and Lady Hale J.S.C. in *Re B* that the appellate court has a duty to decide for itself the question of proportionality and necessity in care proceedings cases (*Re B*, at [116]–[127] (Lord Kerr J.S.C.), [204]–[205] (Lady Hale J.S.C.)) should be preferred. In line with this, it would have been better if the Supreme Court had undertaken its own proportionality assessment on the facts of *Re H-W* and made supervision orders instead of remitting the case for rehearing before a different judge (at [64]). Doing so would avoid delays in settling arrangements for the family involved and uphold the "central principle of the Children Act 1989" that delays are not in the children's interests (J. Doughty, "Remote Justice – Family Court Hearings during the Pandemic" (2020) 42(3) Journal of Social Welfare and Family Law 377, 377).

At the end of the day, there is no doubt that *Re H-W* was "a difficult case" (at [28]). Indeed, decisions made for the removal of children into public care have profound effects and should be carefully scrutinised (at [32]). However, the appellate court's approach should, as far as possible, strike a balance with the avoidance of delays in the interests of the children's welfare. Whilst the Supreme Court acknowledged that the perspectives of both the majority and the minority of the Court of Appeal were "understandable in family law terms" (at [32]), it ultimately concluded that the proportionality assessment at first instance was flawed (at [62]) but nonetheless declined to undertake its own assessment (at [63]). With the case being remitted for rehearing before a different judge, one can only hope that it will not be "a lengthy process" before arrangements are finally settled for the family involved (at [64]).

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LIGHTS, CAMERA, NO ACTION: THE INTERFACE BETWEEN CONTRACT LAW AND UNJUST ENRICHMENT

Bank of New York Mellon (International) Ltd. v Cine-UK Ltd. [2022] EWCA Civ 1021 continues a trend of judicial reluctance to save contracting parties from the unexpected consequences of the pandemic. In this case, certain cinema operators had not paid rent for the periods in which they were forced to close under COVID-19 regulations. Their landlords brought claims under the leases for unpaid rent and applied for summary judgment. The cinema operators' defences denying liability for rent were framed in three alternative ways: (1) rent cesser clauses, (2) implied terms and (3) failure of basis. All three grounds were rejected at first instance ([2021] EWHC 1013 (Q.B.) and [2021] EWHC 2591 (Ch))

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and in the Court of Appeal before Chancellor Flaux, Snowden L.J. and Sir Nicholas Patten.

On Ground 1, one of the cinemas sought to rely on a rent cesser clause in its lease as a basis for not paying rent when the cinemas were closed. The rent cesser clause provided for the suspension or reduction of rent if the leased property was "damaged" inter alia by any of the "insured risks" (see [12]). The cinemas argued that "damage" should be read to include economic damage. Their argument relied on the fact that the definition of "insured risks" extended beyond physical damage (covering matters such as "strikes" or "labour disturbances" (at [66])). But the Court of Appeal rejected this argument. The natural and ordinary meaning of "damage" was physical damage, and that interpretation was supported by other clauses in the lease. In addition, even if the landlord's insurance policy covered risks concerned with economic damage, that was not a basis for reading "damage" in the rent cesser clause so as to match the breadth of the policy (see [126]–[130]).

On Ground 2, the cinemas contended that terms should be implied into the leases to the effect that rent would only be payable insofar as the premises could lawfully be used as a cinema (see [57], [70]). The court applied the usual principles for the implication of terms in *Marks and Spencer v BNP Paribas* [2016] A.C. 742, at [16]–[31] and *Yoo Design Services v Iliv Realty* [2021] EWCA Civ 560, at [51]. Chancellor Flaux reiterated that the test was "stringent" and found that it was "nowhere near satisfied" in this case (at [140]). The proposed terms were not "necessary for business efficacy", because the lease worked perfectly well without them (it simply allocated the risk of closure to the tenant). Nor were the proposed terms "so obvious as to go without saying"; rather they would have been detailed and complex provisions that an officious bystander would not have regarded as obvious at the time of entry into the contract. The cinemas also faced the insuperable problem of the implied terms being inconsistent with the express allocation of risk in the contract (see [135]–[143]).

While Grounds 1 and 2 were relatively straightforward, Ground 3 (failure of basis) merits closer attention. Failure of basis is one of the "unjust factors" forming part of an unjust enrichment claim. It arises where a claimant confers a benefit on a defendant in circumstances where there is a joint understanding that the defendant's right to retain it is conditional. In this case, however, failure of basis was raised by way of a free-standing defence to a contractual claim. This was somewhat unorthodox; one would have expected the cinemas to raise unjust enrichment by way of counterclaim. Taking a pragmatic approach, the Court of Appeal left to one side the issue of pleading amendments and considered failure of basis on its merits (at [39]–[41]) (see further [2021] EWHC 2591 (Ch), at [160]–[172] at first instance).

