Neutral Citation Number: [2019] EWCA Civ 1999

Case No: A2/2018/3005 AND A2/2018/3006

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (Chancery Division)
Business and Property Court
His Honour Judge Pearce
HC-2017-001285/C31MA513

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2019

Before:

LORD JUSTICE DAVIS
LADY JUSTICE ASPLIN
and
LORD JUSTICE MALES

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Between:

Philip Barton	**Appellant**
- and -	
Timothy Gwyn-Jones and Others	**Respondents**

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- -

Mr Brad Pomfret (instructed by **Athena Solicitors LLP**) for the **Appellant**
Mr Robert Sterling (instructed by **Nicholas Woolf & Co Solicitors**) for the **First Respondent**
the **Second, Third and Fourth Respondents** not appearing and not represented

Hearing date: 22 October 2019

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Approved Judgment

Lady Justice Asplin:

1. This appeal raises the issue of whether a contract for a specified introduction fee, payable to an agent if a property is sold at a particular price, leaves no room for remuneration to be payable, nevertheless, where the property is sold for a lesser sum to the party who has been introduced.

2. By an order dated 27 September 2018, His Honour Judge Pearce, sitting as a judge of the High Court, dismissed an appeal by the Appellant, Mr Barton. He held that Mr Barton's contractual claim for an introduction fee of £1.2 million failed because the property in question had been sold for £6 million rather than the stipulated figure of £6.5 million and that Mr Barton could not succeed in a claim in unjust enrichment because such a claim was barred by the principle in *Macdonald Dickens & Macklin (a firm) v Costello & Ors [2012] QB 244;* [2011] EWCA Civ 930. He also stated that, had it been necessary, he would have decided that the value of the benefit to the vendor of the introduction of a party which completed the purchase, albeit at only £6 million, was 7.25% of that purchase price, being £435,000. The citation for the judge's detailed judgment is [2018] EWHC 2426 (Ch).

The proceedings

3. The issue arose in the context of an appeal pursuant to rule 15.35 Insolvency (England and Wales) Rules 2016. Mr Barton appealed the decision of the First Respondent, Mr Gwyn-Jones, who is the sole director of the Fourth Respondent, Foxpace Limited ("Foxpace") acting as convenor of the deemed consent procedure, taken at a creditors' meeting on 30 May 2017. Mr Gwyn- Jones rejected Mr Barton's proof of debt in the sum of £1.2 million, valued his claim for voting purposes in the liquidation of Foxpace at £1 and appointed the Second and Third Respondents, Ms Julie Swan and Mr Mark Phillips, as liquidators of Foxpace. Mr Barton did not and does not dispute that it is appropriate that Foxpace be placed into liquidation. He does oppose the appointment of Ms Swan and Mr Phillips, however, and seeks to nominate his own liquidator, a Mr Andrew Bland. It was for that purpose that he had sought to prove his debt in the sum of £1.2 million.

4. Mr Barton had also commenced separate proceedings against Foxpace to recover the alleged debt. Following a hearing before His Honour Judge Davies on 14 May 2018, the parties agreed, amongst other things, that Foxpace should be joined as a party to the appeal and that on the appeal the court should determine Mr Barton's claim against Foxpace for all purposes.

5. Ms Swan, Mr Phillips and Foxpace were not represented before the judge, nor were they represented before us. They remain neutral on this appeal, having reached an agreement with Mr Barton on alternative bases in relation to the costs of this appeal and the way in which Ms Swan and Mr Phillips' costs and expenses should be dealt with in the liquidation of Foxpace, should the appeal be allowed.

