Neutral Citation Number: [2025] EWHC 3362 (Ch)

Appeal Reference: CH-2024-000224

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

On appeal from the Senior Courts Costs Office (Senior Costs Judge Gordon-Saker) in Case Reference: SCCO-2016-DAT-00275

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 19 December 2025

Before:
MR JUSTICE MARCUS SMITH

- -

Between:

THE WINROS PARTNERSHIP	Appellant (Defendant below)
-and-	
GLOBAL ENERGY HORIZONS CORPORATION	Respondent (Claimant below)

Heard on 10 and 11 November 2025, with supplemental written submissions dated 28 November 2025 and 8 December 2025

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

Approved Judgment

This judgment was handed down remotely at 14:00 on 19 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE MARCUS SMITH

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The First Judgment

1. This appeal has two limbs. First, an appeal, made with the permission of Senior Costs Judge Gordon-Saker, from the Senior Costs Judge's decision to uphold "Objection 1", which decision had the effect of Rosenblatt's costs being assessed at nil. This limb of the appeal is the subject-matter of this Judgment.

2. Secondly, a "rolled up" application for permission and (if permission was granted) appeal regarding the Senior Costs Judge's decision to dismiss "Objection 1" as an abuse of process. Although two days were allocated for the hearing of both limbs of the appeal, it only proved possible to deal with the second limb, at a hearing which took place on 25 and 26 June 2025. The parties were agreed that it would be helpful for the court to hand down (if possible) its decision on the second limb, and the court did so on 1 August 2025 in a judgment under neutral citation number [2025] EWHC 2044 (Ch) (the "First Judgment"). For the reasons given in the First Judgment, permission to appeal was given in regard to the abuse of process point, but the appeal itself was dismissed.

3. The First Judgment is taken as read; and the terms and abbreviations defined in that judgment are adopted in this Judgment.

"Objection 1"

4. Objection 1 is described at [10] of the First Judgment. It is appropriate, now, to expand on the nature of the objection and why it succeeded before the Senior Costs Judge.

5. The Appellant, Rosenblatt, wAS retained by the Respondent, Global Energy, under three conditional fee agreements, CFA-1, CFA-2 and CFA-3. For reasons which do not matter, relations between Rosenblatt and Global Energy deteriorated to such an extent that Rosenblatt terminated CFA-3 by reason of Global Energy's repudiatory breach of contract.

6. The acceptance of Global Energy's repudiatory breach was made in Rosenblatt's letter of 24 February 2016. It is important, for reasons that I will develop (but which are to do with the inter-relationship between CFA-1, CFA-2 and CFA-3), that this letter was only terminating CFA-3. The letter did this "with immediate effect" and made clear that Rosenblatt considered that they were entitled to damages.

7. It is important to make clear that this categorisation of the effect of CFA-3 is binding on me. In an earlier judgment in these proceedings (the "Trower Judgment"), Trower J (sitting with the Senior Costs Judge) held (at [116] of the Trower Judgment):[1]

[1] For ease of reading, all quotations have been adjusted to match the terms and definitions in the First Judgment and this Judgment, without use of square brackets. No disrespect is thereby intended, and of course there can be no change to the meaning of the underlying document.

For these reasons, I am satisfied that the Master was wrong to conclude that Rosenblatt were not entitled to terminate CFA-3 for repudiation by Global Energy. In my judgment, she came close to deciding for herself that Global Energy's conduct was repudiatory, but even if she did not, I am satisfied that she was wrong not to do so. In those circumstances, whether or not the solicitors were also entitled to terminate CFA-3 on some other basis (such as breach of clause 14.3) which would have led to alternative consequences, is irrelevant.

8. Trower J also made findings in regard to CFA-2 at [117] to [122] of the Trower Judgment. Specifically, he found that (i) there had been no acceptance of any repudiatory breach in regard to CFA-2 and (ii) that in fact CFA-2 continued in force (at least in respect of the consequences of past performance). Trower J left open the question of whether CFA-2 had come to end because there were no further acts of performance required of Rosenblatt under CFA-2 (whether by reason of CFA-3 or otherwise). This point I consider to be "live" before me, subject to the question of amendment, to which I will come. There are no findings in the Trower Judgment as regards CFA-1.

