

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

CA Case No. CA-2026-000127

Appeal No.Ch 2024-000224
Case No. SCCO-2026-DAT-00275

An appeal from the High Court of Justice (Ch D)
The Hon. Marcus Smith J
Order of 20 January 2026

B E T W E E N:-

GLOBAL ENERGY HORIZONS CORPORATION

Claimant/Respondent

-and-

THE WINROS PARTNERSHIP
(formerly known as ROSENBLATT SOLICITORS)

Defendant/Appellant

RESPONDENT'S SKELETON ARGUMENT
for the Appellant's Merits Appeal

In this skeleton argument:

- *The Appellant is referred to as **RS** and the Respondent is referred to as **GEHC***
- *Senior Costs Judge Gordon-Saker is referred to as the **SCJ**, and Marcus Smith J as the **Judge***
- *The judgment appealed from ([2025] EWHC 3362 (Ch)) is referred to as the **Merits Judgment***
- *The first instance judgment of the SCJ of 29.2.24 is referred to as the **SCJ Judgment***
- *References to paragraphs in RS's Grounds of Appeal dated 26.1.26 take the form **RS GoA/#** and references to GEHC's Further or Additional Grounds for upholding the Judge dated 23.3.26 take the form **GEHC AG/#***
- *References to paragraphs in RS's skeleton argument dated 26.1.26 take the form **RS Skel/#***
- *References to the Core Bundle take the form **Core/Tab/Page#***
- *References to the Supplemental Bundle take the form **Supp/Tab/Page#***

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A. Introduction and summary

1. This is GEHC's skeleton argument for the Merits Appeal, in response to RS's appeal against the Merits Judgment. In that Judgment, the Judge upheld the decision of the SCJ to assess RS's bill of costs at nil, on the basis it had no accrued right to payment, only a claim for damages to be assessed. As a result, and as GEHC had maintained throughout, it followed RS had wrongfully appropriated several million pounds of GEHC's money from its client account, which it is required to restore.
2. Notwithstanding the apparent complexity of RS's four principal Grounds of Appeal, the question raised by this appeal is straightforward: what was the basis of enrichment conferred by RS, and did that basis (totally) fail? The answer is equally straightforward: looking at the express terms of the parties' bargain, there was no such basis as alleged by RS. It therefore could not fail, and RS cannot have a claim for a quantum meruit in unjust enrichment as a result. It must bring the claim for damages it has always asserted, but has proven notably reluctant to advance.
3. At its heart, this appeal is an example of cakeism. As explained in more detail below, RS chose not to rely upon the express contractual right to payment of its costs which it had bargained for in the event of client default. It elected not to do so in order to pursue what it no doubt then believed to be a more valuable remedy in damages. However, having failed actively to pursue that claim,¹ it now seeks to invoke the law of unjust enrichment in order to re-write the parties' bargain, and establish its rights to pursue a claim for work done, as well as for damages based upon its contingency fee.
4. In order to address each of RS's four principal Grounds, it is first necessary to set out some key principles on the law of termination and of failure of basis, as established by high authority (Sections D and E). These show why RS's claim is misconceived, and why none of the four Grounds is correct in their challenge to the Judge's reasoning below (which are addressed in Section F).
5. Finally, in Section G GEHC addresses Ground 5, concerning the Judge's (obiter) conclusion that s.70 Solicitors Act 1974 assessment in the SCCO is not the appropriate forum for this dispute.

¹ It issued a claim form immediately prior to limitation expiring, but no particulars of claim were ever served, and the claim has since been stayed: see ¶8 below.

B. Background and RS's case below

6. As set out more fully in GEHC's skeleton for the Abuse Appeal,² this appeal arises out of an assessment of RS's bills of costs under s.70 Solicitors Act 1974. In particular, it relates to GEHC's 'Objection 1' to a bill dated 29 February 2016, served upon GEHC on 4 March 2016 (the **2016 Bill**). That Bill sought payment in respect of a conditional fee agreement entered on 6 March 2013 (referred to as **CFA3**). The terms of CFA3 are set out in detail in Section C below, as they are critical to this appeal.

The Termination Letter

7. Prior to the serving of the 2016 Bill, the parties' relationship had broken down over RS's conduct of GEHC's claim against its former associate, Robert Gray, known as the **Gray Action**. In particular, in 2015 Asplin J had ordered Mr Gray to pay some £2.5m by way of costs (the **Gray Monies**). RS insisted (wrongly) that a 'win' had occurred under CFA3, and that it was therefore entitled to retain the Gray Monies to cover its success fee, as well as future disbursements. GEHC, having received nothing from seven years of successful litigation (and already then, despite RS's 'no win, no fee' CFAs, having paid it some £5.568M in costs), disagreed, and instructed Eversheds Sutherland to dispute RS's entitlement. (RS has since admitted that a 'win' had not occurred under CFA3, and that it was therefore not then entitled to the Gray Monies. Despite this, and despite RS's purported retention of the Gray Monies being the rock on which the parties' relationship had foundered, it has still refused to return them – hence these proceedings.)
8. Owing to this breakdown in relations, on 24 February 2016, just over a week before serving the 2016 Bill, RS had written to GEHC terminating their retainer (the **Termination Letter**). As explained in the SCJ Judgment/[46], the Termination Letter asserted an entitlement to damages, by reference to its success fee and other "*lost fees*". That claim has since been commenced in Part 7 proceedings in the High Court (the **Part 7 Proceedings**),³ which are currently stayed.

² RS's related appeal (CA-2025-002112) against the Judge's decision ([2025] EWHC 2044 (Ch)) that GEHC's Objection 1 was not an abuse of process, and upholding the SCJ's refusal to strike it out. Following the order of Lewison LJ giving permission in this appeal, GEHC seeks that the two appeals be heard together.