Property transactions in more detail

6. Foxpace was the owner of a property known as Nash House, in Northolt, London which it had purchased on 30 June 2006 for £3.75 million plus VAT. On 5 December

2012 Stonebridge Action Limited ("Stonebridge"), a company with which Mr Barton had considerable links, exchanged contracts with Foxpace to purchase Nash House for £6.3 million plus VAT. The completion date was extended to 9 May 2013 by agreement of the parties in consideration of payment of a fee by Stonebridge of £200,000 plus VAT. The contract was rescinded by Foxpace, however, on 17 May 2013 after Stonebridge failed to complete the purchase. Subsequently, on 7 June 2013, Mr Barton exchanged contracts with Foxpace to purchase the property himself for £5.9 million plus VAT. A deposit of £885,000 plus VAT was payable on exchange of contracts in three equal instalments between 1 July 2013 and 4 July 2013. Foxpace rescinded that contract on 1 July 2013 after Mr Barton failed to pay the instalment of the deposit which was due.

7. Thereafter, Mr Barton and Foxpace entered (as the Judge found) into an oral agreement under which Foxpace agreed to pay Mr Barton £1.2 million if Nash House was sold for £6.5 million to a purchaser introduced by Mr Barton. As a result, in or around early August 2013, Mr Barton introduced Western UK (Acton) Limited ("Western") to Foxpace as a potential purchaser of Nash House at a purchase price of £6.5 million. In fact, by a contract dated 10 September 2013, Foxpace agreed to sell Nash House to Western for the reduced sum of £6 million plus VAT. The revised sale price was agreed on 9 September 2013, contracts were exchanged the next day and the sale was subsequently completed.

8. The reduction in price from £6.5 million was to take account of the fact that Nash House was situated on land that might be acquired by or on behalf of HS2. When the issue in relation to HS2 first came to light in August 2013, Western suggested that any exchange of contracts should be conditional upon the site being unaffected by the project but this was rejected in favour of a reduced sale price. It was accepted that this reduction in sale price was reached in good faith.

9. The sale having been completed, Foxpace refused to pay Mr Barton the £1.2 million he claimed that he was owed. Instead, it offered to pay him £400,000 as a "goodwill gesture" which he refused.

The Judge's Decision

10. In order to put the judge's decision in context, it is important to understand the way in which the case was put. The main issues before the judge were (i) whether there was a contract between Mr Barton and Foxpace at all, and, if so, what its terms were; and (ii) in the alternative, whether Mr Barton could claim compensation for unjust enrichment, having introduced Western to Foxpace. It was Mr Barton's primary case that Foxpace had agreed to pay him £1.2 million in the event that he introduced a party which purchased Nash House without stipulation as to the purchase price. In the alternative, he alleged that he was entitled to compensation for unjust enrichment because Foxpace had been unjustly enriched at his expense. It had accepted a benefit in the form of the introduction of Western at a time when it knew that Mr Barton expected to be paid and had not rejected the introduction. The *Costello* case having been raised with counsel by the judge during closing submissions, in subsequent written submissions it was contended, for the purposes of the unjust enrichment claim, that either there was no concluded agreement between Mr Barton and Foxpace or, if

there was, the parties should not be held to have allocated the risk of Nash House being sold for less than £6.5 million.

11. It was argued on behalf of Mr Gwyn-Jones, on the other hand, that terms were not agreed; that even if they were they remained "subject to contract"; and in the third alternative, that even if an agreement had been reached the £1.2 million was payable if, and only if, Nash House was sold for £6.5 million. In relation to the alternative claim for compensation for unjust enrichment, Mr Sterling on behalf of Mr Gwyn-Jones argued that the only service, if any, which was accepted on the basis that it would be paid for was the introduction of a purchaser at £6.5 million and that the doctrine of unjust enrichment had no application where the parties have reached a concluded agreement.

12. The judge found that an agreement had been concluded orally between Mr Rooke (an associate of Mr Gwyn-Jones acting on behalf of Foxpace) and Mr Barton during discussions which took place in July 2013. These were evidenced, in part, by emails pursuant to which Foxpace was liable to pay Mr Barton £1.2 million in the event that Nash House was sold for £6.5 million to a purchaser introduced by Mr Barton (the "Agreement"). However, as Nash House was sold for £6 million the Judge held that the claim in contract necessarily failed. See paragraph [151] – [157] and [161] of the judgment. In reaching his findings about the nature and terms of the Agreement, the judge rejected the evidence of Foxpace's solicitor, Mr Morris, that it had been made clear to him that Mr Barton would receive £1.2 million "if, and only if" Nash House was sold for £6.5 million and that nothing was payable if the sale price was less than £6.5 million. The judge also noted that it would be "bizarre" to have entered into a contract on those terms because Mr Barton would have opened himself up to the possibility that a small reduction in the sale price would deprive him of any introduction fee at all. See paragraphs [141] and [143] of the judgment.

