



Neutral Citation Number: [2021] EWCA Civ 1149

Case No: A4/2020/1460 & A4/2020/1604

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT
Mr Justice Picken
CL-2016-000494

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2021

Before:

LADY JUSTICE ASPLIN
LADY JUSTICE CARR
and
SIR TIMOTHY LLOYD

Between:

(1) DARGAMO HOLDINGS LIMITED
(2) SERGIY TARUTA

Appellants

- and -

(1) AVONWICK HOLDINGS LIMITED
(2) VITALI GAIDUK
(3) OLENA GAIDUK

Respondents

Jonathan Crow QC, Anton Dudnikov and Catherine Jung (instructed by **Hogan Lovells International LLP**) for the **Appellants**
Laurence Rabinowitz QC, Ben Woolgar and Alexandra Whelan (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Respondents**

Hearing dates: 6 & 7 July 2021

Approved Judgment

Lady Justice Carr:

Introduction

1. This appeal concerns the proper scope and application of the principle of unjust enrichment in circumstances of alleged total failure of consideration (or basis). It raises a fundamental question as to when a claim in unjust enrichment can succeed in the context of the parties' contractual allocation of risk under a valid and subsisting contract.
2. The debate is set in the context of bitter litigation arising from events between 2007 and 2011 surrounding the division of the shared business interests of three wealthy and powerful Ukrainian businessmen: Sergiy Taruta, a former Governor of Donetsk Oblast ("Mr Taruta") (the Second Appellant (and Fourth Defendant)); Vitali Gaiduk, a former Deputy Prime Minister of Ukraine ("Mr Gaiduk") (the Second Respondent (and First Third Party)); and Oleg Mkrтчan ("Mr Mkrтчan") (the Third Defendant). These shared interests initially and predominantly concerned the metallurgical sector in Ukraine, and in particular a company called the Industrial Union of Donbass ("IUD"), but in time came to cover a broad range of investments.
3. Mr Taruta, Mr Gaiduk and Mr Mkrтчan operated materially through the following corporate vehicles:
 - i) Mr Taruta through Dargamo Holdings Limited ("Dargamo"), (the First Appellant (and Second Defendant));
 - ii) Mr Gaiduk through Avonwick Holdings Limited ("Avonwick") (the First Respondent (and Claimant));
 - iii) Mr Mkrтчan through Azitio Holdings Limited ("Azitio") (the First Defendant).
4. In August 2016 Avonwick commenced proceedings in deceit against Mr Taruta and Dargamo ("the Taruta Parties") and Mr Mkrтчan and Azitio ("the Mkrтчan Parties"). This led in turn to the issue of various counterclaims and also additional claims involving new parties. Amongst those counterclaims and additional claims was a claim by the Taruta Parties against Avonwick, Mr Gaiduk and his wife, the Third Respondent (and Fourth Third Party), Olena Gaiduk ("Mrs Gaiduk") (together the "Gaiduk Parties") for unjust enrichment.
5. In this regard the Taruta Parties claimed the sum of US\$82.5 million paid by Dargamo to Avonwick as part of a total consideration of US\$950 million payable under a share purchase agreement for the sale and purchase of shares in Castlerose Limited ("Castlerose") ("the Castlerose SPA"). The sum was said to have been included in the total consideration on the understanding and in anticipation that the parties would enter into legally binding contracts obliging the Gaiduk Parties to transfer to the Taruta Parties further assets, including (but not limited to) 50% of the Gaiduk Parties' interests in two Ukrainian companies, PJSC New Engineering Technologies ("NET") and CJSC Bakhmutsky Agrarian Union ("Agro Holding"). No part of these interests was ever transferred to the Taruta Parties. I refer below to this as "the unjust enrichment claim".

6. Following trial in October and November 2019, Picken J (“the Judge”) delivered a lengthy and detailed judgment dated 14 July 2020 (running to over 220 pages¹) ([2020] EWHC 1844 (Comm)) (“the Judgment”). He dismissed Avonwick's claims and also all of the counterclaims and additional claims, including the unjust enrichment claim.
7. The Taruta Parties have permission to appeal against the Judgment in one limited respect, namely against the Judge's dismissal of the unjust enrichment claim. Permission was granted conditionally on payment into court by the Taruta Parties of over £2 million on account of costs; that condition has been met.
8. The Taruta Parties contend that the outcome of the Judgment is "inherently unsatisfactory": its practical consequence is that the Gaiduk Parties are entitled to retain not only the benefit of the US\$82.5 million but also the interest in NET and Agro Holding against which those monies were intended to be applied. They submit that they are not asking the court to depart from established legal principle. The Gaiduk Parties, on the other hand, contend that success on the appeal would involve a "radical departure" for English law, permitting any party to even the most carefully-framed commercial contract to seek, by a claim in unjust enrichment, to subvert the contractual bargain on the basis of a non-binding, extra-contractual understanding between the parties.
9. For the purpose of resolving the issues, the court has had the considerable assistance of focussed skeleton arguments, alongside powerful oral submissions from both Mr Crow QC for the Taruta Parties and Mr Rabinowitz QC for the Gaiduk Parties.

The relevant facts

10. It is not necessary to rehearse the full details of what was a complex factual background and which can be found in the Judgment. A helpful overview of the history and course of the parties' dealings is set out at [1] to [67].
11. The focus for present purposes is on the Castlerose SPA, as set out above, a share purchase agreement entered into between Avonwick, Dargamo and Azitio as part of the division of the parties' assets, and events relating to the Gaiduk Parties' interests in NET and Agro Holding.

The Castlerose SPA

12. By deed dated 18 December 2009² Avonwick agreed to sell to Dargamo and Azitio its interest (held through Castlerose) in IUD. As reflected in clause 1.3 of Schedule 2, Castlerose was a special purpose vehicle “incorporated solely to hold a 33.84% participation interest in the charter of capital” of IUD. Specifically, Dargamo agreed to purchase 50% of the shares in Castlerose, which itself held one third of the interests in IUD; Azitio agreed to purchase the other 50% of the shares in Castlerose.
13. Under the Castlerose SPA, Avonwick was defined as “the Seller”; Azitio and Dargamo as “the Purchasers” and each a “Purchaser”; Castlerose as “the Company”. “The

¹ No doubt reflecting the extent of the evidence and arguments made before him, written submissions running to some 2,400 pages alone.

² Bearing the solicitors’ name “Allen & Overy LLP” on its frontispiece.

Shares" were defined as "all the issued shares in the capital of [Castlerose]". The background recital recorded as follows:

"(A) The Seller is legally and beneficially entitled to all the issued share capital of ...the Company....

(B) The Company owns a participation interest equal to 33.84% of the charter capital of [IUD]...

(C) The Seller wishes to grant the Purchasers the option to purchase all the issued share capital of the Company on the terms set out in this Deed."

14. Clause 2 provided:

"SALE AND PURCHASE OF THE SHARES

2.1 The Seller grants the Purchasers the option of purchasing the Shares in equal proportions. The option may be exercised by a joint notice in writing...from the Purchasers to the Seller given on or before the Exercise Notice Deadline. Upon exercise of the option, the Seller shall be obliged to sell and the Purchasers shall be obliged to purchase the Shares (in equal proportions).

2.2 The legal and beneficial ownership of the Shares shall be sold free from Encumbrances and together with all rights and advantages attaching to them as at Completion.

2.3 The Seller shall procure that on or prior to Completion any and all rights of pre-emption over the Shares are waived irrevocably by the persons entitled thereto.

2.4 The consideration for the sale of the Shares shall be US\$950,000,000 (**the Consideration**)."

15. The longstop date for completion was 31 December 2009.

16. By clause 12.1 the deed (and other transaction documents (as defined)) were acknowledged to contain the whole agreement between the parties relating to the transactions contemplated by the transaction documents. The transaction documents were defined as meaning the deed, "the documents referred to in it, and any other agreements or documents executed or to be executed by the Parties as contemplated" by the deed. By clause 13, the Castlerose SPA (and any non-contractual obligations arising out of it) were governed by English law.

17. The only obligation on Avonwick under the Castlerose SPA was to transfer the shares in Castlerose upon exercise of the option by Dargamo and Azitio; the Castlerose SPA made no mention of any other transfer obligation or asset. However, as recorded in the Judgment (at [52]), it was common ground that that sum of US\$950 million was intended to include payment for the Gaiduk Parties' interest not only in IUD but also in NET and Agro Holding (along with other further assets).

18. Dargamo and Azitio exercised the option under the Castlerose SPA. On 30 December 2009 Dargamo and Azitio each paid US\$475 million to Avonwick and the Gaiduk Parties' interest in IUD was duly transferred to them (via Castlerose).

