principle succeed.

53. He explained (at paragraph 55):

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

54. It is important to note that this arose in the context of Solicitors Act proceedings. There was no suggestion that the solicitors were not entitled to deliver a bill for the work done, as opposed to having only a claim in damages or a claim for a quantum meruit.

55. On behalf of the Claimant, Mr Williams does not challenge the principle, but submits that it does not apply where there is no accrued right to payment at the point of termination. Where the fees are contingent on success, and success has not been achieved at the time of termination, the principle identified in Buxton does not apply. As Dyson LJ made clear at paragraph 55 that principle is "subject to any relevant provision contained in the agreement between the parties".

56. In support of that, Mr Williams relied on the decision of HH Judge Behrens, sitting as a judge of the High Court, in Howes Percival LLP v Page.[31] The solicitors acted for the defendants in proceedings under the terms of a conditional fee agreement. The judge found that the defendants had wrongfully repudiated the agreement, which the solicitors accepted, before success had been achieved. The solicitors were not entitled to a quantum meruit but were entitled to damages for loss of a chance which the court assessed at 95 per cent of the fees incurred and success fee, to be assessed by a costs judge.

57. The decision of a deputy High Court Judge is binding on me. On behalf of the Defendant, Mr Gourgey KC submits that this decision is per incuriam because the court was not referred to Buxton or the cases cited in it.

58. On the face of it, it does seem odd that there was no reference to Buxton. However, it may be that the parties felt that the point simply did not arise. The claim was for damages or a quantum meruit, and, in the event, there would have been little difference in the outcome. There would also have been little difference between a quantum meruit and a bill subject to assessment (although the presumptions in CPR 46.9 would not apply to the former). It may also be that those representing the solicitors simply took the view, applying the caveat expressed by Dyson LJ, that the contingency prevented the solicitors from recovering their fees in full.

59. I cannot therefore conclude that the decision in Howes Percival was per incuriam. However, it does not decide the point which I have to decide, namely whether the conditionality of the Claimant's liability takes this case out of the principle articulated in Buxton.

60. In concluding that the solicitors were entitled to damages and not a quantum meruit, Judge Behrens referred to the judgment of Cooke J in Taylor v Motability Finance:[32]

> 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 Limited v Rolloswin Investments Limited [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 end. All accrued rights remain in being and, so far as executory elements are concerned, the primary obligation to perform is replaced by a secondary obligation to pay damages.

61. Judge Behrens decided that the cases on quantum meruit cited by the solicitors were:

> distinguishable because none of them involved a conditional right to payment. Suppose for example it had become clear that [the clients] were going to lose. In that event [the solicitors] would be entitled to no fee. Can it really be right that if [the

[31] [2013] EWHC 4104 (Ch)
[32] [2004] EWHC 2619 (Comm) at para 24

> clients] had repudiated the contract in that situation that [the solicitors] would be entitled to a quantum meruit?
>
> In my view where there is only a conditional right to payment the cases cited by [counsel for the clients] do not compel me to hold that there is a right to a quantum meruit. In those circumstances I prefer the more principled approach of Cooke J in the paragraphs cited above. A similar situation arises in the case of an estate agent where the conditions necessary for the payment of commission are not met. He cannot claim payment under a quantum meruit.

62. It seems to me that the exception to the entire contract principle, as applied in Buxton, is just that. The solicitors in Buxton would have been entitled to their fees whatever the outcome. They were prevented from completing the contract and recovering those fees by the repudiatory breach of their clients. Their right to deliver a bill for work done, rather than have to sue for damages is clear.

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.[33]

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.

Objection 3: whether the Defendant is entitled to payment for work done in the period between December 2012 and March 2013.

67. As articulated in the points of dispute, the challenge was to the apparent assertion that there was a conventional retainer between the conclusion of CFA 2 and the inception of CFA 3. In its replies the Defendant contends either that there was an express or implied term in CFA 3 that it was to be retrospective or that there was an implied retainer.