13. The judge also noted that Mr Rooke had accepted in his evidence that Mr Barton was involved in negotiating the deal at the reduced price of £6 million and that it was accepted that the £1.2 million fee was based upon the sums that had been forfeited to Foxpace as a result of the previous failed attempts to purchase Nash House, both by Stonebridge and Mr Barton himself. See paragraphs [113] and [197] of the judgment respectively.

14. The judge also commented at paragraph [164] that it was wise that Mr Barton did not seek to argue that he was entitled to £1.2 million or any other figure by way of an introducer's fee pursuant to an implied term in the contract, given the judgment of the Supreme Court in *Marks and Spencer plc v BNP Paribas* [2015] UKSC 72.

15. The judge went on to consider Mr Barton's alternative case that he was entitled to compensation for unjust enrichment on the basis of the doctrine of free acceptance. He began by asking the four questions identified by Lord Clarke JSC at paragraph [10] of *Benedetti v Sawiris* [2014] AC 938, a case which was concerned with the valuation of services for the purposes of an unjust enrichment claim and to which I shall refer in more detail below. The judge concluded that: there was a clear enrichment because Mr Barton had introduced a buyer for Nash House which would not have bought the property but for the introduction (see paragraph [180]); that by providing the name of a buyer in circumstances in which Foxpace would expect Mr

Barton to charge Foxpace was enriched at Mr Barton's expense (see paragraph [182]): and that there was no suggestion of any defence open to Foxpace (see paragraph [183]). He concluded that the issue which was 'at the heart of this dispute' was Lord Clarke's third question, namely whether the enrichment was unjust (see paragraph 184]).

16. The judge approached this question with the principle in the *Costello* case in mind, namely that a claim in unjust enrichment should not be allowed to undermine the contractual arrangements between the parties. At paragraph [169] of his judgment, he set out the principle as stated by Etherton LJ in the *Costello* case at paragraph 23, as follows:

> "I am clear, on the other hand, that the unjust enrichment claim against Mr and Mrs Costello must fail because it would undermine the contractual arrangements between the parties, that is to say, the contract between the claimants and Oakwood and the absence of any contract between the claimants and Mr and Mrs Costello. The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provide certainty, and so limits disputes and litigation."

The judge went on to decide whether and, if so, in what way the parties in this case had determined how the risk of a purchase price of less than £6.5 million should be allocated. He concluded at paragraph [189] that:

> ". . . the parties to the contract had no shared or even individual expectation as to how the risk of the sale price being less than £6.5 million should be allocated for the purpose of determining whether Mr Barton should be entitled to payment. The Court must therefore consider whether to impose an obligation on Foxpace to make payment in circumstances which were not contemplated when the contract was concluded."

He went on to hold that:

> "190. In favour of the argument that Mr Barton should be treated as assuming the risk of not being paid for the introduction, it seems to me that the only substantial argument is that the parties failed within the contract to define an obligation on Foxpace to pay the fee in the circumstances of the sale of Nash House for a figure of less than £6.5 million when they could have done so. The principle set out in *MacDonald v Costello* should therefore be applied, namely that the parties' mutual obligations in a case in which they concluded a contract should be limited to those which they have defined and allocated in the course of negotiating that contract, so as to give effect to the need for the court to uphold contractual arrangements.