9. In April 2016, Global Energy commenced these proceedings, which are now approaching their tenth anniversary. By these proceedings, Global Energy seeks an order for the detailed assessment of all invoices rendered by Rosenblatt to Global Energy. These include (uncontroversially) the specific invoices set out in the Part 8 Claim Form which may be listed (in order of the date rendered) as follows:

Date	**Bill reference**	**Amount**
12 September 2012	39274	£7,940.00
21 December 2012	39618	£3,269,131.54
24 February 2016	45444	£106,612.12
29 February 2016	45543	£3,085,040.00

10. The Senior Costs Judge described these bills in the following terms (Decision/[7]):

> In April 2016 the Claimant commenced these proceedings, seeking an order for the detailed assessment of four bills (the first of which was said to incorporate 4 earlier bills). These included a bill dated 21 December 2012 in the sum of over £3.2m (the "2012 bill") and a bill dated 29 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.

11. I shall adopt the Senior Cost Judge's terms as regards these bills. Issues regarding the 2012 bill are <u>not</u> before me. The Trower Judgment has determined that the 2012 bill is not a statute bill and that there was no right to payment at the time that bill was delivered: see the Trower Judgment at [171] to [183].

12. Rosenblatt have also commenced separate proceedings in the Chancery Division for damages in relation to the termination of CFA-3, which are presently stayed pending the outcome of these proceedings.

13. The Senior Costs Judge framed Objection 1 in the following terms (see Decision/[43]):

> *Where the retainer is terminated following repudiation by the client (which we now know to be the case) is the solicitor entitled to payment of his fees for work done up to the date of termination if the retainer was a conditional fee agreement and no success **fee** had been achieved?*

14. The Senior Costs Judge answered this question in the negative. Because his conclusion was in part based on clause 14.3 in CFA-3, it is appropriate to set this out (although it is also set out at [7] of the First Judgment):

> Rosenblatt can end this agreement if it believes 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.

15. Clause 14.3 operates subjectively, in that the solicitor can end the agreement if they "believe" the client does not meet its responsibilities. Doubtless the provision is only reluctantly triggered, because the solicitor does not recover an uplift (or Success Fee, as CFA-3 terms it).

16. The Senior Costs Judge concluded:

> **[63]** Where solicitors have accepted the risk that they may be entitled to no fees at the end of the case, it is not clear that they should have the right to deliver a bill where the retainer is determined before the end of the case. In my experience, there are similar provisions to clause 14.3 in most conditional fee agreements, almost certainly for this reason.
>
> **[64]** In the present case, at the point of termination, the solicitors had a choice. They could "stick" and elect for their basic fees and disbursements under clause 14.3 (but lose the success fee) or they could "twist" and claim damages for their loss of basic fees and success fees.
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> **[65]** In my judgment, Rosenblatt was not entitled to deliver the 2016 bill and Global Energy 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 it was delivered.
>
> **[66]** The purpose of a Solicitors Act assessment is to determine the amount payable by the client in respect of the bill which is the subject of the order for assessment. If nothing is payable when the bill is delivered, the bill must be assessed at nil.

The grounds of appeal

17. The grounds of appeal as originally framed straightforwardly contended that the Senior Costs Judge had erred in drawing a distinction between an "ordinary" retainer (where the solicitor would be able to recover fees and disbursements if

there was good reason to terminate) and a conditional fee agreement. I have not – so far – referred to the law considered by the Senior Costs Judge, but I will obviously come to do so when I deal with this ground of appeal. It is sufficient for the present to note that the grounds of appeal contend that the Senior Costs Judge erred in a number of respects in his consideration of the law.

18. Although the hearing on 25 and 26 June 2025 was concerned only with the abuse of process point, inevitably Mr Gourgey, KC, who appeared for Rosenblatt, had to open the appeal quite fully by reference to the documents. Questions from me – in seeking to understand a complex procedural history and the inter-relationship between CFA-1, CFA-2 and CFA-3 – prompted a thought on the part of Rosenblatt's team that their grounds of appeal ought to be amended.

19. But for the adjournment of the hearing of the Objection 1 point, such an amendment could never have been permitted. However, the gap between June and November 2025 enabled Rosenblatt to put before Global Energy's team a series of amendments well-before this, second, hearing.

20. In the event, these proposed amendments are no longer moved and I need consider them no further. The proposed draft amended grounds of appeal sought to deal with the case where CFA-2 had not been fully replaced by CFA-3. The interrelationship between the various CFAs is complex, but the parties submitted (i) that they were agreed that CFA-2 had been completely replaced by CFA-3 and (ii) that this was the basis upon which the Senior Costs Judge had proceeded in the Decision. In these circumstances – and additionally because of the extremely confused way in which the proceedings have progressed (considered in the First Judgment) – I made clear at the outset of oral argument that my decision on this appeal would be based on the common position that CFA-3 was the only relevant agreement.