Other dealings

19. The same parties had entered into a similar agreement (though not by deed) for the transfer of the shares in Castlerose by Avonwick to Dargamo and Azitio some six months earlier in the same year, on 2 July 2009 ("the July 2009 SPA"). The consideration for the sale of the shares in Castlerose was then expressed to be only US\$723,750,000. The longstop date for completion was 1 September 2009. The option was not exercised by that date and so lapsed.
20. Before completion of the Castlerose SPA, on 9 December 2009, solicitors for the Taruta Parties produced a "first draft" of a "side letter" providing for a binding obligation on the Gaiduk Parties to transfer certain (unidentified) further assets (beyond an interest in IUD) to Mr Taruta on conclusion of the Castlerose SPA ("the December 2009 side-letter"). Further, during the course of December 2009 (up to 18 December 2009), various drafts of a separate document entitled "Agreement on Making Amendments to Memoranda of Understanding No 1 and No 2" ("MOU 4") were circulated. Those drafts listed the Gaiduk Parties' interests in NET and Agro Holding as being the subject of transfer to the Taruta Parties and the Mkrtchan Parties.
21. Neither the December 2009 side-letter nor any version of MOU 4 was ever agreed or executed.
22. Completion under the Castlerose SPA took place on 30 December 2009. On the same day the Taruta Parties and the Mkrtchan Parties sold a controlling interest in IUD (made up of the shares purchased from the Gaiduk Parties and parts of their own interests) to a third party Russian buyer ("the Russian Buyer"). They also entered into a shareholders' agreement governing their future relationship as shareholders in IUD.
23. In the meantime, following the Castlerose SPA, discussions between the parties continued: first to put in place agreements to transfer the assets identified in MOU 4, and secondly to agree the division between the parties of the numerous other assets in which the parties had joint interests.
24. In 2011 the parties took steps to give effect to what the Judge described (at [58]) as "the common understanding" that Mr Gaiduk would arrange to transfer, amongst other assets, his interests in NET and Agro Holding to Mr Taruta and Mr Mkrtchan in equal shares.
25. In 2011 and 2012 the Mkrtchan Parties received 50% of the Gaiduk Parties' interest in both NET and Agro Holding. (In order to do so, Mr Mkrtchan had to pay additional "technical" consideration (required by Ukrainian law in order for a transfer to be effected) in the sum of US\$13,400,900 in respect of the interest in NET and UAH3 million (approximately US\$120,000) in respect of the interest in Agro Holding).
26. The Taruta Parties, on the other hand, did not.

27. As for NET, Mr Gaiduk claimed to have been ready and willing to transfer the remaining 50% interest to Mr Taruta but that Mr Taruta made no attempt to conclude the relevant share purchase agreement - something denied by Mr Taruta. Instead, of the remaining 50% interest in NET, in September 2012 the Gaiduk Parties transferred a 24.5% interest to Prandicle Limited, a company owned by a Mr Dubyna, a business associate of theirs, and retained a 25.5% interest.
28. As for Agro Holding, on 27 April 2011 Mr Taruta and Mrs Gaiduk entered into a share purchase agreement for the transfer of 50% of the Gaiduk Parties' interest in Agro Holding ("the Agro Holding SPA"). However, as Mr Mkrtchan had been required to pay additional "technical" consideration, Mrs Gaiduk required the payment by Mr Taruta of a further UAH3 million as "technical" consideration. Mr Taruta refused to pay that consideration without an assurance that the Gaiduk Parties (and not the Taruta Parties) would fund this payment; that assurance was not forthcoming. The interest was never transferred.
29. Relationships between the parties soured in late 2012. Negotiations rolled on over subsequent years until Avonwick commenced the present proceedings on 9 August 2016.

The litigation

30. In its claim for deceit against the Taruta Parties and the Mkrtchan Parties Avonwick alleged that the Castlerose SPA had been procured by fraudulent misrepresentation. In particular, it was alleged that Mr Mkrtchan and Mr Taruta had represented falsely i) that the price for the Gaiduk Parties' interest in IUD would be the same "price per share" as paid by the Russian Buyer for a controlling interest in IUD and ii) that the Russian Buyer had required certain other assets, including the Gaiduk Parties' interest in the Hyatt Hotel in Kiev ("the Kiev Hyatt") to be transferred as a condition of acquiring the controlling interest in IUD. By the time of trial, only the first of these two alleged representations was pursued. The Judge dismissed the deceit claim, holding amongst other things that the representation as to price had not been made.
31. As already indicated, the Taruta Parties brought various counterclaims and additional claims. These included claims relating to the sum of US\$950 million transferred under the Castlerose SPA.
32. The Taruta Parties' primary case was that a separate contract had been concluded between the three parties for the transfer of the Gaiduk Parties' interests in these further assets ("the alleged 2009 Shareholders' Agreement"). It was said that the terms of the alleged 2009 Shareholders' Agreement were to be found principally in the Castlerose SPA (which, as set out above, made no mention of any assets apart from shares in Castlerose) and also in the drafts of MOU 4.
33. The Taruta Parties brought claims against the Gaiduk Parties and the Mkrtchan Parties for breach of the alleged 2009 Shareholders' Agreement seeking, amongst other things, specific performance of the Gaiduk Parties' alleged obligation to transfer a 50% share of their interests in NET and Agro Holding to them, declarations that that share was held on trust for them and an account of trust property and/or damages.

34. The Judge rejected the Taruta Parties' submission that there was a choice of English law, whether expressly or impliedly, in relation to the alleged 2009 Shareholders' Agreement. At [513] he dismissed their reliance on the express English choice of law provision (clause 13) in the Castlerose SPA which, he said:

“[did] not assist in circumstances where that was an agreement between Avonwick, Dargamo and Azitio, and so an agreement to which Mr Gaiduk, Mr Mkrtchan and Mr Taruta (the alleged parties to the alleged 2009 Shareholders' Agreement) were not themselves parties. It follows that the express choice of English law in the Castlerose SPA was not an express choice of law made by the parties to the alleged 2009 Shareholders' Agreement. The fact that the parties to the Castlerose SPA were closely associated with these individuals is, as a matter of analysis, neither here nor there: the simple point is that the choice of law made in the Castlerose SPA cannot, in my view, constitute an express choice of law between entirely different parties to a different agreement.”

35. He went on to dismiss the claims arising out of the alleged 2009 Shareholders' Agreement, holding that no such legally binding contract had ever been concluded (whether as a matter of English or Ukrainian law). In summary, as set out in [696] to [704]:

- i) There was no evidence of complete and unconditional acceptance (as required by Ukrainian law) of the terms of the alleged 2009 Shareholders' Agreement;
- ii) There was no agreement on the essential terms of the alleged 2009 Shareholders' Agreement;
- iii) There was no agreement as to the proportion of each company's shares to be transferred;
- iv) There was no agreement as to the payment of "technical consideration" (as required by Ukrainian law).

36. In reaching these conclusions, the Judge made a number of findings relevant to this appeal (at [561] to [704]). In particular he found:

- i) (at [596]): for practical purposes, the various MOUs that were circulated over the years (or at least some of them) were treated as giving rise to obligations which the parties expected to be honoured, regardless of whether the obligations were legally enforceable;
- ii) (at [642]): when informed of the December 2009 side-letter, Mr Gaiduk knew nothing about and refused to sign it;
- iii) (at [658] to [662]): no final and binding oral agreement was reached at a meeting on 13 December 2009;
- iv) (at [662]): the parties continued to negotiate over the wording of MOU 4 in the days following a meeting on 13 December 2009;

“...until it was decided to enter into the Castlerose SPA without including in that agreement any obligation as regards the transfer of disputed assets”;

- v) (at [663] to [665]): not even the final version of MOU 4 could be characterised as in final form;
- vi) (at [676] to [677]): the price of US\$950 million in the Castlerose SPA was “calculated on the basis that it represented US\$750 million in Avonwick's 33.4% interest in IUD plus US\$200 million for various other assets that were owned indirectly by Mr Gaiduk and which were to be transferred to the Taruta Parties and the Mkrchan Parties at the same time”;

“This was not in dispute. Indeed, the terms of the [draft of MOU 4 dated 18 December 2009] acknowledge it to be the position expressly. Nor is it in dispute, therefore, that the Mkrchan Parties and Taruta Parties used the Castlerose SPA to pay the Gaiduk Parties money which was intended to be applied against the transfer of the Additional Assets.”;

- vii) (at [679] and [680]): the basis on which sums were transferred under the Castlerose SPA was that they “represented an advance from Mr Taruta and Mr Mkrchan to Mr Gaiduk, made in the expectation that the parties would reach legally binding agreements, against which those sums would be offset using offshore structures”. If the alleged 2009 Shareholders' Agreement were not established, the payments “would amount to a deposit or advance made in the hope of future agreements”;
- viii) (at [689]): it was common ground that Mr Gaiduk, Mr Taruta and Mr Mkrchan had shared interests in assets and were engaged in complex negotiations regarding the separation of those assets, in which each claimed rights in assets arising out of their partnership. Each “had a sense of how these assets would be allocated in the final reckoning”.

- 37. The Taruta Parties advanced the unjust enrichment claim in the alternative to their claims under the alleged 2009 Shareholders' Agreement. As the Judge recognised (at [768]), this claim did not depend on the existence of the alleged 2009 Shareholders' Agreement.
- 38. As set out above, the Taruta Parties' contention was that, of the US\$475 million paid by Dargamo under the Castlerose SPA, US\$82.5 million had been transferred in consideration for the Taruta and Gaiduk Parties entering into legally binding contracts obliging the Gaiduk Parties to transfer 50% of their interest in NET (which owned the Kiev Hyatt) and Agro Holding to the Taruta Parties (or companies owned or controlled by them). Whilst the Mkrchan Parties received their share of those interests, the Taruta Parties never did. It was said that consideration for the transfer of those interests had totally failed in circumstances where no part of the Gaiduk Parties' interests in NET or Agro Holding had ever been transferred to them.
- 39. The Judge dismissed the unjust enrichment claim for reasons set out in more detail below. In summary, however, he held that under the Castlerose SPA, Dargamo was

entitled to the transfer of shares in Castlerose, which shares it had duly received. Any expectation of transfer of other assets was immaterial. There was no "unjust" factor. Further, there had been no total failure of consideration and it was impossible to apportion parts of the US\$475 million paid by Dargamo to the transfer of interests in NET and Agro Holding.