> 191. In my judgment, there is a strong argument for the court declining to interfere with the agreement by which the parties have determined the circumstance in which a sum of money will be payable by granting relief which amounts to an imposing an obligation to pay in different circumstances. Granting such relief amounts to an obvious interference with the freedom of parties to define and allocate their obligations. In circumstances such as those of the instant case, it is in my judgment incumbent on the Appellant to show why the court should in effect interfere with the allocation of risk by imposing an obligation on the Respondent to pay money in circumstances other than those contemplated by and defined in the contract."

17. The judge then turned to the factors which he considered to be in favour of the argument that the court should hold that Mr Barton was not taking the risk of not being paid for the introduction of Western at paragraphs [192] – [197] of his judgment. He concluded, however, that the court could not make any safe assumption about what would have been agreed about an introduction fee in relation to a reduced sale price and noted that to do so would be "speculating about what parties in a commercial relationship might have been willing to agree to and would have been substituting assumptions as to how they would have behaved in place of their freedom to negotiate." See paragraph [198] of the judgment. As a result, the judge concluded that he was not satisfied that Mr Barton had brought himself within the principle of free acceptance and the claim in unjust enrichment also failed (see paragraph [200]).

18. As I have already mentioned, despite having rejected the claim in unjust enrichment, for the sake of completeness, the judge went on to consider the value of the benefit conferred. The judge held that little weight should be given to the fee agreed between Mr Barton and Foxpace when determining the true value of the service provided, for a number of reasons, one being that the fee was based upon Mr Barton recovering his losses on the previous failed transactions rather than an attempt to value his services (see paragraph [211]). In the absence of expert evidence, he decided that the proper valuation of the services should be determined by reference to other agreements for introduction fees entered into by Foxpace in relation to the failed transactions for the sale of Nash House to Mr Barton and to a Mr Kherallah. Taking the midpoint of those figures, the proper valuation of the services provided was held to be 7.25% of the sale price, which was £435,000 (see paragraphs [213-214]).

Grounds of Appeal

19. The judge's decision is appealed on four grounds. It is said that: (i) the judge was wrong to conclude that the terms of the Agreement excluded a claim to a reasonable sum for the benefit conferred on Foxpace if the property sold for less than £6.5 million; (ii) that he was wrong to hold that Mr Barton's claim in unjust enrichment was barred by the general principle in the *Costello* case; (iii) in the event, however, that the claim is barred by the general principle in *Costello*, the principle should not apply on the facts of this case; and (iv) the court erred in its valuation of the benefit of Mr Barton's services provided to Foxpace: rather than £435,000, the correct value of the benefit was £1.2 million or at least £800,000, or at any rate more than 7.25% of the purchase price. Permission to appeal was refused on grounds which related to the

judge's factual findings about the source and terms of the Agreement itself and whether it was too uncertain to be enforceable.

Do the terms of the Agreement exclude a claim for a reasonable sum in respect of the benefit conferred on Foxpace and does the general principle in Costello apply?

20. As they are very closely related, I will consider the first and second grounds of appeal together. In order to determine whether a claim for reasonable remuneration is excluded by the terms of the Agreement, it is necessary, first, to construe those terms. As Viscount Simon LC pointed out at page 119 in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 188, to which I will return, contracts of this kind do not follow a single pattern and it is important in each case to ascertain the meaning of the express terms. Do the terms of the Agreement themselves define and allocate and, to that extent, restrict the mutual obligations of the parties and as a result, do they exclude any payment being made to Mr Barton in relation to a sale for less than £6.5 million?

21. The principles to be applied by the court when determining the proper construction of a contract are well known. See for example, *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 per Lord Hodge JSC at [10] – [14] with whom Lord Neuberger PSC and Lords Clarke, Mance and Sumption JJSC agreed. In this case, the Agreement was oral and its terms were determined by the judge as a question of fact. Permission to appeal in relation to those findings was, as I have said, refused. Taking into account the informality of the Agreement, what would a reasonable person, with all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the Agreement, have understood the parties to have meant by the terms of the Agreement as found by the judge?