The retainer between a solicitor and their client

21. The retainer between a solicitor and their client is a matter of contract, albeit with a "regulatory" overlay affecting, for example, (i) the circumstances in which the solicitor can end the retainer; and (ii) the circumstances in which the solicitor can recover for the fees they have earned. This latter point – the question of assessment of a solicitor's bill pursuant to section 70 of the Solicitors Act 1974 – is a matter that is considered below.

22. Generally speaking, the retainer between a solicitor and their client will be an entire contract. In Underwood, Son & Piper v. Lewis, [1894] 2 QB 310, Lord Esher MR stated:

> …when a man goes to a solicitor and instructs him for the purpose of bringing or defending such an action, he does not mean to employ the solicitor to take one step, and then give him fresh instructions to take another step, and so on; he instructs the solicitor as a skilled person to act for him in the action, to take all necessary steps in it, and to carry it on to the end.

23. In this case, it was common ground between the parties that CFA-3 was an entire contract, and I agree and find accordingly.

24. A contract is "entire" when complete performance by one party is a condition precedent to the liability of the other: Beale, Chitty on Contracts, 36th ed (2025) ("Chitty"), [25-026]. Thus, in the case of CFA-3, Global Energy would only be liable upon complete performance by Rosenblatt of their obligations under the contract. Of course, because of the conditional nature of the agreement, what Rosenblatt would be entitled to, in terms of payment, on complete performance would depend on whether Global Energy won their claim (in which case clause 5 would apply) or lost the claim (in which case clause 6 would apply).

25. In broad-brush terms (it is unnecessary to set out the terms of CFA-3 in any great detail, because the parties were agreed as to its operation), CFA-3 operated as follows:

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

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

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

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

Termination of a retainer other than through performance: the common law

27. In Richard Buxton (a firm) v. Mills-Owens, [2010] EWCA Civ 122 at [53], Dyson LJ (with whom the rest of the court agreed) stated:

> …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.

28. The legal basis for this rule is obscure, as Dyson LJ noted at [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 the 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. It follows that the solicitors are entitled to be paid their profit costs and disbursements for the work done prior to the termination. There should in principle be no difficulty in calculating these, since the basis for charging was clearly defined in the solicitors' terms of business…

29. This, as again was common ground between the parties, was a purely *obiter* statement of the law. The suggestion that the solicitor's entitlement arises through his acceptance of the client's repudiatory breach cannot be right. That would give rise to a claim to damages not a claim in debt for payment of the solicitors fee's (and disbursements). It is clearly a debt claim – ie a claim to enforce an accrued obligation – that the 200-year old law was contemplating. In other words, the solicitor's claim involves the retainer regularly being brought to an end, and this fact causing the solicitor's claim to profit costs and disbursements to accrue.

30. There are two possible explanations for the accrual of the solicitor's rights, and they may both be right. Global Energy contended that (to quote from [47] of their written submissions) "the simplest explanation of the result in Buxton is that where a solicitor has a contractual right to terminate his retainer for reasonable cause, then the retainer will have been properly performed if it is later validly terminated pursuant to that right. In such circumstances, the solicitor will have ceased performance in the very scenario that the parties' contract had both contemplated and authorised, rendering any suggestion that the contract has been abandoned by the solicitor, such that his right to payment has been lost, hopeless".

31. An alternative, equally straightforward, explanation is that there is a term implied into the retainer entitling the solicitor to end the retainer for reasonable cause and on reasonable notice, causing incurred fees and unpaid disbursements to become due and payable by the client.

Express agreement in the retainer

32. The common law rule just described represents a "default". As Dyson LJ made clear at [55] of Buxton, the retainer between solicitor and client may contain specific provisions as to termination and payment.

33. This was so in the case of CFA-3, which provided as follows in clause 14:

> **14.1** [Global Energy] can end this agreement in writing at any time. If [Global Energy] does not continue with the Claim, [Global Energy] must pay Rosenblatt's fees at the normal rates for the work done to the termination date and disbursements. If [Global Energy] continues with the Claim and wins, [Global Energy] will also have to pay the Success Fee for that work.