³ BL-2022-000318

RS's claim and its case below

9. In those circumstances, the Court may ask why RS then demanded payment by means of a bill of costs. The short answer is that the Termination Letter also asserted, untenably, that RS's damages claim additionally constituted its entire time-spent charges to date.⁴ RS then used that assertion to justify serving the 2016 Bill just afterwards, on 04 March 2016. In turn, by supposedly establishing a liquidated claim against GEHC in that way, RS relied on the Bill to purport to exercise a set-off against the entire Gray Monies, which they appropriated to their own account (as well as assert a claim to the balance of £562,000). RS thereby achieved the retention of the Gray Monies which they had been trying to engineer throughout.
10. RS's case has since evolved substantially of the course of these proceedings, as RS has endeavoured to find a justification for that appropriation of over £2.5m from its client account.
11. Before the SCJ, and in writing before the Judge, it appeared that RS contended for some particular principle relating to a solicitors' retainer, by reference to this Court's decisions in Underwood, Son & Piper v Lewis [1894] 2 QB 306 and Richard Buxton v Mills Owen [2010] 1 WLR 1997.⁵ However, the Court will note that these decisions feature very little in the RS Skel.⁶

⁴ Untenable because RS's entitlement to payment was no win, no fee, and at that point no win had been achieved. Any entitlement to damages would therefore have been for the loss of a chance of winning, and would have required a significant discount for uncertainty. RS could have crystallised an immediate right to payment on a time-spent basis by triggering cl.14.3 of the CFA. But as will be seen, they made a deliberate decision not to.

⁵ See SCJ Judgment/[49]-[54] [CB/28/299].

⁶ The Buxton point was itself RS's third justification for appropriating the Gray Monies. The first was its assertion that Asplin J's order had triggered a win under CFA3, which was later conceded to be false. Then there was the assertion in the Termination Letter that appropriating the Gray Monies constituted the payment of damages. That was also abandoned, and replaced with the Buxton argument which was advanced to the SCJ. That was in turn abandoned before the Judge, when this fourth, "failure of basis", argument emerged as RS's final point (at least to date).

12. That is because, at the oral hearing before the Judge, it became clear that, if RS had any claim at all, it was found in the general law of unjust enrichment based upon the unjust factor of “failure of basis”.⁷ This remains so on appeal: RSkel/26.
13. The claim for failure of basis was formulated by counsel as being that “*the basis on which the solicitor had agreed to provide his services, and the basis which failed, is that the solicitor would not be prevented from performing his services*”.⁸ That is reflected on this appeal in RS Skel/32.c at more length, which in the context of its overall argument runs as follows:
 - a. “[RS] *agreed to provide services on terms that it would not be paid unless the retainer was completed, with the Gray proceedings coming to an end or settling, and only in the event that there was a win*” (RS Skel/32.a).
 - b. “[RS] *was prevented from performing its services... through to the end by GEHC’s repudiatory breach*” (RS Skel/32.b).
 - c. “[RS]’s *services were rendered... on the basis that it would not be unlawfully deprived of the opportunity of completing performance of those services*” (RS Skel/32.c).
 - d. That basis totally failed (RS Skel/32.d).
 - e. RS claims a quantum meruit (RS Skel/32.e).
 - f. The right to claim quantum meruit was not excluded by cl.14 of CFA3 (RS Skel/32.f).
14. For the reasons set out below, this argument does not work: points (c)-(e) do not follow from points (a)-(b), ignoring the critical terms of CFA3. Point (f) seeks to avoid that difficulty by relegating those key terms to the end of the analysis, rather than being at its heart. But the latter is what is required by high authority.

⁷ Supp/20/308: Transcript, Day1A1, pages 29 to 30; Supp/20/309: page 34 line 18 to page 35 line 1.

⁸ Supp/20/309: Transcript, Day1A1, page 35 lines 2 to 14.

C. CFA3 and Clause 14

15. CFA3 is a bespoke contractual arrangement drafted by a (then) well-known City law firm. It made very detailed provision for the parties' rights, powers and duties in a variety of circumstances, reflecting a fundamental distinction between CFAs and traditional retainers. A traditional solicitors' retainer (where remuneration would be on a fixed fee or time-spent basis, regardless of outcome) need not be particularly complex. It can leave much – or possibly even everything – unsaid.
16. A conditional fee arrangement is entirely different. As the Judge adverted to in Merits Judgment/[52]-[53] [CB/19/194-195] (and further reflected by the "*Risk Assessment Form*" and the "*Reasons for the level of the success fee*" in the Annex to CFA3) the detailed terms of the CFA reflect the necessary allocations of risk and reward in circumstances where the parties' rights turn upon uncertain, future events.
17. The key terms (other than the definitions in cl. 1) are as follows:
 - a. Clause 4.2 set out the hourly rates by which fees were calculated. Clause 4.3 provided for payment of an 'Advance Fee' of £300,000 upon entering CFA3, which RS could "*retain[... whether the Claim is successful or not*".
 - b. Clause 5 dealt with what happened if GEHC wins. By cl. 5.1, RS was entitled to "*fees at the normal rates, together with disbursements and the Success Fee*". The remaining sub-clauses deal with a variety of circumstances, including winning interim applications (cl. 5.3) and requiring RS's consent to settlement (cl. 5.6).
 - c. Clause 6 dealt with GEHC losing. RS could retain the Advance Fee, but GEHC would not be liable to RS for any other fees (other than disbursements).
 - d. Clause 7 set the success fee at 100% of RS's fees, comprising (i) 95% to reflect "*the risk that [RS] is taking*" and (ii) 5% to reflect the postponement of payment of conditional fees until the end of the claim.
 - e. Clause 13.1 provided for GEHC's "*responsibilities*", which included "*not asking [RS] to work in an improper or unreasonable way*".
 - f. Clause 14 was headed "*Termination*" and covered four scenarios:
 - i. Clause 14.1 provided for GEHC to end the agreement at any time. If it did not pursue the claim further GEHC would be liable for RS's fees "*at the*

normal rates for the work done to the termination date". If it did continue and win it would also have to pay RS's success fee.