[33] [2021] EWHC 3410 (Ch) at paras 171 to 183

68. That developed into a submission that the work was done under CFA 2, even though the parties considered it to have ended and the Defendant relies on the conclusions of Trower J:[34]

> They also submitted that it is clear that CFA2 was not terminated, anyway in respect of the consequences of past performance, and continued to apply to the costs assessment proceedings against Mr Gray for the December Bill. Mr Gourgey said that, even if the Solicitors gave advice to GEHC that a new CFA was required (in the form of CFA3), that did not mean to say that CFA2 came to an end. He pointed out that GEHC continued to pay costs and fees to the defendant under CFA2 in respect of the assessment of costs that Mr Gray had been ordered to pay thereby confirming that CFA2 continued in force.
>
> I think that the Solicitors are correct on this point. The arguments made in paragraph 5 of the respondent's notice all proceed on the erroneous basis that CFA2 had come to an end at or about the time that CFA3 was entered into. In my judgment the Master made no finding to that effect and for the reasons explained by Mr Gourgey she would have been wrong to do so if she had. The mere fact that CFA3 may have been entered into in the erroneous belief by GEHC that a win had been achieved on CFA2 and that it thereby "came to an end" in the sense that there were no further acts of performance required from the Solicitors under it, does not mean to say that they were not entitled to be paid under it for the costs that had thereby been incurred.

69. Given that CFA 2 had not concluded at the time that CFA 3 was entered into, the Defendant would be entitled to charge for its work under CFA 2 until it was superseded. Mr Williams submitted that the client care letter dated 5th February 2013[35] was clearly a formal letter which superseded CFA 2. However, although referring to itself as "a "refreshed" client care letter" it was written in anticipation of "entering into a CFA to cover this next stage". It is of course common for solicitors to send retainer letters in advance of, or with, the counterpart conditional fee agreement for the client to sign. The letter does not itself create a retainer where the intention is to enter into a conditional fee agreement. Similarly, in the absence of express provision, it would not terminate an existing conditional fee agreement.

70. If my conclusion (and that of Trower J) that the Defendant could charge under CFA 2 over this period is wrong, then it seems to me that the arguments raised by the Defendant in the alternative would fail. It is not in issue that there was no express provision in CFA 3 that made it retrospective. It would not be possible to imply a term that CFA 3 was retrospective, because that would not be necessary to give business

[34] [2021] EWHC 3410 (Ch) at paras 120 and 121
[35] Preliminary Issues bundle J234

efficacy to the agreement.[36] Nor is such a term implied by law in agreements of this kind.

71. It would be difficult to find an implied conventional retainer where the clear intention was to enter into a conditional fee agreement.[37]

72. In the event, because of my conclusion on Objection 1, the 2012 and 2016 bills which, between them, cover this period will be assessed at nil.

Objections 6 and 7: whether the Claimant is liable under the second conditional fee agreement for work done during the currency of, but which was outside the scope of, the first conditional fee agreement.

73. The scope of the work covered by CFA 1 was limited to:

> 1. Preparation of Letter of Claim to include:
>
> (a) Drafting/review and finalisation of Letter of Claim.
>
> (b) Review of Letter of Response from Defendant including meetings, necessary attendances on Counsel and client.
>
> (c) Drafting/review and finalisation of the Letter of Response.
>
> 2. Mediation process to include:
>
> (a) Discussions regarding mediation/mediators;
>
> (b) Preparation for mediation.
>
> (c) Attendance at Mediation.
>
> 3. Settlement Agreement should either 1 or 2 above result in terms of settlement being agreed.
>
> **What is not covered by this agreement**
>
> - Any work in preparing draft proceedings or issuing a claim.
>
> - Any further work post the end of exchange of correspondence and mediation process.

74. The Defendant's case is that the cost of work done before the inception of CFA 2 but which did not fall within the scope of CFA 1 is recoverable under CFA2. It is not in issue that CFA 2 is expressly retrospective.[38] The Claimant's argument is that it was unreasonable for the Defendant, having done work outside the scope of CFA 1 for

[36] Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742
[37] Radford v Frade [2018] EWCA Civ 119
[38] Although CFA 2 provides that "if you win your claim, you pay our basic charges from 30 September 2009", "Basic charges" are defined as "for work done from now". 30th September 2009 was the retrospective start of CFA 1, which was dated 8th December 2009. CFA 2 was dated 31st October 2010.

which the Claimant was not liable to pay, to seek to impose a liability on the Claimant after the event.