> **14.2** Rosenblatt can end this agreement if [Global Energy] rejects Rosenblatt's advice to accept a reasonable offer from the Opponent to settle this Claim. In those circumstances, [Global Energy] must pay Rosenblatt's fees for the work done to the termination date and disbursements. If [Global Energy] continues
>
> **14.3** Rosenblatt can end this agreement if [Global Energy] does not meet its responsibilities. If this happens, [Global Energy] will have to pay Rosenblatt's fees for the work done to the termination date and disbursements.[2]
>
> **14.4** Rosenblatt can end this agreement if it believes [Global Energy] no longer has a reasonable prospect of success. If this happens, [Global Energy] will only have to pay Rosenblatt's fees and disbursements.

34. These express terms will displace the "default" position described above. However, in this case, it was common ground that:

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

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

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

Acceptance and consequences of a repudiatory breach

35. Instead, Rosenblatt opted to accept Global Energy's repudiatory breach of CFA-3. This was a matter determined by the Trower Judgment, in which it was held: (i) that although the parties to an agreement can agree to exclude the right to terminate for repudiatory breach, there was nothing to this effect in CFA-3 (at [114]); (ii) that there was nothing in the "default" rules to preclude termination for repudiatory breach (at [115]); (iii) that the fact that Rosenblatt could have ended the agreement in reliance on clause 14.3 (which they could) was irrelevant (at [116]); and (iv) that CFA-3 was in fact terminated by reason of Global Energy's repudiatory breach of contract.

36. The consequences of an accepted repudiatory breach of contract are neatly (and uncontroversially) stated in Taylor v. Motability Finance Ltd, [2004] EWHC 2619 (Comm) at [24] by Cooke J:

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

[2] This provision was misquoted in the First Judgment.

37. Again, it was common ground that: (i) in accepting Global Energy's repudiatory breach of the retainer, Rosenblatt had brought CFA-3 to an end, and could no longer avail themselves of clause 14.3; and (ii) Rosenblatt have a claim in damages against Global Energy. Such a claim has in fact been brought, under Claim No BL-2022-000318. These proceedings have been stayed by consent and by order of Deputy Master Brightwell.

The claim in unjust enrichment

38. Rosenblatt contended that the Senior Costs Judge erred in assessing their bill at nil because Rosenblatt was entitled to a restitutionary quantum meruit because of a failure of basis. Chitty describes this ground of unjust enrichment in the following terms (at [33-063]):

> Where an enrichment has been transferred under a transaction that is or becomes ineffective, the payer may recover the value of the enrichment provided that the basis for the transfer has totally failed. Although this ground of restitution is traditionally called "failure of consideration", the courts are now replacing the language of consideration with its contractual connotations, with that of basis.

39. This Judgment, too, will refer to a "total failure of basis" rather than a "total failure of consideration". It was common ground that neither the one-time availability of bringing CFA-3 to an end by way of clause 14.3 nor the damages claim brought by Rosenblatt and presently stayed could prevent Rosenblatt from asserting a claim in unjust enrichment.

40. The points in dispute, and which I will need to resolve, are these: (i) was there a total failure of basis?; (ii) even assuming there was a total failure of basis, could the Senior Costs Judge properly make an assessment of the bill other than nil? I will deal with these two points in turn.

Failure of basis

41. Failure of basis constitutes the "unjust" factor in a claim for unjust enrichment. Where a claim in unjust enrichment involves a benefit conferred pursuant to a contract, a court must be cautious not to allow the contractual risk allocation between the parties to be disturbed. Thus, where a benefit is conferred pursuant to a legal obligation to do so, the law of unjust enrichment cannot override that obligation so as to enable the claimant to avoid it. As Carr LJ put it in Dargamo Holdings Ltd v. Avonwick Holdings Ltd, [2021] EWCA Civ 1149 at [70], "I describe this principle, namely that an unjust factor will not override a valid and subsisting legal obligation of the claimant to confer the benefit on the defendant, as the "Obligation Rule"."

42. Dargamo itself provides a clear instance of the Obligation Rule precluding a claim in unjust enrichment. In that case, there was an contract that certain shares were to be purchased for US$950,000,000. It was contended that there was an extra-contractual understanding that the basis of payment was intended to be referable to the transfer of other assets, over and above the shares. The claim failed. At [33], Carr LJ stated:

> …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.