- ii. Clause 14.2 allowed RS to end the agreement if GEHC rejected RS's advice to accept a reasonable offer to settle the claim. In those circumstances, GEHC was to pay RS's fees "*for work done to the termination date*", plus the success fee if GEHC went on to win the claim.
- iii. Clause 14.3 provided (in full) "[RS] *can end this agreement if [GEHC] does not meet its responsibilities. If this happens, [GEHC] will have to pay [RS]'s fees for the work done to the termination date*".
- iv. Clause 14.4 provided that RS could end the agreement if it believed that GEHC no longer had a reasonable prospect of success. In that case, GEHC was required only to pay RS's fees.

18. CFA3 therefore made very detailed provision for the agreement to be brought to an early end in several different circumstances, as well as the particular fees payable in each scenario. That did not exclude the ability to terminate for repudiation and to claim damages (as Trower J previously held)⁹ but that does not render these clauses irrelevant to ascertaining the rights and obligations of the parties arising from their dealings (i.e. the basis on which they contracted) – quite the opposite.

D. Termination – key principles

19. It is well established that termination for repudiatory breach is not a form of rescission avoiding the contract ab initio.¹⁰ As noted in Chitty on Contracts (36th ed.) at [28-078], it is entirely *prospective* in effect. Not only does it not affect ancillary terms, such as dispute resolution or exclusion clauses,¹¹ it also has no effect on existing, accrued, obligations. Instead, as famously described by Lord Diplock in Photo Productions Securicor [1980] AC 827, 849 (and identified by the Judge in Merits Judgment/[50]):

“the other party [may] elect to put an end to all primary obligations of both parties remaining unperformed... 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

⁹ [2021] EWHC 3410 (Ch)

¹⁰ Johnson v Agnew [1980] AC 367, 396-7 (Lord Wilberforce).

¹¹ Chitty at [28-079].

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.”

20. The contract, therefore, is not gone, but continues to form the basis of the parties’ relationship and must be considered by the court in ascertaining their rights following any accepted repudiation, including in relation to unjust enrichment.

E. Failure of basis – key principles

The need for an objectively shared basis

21. The ‘unjust factor’ of failure of basis has been considered at length by this Court in Dargamo v Avonwick [2022] 1 All ER (Comm) 1244, to which the Judge referred (Merits Judgment/[41]-[50]). There, Carr LJ explained (at [79]) that:

“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. 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”

22. This analysis was (enthusiastically) approved by the Supreme Court in Barton v Morris [2023] AC 684 at [77]-[78].
23. Carr LJ’s reference to a “*joint understanding*” reflects the analysis in Goff and Jones (10th ed.) at [13-02] that the “*basis of the transfer must be jointly understood as such by both parties. It must be ascertained objectively, and the parties uncommunicated subjective thoughts are irrelevant*”. A basis of performance might be implicit (Goff and Jones at [13-07], but it must still be objectively ascertained by reference to the objective circumstances. At [132], Carr LJ endorsed Dr Frederick Wilmot-Smith’s view that “*the agreements and understandings... help to establish whether the enrichment was conditional and the conditions attached to the transfer*”.
24. It is sometimes suggested that this is the “*no different approach*” to the construction of contract and ascertainment of implied terms: BP Oil v Vega [2021] EWHC 1364 (Comm) at [206]-[208]. In GEHC’s submission, it is the very *same process*: to the ‘official bystander’, the parties will not be reaching two separate, parallel agreements as to the contractual performance, one contractual and one extra-contractual: there is simply one agreement, whether the basis of its performance is express, or so obvious as to go without

saying. Consistently with this, in disposing of the appeal in *Dargamo*, Carr LJ adopted the same approach outlined by Cockerill J in *Vega*, considering the express contractual terms upon which the relevant enrichment had been transferred (at [112]-[118]), and ultimately concluding (at [133]) that: “*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*”.

25. As suggested by Goff and Jones (at [13-04]), this approach is consistent with the rules for implying terms into a contract: they must not only be necessary (rather than reasonable) but also they must not contradict the express terms of the contract.¹²

The further relevance of a contract – the allocation of rights and obligations

26. The Supreme Court’s decision in *Barton* (above) reinforces this analysis. Lady Rose, for the majority, emphasises (at [85]) the need to identify at the outset the basis which is alleged to have failed. Even where the parties fail to address a particular scenario in their contract, it does not follow that there was a shared basis or understanding that it would not occur: see [86-87]. In the present case, of course, the parties’ contract did expressly address the consequence of GEHC, by breach, impeding future performance: *viz* cl.14.3. That fact will be crucial to the analysis.
27. Thus, at [89], Lady Rose cited the statement of Etherton LJ in *MacDonald Dickens v Costello* [2012] QB 244 that:

“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.”

28. As Lord Leggatt (concurring with Lady Rose on this point) pithily put it (at [191]):

“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... To redistribute the allocation of

¹² *Marks & Spencer v BNP Paribas* [2016] AC 742 at [18], [28]

benefits and losses provided for by the law of contract by applying another set of legal principles would undercut this regime.”

