

The Relationship between Contract and Unjust Enrichment

Lord Burrows

This is an edited version of a paper presented at the “Heart of Equity” conference held at University College London on September 17-18 to mark the retirement (as a full-time Professor) of Charles Mitchell.¹

1. Introduction

I first met Charles Mitchell in the early 1990s when, along with the late Norman Palmer, I examined his PhD on Subrogation. Thereafter we became friends. We taught together for a few years on the Commercial Remedies BCL course at Oxford and he was a member of the advisory group that helped me on *A Restatement of the English Law of Unjust Enrichment*. Throughout I have greatly admired his work and his generosity of spirit. I therefore consider it a privilege to contribute to this conference marking his (partial) retirement. What marks out Charles’ scholarship, and has made it so valuable, is his careful attention to the primary sources. He is reluctant to take the simple route of saying that the courts have got it wrong – because the decisions may not fit his own best theory - if he can find a rational and plausible explanation for their decisions.

While the focus of the conference is on Equity, Charles has been equally passionate about the law of unjust enrichment which, of course, combines common law and Equity. His revamping of *Goff and Jones on Unjust Enrichment*,² along with Paul Mitchell and Stephen Watterson, has been of huge importance to the understanding of the law in this area. Since that revamp, it is again very much the first book that any English practitioner or judge will turn to when looking at unjust enrichment. In this paper, I explore some aspects of the relationship between Contract and Unjust Enrichment that are covered more fully in various chapters of Goff and Jones.³ In particular, I wish to query the widely held view that there can be no unjust enrichment where there is an effective or subsisting contract between the parties.

Before turning to that specific topic, there is a general point I would like to make at the outset. Several judges have recently said to me that, having thought they understood in general terms, what the law of unjust enrichment was about, they are now somewhat anxious about a case coming before them on the law of unjust enrichment. That is because they are conscious of fundamental attacks on there being a law of unjust enrichment, in particular by academics such as Professor Robert Stevens in his book, *The Laws of Restitution* published in 2023. My reply has been that there is no need to be afraid. The law of unjust enrichment is in rude health. Although there have always been

¹ An earlier talk on the same theme was given by Lord Burrows at the annual conference of the British Irish Commercial Bar Association in Manchester on 26 March 2026.

² (10th ed, 2022). With his fellow editors he took the book over as from the 8th ed in 2011.

³ Chapter 3 treats contracts as justifying grounds. Failure of basis is covered in chapters 12 – 14.

interesting controversies in this area of the law, including as to its existence (after all, it is not that long since we were talking about quasi-contract), we are today in a relatively stable and settled position. In particular, the four-stage conceptual structure for the law of unjust enrichment - benefit, at the expense of, unjust factors and defences - is cemented into our law. Lord Reed in *Investment Trust Companies v HMRC*⁴ said that the four questions are not legal tests divorced from the case-law and should not therefore be interpreted as if they were the words of a statute. But I do not think any commentator or judge was ever seriously suggesting the contrary, although perhaps some prior judgments on the 'at the expense of' enquiry, which is what the *Investment Trust* case was concerned with, may have been straying towards that.

It follows that, for each of the four elements, one has to consider what the case law lays down as to what is an enrichment, what counts as 'at the expense of', what is meant by 'unjust' and what are the defences. True it is that once one examines all the relevant case law on a particular element one can draw out more specific rules and principles that can act as legal tests but that is nothing more than standard common law technique.

The relationship between the law of contract and the law of unjust enrichment has long perplexed courts and commentators. In considering the relationship afresh, I want to consider several leading cases including a Supreme Court case in which, along with Lord Leggatt, I dissented, namely *Barton v Morris*.⁵

It is helpful to start with a straightforward hypothetical example, where it is clear that there can be no claim in unjust enrichment because of the existence of a valid contract. C enters into a contract with D mistakenly believing that the goods C is buying are made of top-quality material. There is no term, express or implied, to that effect and D has made no representation to that effect. In fact the goods are made of much cheaper material and are worth far less than C has paid for them.