43. Matters are different where someone confers a benefit without being obliged to do so under any contract. Here, the Obligation Rule does not apply. However, whether this is the case can depend upon how the contract is to be construed. The decision of the Supreme Court in. Barton v. Morris, [2023] UKSC 3 provides a good example. Mr Barton had a binding oral agreement with a company called Foxpace Ltd which stipulated that Mr Barton would be paid £1.2m for making a purchase introduction "if Western bought the property for £6.5m. Since the contract made no provision as to what would happen if the property was sold to Western for anything less than £6.5m, there was no contractual obligation on Foxpace to pay anything to Mr Barton" (quoting from [2] of the judgment of Lady Rose, for the majority).

44. Mr Barton claimed in unjust enrichment, contending a failure of basis. His claim succeeded in the Court of Appeal, because the Court of Appeal held that the oral agreement was "entirely silent" as to what was to happen if the sale completed for a purchase price of less than £6.5m. In other words, the contract said nothing about entitlement if the sale occurred at a lower price.

45. Lady Rose disagreed, and the decision of the Court of Appeal was overturned. Quoting from [96]:

> I disagree with that analysis for reasons which mirror the reasons for rejecting the implication of a contractual term. When the parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances; both any obligation to pay under the contract and any obligation to pay to avoid an enrichment they have received from the counterparty from being unjust. The "silence" of the contract as to what obligations arise on the happening of the particular event means that no obligations arise…This excludes not only an implied contractual term but a claim in unjust enrichment.

46. Barton makes clear that silence is rarely a neutral factor. It often implies not a "free for all" but a positive decision by the parties to the contract that certain performances done pursuant to the contract will not be rewarded. Consideration of failure of basis thus goes well beyond a consideration of the express terms of the contract, and obliges the silences to be considered also.

47. This approach can be reframed by reference to risk allocation. In a dictum cited with approval by the Supreme Court in Barton at [89], Etherton LJ stated:

> 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…

48. Similarly, Lord Goff (cited in Barton at [91]):

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

49. The "allocation of risk" analysis is no more than the Obligation Rule described from a different standpoint. The point is that the basis of a contract is as much affected by what is positively agreed as by what is positively not agreed, as Barton itself very clearly demonstrates.

50. Both Dargamo and Barton were cases where the contract was regularly performed and not discharged for breach. Rosenblatt rightly submitted that the fact that a contract had – as here – been brought to an end and discharged by virtue of a breach of contract was a material factor when considering a remedy in unjust enrichment. In Photo Production Ltd v. Securicor Transport Ltd, [1980] AC 827 at 849, Lord Diplock described the effects of an accepted repudiatory breach:

> Where such an election is made (a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged…
>
> Lord Diplock made clear that these secondary obligations consequent on breach could be "excluded or modified by the express words of the contract" (at 849).

51. There is, thus, no category difference between unjust enrichment claims where the contract is discharged and those cases where the contract is regularly performed. The test remains the same. Of course, it is far harder for a contract to anticipate, and cater for, the circumstances arising in a case of breach; and that is why claims in unjust enrichment where the unjust factor is failure of basis are much more common in the case of discharged contracts. A vacuum can be created, where benefits are conferred in circumstances where there is no contractual risk allocation or no Obligation Rule to constrain the restitutionary remedy.

52. In this case, however, I am in no doubt that there is no room for a claim in unjust enrichment. CFA-3 was, in terms of the services provided, straightforward. However, the risks, although easy to anticipate, were hard to calculate in advance and were considerable. That is because this was a contingent fee agreement and the difference between winning and losing was in financial terms, according to the contract, enormous. Equally clearly, the parties would have appreciated that a great deal could happen between the start of the operation of CFA-3 and the resolution of the Claim.

53. CFA-3 made detailed provision in anticipation of problems arising prior to the Claim's resolution in clause 14. In one sense, it was a complete code in that it anticipated a number of risk contingencies: (i) "buyer's remorse", where Global Energy wanted to stop the proceedings; (ii) "rejection of settlement advice", where there is an offer to settle, which (contrary to advice) Global Energy refuses; (iii) "client's non-performance", where Global Energy fails to perform its clause 13 responsibilities; and (iv) "seller's remorse", where Rosenblatt come to the view that Global Energy no longer has reasonable prospects of success.

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

55. The question is whether the existence of a choice for Rosenblatt to end CFA-3 by other means, renders a restitutionary remedy possible. In my judgement, it cannot, because CFA-3 has already articulated what is to happen in this kind of case: see clause 14.3. The existence of the common law right in damages is not to open the way to an alternative restitutionary claim that is duplicative of clause 14.3: that would be to upset the considered exercise in risk allocation expressly contained in CFA-3, dealing with precisely this case. The common law remedy is a "last resort", really intended for those cases not anticipated in clause 14.