29. This principle may apply even where a given situation is not addressed by the express terms of a contract (as it was not in Barton and the key cases it cites): “*The ‘silence’ of the contract as to what obligations arise on the happening of the particular event means that no obligations arise* [citing Lord Hoffmann on implied terms in the Belize Telecom case]. *This excludes not only an implied contractual term but a claim in unjust enrichment*” (per Lady Rose at [95]-[96]). But the principle is clearer still where a given situation is addressed by the express terms of the contract. If, as Lady Rose says *loc cit*, any non-contractual obligation to pay to avoid unjust enrichment is excluded where parties have chosen not to stipulate for a contractual obligation to pay in the relevant circumstances, it must *a fortiori* be excluded where the parties have contractually stipulated for the payment obligation in the relevant circumstances. Here, that is precisely what the parties did, via cl.14.3.
30. It is important to appreciate that this is not the same question as asking whether the contract excludes an otherwise valid claim in unjust enrichment. There is no doubt that commercial parties might do this in sufficiently clear terms (in the same way that they might exclude an action for damages for breach, having made an alternative contractual stipulation instead). But here the court is concerned with an antecedent question, as Lord Burrows stated in Barton (at [204]): “*logically prior to that exclusion issue is the question whether [the Claimant] had any prima facie right (i.e. a right that applies subject to exclusion) to be paid for his successful services*”.¹³
31. In considering whether a term of the contract precludes there being any failure of basis at all, it is not permissible to ask (as counsel for RS did below,¹⁴ and RS does at RS Skel/32.f) “what would the basis have been absent this clause?” and then “does this clause exclude a claim for failure of that basis?”. It is for the claimant to establish that

¹³ Lord Burrows dissented on the question of whether there was a basis which had failed, but he was in plain agreement with Lady Rose that the question of whether there was such a claim at all was an anterior question to its exclusion.

¹⁴ Supp/20/304: Transcript, Day1A1, page 14 line 13 to 18

they have a prima facie claim (including identifying the objectively shared basis that is said to have failed) which could then be excluded by the contract.

32. Having made these points, and presaging the more detailed response to the appeal below, GEHC's case can be stated very simply indeed. Its contract with RS, i.e. CFA3, expressly stipulated for GEHC's payment obligation in the event of its non-performance: see cl.14.3. In other words, the contract expressly legislated for the events which subsequently happened. In these circumstances, there was obviously no "failure of basis" when those events did happen; and for the same reason (in Lady Rose's words in Barton at [101]) "*there is no room for an unjust enrichment claim.*" The reason cl.14.3 ultimately did not operate is not because the basis of the contract failed; but because RS took a studied decision not to invoke it, it then thinking that a claim for damages for repudiatory breach was preferable to its contractual remedy.¹⁵ There is indeed "*no room*" for an unjust enrichment claim in these circumstances.

The relevance of termination for repudiatory breach

33. RS argue that none of these cases cited by GEHC involved a situation where the contract had been terminated for breach: RS Skel/48. This is true, but it is difficult to see what possible relevance termination could have to the particular question of what the basis for the contract was in the first place.
34. As noted above in Section D, termination operates prospectively only, discharging future obligations on both sides. Where the contract expressly or impliedly provides for the basis upon which a transfer was to be made or performance rendered, termination cannot retrospectively eliminate that basis, much less *alter* it. The objective facts at the time the contract was made, and the enrichment rendered, remain the same.
35. Of course, as Professor Robert Stevens has noted, termination is *relevant* to claims for failure of basis, and is part of the fact pattern in many cases, because it may make the failure of the particular basis inevitable or inescapable.¹⁶ It may, for example, render the

¹⁵ GEHC would meet any claim for damages by saying that, at the point it repudiated, RS had already made future performance impossible by refusing (on shifting pretexts) to release the Gray Monies. Since RS now admits it had no contractual entitlement to those monies at the time, this appears a formidable obstacle to the supposed damages claim.

¹⁶ The Laws of Restitution (OUP, 2023), 127

promised counter-performance impossible (even if the defaulting party subsequently stands willing and able to perform). Equally, it may mean that the claimant cannot render their own performance and is therefore prevented from earning their fee.

36. However, as Professor Stevens has also noted, it is neither necessary nor sufficient.¹⁷ Insufficient because restitution does not automatically follow termination (where payments have already been earned); unnecessary because, for example, even if the time for performance has passed (such that the contract cannot be prospectively terminated), the claimant can still recover money paid if no performance occurred. Termination, or lack of termination, is not determinative of failure of basis.
37. The point may be tested by supposing the case of a repudiated contract which contained express provision for the resulting consequences. Take, for example, the famous early case of Planché v Colburn (1831) 8 Bing 14; 131 ER 305, cited (albeit inaptly) by RS themselves, where the plaintiff had part written a book on costume for the defendant's *Juvenile Library*. When the defendant, in repudiatory breach, discontinued that series pre-publication, the plaintiff was awarded (in what some scholars have seen as a case of proto-restitution for failure of basis) 'damages' of £50 to allow for his wasted work. That was in the absence of any contractual stipulation for the consequences of prevention of performance. But suppose the plaintiff's contract stipulated for payment of £40 if "for whatever reason, we are unable to publish your book". Could he still nonetheless have terminated and sued for the £50, saying that the £40 clause was ousted as the basis of his performance by the demise of the contract, and there had therefore been a failure of implied basis (thereby avoiding his bad bargain)? Obviously not. Where a contract stipulates for a given situation, "*there is no proper scope for inquiring into an alternative basis that is plainly contrary to the express basis freely agreed between the parties*" – per Carr LJ in Dargamo at [133]; a passage explicitly approved by the Supreme Court in Barton at [102].

F. The present appeal

There was no basis as alleged by RS, and the basis of performance has not failed

38. In light of these principles, RS's appeal can be dealt with relatively shortly.

¹⁷ *ibid*, 124-126.