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The cinema operators' argument on Ground 3 was that their ability to use the premises lawfully as a cinema was fundamental to the basis for the lease. Since that basis had failed to materialise during the COVID-19 lockdowns, it would unjustly enrich the landlords to be paid rent for those periods. This argument faced a number of difficulties. The most fundamental of these was the so-called Obligation Rule. This was summarised recently as the proposition that "an unjust factor will not override a valid and subsisting legal obligation of the claimant to confer the benefit on the defendant" (Carr L.J. in *Dargamo Holdings Limited v Avonwick Holding Limited* [2021] EWCA Civ 1149, at [70]). So in the case of a contract, the rule provides that it is not possible to describe the defendant as being unjustly enriched in circumstances where she was entitled to receive the benefit from the claimant under a valid contractual obligation. The unjust factor is nullified and there is no claim for unjust enrichment (*Dargamo*, at [67]–[68]).

The Court of Appeal applied the Obligation Rule to conclude that "failure of basis" could not undermine the otherwise valid contractual obligation to pay rent for the premises, particularly where the leases contained a "carefully worked out contractual regime for the allocation of risk" between landlord and tenant (see [144]–[147]). In the court's view, the rent cesser clause contained the "complete code" for circumstances where rent was not payable (at [152], [156]). The court distinguished cases where unjust enrichment claims have succeeded notwithstanding a valid contract because, in those cases, the unjust enrichment claim was "consistent with" the contract, and arose because of an "extra-contractual understanding" which did not subvert the contract (at [148], [150]). Finally, since the Obligation Rule dispensed with the point, the court did not need to address the question of whether the failure of basis was "total", namely such that the claimant has received no part of what they bargained for (at [161]). The tenants' appeals were therefore dismissed.

The court's conclusion on failure of basis represents the outworking of long-standing arguments about the proper interaction of unjust enrichment and contract law. In the past, the Obligation Rule may have reflected a special deference to contract law. The insistence on the "subsidiary" or "gap-filling" function of unjust enrichment seemed to stem from a fear of "containing the beast" (see the criticisms of such fears in K. Barker, "Unjust Enrichment: Containing the Beast" (1995) 15 OJLS 457). Even in the instant case, the High Court seemed to hark back to this view, saying that courts ought to keep a "tight rein" over unjust enrichment: [2021] EWHC 2591 (Ch), at [173]. Such deference has, however, been difficult to justify as a general principle in the law of obligations. If the elements of unjust enrichment are independently made out, why not permit the claimant to choose her remedy? Why not let the claims lie where they

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fall? Concurrent claims in tort and contract, for example, have not been viewed with such trepidation (S. Smith, "Concurrent Liability in Contract and Unjust Enrichment: the Fundamental Breach Requirement" (1999) 115 L.Q.R. 245).

More recently, courts and scholars have been careful to explain the Obligation Rule from within the logic of unjust enrichment. On this approach, the correct application of the principles of unjust enrichment shows that there is no failure of basis because there is a legal obligation which supplies that basis. With such reasoning, we can see clear parallels between: (1) English law's variegated unjust enrichment action, as it has grown up, and (2) the alternative "absence of basis" approach in civil law. On either account, if the contract constitutes the basis, there is no unjust enrichment.

The contemporary approach has the advantage of not condemning unjust enrichment to subservience. But it still represents a form of subsidiarity, in that we continue to prioritise the parties' contract over the potential injustice that would otherwise be identified by a failure of basis. The mundane explanation for this is evidentiary: if commercial parties set out their bargain in a detailed contract, and expressly provide for certain scenarios, it is improbable that there was a different, unspoken basis for the same bargain. However, a more principled explanation for the contemporary approach may be found in the concept of coherence. Coherence, on the narrowest account, is the principle that the same facts should not generate inconsistent outcomes under different causes of action. Thus the High Court of Australia invoked coherence to explain why a negligence claim would not be available where a defamation claim, including the defence of truth, would be the proper avenue for resolving the competing interests of the parties (*Sullivan v Moody* (2001) 207 C.L.R. 562, at [54]–[55]). One could go further and adopt a more robust form of coherence, by identifying a common normative principle which underpins different causes of action (e.g. respect for consent in R. Grantham and C. Rickett, "On the subsidiarity of unjust enrichment" (2001) 117 L.Q.R. 273). But at the very least, coherence is a less tendentious label than "subsidiarity" because it is not systematic or hierarchical, and can be shaped by the particular facts of each case. The court's conclusions on each of the grounds in *Bank of New York v Cine-UK* were coherent in that they sang from the same hymn book: the contract was detailed and it revealed that the risk of closure due to the pandemic had been allocated to the tenant.

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