Does C have a claim in unjust enrichment on the ground of mistake? That is, can C successfully argue that it is entitled to restitution of the price paid because it has made a causative mistake, whereby it would not have paid the agreed price had it known the truth? The answer is clearly "no". C is not entitled to restitution of the contract price (even in return for counter-restitution of the goods) because, according to the standard explanation, the contract remains valid or effective. This was made clear by, eg, Millett LJ in *Portman Building Soc v Hamlyn Taylor Neck*⁶ and Lord Scott in *Deutsche Morgan Grenfell plc v IRC*.⁷

⁴ [2017] UKSC 29, [2018] AC 275.

⁵ [2023] UKSC 3, [2023] AC 684.

⁶ [1998] 4 All ER 202, 208.

⁷ [2006] UKHL 49, [2007] 1 AC 558 at [84]-[85].

On the other hand, it is equally clear that there can be restitution of an unjust enrichment where the contract is void, for example, for common mistake or because the statutory requirement for a contract for the sale of land to be in writing has not been complied with;⁸ or where the contract has been avoided (ie rescinded) for, for example, misrepresentation or undue influence or duress; or where the contract has been terminated (ie discharged) for breach or frustration; or where the contract is unenforceable.

Therefore, to give a couple of hypothetical examples, say C pays money to D under a valid contract for goods or services. The contract is then terminated for frustration or for D's breach and let us assume, to make matters simple, that the termination occurs before D has benefitted C ie C has received none of the contracted-for goods or services. C is entitled to restitution of the money paid for a total failure of consideration or what is now preferably referred to, following numerous cases making this terminological point, including *Barton v Morris*, a failure of basis (or, if necessary to add, a total failure of basis). That is so, even though the money was paid under what was, at the time of payment, a valid contract and even though termination of a contract wipes away contractual obligations for the future but not for the past. This fact-situation is exemplified by *Giles v Edwards*⁹ and by the leading common law frustration case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd.*¹⁰ Under the Law Reform (Frustrated Contracts) Act 1943 there is a claim for failure of basis, subject to counter-restitution, even if there is a partial rather than a total failure of basis ie even though C has received some part of what C was promised.

Similarly, say C performs services for D (or renders another benefit to D) in return for the promise of payment by D under a contract that is unenforceable. That may be, for example, because the limitation period has expired so that the contract has become unenforceable; or it may be because there is a formality requirement which renders the contract unenforceable.¹¹ In breach of contract, D refuses to pay C anything. C is entitled to restitution for failure of basis for the value of the services rendered. This is so even though the obligations under an unenforceable contract are valid albeit unenforceable. The best illustrations of this fact-situation are the leading Canadian and Australian cases on unjust enrichment, in both of which the contracts were unenforceable for want of formality, namely the Supreme Court of Canada's decision in

⁸ Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989. It used to be the case that an oral contract for the sale of land was merely unenforceable not void.

⁹ (1797) 7 Term Rep 181.

¹⁰ [1943] AC 32.

¹¹ As was previously the position in English law in respect of oral contracts for the sale of land: see note 8 above.

Deglman v Guaranty Trust Co of Canada and Constantineau,¹² and the High Court of Australia's decision in *Pavey & Matthews Pty Ltd v Paul*.¹³

It might appear from this overview that the essential relationship between contract and unjust enrichment is straightforward and can be expressed as follows. There can be no unjust enrichment where the benefits were conferred under an effective contract: but that there can be unjust enrichment where the benefits were conferred under a contract that was ineffective, whether the ineffectiveness was because the contract was void; or was voidable and has been avoided;¹⁴ or has been terminated; or was unenforceable. The language of effective or ineffective, rather than valid or invalid, allows one to incorporate unenforceable contracts which, by definition, are valid contracts, creating valid obligations, but cannot be enforced by coming to court.

2. The 'obligation rule'

However, there are two difficulties with simply relying on a rule that there can be no unjust enrichment where there is an effective contract. The first is that, while that may be an accurate *description* of the law, it is not an explanation. It does not tell us why unjust enrichment is ruled out where there is an effective contract. At this point, it is sometimes said that the answer is that unjust enrichment is subsidiary to contract. But that answer just pushes the question back one level because one must then ask, why should unjust enrichment be subsidiary to contract?¹⁵ One can readily understand that, to respect the parties' autonomy and (objective) intentions, parties may contract out of restitution of an unjust enrichment but it cannot be said, without fictionalising the parties' intentions, that a rule barring unjust enrichment where there is an effective contract correlates to a contracting-out by the parties. It would seem, therefore, that one must search for an explanation that goes beyond the bare description that an effective contract bars unjust enrichment.