39. As Lady Rose identified in Barton (and which RS appears to accept belatedly in RS Skel/61), it is for RS to first identify and establish that it performed on a shared basis and, then, to establish that it failed. The sole basis it relies upon is that at RS Skel/32.c: “*it would not be unlawfully deprived of the opportunity of completing performance*”. This implied term is based upon the work of Winterton and Pilkington¹⁸ to explain why claims for unjust enrichment have succeeded where the ‘innocent’ party has not been able to earn the price in an ‘entire’ agreement, while there is no claim in unjust enrichment where the party in breach has partly performed a service on an ‘entire agreement’ basis, but not wrongfully failed to complete it (e.g. Sumpter v Hedges [1898] 1 QB 673).
40. There is no suggestion by RS that this basis was, in the present case, an express one. This is for obvious reasons: it appears nowhere in CFA3, or indeed in any communication between the parties. It must therefore be an implied basis, found in the dealings between the parties.
41. GEHC does not suggest that the basis suggested by Winterton and Pilkington cannot be implied in cases where the claimant is performing under an ‘entire’ agreement: in a relatively simple agreement, an officious bystander would think that it would go without saying that the performance is conditional on the claimant having the opportunity to earn the price. If they cannot, the benefit conferred must be returned. That is also why a solicitor who terminates a simple ‘entire’ retainer early on proper grounds does not forego any fee at all, as in Underwood and Richard Buxton (above).
42. However, it is not enough to simply say that such an implied basis has arisen in some previous cases. It is not a rule of law. The alleged implied basis must be established on the facts of the given case by reference to the parties’ dealings, in particular any contract under which the enrichment was transferred.
43. In this case, the parties had entered into a detailed contractual framework at the outset, allocating their precise rights and responsibilities in various situations, reflecting (and potentially rewarding) the risk being knowingly taken by RS in working on conditional payment terms.

¹⁸ (2020) 44 Melb U L Rev 679.

44. In light of those risks, RS had bargained for cl.14, which regulated the parties' rights and obligations if the contract was brought to an end by GEHC, as a result of GEHC's conduct, or by a re-assessment of the merits of the Gray Action.
45. Most importantly, RS had the benefit of cl.14.3. If GEHC did not meet its "responsibilities", which including allowing RS to continue to complete performance by prosecuting the Gray Action to the end (i.e. as defined in cl.13.1, by "giving... full and... timely instructions... co-operating fully with RS in preparing the claim" etc.), RS could bring the agreement to an end, and require GEHC to pay its fees for work done, (effectively converting a conditional fee arrangement into an unconditional, purely time-costed, arrangement).
46. Such a clause was of obvious commercial benefit to RS. Its inclusion in CFA3 alone makes that clear, but there are at least two reasons why such a clause might be included: relieving it of the need to prove fundamental breach or repudiation (and the associated uncertainties and risks of purporting to accept repudiation), or of the need to prove its loss on a counterfactual basis.¹⁹
47. In those circumstances, the contract has expressly set out what could happen if RS was prevented from completing performance. Clause 14.3 (along with cl. 4.3 (the Advance Fee) cl. 5 (i.e. a win), cl.6 (i.e. a loss) and the other sub-clauses of cl.14) was the express basis upon which RS performed, and that basis has not failed: it was common ground below that it was open to RS to invoke cl. 14.3 at the time they sent the Termination Letter: SCJ Judgment/[45]; Merits Judgment/[34]. It chose not to do so, seemingly because it wished to claim damages by reference to the potential success fee, which no doubt it considered to be in its commercial interest at the time.
48. There is simply no room for implying a different basis into the contract in those circumstances, as Dargamo and Barton demonstrate. It is not necessary, given cl. 14.3, and it moreover it contradicts the express terms. Implying a failed basis into CFA3 alongside an express basis which did not fail does exactly what Etherton LJ in Costello

¹⁹ E.g. suppose at the time of a breach of GEHC's responsibilities the litigation was going very badly. GEHC would be able to argue in response to a claim for damages that there was no loss, or only the loss of a very small chance, relying on the fact that the CFA was largely 'no win, no fee'.

warned against: “shattering” the contractual containment agreed by the parties, and using unjust enrichment to rewrite the parties’ rights and obligations.

49. The termination of CFA3 has no bearing upon this at all. The basis upon which RS performed was objectively established at the time of contracting (or when it began performing): not that it would not be prevented from performing, but that if it was prevented from performing, it could invoke cl.14.3 and recover its time-spent charges. That basis cannot be changed retrospectively. The prospective termination of a contract has no effect on the *basis* itself, only potentially on whether an agreed basis will inevitably fail by preventing future performance (as explained at ¶¶34-37 above). But there is no question of the latter in the instant case, as the express basis on which the parties contracted and performed, cl. 14.3, did not ‘fail’, regardless of the termination.
50. For those reasons, as set out in the Merits Judgment itself and, slightly more expansively in this skeleton and GEHC’s additional grounds, RS’s appeal is unsustainable, and should be dismissed. GEHC deals with each of RS’s specific grounds below.

The SCJ Judgment

51. Although RS’s case has shifted somewhat since that which it advanced before the SCJ, it is nevertheless instructive to consider the SCJ’s reasoning. Having rehearsed the arguments on Richard Buxton (above), the SCJ noted at SCJ Judgment/[63]-[64]:

“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.

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.”

52. Although not put in the precise language of failure of basis (given that this was not the basis on which the argument was put at the time), that reasoning ultimately chimes closely with Dargamo and Costello:
 - a. CFA3, of which cl.14 is an integral part, makes detailed provision as to the parties’ rights and obligations, including when a solicitor terminates because the client is not allowing them to advance the claim and therefore earn their success fee.

- b. The view of the SCJ, as an experienced costs judge, that “*most conditional fee agreements*” contain clauses similar to cl.14.3, directed to precisely such situations, is significant in this regard: it is on that basis of detailed provision for payment rights and power that a solicitor undertaking conditional fee work provides their services. Not, as RS now asserts, on some other implicit basis.
- c. To allow such a basis to be implied into the bargain risks shattering the contractual arrangement, and the detailed allocation of risks agreed by the parties at the outset.