The Judgment on the unjust enrichment claim

40. The Judge's detailed reasoning for dismissal of the unjust enrichment claim can be found at [769] to [835] of the Judgment. At [770] to [776] he determined the applicable law to be English; there is rightly no challenge to that conclusion.
41. In the light of his finding that the alleged 2009 Shareholders' Agreement did not exist, the Judge stated that all that mattered was whether there was a legitimate unjust enrichment claim on that premise. He stated that he would nevertheless, albeit *obiter dicta*, consider whether or not "an unjust enrichment claim is precluded if there is a contract between the parties".
42. He identified the general position set out in *Goff & Jones, The Law of Unjust Enrichment* (9th ed) ("*Goff & Jones*") (at 3-13) and referred to various authorities including *Kleinwort Benson Ltd v Lincoln City Council* [1999] 1 AC 349 ("*Kleinwort Benson*"); *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; [2001] 208 CLR 516 ("*Roxborough*"); *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 ("*Mann*"); *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26; [2016] AC 1 ("*Barnes*"); *International Energy Group Ltd v Zurich Insurance plc* [2015] UKSC 33; [2016] AC 509 ("*IEG*").³ At [797] he went on:

"Drawing these threads together, in my view, the general rule - that where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will generally lie while the contract is subsisting - continues to operate but subject to certain exceptions. These exceptions include that applicable in *IEG* which was developed in response to the unique difficulties thrown up by the mesothelioma claims. In my view, it is best confined to the *Fairchild* enclave or cases where similar policy considerations arise. As I see it, it would be wrong to draw from *IEG* a principle of universal application."

43. At [798] the Judge distinguished the cases of *Roxborough* and *Barnes* on the basis that the present case did not:

"...concern an external state of affairs which has either failed to materialise or (if it did exist) has failed to sustain itself. Rather, it concerns the failure of the parties to perform the part of the contract in respect of which the payment was made. In such circumstances, I can see no principled reason for departing from the orthodox approach."

³ On appeal the Taruta Parties have (rightly) not pursued their arguments by reference to *IEG* and the "*Fairchild* enclave", a series of decisions arising out of mesothelioma claims against employers: see *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32 et al.

44. Thus, had he decided that the alleged 2009 Shareholders' Agreement had been concluded, he would "likely have gone on to decide that the Taruta Parties were unable to recover any sums paid in accordance with that agreement through the unjust enrichment route" (see [799]).
45. Turning to the only controversial aspect of the unjust enrichment claim, namely whether or not the Gaiduk Parties' enrichment at the Taruta Parties' expense was unjust, the Judge recorded (at [803]) the Taruta Parties' submission that, in the absence of binding contracts for the transfer of the interests in NET and Agro Holding, consideration should be regarded as having totally failed such as to justify a claim in unjust enrichment.
46. He referred to the authorities relied upon by the Taruta Parties, including *Chillingworth v Esche* [1924] 1 Ch 971 ("*Chillingworth*") and *Nu Line Construction Group Pty Ltd v Fowler* [2014] NSWCA 51 ("*Nu Line*") and (at [809]) the submission for the Taruta Parties that a claim in restitution permits a wider enquiry than an analysis of the parties' contractual obligations under the Castlerose SPA; it enabled proper account to be taken of the fact that the US\$82.5 million was not paid for the interest in IUD. Thus, if Mr Taruta was to get nothing back in respect of the assets for which it was paid, then equally there was no reason why he could not demand his money back. The Judge responded to this submission (at [810]) by stating that he struggled to see that there had been the total failure of consideration alleged, and so to see the unjust factor suggested. His reasoning at [811] to [824] was in summary as follows:
- i) Looking at the Castlerose SPA in isolation, Dargamo received what it was entitled to, namely half of Avonwick's shares in Castlerose in exchange for a payment of US\$475 million. There was no reference to any obligation in respect of any other asset:
- “...The fact that the parties may have had some non-binding extra-contractual understanding or expectation of the sort alleged by the Taruta Parties is immaterial since,..., there is no principle of English law which permits the Court to find that sums were paid in respect of some understanding which was not an obligation under the relevant contract.”
- (see [811] and [812];
- ii) Whilst recognising, as explained in *Goff & Jones* at 12-24, that the courts have not adopted a literal approach to the general requirement of total failure of consideration, it was not possible (in the absence of the alleged 2009 Shareholders' Agreement) to apportion in the manner suggested by the Taruta Parties (see [813] to [818]);
- iii) There was a further potential difficulty with the Taruta Parties' reliance on *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) ("*Giedo*") and in particular on the comments of Stadlen J (at [297]) that the question was whether “as a matter of practical common sense the court considers that it is able to apportion on objective analysis of the nature of the contract and the consideration”. Those comments were in the context of a case in which, unlike the present, all the relevant obligations in consideration for

which the price was paid were obligations contained within the contract (see [819]);

- iv) The authorities relied upon by the Taruta Parties were all cases in which there was no contract in place at the time that the relevant payment was made. The monies now sought to be recovered were, by contrast, paid pursuant to the Castlerose SPA:

“..The fact that it was anticipated that other contractual arrangements would be entered into thereafter does not alter the fact that what was paid was paid pursuant to an existing contract and not, as for example in the case of a deposit, merely in anticipation that a contract would be entered into.”

(see [820]);

- v) The Judge distinguished the authorities such as *Chillingworth* and *Nu Line* on the basis that payment here was not gratuitous. This was an important “indeed vital” point of distinction (see [821]);
- vi) The unjust enrichment claim required the court to decide that, in respect of US\$75 million and US\$7.5 million, Avonwick had not done what it agreed to do in exchange for the money. Yet all that Avonwick had agreed to do was transfer the shares in Castlerose. Without the alleged 2009 Shareholders' Agreement in existence, there was “simply no basis” on which it could be concluded that any part of the consideration agreed in the Castlerose SPA had failed:

“...this is not a surprising result since, if parties design a bargain in a particular way and conclude a binding contract on that basis, it is not, then, open to them to claim a restitutionary remedy.”

(see [823]).

- 47. The Judge thus dismissed the unjust enrichment claim. He did not need to address arguments arising out of the “entire agreement clause” in the Castlerose SPA, or out of the 2011 Agro Holding SPA. He did go on to consider the limitation defence in any event, indicating that he would not have found the unjust enrichment claim to have been statute-barred (under s. 5 of the Limitation Act 1980).

The parties' respective positions on appeal

The Taruta Parties' position in summary

- 48. The Taruta Parties emphasise the common ground between the parties (and indeed part of the Gaiduk Parties' own positive case as pleaded), namely that of the US\$950 million paid by Dargamo and Azitio under the Castlerose SPA, only US\$750 million represented the purchase price for Avonwick's shares in Castlerose. The remaining US\$200 million represented advance payment for, amongst other things, the Gaiduk Parties' interests in NET and Agro Holding. It was also common ground that no part of the Gaiduk Parties' interests in NET and Agro Holding had ever been transferred to the

Taruta Parties (or any vehicle under their control or ownership), in contrast to the position of the Mkrchan Parties.

49. Against this background, the Taruta Parties contend:

- i) That the Judge erred in confining his analysis of the “consideration” for the US\$82.5 million paid by Dargamo to Avonwick to the terms of the Castlerose SPA. This was to conflate the question of contractual consideration with the separate question of what was the state of affairs contemplated as the basis or reason for the payment, a wider enquiry extending beyond the terms of the contract. Had the Judge applied the “failure of consideration” requirement correctly, he would have held that Dargamo had transferred part of the US\$475 million (specifically US\$75 million for NET and US\$7.5 million for Agro Holding) with the intention and in the expectation that the Taruta Parties and the Gaiduk Parties would enter into legally binding contracts to transfer the interests in NET and Agro Holding. He would also have held that the consideration or basis for the transfer by Dargamo had failed. In relation to NET, no contract was ever concluded between the Gaiduk Parties and the Taruta Parties for the transfer of 50% of the Gaiduk Parties' interest, and no part of that interest was ever transferred to the Taruta Parties. In relation to Agro Holding, again, no unconditional contract for transfer was ever completed and no transfer ever took place;
- ii) That the Judge wrongly distinguished *Barnes* and *Roxborough* from the facts of the present case. Whether or not one (or more) of the parties was responsible for the failure of basis is legally irrelevant and in any event it is well established that a claimant can pursue a claim in unjust enrichment even where he himself is responsible for the failure of basis. Similarly, he wrongly distinguished the present case from past decisions in which consideration was held totally to have failed in circumstances where a benefit was transferred in anticipation of legally binding contracts being concluded. His reliance on the fact that the payment here was contractually required once again incorrectly conflated the issue of consideration in the contractual sense with the question of the basis on which the claimant had transferred the relevant benefit to the defendant. Further, the Judge's distinction of the present case from the “deposit or deposit-style cases” ran directly contrary to his own reasons for dismissing the Taruta Parties' case that the 2009 Shareholders' Agreement had been concluded. When doing so, he drew an express parallel between the facts of the instant case and those in *Chillingworth*. On the one hand, the Judge found that there was no concluded 2009 Shareholders' Agreement because the payments were made in anticipation of future contracts being concluded but on the other hand held that those same payments could not be recovered in unjust enrichment because all that Avonwick agreed to provide in return was the shares in Castlerose. This is said to be internally contradictory;
- iii) That the Judge ought to have found that there had been a total failure of consideration and that it was possible to apportion parts of the US\$475 million paid by Dargamo to the transfer of the interests in NET and Agro Holding, adopting a non-literal and pragmatic approach (as reflected in *Giedo* at [297]). The enquiry on apportionment should not have been confined to the terms of any legally binding contract, but rather should have extended to a wider, factual

enquiry. The terms of MOU 4 provided contemporaneous evidence as to how the US\$475 million had been arrived at, whether or not they were contractually binding.