The second difficulty is that, while very rare, it is not always the case that restitution of an unjust enrichment is ruled out where the benefits were conferred under an effective contract. Twenty-five years after it was decided, the clearest example of this is still the much discussed and controversial High Court of Australia decision in *Roxborough v Rothmans of Pall Mall Australia Ltd*.¹⁶

Here a retailer, Roxborough, bought cigarettes from a wholesaler, Rothmans. The purchase price included a separately itemised amount representing the tax – in the form

¹² [1954] 3 DLR 785.

¹³ (1986) 162 CLR 221.

¹⁴ It may be that one should here add 'or was rectifiable and has been rectified' but there is an issue as to the extent to which one can count the consequence of rectification as restitution given that an effective contract, albeit a different contract, is left in play.

¹⁵ For criticism of subsidiarity, see eg *Goff and Jones on Unjust Enrichment* (10th edn, 2022) paras 2.01-2.06.

¹⁶ (2001) 208 CLR 516.

of a licence fee- that it was assumed by both parties that the wholesaler would have to pay over to the State. It subsequently transpired that that tax did not have to be paid by the wholesaler to the State because the tax was held to be unconstitutional. The retailer sought restitution from the wholesaler of the tax element of the payments it had made. A majority of the High Court of Australia, Kirby J dissenting, held that the retailer was so entitled. This was because there had been a failure of consideration or, as we would now say, a failure of basis, in the sense that the expected state of affairs – the wholesaler being legally required to pay over the tax to the State – did not eventuate; and the part of the price representing the tax was clearly specified and could be straightforwardly severed from the rest.

The reason why the decision is controversial, and the reason why Kirby J dissented, was that the payment was made under a contract that was effective. The contract of sale was not void, voidable, or unenforceable and had not been terminated. Applying the supposed rule that an effective contract bars unjust enrichment, there should have been no restitution.

My view is that, although difficult, the decision was correct. In order to understand why, we need to move away from the idea that there is a rule (or at least an absolute rule) whereby an effective contract bars unjust enrichment. Instead, we should accept that there is a very closely connected, but nevertheless different, rule which denies restitution of an unjust enrichment in almost all, but not all, situations where there is an effective contract.

That rule was termed, drawing on my own earlier work, the ‘obligation rule’ in *Dargamo Holdings Ltd v Avonwick Holdings Ltd*.¹⁷ What that rule says is that an enrichment is not unjust, so there can be no restitution, if the benefit was owed to the defendant under a valid contractual (or other legal) obligation. Or looked at from the perspective of the defendant (ie the person to whom the obligation was owed) the enrichment is not unjust if the defendant was legally entitled to that benefit under a valid contractual (or other legal) obligation.¹⁸ Where the obligation rule applies, the conflict between contract law and unjust enrichment law is resolved, without resorting to saying that unjust enrichment is subsidiary, because the unjust factor grounding unjust enrichment is

¹⁷ [2021] EWCA Civ 1149. I regard *Dargamo* as correctly decided and reasoned. There was no failure of basis because the contract had been fully performed and it was correctly held that any informal understanding could not override, by supplying a clashing informal basis, the basis provided by the contractual terms. Similarly, there was no failure of basis in *Bank of New York Mellon (Int) Ltd v Cine-UK Ltd* [2022] EWCA Civ 1021, [2023] 2 P & CR 19: it would clash with the terms of the lease to say that there was a failure of basis because the premises could not be lawfully used as a cinema.

¹⁸ Several other commentators, eg Mitchell, Mitchell and Watterson in *Goff and Jones on Unjust Enrichment* and Virgo, *The Principles of the Law of Restitution* (4th edn) come close to this idea by setting up “justifying grounds” or “presence of basis” as nullifying an unjust factor. With respect, I regard those ideas as overelaborate and having less explanatory force than the obligation rule.

negated – there is no injustice - by the existence of the valid contractual (or other) obligation to render the benefit to the defendant.