75. The example given by Mr Williams of work done before the date of CFA 2 which did not fall within the scope of CFA 1 is the drafting of Particulars of Claim. However it is not clear, and will not be decided here, whether that did fall outside the scope of CFA 1, because, as not uncommonly happens, the draft Particulars were sent with the Letter of Claim and might be said to be part of that and so within scope. That is a matter for the line-by-line assessment.

76. Mr Gourgey took me through the correspondence[39] between the Claimant and the Defendant from the date of the Letter of Response, denying liability, to the inception of CFA 2, from which it is clear that different funding models in relation to the anticipated claim were being considered. However, there is nothing to suggest that there was any discussion about how work then being done which may fall outside the scope of CFA 1 would be charged for.

77. In his first witness statement on behalf of the Claimant[40], Mr Monych stated that he did not recall Ms MacLeod of the Defendant telling him that the retrospective nature of CFA 2 was unusual or that it would cover the same time period as CFA 1 so that a "win" would trigger a success fee under CFA 2.

78. In her first witness statement,[41] Ms MacLeod stated that she had explained the retrospective nature of CFA 2 fully to the Claimant's representatives. She did not think it either unusual or unreasonable for CFA 2 to apply to the same time period as CFA 1 and considered that CFA 2 had "replaced" CFA 1. At paragraph 20 she said:

> We had however incurred a considerable amount of unpaid time preparing GEHC's claim, including working with Counsel to prepare the draft particulars as well as taking a detailed proof from Brian neither of which were covered by CFA1. As of 21 October 2010, when CFA2 was entered into, we already had over c£200k of outstanding WIP on the clock (see page 36 of TM1).

79. Where a solicitor and client have expressly agreed a limited retainer, it is difficult to imply a retainer to do other work or a general retainer. Where they have agreed that the client will be liable only to pay for work done in the event of a "win", it is difficult to imply a retainer that the client will pay for work falling outside that arrangement whatever the outcome. In other words, where a conditional fee agreement has been entered into, it is difficult to imply any other retainer.

80. Where, because of that, a client is not liable for work falling outside the conditional fee agreement, it may be unreasonable, as between the client and the opponent, for the client to assume retrospective liability.[42]

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[39] Preliminary Issues bundle J71 to J118
[40] 27th July 2016
[41] 7th September 2016
[42] For example, where work is done under a conventional retainer and the client then enters into a retrospective conditional fee agreement, the success fee may not be recoverable on work done before the agreement: J N Dairies Ltd v Johal Dairies Ltd [2011] EWHC 90211 (Costs)

81. Retrospective conditional fee agreements are not uncommon and they were known before additional liabilities became irrecoverable. Where work is done before a retrospective conditional fee agreement is entered into it is likely that the reasonable cost of that work will be recoverable from the opponent in the event of success. In my experience, it is, however, unlikely that the success fee in respect of that work will be recoverable.

82. In the present case, it seems to me that the parties clearly anticipated that the Defendant would continue working on the claim after the Letter of Response had been received pending a new funding arrangement being agreed. While one could not imply a conventional retainer, a retrospective conditional fee agreement covering work done in the interval between CFA 1 and CFA 2 would not be unusual and the cost of that work would not be less likely to be recoverable from the opponent.

83. CPR 46.9 provides some presumptions as to the reasonableness of costs between solicitor and client:

> (3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –
>
> (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
>
> (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
>
> (c) to have been unreasonably incurred if –
>
> (i) they are of an unusual nature or amount; and
>
> (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.
>
> (4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.

84. ""Approval" in CPR 46.9(3)(a) and (b) means informed approval in the sense that the approval was given following a full and fair explanation to the client": per Etherton MR in Herbert v HH Law Ltd.[43]

85. I cannot conclude that there was no informed approval by the Claimant of the retrospectivity of CFA 2, which was reviewed by their Canadian Counsel,[44] and the retrospectivity could only relate to work done in the period covered by CFA 1.