22. In this regard, Mr Pomfret referred us to *Firth v Hylane Ltd* (1959) EGD 212. He submitted that it supports his argument that in the absence of a clear and express agreement that Mr Barton should receive nothing unless Nash House was sold for £6.5 million, the parties should not be held, by default, to have allocated the risk of a sale at a lesser sum to Mr Barton, in the sense that he should receive no payment at all, and the Agreement should not be construed in that way. Mr Pomfret went as far as to submit that the decision in *Firth* is binding upon us.

23. As the case was reported only very briefly in digest form, Mr Pomfret had very helpfully obtained a transcript of the judgments in the Court of Appeal. It was a case in which a vendor had told an estate agent that he would pay him £1,000 commission if a property was sold for £35,000. Subsequently, an agreement to that effect was reached. After further discussion, an auction took place but the vendor refused the highest offer which was made, which was £29,500. The estate agent continued to be involved in further negotiations in relation to the property with the authority of the vendor and, some months later, the vendor made clear that he would sell the property for £30,000 plus a sum of £4,000 or £5,000 for plant. In those circumstances, he stated that he would pay £500 commission. Further correspondence and negotiations took place in which the agent was involved and the property was eventually sold for £31,000.

24. Morris LJ (with whom Sellers and Pearce LJJ, who gave concurring judgments, agreed) stated at 8C-E of the transcript that all that was being said was that if the

property was sold for an exceptionally good price the agent would receive £1,000 commission and if it was sold at a cut price he would receive £500. He went on: " . . nothing in those two letters could reasonably be interpreted, as it seems to me, as saying: "and if these prices are not realised, but I introduce a purchaser to you who does in fact buy at a lower price, then I agree to take nothing, and you are not to be under any obligation to pay me". In that event, the Company would be under an obligation to pay. The obligation would arise because if you ask somebody to do work for you, you expect to pay for it." He had also stated at 4C-F that the £1,000 was a special sum and went on:

> "But suppose that the Plaintiff, as an estate agent, introduced somebody as a purchaser to the Defendants and the Defendants accepted the introduction and did sell to such a purchaser but at less than £35,000, then it could not be that the Plaintiff was not to be remunerated at all. That would be most unreasonable, and that could not have been in the contemplation of these parties. If you invite somebody to render a service, in circumstances in which payment is usual, and the service is rendered and accepted and a specific charge has not been agreed upon, then a reasonable sum becomes payable for the service. ... The contract did not set out what was the amount to be paid if a purchaser at less than £35,000 was introduced as a result of which there was a sale, but the contract certainly did not provide that there was to be no remuneration in the case of the introduction of a purchaser to whom the company decided to sell for less than £35,000."

25. Mr Pomfret says that the situation here is indistinguishable because Mr Barton was involved in negotiations once the HS2 issue had come to light and the question of a conditional contract or a reduced purchase price arose. He relied on the judge's findings at paragraphs [113], [114] and [135] of the judgment. Mr Sterling submitted, on the other hand, that *Firth v Hylane* turned on its facts and accordingly, was not binding upon us. Further, it had not been cited or relied upon before the judge. He also stated that, perhaps as a result, the facts in relation to Mr Barton's involvement in negotiations once the HS2 issue came to light were not considered in any detail at trial.

26. I agree with Mr Sterling that the decision in *Firth v Hylane* is not binding upon us. As Morgan J noted in *Berkeley Community Villages Ltd v Pullen* [2007] 3 EGLR 101; [2007] EWHC 1330 (Ch) at [108], the decision turned upon the particular course of dealing and correspondence between an estate agent and his client in that case. As Morris LJ himself noted at 5B of the transcript in that case, each case must turn on the exact terms of the contract in question. I agree, however, that it is generally supportive of Mr Pomfret's argument that the Agreement should not, without more, be construed to mean that Mr Barton should receive nothing unless the £6.5 million purchase price was achieved and as a result to have allocated the risk of a sale at a lesser sum to Mr Barton.