The Gaiduk Parties' position in summary

50. The Gaiduk Parties resist the appeal, submitting:

- i) That no claim in unjust enrichment will normally lie where the sums in question were paid under a valid and subsisting contract. Here, the sums were paid under the Castlerose SPA, which remains in force and has never been impugned by the Taruta Parties;
- ii) That if there is any exception to that rule in English law, it is an extremely narrow one that arises only when underlying policy considerations dictate a departure from the general rule;
- iii) That a divisible part of a payment under a contract may be recovered in unjust enrichment only if there is no conflict between the allocation of risk under that contract and a claim in unjust enrichment. Here, there would be such a conflict;
- iv) That the Taruta Parties' claim ignores the express language in the Castlerose SPA and the fact that the enquiry into the "basis" of a payment is an objective one, considering the terms of the contract;
- v) That in any event, the Taruta Parties' case cannot survive the Judge's express findings that i) the parties, having sought to negotiate the terms of the 2009 Shareholders' Agreement, "decided to enter into the Castlerose SPA without including in that agreement any obligation as regards the transfer of the disputed assets" (at [662]) and ii) the only basis for payment under the Castlerose SPA was the transfer of the shares in Castlerose (at [811] to [812]);
- vi) That the Judge was right to distinguish the cases of *Barnes* and *Roxborough* as he did: the law of contract in general, and the Castlerose SPA in particular, regulate the position between the parties where it is alleged that one of them has failed to comply with an obligation owed to the other.

The law

51. The law of unjust enrichment has been the subject of widespread academic and judicial consideration. It is perhaps one of the most theorised subjects in the private law of obligations. Nonetheless, it is relatively new. It was not until 1966 when Robert Goff and Gareth Jones (as they then were) published their ground-breaking work, *The Law of Restitution* (1st edn), that English law sought to recognise a principled basis for the law of restitution based on reversing unjust enrichment. Their thesis gained widespread acceptance amongst judges, practitioners and academics and, following ever-increasing judicial references to restitution and unjust enrichment, the subject was established firmly in English law by the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.
52. However, debate has persisted as to what exactly the subject covers and what precisely is the relationship between restitution and unjust enrichment. It was the late Professor

Birks in *An Introduction to the Law of Restitution* (rvsd edn, 1989) (“*An Introduction to the Law of Restitution*”) who first stressed the distinction between restitution for the cause of action of unjust enrichment on the one hand, and restitution for wrongs on the other. In his later writings, culminating in *Unjust Enrichment* (1st edn, 2003) (“*Unjust Enrichment*”), he argued that the subject should be confined to the cause of action of unjust enrichment. This was in line with the conventional approach to classification in private law, namely to classify by reference to the cause of action (or event) rather than by reference to response.

53. This distinction has become widely accepted judicially (see for example *Sempre Metals Ltd v IRC* [2007] UKHL 34; [2008] 1 AC 561 at [16], [201]-[231] and *Barnes* at [100]), and in the eighth edition (2011) of their textbook, the authors of Goff & Jones adopted the title “*The Law of Unjust Enrichment*” in favour of its predecessor.
54. Despite its evolutionary nature, the common law claim in unjust enrichment can, for present purposes, be summarised as follows: a claimant has a right to restitution against a defendant who is unjustly enriched at the claimant’s expense. The purpose of the claim is to correct normatively defective transfers of value, usually by restoring the parties to their pretransfer positions (see *Menelaou v Bank of Cyprus Plc* [2015] UKSC 66; [2016] AC 176 (at [23]) and *Investment Trust Companies v HMRC* [2017] UKSC 29; [2018] AC 275 (“*ITC*”) (at [42]) where Lord Reed went on to comment that it “reflects an Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted”).
55. Courts and commentators have broken down the conceptual structure of a claim in unjust enrichment into four elements: i) Has the defendant been *enriched*? ii) Was the enrichment *at the claimant’s expense*? iii) Was the enrichment *unjust*? iv) Are there any *defences*? (See Goff & Jones at 1-09).
56. Originally this four-stage approach was considered to be rigid. Each question was to be applied uniformly in individual cases (see *Banque Financière de la Cité v Parc (Battersea) Ltd* [1988] UKHL 7; [1999] 1 AC 221 (at 227)). However, more recently the courts have cautioned against an inflexible approach (see for example *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32; [2018] AC 313 (“*Swynson*”) at [22]). As Lord Reed stated in *ITC* at [41]:

“...the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements.”

Careful legal analysis in each individual case is therefore required before a claimant can succeed in a claim for unjust enrichment.

57. As regards the third question, the claimant must positively identify what has been described as the “unjust factor⁴” (see *Samsoodar v Capital Insurance Company Ltd (Trinidad and Tobago)* [2020] UKPC 33; [2021] 2 All ER 1105 at [19] and Goff & Jones at 1-21). There is widespread judicial acceptance of this terminology and the need for an unjust factor (see for example *Kleinwort Benson* at 408-409; *Chief*

⁴ See Professor Birks “*Unjust Enrichment – a Reply to Mr Hedley*” (1985) 5 Legal Studies 67 at 71; *Restitution – the Future* (1992) at p 41.

Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd [2008] EWCA Civ 1449; [2009] 1 WLR 1580 at [50], [62] and [67]; *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19; [2012] 2 AC 337 (“*FII*”) at [81]).

58. It is the “unjust factor” that distinguishes the English claim in unjust enrichment from the civilian “absence of basis” approach⁵. Examples of unjust factors include mistake, duress, undue influence, failure of consideration, necessity and legal compulsion. These unjust factors are recognised because they establish that the claimant did not intend the defendant to receive a benefit in the circumstances, either because the claimant never had an intent to benefit the defendant in those circumstances or the intent was vitiated or qualified in some way.

59. An unjust enrichment claim is not based on a wide ranging and open-ended assessment of fairness (or justice) in the round. Rather, it is a common law remedy requiring a claimant to make out an established category of “unjust factor” in order to trigger the claim⁶. As Lord Sumption put it in *Swynson* (at [22]), it is “not a matter of judicial discretion”, referring to the dictum of Lord Reed in *ITC* (at [39]):

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

60. This approach has been echoed consistently in judicial warnings throughout the common law world. Thus in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (“*Pavey*”) Deane J stated (at 256-257):

“To identify the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate.... [Unjust enrichment] constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case...”

61. Similarly, Mason CJ and Deane, Toohey, Gaudron and McHugh JJ in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 stated (at 379):

“Accordingly, it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends

⁵ The latter approach is founded on the lack of a legal ground, also referred to as juristic basis or juristic reason (*Ungerechtfertigte Bereicherung* (812-822 BGB) in German law). I note that in *Unjust Enrichment* Professor Birks abandoned the unjust factor approach and endorsed the absence of basis approach.

⁶ As argued recently (and correctly in my judgment) in *School Facility Managements Limited and others v Governing Body of Christ the King College and another* [2021] EWCA Civ 1053 (see [33]).

upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality.”

62. The need to identify an established unjust factor was highlighted by Lord Toulson in *Barnes* (at [102]) (citing *Goff & Jones* at 1-08):

“the ‘unjust’ element in ‘unjust enrichment’ is simply a ‘generalisation of all the factors which the law recognises as calling for restitution’ [a citation from the judgment of Campbell J in *Wasada Pty Ltd v State Rail Authority of New South Wales* (No 2) [2003] NSWSC 987, para 16, quoting Mason & Carter, *Restitution Law in Australia* (1995), paras 59-60]. In other words, unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases; it is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit that is gained at the claimant’s expense in circumstances that the law deems to be unjust. The reasons why the courts have held a defendant’s enrichment to be unjust vary from one set of cases to another, and in this respect the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying the single principle that expectations engendered by binding promises must be fulfilled).”

63. The reasons justifying the existence of an unjust factor are thus not fixed. The common law tradition is to allow for modern, incremental development in relation to the type or scope of the unjust factors (see Professor Burrows (as he then was), *A Restatement of the English Law of Unjust Enrichment* (1st edn) (“*the Restatement*”) at paras. 3(2)-3(5)). Flexibility is embedded within the unjust factors scheme.
64. What is ultimately required is a principled judicial determination on the facts of each case. As Gummow J stated in *Roxborough* (at [72]):

“Considerations such as these, together with practical experience, suggest caution in judicial acceptance of any all-embracing theory of restitutionary rights and remedies founded upon a notion of “unjust enrichment”. To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.”

Interplay between contract and unjust enrichment

65. The relationship between liability in contract and liability in unjust enrichment has been, and continues to be, problematic. In my analysis, the two play distinct but complementary roles in the private law of obligations.

66. It was thought at one time that a prerequisite to a claim in unjust enrichment was that any relevant contract must, if initially valid, have been discharged for breach or frustration or be void, unenforceable or incomplete (see Goff & Jones, *The Law of Restitution* (7th ed, 2007) at 1-063 to 1-067; *An Introduction to the Law of Restitution* at 464 and *Chitty on Contracts* (30th edn, 2008) at 29-058). This may have been a consequence of the fact that in almost all cases where a claimant seeks restitution for a failure of basis, any relevant contract will be ineffective. And where a contract has been discharged for repudiatory breach or frustration, the legal enforceability of the contract and the failure of basis are two sides of the same coin.
67. However, as demonstrated by *Roxborough* (considered further below), invalidity of a relevant contract is not a necessary prerequisite to a successful claim in unjust enrichment. That is not to say that claims in unjust enrichment must not respect contractual regimes and the allocations of risk agreed between the parties. On the contrary, as explained by Professor Burrows in *The Restatement* (at 3(6)), an “often overlooked but crucial” element of the unjust factors scheme is:
- “...that an unjust factor does not normally override a legal obligation of the claimant to confer the benefit on the defendant. The existence of the legal obligation means that the unjust factor is nullified so that the enrichment at the claimant’s expense is not unjust...”
68. This orthodox position in England was articulated in *Kleinwort Benson* (at 407-408). Lord Hope identified that a third question for consideration was “*Did the payee have a right to receive the sum which was paid to him?*” That question was relevant as follows:
- “The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground.”
69. The principle is not confined to contractual obligations. By way of example, there may have been a statutory obligation to pay tax (*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch); [2008] 11 WLUK 717; [2009] STC 254 at [257]) which would similarly nullify an unjust factor.
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”. It has been reaffirmed recently at the highest level by the Privy Council in *Fairfield Sentry Ltd (in liquidation) v Migani* [2014] UKPC 9; [2014] 1 CLC 611 (JCPC) at [18] and *DD Growth Premium x2 Fund v RMF Market Neutral Strategies (Master) Limited* [2017] UKPC 36; [2017] 11 WLUK 567 (“*DD Growth Premium*”). As stated in *DD Growth Premium* by Lord Sumption (at [62]):
- “It is fundamental that a payment cannot amount to an enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right... The proposition is supported by more than a century and a half of authority...”