So going back to the mistake hypothetical set out above, the payment does not constitute an *unjust* enrichment because, although the buyer made a mistake about the quality of the goods, the seller was legally entitled to the payment under the buyer's valid contractual obligation to pay. The injustice founded on the mistake is therefore negated by the valid obligation so that the enrichment is not *unjust*.

In contrast, there can be a successful unjust enrichment claim where the contract in question is void or has been avoided because then there is no possible conflicting valid contractual obligation.

Moreover, and this is crucial and of wide-ranging importance, there is also no conflicting valid contractual obligation where the obligation to render the benefit (and from the defendant's perspective the entitlement to the benefit) is conditional and that condition has failed. In that situation, to grant restitution of unjust enrichment for failure of basis is consistent with, and does not conflict with, the valid contractual obligation because of the conditional nature of the contractual obligation.¹⁹

That is the essential point which I failed to make clear in my earlier analyses of the obligation rule where I instead invoked the flawed idea that there was a general obligation rule subject to wide-ranging exceptions which required the courts to weigh up the strength of the unjust factor against the strength of the countervailing contractual obligation. As I now see it, the conditional nature of the obligation avoids any conflict with the unjust enrichment claim for failure of basis so that there is no need to see there as being a wide-ranging exception to the obligation rule.²⁰

If we therefore take the Canadian case of *Degelman*, there is no conflict between saying that there was a valid, if unenforceable, contractual obligation on the nephew to render the services and saying that the nephew was entitled to restitution for the value of those services in the law of unjust enrichment on the ground of failure of basis. The failure of basis was the aunt's breach of promise in failing to leave the nephew her house in her will. Granting restitution for the value of the nephew's services for that failure of basis did not clash with his valid contractual obligation to render the services because that contractual obligation was conditional on the aunt carrying out her promise to leave him her house in her will, which she did not do. Of course, the nephew could not both

¹⁹ Edelman and Bant, *Unjust Enrichment* express a similar idea by saying that D was entitled to receive the enrichment but, once the basis has failed, is not entitled to retain the enrichment.

²⁰ There is a question as to whether the decision in *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 AC 558 infringes the obligation rule. One might say that the money was owed by reason of the EU legislation. But, in my view, restitution for mistake is consistent with that obligation in the sense that the very unlawfulness in question was the non-provision of an option for group relief which the claimant would have exercised had it been available. Even if this cannot be rationalised as consistent with the obligation rule, it seems a justified exception to that rule.

enforce the promise, so that there would be no failure of basis, while being awarded restitution of an unjust enrichment, based on a failure of basis: that would amount to inconsistent double recovery.

Again, where a valid contractual obligation to pay for goods or services has been terminated for breach or frustration after payment but before any goods or services have been received, there is no conflict between restitution of the payment in unjust enrichment for failure of basis and the valid contractual obligation to pay. That is precisely because the contractual obligation, albeit valid, is conditional on the promise to render the services being fulfilled and, where it has not been, and provided the claimant is not awarded double recovery, restitution of the payment for failure of basis is consistent with the conditional nature of the contractual obligation to pay.

This leads us then to the best explanation of why *Roxborough* was correctly decided. At first sight, it might have been thought that, applying the obligation rule, there could be no restitution of an unjust enrichment. That is because there was a valid, effective and subsisting contractual obligation requiring the retailer to make the payment to the wholesaler including the tax element. But on closer examination, one can say that there was a failure of basis in respect of the tax element because the expected state of affairs, objectively shared by both parties, in respect of that tax element – that the tax was lawfully levied and would therefore have to be paid over to the State – did not sustain itself.²¹ And restitution of the tax paid for failure of basis was not inconsistent with the valid and subsisting contractual obligation to make that element of the payment because that contractual obligation, albeit valid, was itself conditional on the tax element being lawful and that contractual condition failed when it was established that the tax was unconstitutional.