56. It follows that there has been no failure of basis. Thus, for substantially the reasons advanced by the Senior Costs Judge, the appeal must be dismissed.

Proper limits to a detailed assessment

57. For the reasons given, Rosenblatt's claim, which was put (at least by this stage of the proceedings) as a pure claim in restitution, fails. This point, which concerns the appropriateness of resolving issues such as a restitutionary quantum meruit in the course of detailed assessment, does not strictly arise for that reason. Nevertheless, both parties made points in relation to the interaction between a claim in restitution and a detailed assessment, and (at my invitation) submitted written submissions on this point after the hearing. I am very grateful to the parties for their further assistance.

58. The process for detailed assessment of a solicitor's bill under the Solicitors Act 1974 is not a process by which a solicitor's asserted right to payment is enforced. It is not a process by which a debt is collected. Section 70 of the Solicitors Act 1974, makes clear that where an application for assessment has been made in time, "the High Court shall, without requiring any sum to be paid

into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed": section 70(1) of the 1974 Act.[3]

59. The point of the assessment process is to enable the party chargeable to have the High Court review the bill. The process is the antithesis of an enforcement process.

60. It follows that the process is not one that is appropriate to resolving a claim for unjust enrichment, where unjust enrichment is the complete basis for the claim (albeit based upon a contractual failure of basis). The point of the process is to enable – outside of enforcement proceedings – a party chargeable with a bill to have that bill assessed, it being foundational to the process that the solicitor's claim against the party chargeable is founded in contract, albeit a contractual claim with a significant "regulatory" overlay.

61. This analysis does no more than follow that of Johnson J in Jones v. Richard Slade and Co Ltd, [2022] EWHC 1968 (QB). In that case, during a detailed assessment sought by the chargeable party, it was contended by that party that an agreement regarding the solicitor's offer to reduce their fees, which had been accepted by the chargeable party, had been entered into as a result of undue influence or economic duress. After a careful review of the "regulatory overlay", which I shall not repeat but gratefully adopt, Johnson J stated:

> **[41]** The professional negligence cases are valuable in indicating a principled approach to the limits of section 70. They show that "wholesale" allegations of professional negligence may not be determined when assessing costs. Such allegations are simply not relevant to the exercise of assessing costs. On the other hand, a discrete and contained allegation of negligence (what Mr Williams terms "localised" negligence) may be relevant to the question of whether particular items of costs were reasonably incurred. If, for example, a solicitor submits a witness statement late, and costs are incurred in securing an extension of time, then it may be relevant to inquire whether the delay was the fault of the client, or the solicitor. If the former, then the costs of securing an extension of time are likely to be reasonably incurred. If the latter, then the client might succeed in showing that they were unreasonably incurred, in that they were due to the solicitor's negligence. In that type of case, the issue of negligence is closely tried to the exercise that the court is required to undertake – the assessment of the costs' bill. Resolving where the fault lies is a necessary part of assessing the costs. Conversely, if a claim is issued after the expiry of the limitation period, and is, for that reason, ultimately unsuccessful, the assessment of each item of costs that was incurred during the case does not depend on whether the solicitor was negligent in issuing the claim late. Such a case of "wholesale" negligence is irrelevant to the assessment of costs.
>
> **[42]** The same might be said of allegations (such as the claimant here advances) of breach of fiduciary duty, or inappropriate pressure, or economic duress. There is no good reason why they should be treated in a qualitatively different way from allegations of professional negligence. If an individual item of costs

[3] See also section 70(2) of the 1974 Act, which deals with the case where there is still time to seek an assessment, but no assessment has yet been sought.

was incurred because, for example, a solicitor acted in breach of fiduciary duty, then that might be relevant to the assessment of costs. More generalised allegations about a solicitor's conduct are less likely to be within the proper scope of a costs assessment.

62. I am in no doubt that this case raised generalised questions more appropriate to separate High Court litigation. It is only because the point ultimately failed – both before the Senior Costs Judge and now, on appeal, 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.

63. I stress that there is no question of jurisdiction – in the sense of power to hear – arising in cases such as this. Both the Senior Costs Judge and I have the jurisdiction to decide such matters. The question is one of the appropriateness of the jurisdiction. Viewed in this light, it is clear that the point should have been heard in a different jurisdiction, and the detailed assessment stayed pending the outcome of the point.

64. As it is, the effective dismissal of the claim by the Senior Costs Judge was entirely right, and I dismiss the appeal against his decision.