71. For the Taruta Parties it was suggested that these statements should in some way be read as limited to their specific factual context: these cases were not contemplating a failure of basis. (By way of example, *Kleinwort Benson* was a case involving the unjust factor of mistake.) However, Mr Crow was unable to identify any principled reason why this should be so, and I can see no good basis for not treating them as being of more general application.
72. The Obligation Rule is not absolute (as evidenced by Professor Burrows' use of the word "normally" at the passage in 3(6) of *The Restatement* quoted above). There will be exceptions, albeit limited. Thus, as explored further below, in *Roxborough* a claim in unjust enrichment succeeded despite the existence of a valid contract. The rationale behind these exceptions is difficult to pinpoint. In *The Restatement* it is suggested (again at 3(6)) that:
- "one might say that they are situations where there is no underlying conflict between the reason for allowing restitution and the defendant's legal entitlement (for example, because allowing restitution does not conflict with the allocation of risk in the contract or does not conflict with the contract as there is a good reason for the contract not to be enforced because it is unenforceable or has been validly terminated). It might help to think of the legal entitlement as being easily outweighed by the unjust factor."
73. *The Law of Restitution* (at 328) indicates that the exceptions could be rationalised as follows:
- i) On the basis that there may be no undermining of the risks undertaken by the parties and so no inconsistency between contract and unjust enrichment;
 - ii) The very need to establish failure of consideration is sufficient to prevent unwarranted subversion of the contract, because if all parties had known that the consideration would fail, the benefit would never have been conferred.
74. In "*Failure of Consideration and its Place on the Map*" (2002) 2 Oxford University Commonwealth LJ 1, in the immediate aftermath of *Roxborough*, Professor Birks emphasised (at 4) that it would be "a very rare" case in which failure of consideration could be made out despite the existence and performance of a valid contract.
75. The Gaiduk Parties submitted that a claim in unjust enrichment functions as a "gap-filling" device which is in some way subsidiary to the law of contract, echoing remarks made by Australian judges in the past (see *Pavey* at 256; *Roxborough* at [75] and *Mann* at [22]). Provided that what is meant by this is properly understood, it can be seen to make sense: the claim in unjust enrichment is not allowed to contradict the terms in the contract. However, it should not be treated as meaning that the claim in unjust enrichment is in some way inferior or subsidiary to a claim in contract. Frederick Wilmot-Smith advances a sound criticism of the terminology in *Contract and Unjust Enrichment in the High Court of Australia* 136 LQR (April) 2020, 196-201 stating:
- "Since a court can... always let gains and losses lie where they fall, there is never a true "gap": it follows that there is only ever

a “gap” if (for independent reasons) one concludes that there should be a restitutionary claim.”

76. Asplin LJ may have expressed the true meaning of the phrase “gap-filling” with the greatest clarity during the course of the hearing: it is not gap-filling “in the sense of seniority or a minority, or being junior”. It is because there is no “space” for the law of unjust enrichment in particular claims. In this way, the law of unjust enrichment can be seen as complementary, though not subsidiary, to the law of contract.

Failure of basis

77. The unjust factor claimed here by the Taruta Parties, and the focus of the present appeal, is “failure of consideration”. Whilst long-established, it is generally accepted that the terminology of “failure of consideration” is apt to lead to confusion. In particular, as set out below, the term “consideration”, when used in the phrase “failure of consideration” as a basis for a restitutionary claim, does not carry the same meaning as it does when considering whether there is sufficient consideration to support the formation of a contract (see *Barnes* at [104]).
78. I prefer to adopt the terminology of “failure of basis” suggested by *Goff and Jones* at 12-10 to 12-15. However, whichever terminology is used, the legal content is the same (see *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2011] 1 All ER 190 at [62] per Aikens LJ: the debate about whether to use the language of failure or absence of consideration is “a question of which is the more apt terminology; it does not have any legal significance”; and *Barnes* at [105]).
79. The core concept of “failure of basis” is that a benefit has been conferred on a joint understanding that the recipient’s right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit (see *Goff & Jones* at 12-01). Whilst failure of basis ranks alongside the unjust factors of mistake, duress and undue influence as a factor negating consent, it differs in that it is concerned with qualification of consent, as opposed to impaired or vitiated consent (see Burrows, *The Law of Restitution*, 3rd ed, 2011).
80. It is common ground that the meaning of failure of basis extends beyond failure of promissory consideration payable under a contract or a failure of contractual counter-performance (see *Fibrosa Spolka Akcyjna v Fairburn Lawson Combe Barbour Ltd* [1943] AC 32 at 48). To the extent that [812] or [823] of the Judgment suggest otherwise, they are wrong. The extended meaning is supported in *An Introduction to the Law of Restitution* (at p 223) (cited with approval by the Court of Appeal in *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch 23 at [24]) where it is stated that:

“Failure of consideration for a payment... means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself.”

The courts in both *Roxborough* and *Barnes* adopted this extended meaning.

81. These two cases have loomed large in the parties’ submissions and I now turn to them. Given the nature of the debate, it is necessary to set out their facts in some detail.

82. *Roxborough* was a decision of the High Court of Australia. Whilst not binding on this court, there are relatively few English decisions that consider “failure of basis” as an unjust factor. It is a judgment of the highest court of a common law jurisdiction well-versed in addressing such issues. It has also been referred to in English authorities without criticism⁷, including by Lord Toulson in *Barnes* (at [109] to [114]).
83. In *Roxborough* tobacco retailers (“Roxborough”) bought tobacco products from licenced wholesalers (“Rothmans”) under a series of contracts on terms that the invoiced “cost” comprised the wholesale price of the products and a further discrete amount, representing a licence fee, imposed by State law⁸ (effectively as an indirect tax imposed on tobacco products). The prices charged by Rothmans to Roxborough involved payments to the wholesaler in anticipation of the licence fees which were to be incurred at a future date. Roxborough had a direct interest in Rothmans’ payment of these fees, since it relieved Roxborough of a corresponding liability to pay. Roxborough in turn passed on the cost of the licence fees in the prices that it charged to its customers.
84. There are two points of detail to note at this stage:
- i) The relevant legislative scheme stipulated that the licence fees were to be imposed by reference to the value of tobacco sold during a relevant period by the wholesaler. That value was to be ascertained by reference to a manufacturer’s published wholesale price list, excluding any amount included in the selling price in consideration of a licence fee. Such exclusion was necessary, for otherwise there would be a tax upon a tax (see [8]). This was why the value of the tobacco was separated from the licence fee in the wholesale price list. Any customer purchasing from Roxborough could also identify from that list the cost and its breakdown (see [9]). Any retailer such as Roxborough wishing to trade with Rothmans had to sign a form of request for a commercial trading account which referred to Rothmans’ wholesale price list and which made express reference to the fact that it included the liability to pay the licence fee;
 - ii) Correspondingly, Rothmans’ standard form invoice to Roxborough also specified the wholesale price on the one hand, and, separately and on the other hand, the amount of the “tobacco licence fee” for each type of product (see [11]-[12]);
 - iii) The separation out of the wholesale price for each type of product from the relevant licence fee thereby formed part of the contractual arrangements of the parties. Further, the express contractual basis for the additional sum payable over and above the value of the tobacco was identified as being the liability for the licence fee.
85. The licence fee was held subsequently to be a duty of excise (see *Ha v New South Wales* (1997) 189 CLR 465) and the relevant legislation thereby rendered invalid – on the basis that the imposition of excise duties is reserved to the Federal legislature. Amounts which had been paid by Roxborough to Rothmans in the expectation that Rothmans

⁷ Albeit not expressly approved, at least not in its entire reasoning and outcome.

⁸ The Business Franchise Licences (Tobacco) Act 1987 (NSW).

would pass them on to the revenue authorities were thus not in fact passed on. Rather, they were retained by Rothmans.

86. Although Roxborough had passed on the cost of the licence fees to its customers in the prices that it charged, it claimed to be entitled to repayment of the sums representing the licence fee payments that had not been remitted to the revenue authorities from Rothmans. Against this background, the case can be seen as a dispute between two essentially undeserving parties: a wholesaler which had received the tax and not paid it on to the revenue and a retailer which had already charged the tax to and recovered it from the consumer.
87. The majority (Gleeson CJ, Gaudron, and Hayne JJ) held that there had been a failure of a distinct and severable part of the consideration for the purchase of the goods, and that there was a total failure of that consideration. The amount claimed was recoverable as money had and received to Roxborough's use. That was so, notwithstanding that when Roxborough sold goods to its customers, it had charged prices which covered the cost of the amount that they sought to recover from Rothmans.
88. It was considered that the tax represented a distinct part of the consideration for the tobacco products purchased. The licence fees were treated by both parties to each relevant contract as separate from the wholesale price of the goods sold, that price constituting the value by reference to which the amount of the tax was determined (see [13]). The very form of the transactions indicated that the payments made by Roxborough could be "broken up" (see [109]).
89. The majority accepted that failure of basis embraces payment for a purpose which has failed as, for example, where a condition has not been fulfilled, or a contemplated state of affairs has disappeared (see [16]). The basis in this case was the common intention of the parties (and the revenue authorities) that the cost of the goods would include the licence fees and those licence fees, when so incurred, would be paid to the revenue authorities by Rothmans. In the events that happened, the anticipated licence fees were not incurred by Rothmans. Thus the state of affairs, which was within the contemplation of the parties as the basis of their dealings concerning tax liability, altered. And it did so in circumstances which permitted, and required, severance of part of the total amount paid (see [17]).
90. The majority considered that to regard that part of the net total amount of each invoice referable to the "tobacco licence fees" as a severable part of the consideration accorded "with the basis of dealing, and the contractual arrangements between the parties". The majority was influenced by the combination of material comprising the legislative scheme, form of request and standard form invoice, all of which split the licence fee payment from the net total wholesale cost.
91. At [21], the majority held as follows:

"... the tax component of the net total wholesale cost was treated as a distinct and separate element by the parties. It was externally imposed. It was not agreed by negotiation. It was not like the discounts, which might differ between retailers, just as the wholesale price list would vary from time to time in accordance with market conditions. To permit recovery of the tax component

would not result in confusion between rights of compensation and restitution, or between enforcing a contract and claiming a right by reason of events which have occurred in relation to a contract.”