Although the fact that the obligation rule was not being infringed in *Roxborough* may seem a somewhat formal explanation of the decision, it is supported at a deeper level because the conditional nature of the contractual obligation explains why restitution of unjust enrichment would not undermine the parties' contractual allocation of risk. Put another way, the parties had not allocated the risk to one or other of the tax not being payable because unlawful. The tax element of the payment was outside their risk allocation and was conditional on the tax being lawfully levied. Had it been clear in advance of the payment that the tax was unlawful, the retailer would not have been contractually bound to pay that element of the price.²² That shows that the tax element

²¹ For another example of a failure of basis where a (non-promissory) state of affairs has failed to sustain itself, see the failure of basis that was held to ground a restitutionary quantum meruit by a receiver against the Crown Prosecution Service in *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26, [2015] AC 1. The basis failed when the receiver lost its right (by lien) to enforce payment against the companies' assets.

²² See, Robert Stevens, 'Is there a Law of Unjust Enrichment?' in S Delgeling and J Edelman, *Unjust Enrichment in Commercial Law* (2008) 11.

was conditional on the tax being lawful. The unjust factor of failure of basis, applied to the severable tax element of the price was therefore consistent with the valid but conditional contractual obligation to pay.

I would add five points. First, failure of basis in the law of unjust enrichment is an objective bilateral concept that depends on the qualification of the objective intentions of the parties. It is not a unilateral subjective concept like mistake.

Secondly, the tie up between the unjust factor of failure of basis and the conditional nature of the contractual obligation is very wide-ranging. It would appear that, wherever in a contractual context, there is a failure of basis, the benefit conferred under the contract was conditional. Provided that the claimant is not granted double recovery – by enforcing the promise and being granted restitution for failure of basis – the claimant should be entitled to restitution of an unjust enrichment.

Thirdly, the fact that there is consistency between failure of basis and the conditional nature of the contractual obligation does not mean that the source of the restitution on the ground of failure of basis is to be found in the contract. The contract is usually silent as to what is to happen in respect of benefits conferred and the law of unjust enrichment steps in, subject to contracting out, precisely because the parties' objective intentions are silent and do not deal with the benefits conferred.

Fourthly, I have modified my views in the light of persuasive criticisms of the way I had earlier formulated my position. For example, KV Krishnaprasad, whose superb D Phil on this topic I had the privilege of examining, writes in his book (based on that D Phil) *Unjust Enrichment and Countervailing Obligations*: "Burrows's explanation for [the relevant] cases ... is unconvincing ... the [alternative] explanation offered here is based on the conditional nature of the defendant's contractual entitlement".²³

Fifthly, how does the obligation rule work where the contract is unilateral rather than bilateral? Say, for example, in a variation of the hypothetical mistaken payment example given above, C has an option to buy the goods.²⁴ That is, D promises to supply the goods to C, if C chooses to exercise an option to buy them. C exercises that option and D supplies the goods that are of lower quality than C believed them to be. Is C entitled to restitution of the purchase price paid on the ground of mistake? As in the bilateral contract example, the answer is "no". But here one cannot say that the explanation for that is that the injustice of C's mistake is negated by C's obligation to pay for the goods because C had no such obligation given that the contract is unilateral. However, D received the (mistaken) payment under a valid unilateral contract and one can say that D is, in that sense (even though not a mirror image of an obligation of C), contractually

²³ (2025) at p 66. See similarly Tariq Baloch, *Unjust Enrichment and Contract* (2009) pp 160-161; Jordan English, *Discharge of Contractual Obligations* (2025) ch 9.

²⁴ I am grateful to Professor Ben McFarlane for emailing me this hypothetical example.

entitled to the payment. Had the facts been different so that there was an unjust factor of failure of basis, rather than mistake, restitution of the payment would have been possible assuming that D's contractual entitlement to payment was conditional. In that situation, there would be no inconsistency between the failure of basis and the contractual entitlement because D's entitlement to the payment under the contract was conditional.