86. It seems to me that, in all the circumstances, as between the Claimant and the Defendant, it was reasonable to regularise the Claimant's liability for the cost of any

[43] [2019] EWCA Civ 527 at para 37
[44] 1st statement of Ms MacLeod para 19

work which fell outside CFA 1. These costs would in principle be recoverable from the opponent and (subject to reasonableness) the Claimant would be liable for them only if the opponent were liable for them in principle.

87. However, the success fee in respect of those costs would probably not have been recoverable from the opponent. Absent an explanation that they were unusual[45] and, as a result, might not be recovered from the opponent, r.49.6(3)(c) would apply and they would be presumed to be unreasonable. There is nothing to rebut that presumption.

88. Accordingly the Claimant should be liable under CFA 2 for the basic charges for work done before the inception of the agreement, even if it fell outside the scope of CFA 1, but should not be liable for success fees under CFA 2 in respect of that work. In the event, as I understand it, the Defendant has already conceded success fees up to 13th December 2010 because they were not recovered in the Gray action by reason of the Defendant's failure to give notice of funding.

Whether the 5 per cent postponement success fees under the first and second conditional fee agreements are reasonable.

89. The Claimant's argument is that, given the advance fees of CAN $350,000 under CFA 1 and £1m under CFA 2, the requirement for success fees of 5 per cent of the basic charges in respect of "the postponement of payment of our fees" is unreasonable and the fees should be disallowed.

90. Under the terms of CFA 1 the Defendant agreed to fund all disbursements, although these would be limited by the scope of the work covered by the agreement. Under the terms of CFA 2 the Defendant agreed to fund disbursements, including counsel's fees (but not counsel's brief and refresher fees for trial, which the Claimant would pay).

91. There is nothing to suggest that the Claimant was given a full and fair explanation such as to engage the presumptions in r.46.9(3)(a) and (b).

92. It seems to me that the presumption in r.46.9(3)(c) does not apply in cases where there would be no expectation of the recovery of these costs between the parties.[46] There would be no prospect of recovering the deferment element of the success fee in the Gray action.

93. I am not able to carry out the sort of calculation suggested by Dr Friston for ascertaining a reasonable deferment percentage.[47] Nor has either party attempted it. All I can do is to consider the matter in the round, untrammelled by presumptions, but exercising any doubt that I have in favour of the Defendant.

94. In respect of CFA 1, while the scope of the work covered by the agreement was limited and the disbursements would be limited, if, as happened, the claim did not settle and success was achieved only following trial, the deferment could be a substantial period. A 5% fee for deferment is, in my experience, very common and might be said to be the norm. While a fixed advance fee is unusual, insofar as it is payable whatever the outcome there is some similarity with a discounted conditional fee agreement. However

[45] because retrospective success fees are unusual even though retrospective conditional fee agreements are not
[46] Farrer & Co LLP v Yertayeva [2021] EWHC B16 (Costs) at para 107
[47] Friston on Costs (5th ed) Table 54.01

I cannot avoid the conclusion that because it was payable in advance and was a substantial sum,[48] as against the scope of work covered by the agreement, in effect the Claimant was being asked to pay twice for the same thing. It seems to me that is something which should have been explained clearly to the Claimant, and, absent such explanation, the deferment element is unreasonable and should be disallowed.

95. In respect of CFA 2, although the scope of work was wider and the disbursements likely to be greater (albeit without counsel's fees for trial), the advance payment was much more substantial. Again, I have to reach the same conclusion. The client was asked to pay a substantial sum in advance and also to pay a sum which is, in effect, interest on delayed payment. The question of whether the Defendant's reasonable fees will exceed the advance payment has yet to be decided. However, as at 2010, a client asked to pay £1m up front for this size of case could reasonably challenge why it is also being asked to pay a deferment element. In the absence of clear explanation, the deferment element under CFA 2 is also unreasonable and should be disallowed.

[48] About £200,000 in 2009