92. Gummow J agreed with the majority that the appeal should succeed (for reasons set out in a lengthy separate judgment), as did Callinan J. Kirby J, however, dissented. He found that Roxborough’s obligation to Rothmans was to pay the price of the goods in full; this was a single aggregate amount referable to each occasion of supply. He rejected the submission that some part of the basis could be separately identified, apportioned and then seen as having failed, for the following reasons:

“[168] ... by their terms, the contracts between the wholesaler and the retailers left the obligation of the wholesaler to pay the tobacco licence fee to the government entirely out of account. It was unsurprising that this should have been so. At the time the contracts were agreed to, the obligation to pay the tobacco licence fees arose not by any contractual agreement at all but by the operation of statute law, namely pursuant to the duties purportedly imposed by the Act. As the majority in the Full Court explained (299), the retailers could succeed in a claim for restitution on the ground of failure of consideration only if the wholesaler was bound to them by the promise to pay the amount identified as being for the licence fees and such promise was wholly unperformed.

[169] In light of the then understanding of the obligations of the Act, it borders on the surreal to suggest that the wholesaler “promised” the retailers that it would pay the licence fees to the government, in default of which payment there would be a failure of consideration in respect of that part of the price paid. Not only does this hypothesis defy the express terms upon which the parties trade with each other. It also contradicts the historical fact that the obligation of the wholesaler to pay the tax was an obligation imposed on the wholesaler not by private contract but by the terms of the Act.”

93. This was the basis for his earlier conclusion at [166]:

“In the foregoing circumstances, it is impossible to assert that there has been a total failure of consideration. The individual contracts between the wholesaler and the retailers were uncontestably valid. They were not ineffective. Nor were they terminated. Far from attempting to terminate the contracts for the supply of goods by the wholesaler, the retailers actually accepted the goods in every case. They onsold them to consumers, thereby recovering the component for licence fees about which they now complain. The law of restitution only rarely operates in the context of an effective contract. The present, in my opinion, is not a case that falls within one of the recognised exceptions.”

94. The facts of *Barnes* were very different to those of *Roxborough*. *Barnes* was not a case involving a failure of basis in relation to a (part-)payment.
95. The Crown Prosecution Service (“the CPS”) obtained management receivership orders under sections 48 and 49 of the Proceeds of Crime Act 2002 (“POCA”) in respect of the assets (including companies associated with) two defendants suspected of fraud by evasion of alcohol and tobacco duties. The orders provided that the expenses and remuneration of the receiver would be paid out of the receivership property and in accordance with a letter of agreement sent by the CPS to the receiver. That letter stated that the receiver would have a lien over the defendants’ assets and that the CPS did not undertake to indemnify him if those assets proved insufficient to meet his costs and expenses:

“Your remuneration costs and expenses are to be drawn from the assets of the defendants under your management in accordance with section 49(2)(d) of the Proceeds of Crime Act and the decision of the House of Lords in *Capewell v Customs and Excise Commrs* [2007] 1 WLR 386. You are reminded that you will have a lien over the defendants’ assets for payment of your fees and that the Crown Prosecution Service does not undertake to indemnify you in relation to your fees in the event that there are insufficient assets within the defendant’s estate. Your remuneration, costs and expenses are to be paid in accordance with the Framework Agreement referred to above and any deviation must be agreed in writing with the Crown Prosecution Service.”

Clause 12.5 of the Framework Agreement provided:

“In the case of management and enforcement receivers in criminal confiscation cases, the receiver will be remunerated from the sums that they may realise from the sale of the assets over which they are appointed [subject to an immaterial exception]. To the extent [that] there is any shortfall, the contracting bodies will not agree to grant indemnities either in full or in part.”

96. The orders were subsequently quashed on appeal as against the companies (though not the individuals), and the question arose as to who should then bear the receiver’s costs and expenses. The receiver applied to the Crown Court for an order that they be paid out of the receivership estate. In response, the companies applied for an order that the CPS pay compensation equivalent to whatever sum was payable to the receiver out of their assets. The Crown Court refused to make an order for payment out of the companies’ assets but ordered the CPS to pay the receiver’s costs and expenses. On appeal the Court of Appeal upheld the refusal to order payment out of the companies’ assets but overturned the order requiring the CPS to pay, on the basis that that was no power in POCA to order such recovery. The Supreme Court reversed that decision in part, holding so far as material that, whilst there was no power to order payment by the CPS, under the law of unjust enrichment the receiver was entitled to recover his proper remuneration and expenses from the CPS: there had been a total failure of consideration in relation to the receiver’s rights over the companies’ assets which was fundamental

to the basis on which the receiver had agreed to act in accordance with the CPS' request. Accordingly the Crown Court order against the CPS was reinstated.

97. Once again, the basis which failed in *Barnes* was not a promissory condition. Instead, there was a common assumption that the receiver agreed to accept the burden of the management of the companies on the basis that he would be entitled to take remuneration and expenses from the companies' assets; that state of affairs was fundamental to the basis on which the receiver was requested by the CPS and agreed to act. That state of affairs had failed to sustain itself. The basis was evident from and consistent with the terms of the contract.
98. Thus, although the CPS had fulfilled its contractual obligations to the receiver by ensuring that the order appointing him conformed with the terms of the underlying agreement between them, the receiver was nevertheless entitled to recover his proper remuneration and expenses from the CPS. This was because the work done and expenses incurred by the receiver were at the request of the CPS and there had been a failure of the basis on which the receiver was asked and agreed to do so. At [115] Lord Toulson reasoned as follows:

“In the present case there was a total failure of consideration in relation to the receiver's rights over the companies' assets, which was fundamental to the basis on which the receiver was requested by the CPS and agreed to act. I use the expression “fundamental to the basis” because it should not be thought that mere failure of an expectation which motivated a party to enter into a contract may give rise to a restitutionary claim. Most contracts are entered into with intentions or expectations which may not be fulfilled, and the allocation of the risk of their non-fulfilment is a function of the contract. But in the present case the expectation that the receiver would have a legal right to recover his remuneration and expenses was not just a motivating factor. Nobody envisaged that the receiver should provide his services in managing the companies as a volunteer; those services were to be in return for his right to recover his remuneration and expenses from the assets of the companies, such as they might be. The agreement between the CPS and the receiver so provided, and that provision was incorporated into the order of the court.”

99. I turn next to what have been described as “the deposit cases”. There is no issue of principle dividing the parties here (and in oral submission at least, little time was devoted to them). They are all cases in which payment was made in circumstances where there was no valid and subsisting contract in place. Instead, the payment was transferred in anticipation of legally binding contracts being concluded.
100. In *Chillingworth* a purchaser agreed to buy land subject to a proper contract being prepared by the vendor's solicitors, and paid a 5% deposit to the vendor. Although a contract was drawn up, the purchaser changed his mind, and withdrew from the sale. His claim to recover the deposit succeeded on the basis of total failure of consideration (see [114]-[115]).

101. Similarly, in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 88; [2008] 1 WLR 1752 Lord Scott held that Mr Cobbe was entitled to a quantum meruit payment for his services in obtaining planning permission. The services were provided in the expectation of becoming the purchaser of the property under an enforceable contract. The anticipated contract did not materialise but nevertheless a quantum meruit award in respect of his services was granted. In *Guardian Ocean Cargoes Ltd v Banco Do Brasil SA (Nos 1 and 3)* [1994] 2 Lloyd's Rep 252 the Court of Appeal held that payments made by the claimants to the defendant bank had been in anticipation of a refinancing deal being concluded between the parties; if no deal transpired, the bank would have no right to retain the money. Lastly, in *Nu Line* the New South Wales Court of Appeal granted the appellant restitution of payments made in anticipation of a contract for the sale of land which was not in fact concluded.

Doctrine of Apportionment

102. It is well-established that failure of basis must be total: if even a very small part of the benefit which formed the basis for the payment has been conferred, no action will lie (*Fibrosa Spolka Akcyjna v Farnburn Lawson Combe Barbour Ltd* [1943] AC 32 at 77; *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 at 924B; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 at 588).
103. However, the courts have not adopted a literal approach to the total failure of basis requirement (see *Goff & Jones*, 12-24 and *Goss v Chilcott* [1996] UKPC 17; [1996] AC 788 at 796 to 798). In particular, its practical significance has been reduced by the doctrine of apportionment which allocates parts of the payment to distinct elements of the benefit in return for which the payment was made; if only part of that expected benefit has been conferred, it is said that there has been a total failure of basis in relation to the severable part of performance which has not been achieved. As Lord Toulson said in *Barnes* (at [114]) (referring by way of example to *Roxborough* and *DO Ferguson & Associates v Sohl* [1992] 62 BLR 95):

“Modern authorities show that the courts are prepared, where it reflects commercial reality, to treat consideration as severable.”