The Merits Judgment

53. The Merits Judgment is shortly reasoned and must be understood in light of the authorities referred to the Judge and rehearsed by him, as well as the reasoning of the SCJ (with which the Judge “*substantially*” agreed: Merits Judgment/[56]):²⁰
- a. At [41]-[48], the Judge identified the key passages from Dargamo, Barton and Costello set out above.
 - b. At [49], the Judge made clear that it was vital to focus on the terms of the contract, including what is agreed and what was not agreed.
 - c. At [50], the Judge identified that CFA3 had been terminated, and considered the effect of termination by reference to Lord Diplock’s analysis in Photo Productions (above).
 - d. He therefore (rightly) considered (at [51]) that there is no “*category difference*” between claims where there is no termination and those where there are. The only difference is that situations which lead to termination may be more likely to be situations which the contract has not provided for. Although put in terms of a ‘vacuum’, this must mean that the court may need to ascertain the implied bases on which the parties performed, if any.
 - e. However, in this case, the particular circumstances of breach were expressly contemplated and provided for by cl.14.3 (Merits Judgment/[52]-[53]), and this is

²⁰ An appeal court, in dismissing an appeal on the ground the court below was correct, is perfectly entitled to “*adopt and affirm it without any obligation to say the same things over again in different words*”: Re Portsmouth City [2013] Bus LR 115 at [38] (Mummery LJ).

unsurprising because this was a conditional fee arrangement, and the range of potential outcomes are well known to sophisticated players such as RS.

f. The question was therefore whether the ability of RS to terminate for repudiatory breach also entailed a restitutionary remedy (at [54]-[55]).

54. The Judge's essential reasoning, concluding the answer to that question is "no", is at Merits Judgment/[55]:

"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."

55. Though compressed, this reasoning is entirely correct: the basis of RS's performance was found in cl.14.3, and there is no room to imply an alternative and different basis into CFA3, thereby avoiding the rights and obligations stipulated in cl.14.3 so as to give RS both a right to damages and a right to a quantum meruit. The Judge's conclusion is therefore unassailable, and should be affirmed.

Grounds 1 to 2

56. As RS takes these points together (RS Skel/44), GEHC similarly does so.

57. RS GoA/1 seeks to argue that there is a "*category difference*" between claims for failure of basis where the contract is terminated and those where it is not.

58. For the reasons set out above in Sections D and E, this is wrong. Termination itself has no effect on the basis of performance (which is objectively determined at the outset) and it is both insufficient and unnecessary for a restitutionary claim. Its only relevance is that it may render the failure of a particular basis inevitable.

59. It is that type of relevance that RS Skel/46 is concerned with when it says that "*the determination of whether there has been a failure of basis can be... very different where the claimant has terminated*". GEHC does not dispute that termination – by precluding the possibility of the defendant or the claimant performing in the *future* – may be critical to establishing that a given basis has in fact failed. However, it has no bearing on the prior question of what that basis was in the first place.

60. The same paragraph also draws a false dichotomy between cases of termination and cases where “*the contract is fully performed*”. As Professor Stevens has noted, above, there are cases where a contract is incapable of being performed (because e.g. the time for performance has now passed) but which are not, and cannot be, terminated. Nor does restitution necessarily follow because a contract is not fully performed: no restitution lies where the failure of basis is not total, and also any accrued payments will remain payable or, if paid, will not be returnable.
61. The quotation at RS Skel/46.b from Dargamo at [66] is not authority to the contrary. The only point Carr LJ is making in this passage is that termination is not a necessary condition of a claim for failure of basis (which was the issue before the court). The Judge said much the same thing in at Merits Judgment/[51]: “*claims in unjust enrichment [for] failure of basis are much more common in the case of discharged contracts*”.
62. While, at [66], Carr LJ says that where a contract is discharged for repudiation or frustration, legal enforceability and failure of basis “*are two sides of the same coin*”, she obviously does not mean that repudiation or frustration invariably lead to a failure of basis. That would be plainly wrong. If it were correct, restitution should follow in all cases of discharge even though there is no failure of counter-performance or prevention of performance. As Professor Stevens identifies, it would be inconsistent with, e.g., the House of Lords’s decision in Stocznia Gdanska v Latvian Shipping [1988] 1 WLR 574, where the claimant shipbuilder was entitled to recover the agreed stage payments for completing sections of the ship, notwithstanding the defendant later terminated for breach before the ship was complete, preventing them from earning their fee for delivering the entire ship.
63. Insofar as it is different to RS GoA/1, RS GoA 2 (and RS Skel/46.c and 47.c) seeks to suggest that the judge ignored various authorities cited to him, in particular Lusty v Finsbury Securities [1991] 58 BLR 66; Planché v Colburn (above); and Mann v Patterson [2019] HCA 32 and Elek v Bar Tur [2013] EWHC 207 (Ch).
64. The simple fact is that these cases were not relevant to the question for the judge, beyond demonstrating the potential for implication of an implied basis along the lines suggested by Winterton and Pilkington (above). That such a basis *might* be implied in an entire agreement was, and is, common ground. None of the authorities RS relies upon however

establish that such a basis will always be implied, or can be implied in the face express terms of the contract which legislate for the very events that have happened:

- a. Lusty concerned a claim by an architect and a client. It involved very simple contract for an interim fee upon planning approval, followed by a percentage fee of the total building costs at final completion. It made no express reference at all to termination, breach or prevention of performance by either party. It is unsurprising that there was held to be an implied basis that the client would not wrongfully prevent the architect earning his fee.
- b. Planché is a difficult case,²¹ found in a brief report of the King's Bench upholding a jury verdict, at a time when parties were still required to plead forms of action. Insofar as it is treated as a failure of basis case, the report does not discuss the precise terms of the contract, but there is no evidence that it made any provision for what was to happen if the defendant ceased to publish the work in which the plaintiff's writings were to appear. If it had done, it seems obvious that no question of failure of basis could have arisen: see the discussion at ¶37 above. Again, absent express stipulation in the contract for the consequences of the counterparty preventing performance, it is unsurprising that an implied basis along the lines that Winterton and Pilkington (above, ¶39) suggest was found.
- c. Mann concerned a contract between a builder and a homeowner for renovations (which in Victoria are subject to a complex overlaying statutory scheme, the Domestic Buildings Contracts Act 1995). None of the terms identified by the High Court (at [112]-[119]) refer to the consequence of breach or repudiation, and this is again the point of fundamental distinction from the present case.
- d. Elek is a very brief judgment in which the deputy judge set aside permission to serve out. The claimant had sought a quantum meruit following the termination of a purported partnership at will (which the judge held at [16] was incapable of being wrongly terminated at all). The terms of the letter creating that partnership were brief (at [3]) and again did not deal with the termination of the partnership.