27. It seems to me, on the other hand, that Mr Sterling's submissions about the construction of the Agreement require one to ignore the judge's findings. He

submitted that the payment of £1.2 million was contingent upon a sale to a purchaser introduced by Mr Barton at £6.5 million or more and that Mr Barton was only to be remunerated in those circumstances. He relied upon *Luxor (Eastbourne) Ltd v Cooper* in which the House of Lords decided that where an estate agent was promised a commission only if a sale of a property was completed, there was no room for an implied term that the vendor/principal would not dispose of the property himself or through other channels. Mr Sterling relied, in particular, upon the description of what Viscount Simon LC described as the third class of contracts under which an agent may be attempting to sell a property. That class was where "by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal." In such circumstances, Viscount Simon LC stated that there was no room for the implied term which had been proposed. He went on: "The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, but if he is not willing to run the risk he should introduce into the express terms of the contract the clause which protects him." See pages 120 and 121. Mr Sterling also drew our attention to a similar passage from the speech of Lord Russell at page 124 as follows:

> "No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. . . . The agent is promised a commission if he introduces a purchaser at a specified or minimum price. The owner is desirous of selling. The chances are largely in favour of the deal going through, if a purchaser is introduced. The agent takes the risk in the hope of a substantial remuneration for comparatively small exertion. . . . There is no lack of business efficacy in such a contract even though the principal is free to refuse to sell to the agent's client."

28. Mr Sterling submitted, therefore, that, just as Lord Russell described in the *Luxor* case, Mr Barton took the risk that the sale would not be completed at the specified figure and a claim for reasonable remuneration is excluded by the terms of the Agreement itself. Had Mr Barton wanted to receive remuneration for introducing a purchaser where the purchase price was less than that provided for, he should have negotiated terms to that effect. He did not do so.

29. As I have already mentioned, when making his findings about the terms of the Agreement the judge expressly rejected the evidence of Foxpace's solicitor, Mr Morris, to the effect that he had been informed that the agreement was that Mr Barton was to be paid "if, and only if" £6.5 million or more was achieved. As a result, the judge rejected one of the alternative ways in which the defence to the contractual claim had been put. The judge went as far as to comment that such an agreement would be "bizarre". See paragraphs [141] – [143] of the judgment. Mr Sterling, however, would in effect have us construe the terms of the Agreement, as found, as if his alternative defence had not been rejected. The Agreement as found by the judge was that Mr Barton would be paid £1.2 million if Nash House was sold for £6.5 million to a party which he had introduced. The terms were not that Mr Barton would

be remunerated if, and only if, the property was sold for £6.5 million or more. In my judgment, there is nothing in the terms of the Agreement, objectively construed, which means that Mr Barton should receive nothing at all unless the £6.5 million purchase price was achieved.

30. Is such a claim excluded, nevertheless, by the principle in the *Costello* case? In the *Costello* case, the claimant builders had entered into a contract with a company for the construction of houses on land owned by the shareholders and directors of the company personally. The builders had been informed that the contract was being made with the company rather than the individuals for tax reasons. The company failed to pay the builders' invoices and judgment was given against the company for the amount due. The company being unable to pay, a monetary restitutionary award for unjust enrichment was made against the shareholder/directors. Their appeal was allowed by the Court of Appeal on the basis that the unjust enrichment claim would undermine the contractual arrangements between the parties. The contract was only between the builders and the company and the parties had chosen to restrict their obligations and to allocate the consequences of non-performance in that way.

31. Although there can be no doubt that a claim in unjust enrichment should not be allowed to alter or undermine the express allocation of risk and obligations arising from a contract and the autonomy of the parties to configure their contractual relations (see Etherton LJ (as he then was) at paragraph 23 of the *Costello* judgment which is set out at paragraph [16] above), it seems to me that that principle does not apply in this case. The position was very clear in the *Costello* case. The builders were not allowed to circumvent the contractual arrangements which they had entered into. They had contracted with the company and had taken the risk that it would not or could not pay for the services rendered. In such circumstances, to allow a claim in unjust enrichment against the individuals would have been to by-pass the contract altogether, and to ignore the separate legal identity of the company and the consequences of that separate identity and, in effect, render the shareholder/directors guarantors of the company's debt where no such guarantee existed.