104. This pragmatic approach was reflected in *Giedo*. There a contract provided for the claimant, an aspiring race driver, to act as a test driver for the defendant Formula One racing team. The claimant paid US\$3 million. In return the defendant promised to give him 6,000 kilometres of testing, sponsorship space on the car and on his race suit, pit passes and—if the claimant obtained the necessary licence from the motor racing authorities—the opportunity to test the car in high-profile testing immediately before Grand Prix races and to act as a reserve driver on race days. In the event approximately only 2,000 kilometres of testing were made available. The claimant brought a claim for unjust enrichment on the ground of failure of basis. After reviewing the authorities, Stadlen J apportioned various elements of the contractual price to the performance of the different contractual duties. In particular, he described the exercise of apportionment as one not based upon the express or implied terms of the contract, but rather:

“whether as a matter of practical common sense the court considers that it is able to apportion on objective analysis of the nature of the contract and the consideration.”

(see [297]).

105. Stadlen J would have felt able to apportion the testing distance to the price paid, had it not been for the contingent rights to high-profile testing and to act as a reserve driver. In those circumstances it was not possible to apportion a distinct value to the testing distance element and no award could be made.

Discussion and analysis

106. The central question is whether or not the Judge was wrong to reject the unjust enrichment claim on the basis that the necessary alleged “unjust factor”, namely failure of basis, was not made out. As set out above, this is to be determined not by reference to general (and subjective) notions of fairness or justice (which the Taruta Parties from time to time sought to invoke), but rather by reference to an application of the relevant principles of law to the facts in the search for an unjust factor.
107. I recognise at the outset the common ground between the parties, as reflected in the Judgment at [52], [57], [58], [677] and [679], that the price of US\$950 million was intended to include payment for a number of assets over and above the Gaiduk Parties’ interests in IUD, including (but not limited to) their interests in NET and Agro Holding. The price of US\$950 million was calculated on the basis that it represented a sum of US\$750 million for the Gaiduk Parties’ interest in IUD (held via Castlerose) and a sum of US\$200 million attributed to those additional assets. (In fact, that value was apparently calculated at more than that, some US\$201 million; but, according to Mr Gaiduk, it was agreed that “this should be rounded down to US\$200 million.”) This explained the difference between the sale price in the July 2009 SPA and the Castlerose SPA.
108. So much is apparent from the statements of case. Thus, by way of example, Avonwick’s Amended Particulars of Claim averred (at paragraph 12):

“The price of US\$950 million was calculated on the basis that it represented US\$750 million for the Claimant’s 33.84% interest in IUD plus US\$200 million for various other assets that were owned indirectly by Mr Gaiduk and which were to be transferred to the Defendants at the same time including those that it was said had to be passed on to the Russian buyer (and in particular the Yalta Hotel Complex and the Hyatt Hotel).”

This proposition was said by Mr Crow to be the “backbone” of the unjust enrichment claim. It was reflected consistently throughout the pleaded claim in deceit, including as to damages, and in Avonwick’s Re-Re-Amended Reply and Defence to Counterclaim (at paragraph 15.3).

109. Less clear was the precise position in relation to the breakdown of the (rounded down) additional US\$200 million, in particular as to the attribution of US\$150 million in respect of NET and US\$15 million in respect of Agro Holding. Mr Gaiduk’s witness statement referred to a requirement by him there should be a payment of “at least” US\$150 million for the Kiev Hyatt and to a “provisional” value of US\$15 million for Mrs Gaiduk’s stake in Agro Holding. The witness statement of Mr Petrov, an advisor to Mr Gaiduk, referred to a “provisional” agreement to increase the total amount

payable under the Castlerose SPA to US\$950 million to reflect, amongst other things, a figure of US\$150 million in respect of NET and US\$15 million in respect of Agro Holding. The written opening submissions for Avonwick at trial stated that the sum of US\$950 million:

“was calculated by reference to (i) US\$750 million in respect of...IUD plus (ii) approximately US\$150 million that was intended to represent the value of the shares in NET...and (ii) approximately US\$15 million that was intended to represent the value of the shares in Agro Holding...”

(emphases added)

110. However, a breakdown on the basis of US\$150 million in respect of NET and US\$15 million in respect of Agro Holding was a position accepted in the Mkrtchan Parties' Re-Re-Re-Amended Defence and Re-Amended Counterclaim to the Taruta Parties' Additional Claims (at paragraph 20(b)). There the Mkrtchan Parties adopted paragraph 17.2 of the Taruta Parties' Re-Amended Defence and Counterclaim and Re-Re-Re-Amended Particulars of Additional Claims, where a breakdown of US\$150 million for NET and US\$15 million for Agro Holding was spelt out in terms. Further, Mr Gaiduk accepted in cross-examination that US\$150 million had been paid “for 100% of NET” and US\$7.5 million for Agro Holding.
111. I also accept that the parties' understanding (or intention) as set out above was more than a mere motivational expectation (in the sense referred to by Lord Toulson in *Barnes* at [115]).
112. At the same time, it is common ground that, for whatever reason⁹, the parties *deliberately* omitted any of the additional assets from “the Consideration” in the Castlerose SPA (see [662] and [823] of the Judgment). The bargain that they consciously chose to strike was one by which they agreed that all that Avonwick was obliged to transfer in return for the payment of US\$950 million was the shares in Castlerose. This is not, therefore a situation where, for example, a claim for rectification of the Castlerose SPA would ever have been a viable option.
113. The parties stuck to their contractual obligations: Dargamo and Azitio paid “the Consideration” of US\$950 million under the Castlerose SPA and Avonwick duly transferred the shares in Castlerose. There was no obligation to transfer the Gaiduk Parties' interests in NET or Agro Holding to the Taruta Parties and no such transfer ever took place.
114. This sets the material factual framework against which the question of unjust factor is to be assessed.
115. In my judgment, the fundamental reason why the claim in unjust enrichment cannot succeed is clause 2.4 of the Castlerose SPA, repeated here for ease of reference:

⁹ The reason (or reasons) for the decision do not appear to have been explored at trial, nor is there any reason why they should have been. In his witness statement Mr Gaiduk referred to the fact that he understood that the Castlerose SPA would be “a simple agreement, quickly drawn up”. Mr Rabinowitz pointed out that there could have been many reasons for the decision.

“2.4 The consideration for the sale of the Shares shall be US\$950,000,000 (**the Consideration**).”

116. This was the express basis of payment agreed in a relevant contract the validity of which cannot be (and has not been) impugned. In such circumstances, there is no scope for the law of unjust enrichment to intervene by reference to a basis which is not only alternative and extraneous, but which also directly contradicts the express contractual terms. None of the authorities begin to go that far.
117. The basis for the unjust factor contended for by the Taruta Parties does not qualify or add to clause 2.4: it is simply wholly at odds with it. Indeed, whilst the factual background of fluid commercial negotiation between the parties could be said to be commonplace, the proposition contended for by the Taruta Parties is extreme: that they should be entitled at common law to recover monies on the basis of an understanding which runs directly contrary to an express agreement contained in a valid and subsisting contract (in circumstances where the facts do not afford any basis for a claim for rectification).
118. Mr Crow did not go so far as to suggest that there would be a sound claim in unjust enrichment in all cases where there was a relevant contract but a separate understanding as to the basis of payment under it, which basis wholly failed. He suggested that there were three factors why there was such a claim in this case:
 - i) The fact that it was common ground that the basis of payment was intended to be referable to the transfer of interests in NET and Agro Holding;
 - ii) The clarity of that position;
 - iii) The mismatch of parties: the Castlerose SPA was entered into between Avonwick, Dargamo and Azitio but the understanding forming the relevant basis was between Mr Gaiduk, Mr Taruta and Mr Mkrtchan. Reliance was placed on the Judge’s reference to the distinction between the companies and the individuals at [513] in the context of his decision on choice of law in relation to the alleged 2009 Shareholders’ Agreement.
119. These factors are not persuasive. The first two do no more than establish the basis that is said to have failed. As for the third, it can be readily understood why the distinction between the individuals and the companies was relevant to the question of whether or not the individuals said to have been party to the alleged 2009 Shareholders’ Agreement were to be taken to have chosen English law as applying to that agreement on the basis of the (English) choice of law provision in the Castlerose SPA (entered into by the companies). But it is difficult to see why the distinction should be of any relevance to the unjust enrichment claim, particularly in circumstances where it was the practice of the individuals to act through corporate vehicles of which they were the controlling minds and/or ultimate owners.
120. The cases of *Roxborough* and *Barnes* do not provide support for the unjust enrichment claim here.
121. *Roxborough* has proved to be a controversial decision. As set out above, Kirby J dissented from the majority. There are those who consider it to have been wrongly

decided (see for example J. Beatson and G. Virgo “*Contract, Unjust Enrichment and Unconscionability*” (2002] 118 LQR 352, 355-356). *Goff & Jones* (at 3-26) states:

“Those who have criticised the decision argue that the contract allocated the risk of the tax becoming unconstitutional to the retailer, because it made no provision for the payment to be returned. On the other hand, it has been argued that because the amount paid for the tax was fixed from the outset, and was not the product of any negotiation between the parties, it was no subversion of the contract to allow that sum to be recovered in unjust enrichment. On balance, the former view is more convincing. Whilst it is quite true that the parties had not negotiated about the sum payable in respect of the licence fee, and the unjust enrichment remedy coincided with the value that the parties had agreed, the fact remains that, by requiring its repayment in the absence of any contractual term, the court reallocated the risk to the wholesaler.” (citations omitted)

What matters for present purposes, however, is that, as *Goff & Jones* identifies, those who consider it rightly decided do so on the basis that it did not upset the parties’ contractual allocation of risk. On this basis, it is not to be seen as authority for the proposition that an unjust enrichment claim can succeed in circumstances where it contradicts that allocation. As was stated in *Mann* at [23], it was essential to the reasoning in *Roxborough* that the restitutionary claim did not “cut across the contractual charter of the parties’ rights and obligations”.