²¹ At least for the purposes of legal taxonomy, not the merits of the outcome. See the discussion in Mitchell and Mitchell 'Planché v Colburn (1831)' in Mitchell and Mitchell (eds) 'Landmark Cases in the Law of Restitution' (2006, Hart), 65-96.

- e. Indeed, RS Skel/64 *concedes* that none of the cases contain “*express (albeit optional) provisions as to termination*”. That does not go far enough: they contain no such clauses at all.
65. The Judge was therefore right to consider, as he must have done, that these authorities (all pre-dating the restatements of principle in Barton and Dargamo) were of limited assistance in answering the question before him given the detailed terms of CFA3.
66. The attempt to sideline Barton and Dargamo in RS Skel/48 goes nowhere. It is true that these cases did not concern situations involving termination, but, again, there is no reason (and no reason suggested) why the fact of subsequent termination has any impact upon the identification of the basis of enrichment as articulated (rather than on whether it has failed). This is the same error in RS Skel/49, which latch on to the Judge correctly identifying the *relevance* of termination to the question of whether a basis has failed, and seek to turn that into his acceptance of the proposition that there will always be a failure of basis where an entire agreement has been terminated (which he rightly did not accept).
67. These two Grounds provide no basis to disturb the Merits Judgment. A quantum meruit is not available where there has been no failure of a basis, regardless of whether the contract has been terminated.

Ground 3

68. As to Ground 3 and RS Skel/51, the criticism of the Judge for referring to Photo Productions in this context is misplaced. It does not show he had fallen into error – rather, it demonstrates RS’s own error. Lord Diplock was not addressing unjust enrichment, but he was addressing the effect of termination, making clear that it operated *prospectively* only, and had no effect on accrued (and performed) obligations under the contract. The Judge was entirely right to remind himself of that in dealing with RS’s submission as to the effect of termination on a claim for failure of basis, for the reasons given above.
69. Contrary to RS Skel/52, the Judge nowhere suggested that a claim for damages excluded a claim in unjust enrichment, and RS are not able to point to him doing so. At Merits Judgment/[54], he accepted that if cl.14 had excluded acceptance of repudiation, this would have ruled out both damages and a quantum meruit. At [55], he explained that the converse was not true – the existence of a damages claim did not necessarily entail a quantum meruit claim if that would “*upset the considered exercise in risk allocation*” in

CFA3. In other words, the two claims have different requirements, and the existence of one does not necessarily entail the existence of the other.

70. That is plainly correct, and the Judge understood that it was his job to ascertain whether, on the facts of this case, there was a basis, and a basis which had failed, applying the principles in Dargamo and Barton.

Ground 4

71. RS GoA/4 belatedly turns to the wording of the contract between the parties, and to cl. 14.3. However, it does so on an incorrect premise, namely that the Judge considered cl. 14.3 to be an exclusion clause, rather than a key part of ascertaining the basis upon which RS performed in the first place. Each point proceeds from that false premise.
72. At RS Skel/55, it is suggested the Judge misunderstood cl.14.3 as being mandatory. This reads quite a lot into the word “*is*”, which the Judge was well aware created a power (as RS’s quotations at RS Skel/54, 56 show). Clause 14.3 was necessarily permissive, as it would be plainly uncommercial for CFA3 to automatically be ended by *any* breach of GEHC’s ‘responsibilities’, even if RS wished to continue with it.
73. Of course, for cl.14.3 to *exclude* a remedy it would have to be mandatory, or at least exclusive. However, when considering the basis of performance, it need only be a power: in cl.14.3, RS had bargained for a bespoke remedy for itself in a situation where GEHC was preventing it from performing its retainer. It was on that express basis, the existence of that power – and not any further implied basis – that it performed. The fact that it did not *have* to rely upon cl.14.3 when it *could* have done so does not change that and does not mean the basis of performance has failed, or that another one arose.
74. The fact that RS did not exercise its right under cl. 14.3 did not mean that the present case is one not “anticipated” or “contemplated” by cl. 14 (cf. RS Skel/56). Objectively, cl. 14.3 did contemplate this scenario: there is no suggestion that GEHC’s repudiation fell outside of cl. 14, and it has always been common ground that that power could be exercised and would have resulted in a remedy at least as valuable as the quantum meruit now sought (albeit at the expense of any damages claim).
75. Nor does it mean that cl. 14.3 “*falls out of consideration*” (RS Skel/57). Again, cl. 14.3 is part of the contractual relationship between the parties upon which RS performed under the retainer. The fact that RS terminated CFA3 prospectively, and elected not to rely upon