32. The circumstances are completely different here. Although the Agreement remained valid and had not been superseded, it was entirely silent as to what was to happen if the sale completed for a purchase price of less than £6.5 million. As I have already mentioned, the judge found that it was not an "if, and only if" agreement. He also found that the parties had not given any thought to circumstances other than a sale at £6.5 million. Objectively construed, it did not restrict payment to the happening of a specific event.

33. As a result of the Agreement, Mr Barton took the risk that there would be no sale at all, in which case he would not be paid. He also took the risk that the purchase price would be less than £6.5 million, in which case he would not be entitled to £1.2m. However, there was no allocation of risk in other circumstances. Therefore, there is nothing which would preclude Mr Barton from seeking remuneration on the basis of unjust enrichment. In awarding such a remedy, the court would not be undermining the contractual allocation of risk negotiated by the parties. The Agreement did not address the situation at all.

34. Had the parties in this case wished to allocate the risk in relation to completion at other prices in a particular way and to define, allocate and restrict their mutual obligations as a result, they could have done so by including express terms within the Agreement. Furthermore, had they wished to exclude any claim for remuneration other than in relation to a sale at £6.5 million they should have entered into an agreement which, when objectively construed, made clear that payment was to be received if, and only if, the specific event occurred. They could have included an express term to that effect. Had there been such circumstances, the principle in the *Costello* case would apply because a claim in unjust enrichment would undermine the parties' contractual freedom. But that did not happen.

35. In my judgment, therefore, the express terms of the Agreement do not exclude a claim in unjust enrichment, nor does the general principle in the *Costello* case require the court to dismiss a claim for remuneration. It follows that, in my judgment, the judge was wrong to apply the principle in the *Costello* case in the way he did. He reminded himself that he had found that the parties had not addressed the circumstances of a sale at a price which was less than £6.5 million (see paragraphs [187] – [189] of the judgment) and that the Agreement was not an "if, and only if" contract (see paragraphs [116], [141] and [161] of the judgment). He went on, nevertheless, to decide that to impose an obligation upon Foxpace to pay Mr Barton in different circumstances from those which were set out expressly in the Agreement would amount to "an obvious interference with the freedom of parties to define and allocate their obligations" and that the court would be "speculating about what parties in a commercial relationship might have been willing to agree." See paragraphs [191] and [198].

36. It seems to me that such an approach is confused. Once the Agreement is construed objectively and those terms are not undermined by the award of a compensation on another basis, and all of Lord Clarke JSC's questions in relation to a claim in unjust enrichment have been answered appropriately, it is necessary for the court to determine the objective market value of the benefit which has been conferred. One does not turn back to speculate about what additional contractual terms the parties would have agreed. That is, in effect, what the judge thought should be done and concluded amounted to inappropriate speculation. He relied upon that "speculation" to illustrate the "danger in interfering in the contractual relationship between the parties" and to decide that in doing so the court would be "substituting assumptions as to how [the parties] would have behaved in place of their freedom to negotiate". See paragraph [198] of the judgment. The law of unjust enrichment, however, is not primarily concerned with the intention of the parties. See the *Benedetti* case per Lord Clarke JSC at [33].

37. This was a case in which Foxpace was enriched by the receipt of a benefit in the sense of the introduction of a willing purchaser for Nash House. The service was rendered in circumstances in which the specific fee had not been agreed but it was not expected that the agent would go unpaid. The contractual arrangements did not extend to the circumstances which arose and, accordingly, there was no contractual allocation of risk.

38. I should also add that it is not clear to me that the judge was correct to refer to the claim in unjust enrichment as having arisen as a result of the doctrine of free

acceptance. Although we were not addressed directly on this matter I note that: it is a doctrine about which there is much academic debate; it was not the basis for a claim in unjust enrichment considered by the Supreme Court in the *Benedetti* case, upon which the judge ultimately founded his reasoning; and it does not form the basis of my consideration of the claim in unjust enrichment.