122. Standing back, *Roxborough* is on any view a very different case to the present (even putting to one side the fact that the licence fee was externally imposed by statute and non-negotiable), not least since:
 - i) The relevant basis which was said to have failed was entirely consistent with the terms of the contract;
 - ii) The licence fee was treated by the parties in the contract as a separate and distinct sum;
 - iii) As it was put for the Gaiduk Parties, it was possible to establish the claim in unjust enrichment “within the four corners of the contract”. It provides no support for engagement with a wider enquiry extending beyond the terms of the valid and subsisting contract.
123. The position is quite different here. The alleged basis said to have failed is to be found nowhere in the Castlerose SPA and, moreover, is inconsistent with the express contractual terms.
124. The facts of *Barnes* were again highly unusual and are to be distinguished from the present. Again, in granting the unjust enrichment claim the Supreme Court in *Barnes* was not interfering with the parties’ contractual allocation of risk. The risk that was allocated contractually was the risk of the corporate assets being insufficient to meet the receiver’s costs and expenses under the receiver’s lien, not the risk of the lien not existing at all in the first place. The Framework Agreement made no provision as to what would happen if the receiver’s lien were held to be invalid altogether. By contrast, under the Castlerose SPA the Taruta Parties very much agreed to take the risk of not

receiving any interest in NET or Agro Holding, despite paying US\$82.5 million over to the Gaiduk Parties.

125. It is in this context, namely the contractual allocation of risk, that it is relevant that a failure of basis was externally imposed or not negotiated, matters seen as material by the majority in *Roxborough* at [21] (and the Judge at [798]). This is not to play an inappropriate “blame game” in the sense of looking to see who, if anyone, is at fault for the failure of basis. That is irrelevant: a claimant can pursue a claim in unjust enrichment even where he himself is responsible for the failure of basis (see *Chillingworth* at 106-7, 111 and 114-115). Rather it is to examine whether or not the basis of failure was something that was within the parties’ contemplation (for example by way of negotiation or as a matter under their control) at the time of the relevant contract. In *Roxborough*, the lawfulness of the tobacco tax the subject of the licence fee was something that was not in the parties’ gift or purview, any more than was the lawfulness of the receivership order in *Barnes* at the time of the receiver’s retainer by the CPS.
126. However, in the present case, the further assets, including the interests in NET and Agro Holding, were very much within the parties’ understanding and discussions at the time of the Castlerose SPA, and the price for the shares in the Castlerose SPA was freely negotiated between the parties. In this way, the unjust enrichment claim can be seen to interfere impermissibly with the parties’ contractual allocation of risk. It seeks not to complement but rather to override the Castlerose SPA.
127. The deposit cases are not materially on point involving, as they do, cases where no contracts were ever entered into. The fact that the monies were paid under an existing contract is an important, if not fundamental, point of distinction.
128. Thus, whilst the Obligation Rule is not to be treated as wholly inflexible, it is in my judgment clear that this is not one of those rare cases where there is a proper basis for stepping outside it.
129. The Taruta Parties can point to one oddity in the Judge’s approach, which was that he considered the effect of the Obligation Rule (and cases such as *Roxborough* and *Barnes*) only by reference to and in the context of the alleged 2009 Shareholders’ Agreement, and not the Castlerose SPA. In his mind, he was therefore looking at the Obligation Rule on an *obiter dicta* basis only. It is also right to say that his reason for distinguishing *Roxborough* and *Barnes* at [798], namely (by reference to the alleged 2009 Shareholders’ Agreement only) that this was a case concerning the failure of the parties to perform the part of the contract in respect of which the payment was made, does not apply in the context of the Castlerose SPA.
130. However, as a matter of substance, his conclusion at [811] and [812] in particular is consistent with my analysis as set out above. He said this:

“811. Looking at the Castlerose SPA in isolation, Dargamo was entitled to the transfer of half of Avonwick’s shares in Castlerose, in exchange for a payment of US\$475 million... This is what happened.... Clause 2.4 of the Castlerose SPA described the “Consideration” as being payable in respect of “the Shares” defined in Schedule 6 as being the shares in Castlerose.

812. There is no reference...to any obligation in respect of any asset other than the Shares. The fact that the parties may have had some non-binding extra-contractual understanding or expectation of the sort alleged by the Taruta Parties is immaterial...”

131. In these circumstances, it is not strictly necessary to say any more on the question of whether or not it is appropriate to make any wider enquiry outside the Castlerose SPA (since the extra-contractual basis relied upon would not avail the Taruta Parties in any event). However, in deference to the arguments raised, I comment shortly as follows.
132. I would accept as a matter of principle that in an appropriate case, it may be legitimate for a court to look beyond the terms of the contract for a wider understanding in the context of an unjust enrichment claim, even though there is a valid and subsisting contract. (There may of course be no contract, as in the deposit cases). As developed by Frederick Wilmot-Smith in *Replacing Risk-Taking Reasoning* 127 LQR (October) 2011, 610 – 730, the underlying rationale for a claim in unjust enrichment differs from that of a contractual claim, and different policy considerations will arise. For example, in unjust enrichment, the practical policy reasons for excluding previous negotiations in the interpretative exercise do not arise. It may be that the “best way forward” is to “build on those principles developed to interpret contracts, bearing in mind the different context of a claim in unjust enrichment” (at 620-621). Frederick Wilmot-Smith suggests that “the agreements and understandings of the parties are crucial elements in the exercise of construction. They help to establish whether the enrichment was conditional and the conditions attached to the transfer” (at 623).
133. However, 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. It is not an inquiry that was carried out in *Roxborough* or *Barnes* where the basis that failed was one not at odds with (and indeed in the case of *Roxborough* expressly reflected in) the relevant contractual provisions.
134. Finally, even if it were appropriate to go outside the contract and inquire into the possibility of a different (and contradictory) basis for payment of part of the sum of US\$950 million, I am by no means necessarily persuaded that the factual picture is as clear as the Taruta Parties suggest. Whilst the figures of “approximately” US\$150 million (for NET) and US\$15 million (for Agro Holding) were used in order to calculate the final figure of US\$950 million under the Castlerose SPA (itself “rounded down”), it is another thing to contend that the parties understood with any certainty that the Gaiduk Parties’ interests in NET and Agro Holding would be transferred for those sums at the end of the day. As set out above, Mr Petrov, for example, referred only to a “provisional” agreement for the transfer. The Taruta Parties’ claim that a binding agreement to this effect existed, namely the alleged 2009 Shareholders’ Agreement, failed. As Sir Timothy Lloyd put it during the hearing, the parties “decided to enter into one agreement that was legally binding and that is what they were held to”.
135. This court has only had a glimpse of the full picture, but even on the limited basis of what it has seen, the parties’ dealings in progressing the severance of their interests can fairly be described as a moving feast. The July 2009 SPA, the December 2009 side-letter and the various circulated drafts of MOU 4 illustrate the point. It is no surprise

that that pattern did not change upon completion of the Castlerose SPA; the parties' negotiations and arrangements continued to fluctuate in the months and years that followed. Further, no understanding on all of the relevant details for transfer of the Gaiduk Parties' interests in NET and Agro Holding appears to have been reached, for example arising out of the requirement in Ukrainian law for payment of "technical" consideration. As set out above, the Mkrtchan Parties had to pay over US\$13 million in this respect in order to secure the Gaiduk Parties' interest in NET. It was this requirement that appears to have been the, or at least a, stumbling block in the transfer of the interest in Agro Holding by Mrs Gaiduk to Mr Taruta in 2011.

136. In light of the above, it is not necessary to address the further issues arising in relation to apportionment in circumstances where the Castlerose SPA provided for payment of a single, indivisible sum and the basis for apportionment is said to lie outside the contract (unlike the position in *Giedo*), and the Agro Holding SPA.

Conclusion

137. For these reasons, whilst I do not entirely adopt his reasoning, the Judge was right to reject the unjust enrichment claim. There was no failure of basis amounting to an unjust factor, and thus no trigger to an entitlement on the part of the Taruta Parties to recover part of the sum of US\$950 million paid over by Dargamo under the Castlerose SPA. This is not an unsatisfactory result in the eyes of the law: the parties are simply being held to the express terms of the contract into which they chose to enter and with which terms they have fully complied on all sides. The law of unjust enrichment does not provide a means of subverting that agreement. I would therefore dismiss the appeal.

Sir Timothy Lloyd:

138. I agree.
139. The three individual parties negotiated over a considerable period of time about how to satisfy Mr Gaiduk's wish to withdraw from the arrangements that they had set up in a process that had itself taken some years. Apart from the July 2009 SPA mentioned by Lady Justice Carr at paragraph [19], the Castlerose SPA was the only legally binding agreement entered into in the course of this long process of negotiation, nor did its execution and completion bring the negotiations to an end.
140. That is the context of the accepted fact that, in the calculation of the price of US\$950 million as payable under the Castlerose SPA, US\$200 million was agreed as referable to assets other than the Castlerose shares. However, as Lady Justice Carr has explained, the continuing negotiations did not result in any agreement as to the transfer of any part of, or interest in, the additional assets to the Taruta Parties. That was a risk that the Taruta Parties took (as did the Mkrtchan Parties) by entering into the Castlerose SPA in the agreed terms.
141. In those circumstances, for the reasons set out by Lady Justice Carr, it is right that the parties should be held to what they agreed to in the Castlerose SPA and there is no legal basis for subverting the terms of that agreement by reference to the surrounding negotiations.

Lady Justice Asplin:

142. I agree that the appeal should be dismissed for all of the reasons set out by my Lady, Lady Justice Carr. I also agree with her analysis of the principles of unjust enrichment which apply in this case. In the light of the express terms of the Castlerose SPA, there was no “unjust factor” in this case. To put the matter another way, the Taruta Parties sought to use the principle of unjust enrichment to override rather than complement the express contractual obligations contained in the Castlerose SPA.