- cl. 14.3 does not rescind that clause ab initio. To say that if RS chooses not to invoke cl. 14.3 it has “*all the rights raising upon termination*” is to beg the question.
76. As for the criticism of the Judge’s conclusion that a quantum meruit claim is ‘duplicative’ of cl. 14.3 (RS Skel/58), this analysis rather makes the point about cakeism: by eschewing the agreed terms of the contract which deal with the very eventuality which transpired, RS now contends it has a potentially *better* (implied) remedy in unjust enrichment than under the contract, *in addition* to a claim for damages. That does not demonstrate the Judge was wrong; it demonstrates that he was right to be concerned that RS was attempting to “*upset the considered exercise in risk allocation*”, by seeking a remedy that would not merely mirror, but swallow whole, cl.14.3 (or to borrow how RS Skel/58.3 puts it, get cl. 14.3 *and then some*, by the back door).
77. As to RS Skel/61, the criticism of the Judge for not “*follow[ing] the logical steps in the argument*” is again misplaced. As immediately noted at RS Skel/62, the Judge in fact considered that cl.14 “*formed part of the relevant basis*”. In GEHC’s submission, it was the relevant basis, and not RS’s (overlapping) implied basis.
78. RS seek to evade this conclusion in RS Skel/62 by not following their own insistence at RS Skel/61 that “[f]irst, one identified the relevant basis”. They treat cl. 14.3 not as part of the express terms of the parties’ relationship in which a basis must be located, but whether it “*show[ed] the parties intended there to be no unjust enrichment claim*” (i.e. an exclusion clause). As Lord Burrows made clear in Barton (above at ¶30), that is not analytically sound. Before one gets to the question of whether an unjust enrichment has been contractually excluded, one must first determine whether there has actually been a failure of basis. The complete answer to the present case remains that there has not been, as the basis of the parties’ contract included cl.14.3, which pre-legislated inter alia for the contractual remedy for repudiatory breach, in particular for repudiation by prevention of performance.
79. RS Skel/65 suggests the Judge misunderstood the ‘Obligations Rule’. In GEHC’s submission this is not the basis of the Judge’s reasoning, and in any event this is not an Obligation Rule case, as that is (to quote RS itself) a “*separate stage of the analysis*”.
80. To the extent that RS Skel/66 is not contingent on the Obligations Rule, it is wrong to suggest that the Judge’s analysis is that RS conferred its services on GEHC “*for free*”. It did not. It conferred them on the basis of the bespoke allocations of risk set out in CFA3

(including a risk under cl. 6 that it might get nothing but the Advance Fee), and on the basis of its rights to payment under cl. 14. None of those terms failed, and RS at all times had a right to be paid for its services. It chose to forego those rights in favour of a claim for damages, but that was its own independent commercial choice.

81. For those reasons, RS GoA 4 (and RS's four principal grounds as a whole) do not provide any basis to disturb the Merits Judgment, and RS's appeal should be dismissed.

G. Ground 5 – The forum issue

82. The Judge's decision was strictly obiter dicta, in light of his conclusion on failure of basis. However, the Judge considered that, had the issue been live, the SCCO was not the appropriate forum for the resolution of this dispute.
83. Insofar as this Court allows RS's appeal on the earlier grounds, GEHC submits that this was the correct conclusion. This Court should direct that any quantification take place in the Part 7 Proceedings, rather than being remitted to the SCCO.
84. None of the cases relied upon in RS Skel/78-80 or 82 appear to have considered this question directly. In *Diag Human* (where the court found the statute ruled out any claim, including by quantum meruit) that is likely a product of the same phenomena the Judge identified in Merits Judgment/[62]:

“It is only because the point ultimately failed that the point appears less stark. Had the outcome been different, and a restitutionary quantum meruit been indicated, then it is clear that the detailed assessment would have been the wrong forum”

85. The Judge was correct to conclude that a claim for a quantum meruit, by reference to the careful analysis of Johnson J in Jones v Richard Slade (which, contrary to RS Skel/86, was extracting a more general principle from the case law in order to answer the question before the court).
86. As noted at Merits Judgment/[58]-[59], the purpose of s.70 Solicitors Act 1974 is not to enforce debts or other private rights or even serve as a preliminary to such enforcement. It is to enable a client to challenge particular items on a bill of costs for being unreasonably or improperly incurred under the court's supervisory jurisdiction. Such a finding then removes them from the scope of any subsequent debt claim (which is precluded while the assessment is taking place: s.70(1).)

87. As Johnson J contemplated in Richard Slade at [41]-[42], while individual items on that bill might be challenged because as unreasonable or improper in light of some more general private law duty (e.g. because they resulted directly from a solicitor's negligence), generalised questions of negligence, or challenges to whether the solicitor has contractual rights at all because of rescission for undue influence or duress, are not suitable for this process. They ought to be dealt with in Part 7 proceedings, with the procedural tools available in those cases (to emphasise, this is plainly not a criticism of the SCCO, whose judges are plainly capable of dealing with all range of matters, but the fact that s.70 proceedings are carried out in a particular, restricted, and highly truncated format).
88. As the Judge concluded at Merits Judgment/[62], the existence or non-existence of a quantum meruit does not go to whether a particular item on the bill is reasonable or unreasonable. It is a "*generalised allegation*" which goes to the existence of the whole bill, and may involve complex factual disputes and detailed evidence.
89. Such claims are safer dealt with in Part 7 proceedings, with provision for pleadings, disclosure and witness evidence.
90. The same is true of any quantification exercise for a quantum meruit: the court may need to hear witness and expert evidence in order to determine the value of the services.
91. It is not necessarily simply a question of a costs judge asking whether a fee is reasonably incurred by reference to prevailing rates, as it would on ordinary detailed assessment. Instead, as RS Skel/58.a suggests, RS intends to argue that its quantum meruit is not merely for its base fee (i.e. its hourly rates on a time spent basis), but potentially higher:
- "In contrast, a quantum meruit, on the basis of unjust enrichment, would consider the objective value of the enrichment. That objective value would, or at least could, take into account whether the services rendered to date were likely to result in a win, and therefore the uplift in base fees."*
92. GEHC agrees that any quantum meruit might need to reflect the contingent nature of the CFA, but that this would lead to a lower value than work done on a non-contingent basis.
93. Either way, the court dealing with quantification would need to hear witness and expert evidence going to how the contingency/risk was properly factored into the objective value of the work done by RS.

94. For those reasons, if RS succeeds on its other grounds of appeal, GEHC seeks that the quantification of any quantum meruit matter be remitted to the Part 7 Proceedings in the Chancery Division, not to the SCCO.

H. Conclusion

95. For the reasons given above, each of RS's appeal should be dismissed, and the Merits Judgment affirmed.