3. *Barton v Morris*

It is now convenient to turn to *Barton v Morris*. An oral contract was made between Mr Barton, who was a property dealer and developer, and Foxpace Ltd, who owned a property called Nash House which it wanted to sell. The only express terms of that oral contract, as found by the trial judge, were that if Mr Barton introduced to Foxpace a prospective purchaser, who then went ahead and concluded a sale of Nash House for £6.5m, Foxpace would pay Mr Barton £1.2m. That sum of £1.2m represented deposits (and other expenses) that Mr Barton had himself lost on two previous attempts to buy Nash House. The parties did not give any thought to the consequences of a sale under £6.5m.

Mr Barton introduced Western UK (Acton) Ltd to Foxpace. Western went ahead and bought Nash House. The initially agreed price had been £6.5m but, on learning of a potential issue with the high-speed rail-link HS2, the final purchase price was knocked down to £6m. There is no suggestion of any dishonesty by Foxpace in so doing (ie Foxpace did not lower the price to undermine Mr Barton's claim to £1.2m).

As the sale price had been lower than £6.5m, Foxpace refused to pay Mr Barton the £1.2m promised and argued that they were not legally liable to pay him any sum for his services in introducing Western to them (although they did offer him £400,000 as a goodwill gesture, which he refused).

The trial judge, His Honour Judge Pearce sitting as a Judge of the High Court,²⁵ decided that Mr Barton was not legally entitled to any payment for the beneficial services he had rendered to Foxpace. The contract expressly provided only for a payment to Mr Barton (of £1.2m) if the price paid for Nash House was £6.5m. No implied term for reasonable remuneration had been pleaded. And a claim for unjust enrichment could not succeed on these facts because there was a valid contract and any such claim would undermine the contractual allocation of risk. However, had there been such a successful claim for unjust enrichment, the trial judge put a market value of £435,000 on the services rendered to Foxpace by Barton which he would have awarded as restitution.

²⁵ [2018] EWHC 2426 (Ch).

The Court of Appeal (Davis, Asplin and Males LJ) unanimously reversed that decision.²⁶ The leading judgment was given by Asplin LJ with whom, in his short concurring judgment, Males LJ agreed. Their reasoning was that Mr Barton was entitled to £435,000 as restitution for unjust enrichment. Both indicated, in obiter dicta, that a possible alternative analysis was that there was a contractual right to reasonable remuneration, comprising the same sum, which Asplin LJ explained might have rested on there being an implied term (of fact). Davis LJ preferred to reason that that sum was payable, not within the law of unjust enrichment, but as reasonable remuneration based on an implied term in the contract. Davis LJ said that there was an implied term because it was “inherent in” the contract²⁷ that Mr Barton would be reasonably remunerated for successfully introducing a purchaser.

The majority of the Supreme Court (Lady Rose, with whom Lord Briggs and Lord Stephens agreed) reversed the Court of Appeal and, restoring the decision of His Honour Judge Pearce, held that Mr Barton was entitled to nothing for his services.²⁸ There was no express term in the contract entitling him to remuneration and nor was there an implied term to that effect. Nor was there any entitlement under the law of unjust enrichment.

In contrast, Lord Leggatt and myself, in separate dissenting judgments, were of the view that Mr Barton was entitled to reasonable remuneration for his services because there was a term implied by law in the contract entitling him to reasonable remuneration.

I should make clear that counsel for the appellant, Andrew Trigger KC, clarified at the start of his submissions in the Supreme Court that he would not be taking any pleading or procedural point as to an implied term not having been pleaded or having been eschewed at first instance.

In the view of Lord Leggatt and myself, the implied term by law was either laid down by statute, as a possible interpretation of section 15 of the Supply of Goods and Services Act 1982, but, in any event, was implied by law at common law (applying the approach in *Liverpool City Council v Irwin*)²⁹ as a necessary element of a contract of this type (the type of contract being an introduction or commission contract).

That implied term was not inconsistent with, or excluded by, the express terms of the contract. In this respect, it is important to understand that, while the contract was happily described as a unilateral “if but only if” contract, there was an ambiguity as to what that meant. His Honour Judge Pearce interpreted the contract as an “if, but only if” contract in the weak sense that the agreed sum of £1.2m was only to be paid if the sale price reached £6.5m ie Mr Barton was not entitled to £1.2m if the sale price was lower

²⁶ [2019] EWCA Civ 1999, [2020] 2 All ER (Comm) 652.

²⁷ See para 75.

²⁸ [2023] UKSC 3, [2023] 2 All ER 701.

²⁹ [1977] AC 239.

than £6.5m. But that interpretation is different from this being an “if, but only if” contract in the strong sense that, if the sale price did not reach £6.5m, the contract was excluding any other obligation to make a payment for Mr Barton’s beneficial services. In other words, this strong sense would mean that, if the sale price was less than £6.5m, Mr Barton was not merely not entitled to £1.2m he was also not entitled to any remuneration at all for his beneficial services. In short, if the strong sense were applied, reasonable remuneration was being excluded. Judge Pearce did not interpret the contract as an “if, but only if” contract in that strong sense and I made clear why I thought he was correct to do so.

However, it is of particular relevance to the relationship between the law of contract and the law of unjust enrichment, that, according to my dissenting judgment, even if there were no term implied by law, Mr Barton would in any event have been entitled to a restitutionary quantum meruit in unjust enrichment with the unjust factor being failure of basis. My analysis was that, if the contract was silent on the matter, there was nothing to contradict the operation of the normal rules of unjust enrichment. The failure of basis was because Mr Barton had rendered the services on the basis that, if Nash House were sold for £6.5M, he would be paid £1.2M. The basis failed when Nash House was sold for less than £6.5M so that he would not be paid, and was not paid, the £1.2M. Hence I said:

‘On the facts of this case, there has been a relevant failure of basis. Mr Barton rendered the beneficial services to Foxpace on the basis, objectively shared with Foxpace, that he would be paid £1.2m for those services if Nash House was sold to Western for £6.5m. That basis failed ... when the sale to Western was for a price lower than £6.5m so that Mr Barron was not entitled to, and was not paid the promised £1.2m. It is this failure of basis that supplies the unjust factor.’³⁰

My fellow dissentient, Lord Leggatt, did not agree with me on this unjust enrichment point. This was because, in his view, “there is no room for an unjust enrichment claim where there is a subsisting contract between the parties.”³¹

He pointed out, correctly, that the obligation rule was not here an objection to unjust enrichment because we were dealing with a unilateral contract not a bilateral contract. That meant that Mr Barton was not under an obligation to do anything. Nevertheless, Lord Leggatt reasoned that there was a wider objection, namely that there was a valid subsisting contract. With great respect, it will be clear from what I have said that I am not convinced by that reasoning which appears to be inconsistent with the decision in *Roxborough*.

³⁰ At para 233.

³¹ At para 189. But Lord Leggatt’s position has the powerful support of Edwin Peel, “Implied Terms and Restitution” in *Shaping the Law of Obligations* (eds Peel and Probert, 2023), 383 -396.

As I have explained above, while one could say Foxpace was entitled to the benefit of Mr Barton's services under a valid unilateral contract, restitution for failure of basis would not be inconsistent with that contractual entitlement because that entitlement was conditional.

In my view, therefore, there was a claim for unjust enrichment with the unjust factor being failure of basis. There was no countervailing contractual obligation (because this was a unilateral contract) and the parties had not contractually excluded unjust enrichment. Moreover, although Foxpace was entitled to the services under a valid unilateral contract, that contractual entitlement was conditional on a sale of Nash House at £6.5m and that condition had failed.

Hence my conclusion was that, although there could be no double recovery, one reached the same result – of awarding £435,000 as reasonable remuneration for the services rendered – whether by an implied term of law or by the application of unjust enrichment grounded on failure of basis.

4. Conclusion

Much has been written about the relationship between contract and unjust enrichment. Although it is commonly stated that there can be no claim for restitution of an unjust enrichment where there is a valid subsisting contract, this paper has argued that that is marginally, but importantly, inaccurate. Instead, there is an obligation rule to the effect that an enrichment is not unjust, so there can be no restitution, if the benefit was owed to the defendant under a valid contractual (or other legal) obligation. In applying that obligation rule, a valid and subsisting contractual obligation that is conditional, where that condition has not been fulfilled, is consistent with restitution for unjust enrichment grounded on a failure of basis.