39. Could the same result have been achieved by the implication of a term into the Agreement for reasonable remuneration if Nash House was sold for less than £6.5 million? Although this point was not argued before the judge (and it would seem from paragraph [164] would not have found favour with him), Mr Pomfret adopted it in argument before us. He submitted that in the circumstances a claim in unjust enrichment and the effect of such an implied term were "two sides of the same coin".

40. Although Mr Sterling suggested that the evidence sought to be adduced might have been different before the judge had the point been taken at trial, it seems to me that that would not have been the case. The oral evidence and the case on behalf of the Respondents before the judge would have rebutted any implied term, if it had been accepted.

41. It seems to me that such a term might have been implied. It would not contradict the express terms of the Agreement, is capable of clear expression, is so obvious that it goes without saying and is necessary to give the Agreement business efficacy and it lacks commercial coherence without it. As it stands, the Agreement, which was arrived at orally, does not deal with circumstances in which the sale price was less than £6.5 million and creates the situation in which only a small reduction in the purchase price would deprive Mr Barton of a fee altogether, something which the judge described a "bizarre". See *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20 per Lord Simon and *Marks and Spencer Plc v BNP Paribas* [2015] UKSC 67 per Lord Neuberger PSC at [21] (with whom Lord Sumption and Lord Hodge JJSC agreed). As Lord Neuberger pointed out, the implication of a term is not critically dependent upon proof of an actual intention of the parties when negotiating the contract. Instead it turns upon what notional reasonable people in the position of the parties would have decided.

42. It is not clear to me, however, that the claims and their results are opposite sides of the same coin. It seems to me that such claims must be mutually exclusive and are not necessarily interchangeable. It is not clear to me, for example, that a claim for reasonable remuneration arising from an implied term would necessarily lead, in all cases, to the same compensation that would be awarded for unjust enrichment, a topic which I will explore further below.

What was the value of the benefit conferred?

43. In the circumstances, although it is not necessary to consider the third ground of appeal, I must turn to consider the fourth, which is concerned with the value of the benefit conferred. The judge did not have to decide this issue because he had already concluded that the claim in unjust enrichment failed. He set out what his approach would have been, nevertheless. Was he correct to place little weight on the agreed figure of £1.2m for the reasons he set out at [211] of his judgment and to do his best

to arrive at the value of the enrichment by using as benchmarks other agreements which Foxpace had entered into with potential introducers in relation to Nash House, ultimately taking a midpoint of 7.25% of the purchase price which amounted to £435,000?

44. Mr Pomfret submitted that, in circumstances in which there was no general market for the benefit conferred, the price agreed between the parties was the best measure of the market value of the introduction of Western to Foxpace and, further, that the background to the introduction of Western and the negotiating position adopted by Mr Barton gave rise to an "individuated" objective market price. Alternatively, the £1.2 million figure should only have been reduced by the same pro-rated reduction as the purchase price itself, leaving the parties in the same position or, in the further alternative, the court should have considered what the parties would have negotiated: which he says would have resulted in a fee of £800,000. In addition, Mr Pomfret submits that in placing reliance on the fees agreed with other introducers, the court failed to take proper account of the effect of the HS2 issue on the market value of the benefit conferred. They were agreed before the issue arose. After the property was affected by the potential for HS2 blight, the introduction of a purchaser became more valuable.

45. In this regard, Mr Pomfret referred us to the *Benedetti* case in the Supreme Court and, in particular, to Lord Reed JSC's observation that market value is specific to a given place at a given time (see paragraph [105]) and his and Lord Neuberger PSC's consideration of the significance of the amount which the recipient of the benefit in that case, Mr Sawiris, had offered to pay for the services rendered by Mr Benedetti. The offer exceeded the amount which, according to the evidence, was the ordinary market value of the services.

46. The facts of that case are complex and it is only necessary, for these purposes, to set them out in summary. Mr Benedetti had promoted and facilitated a takeover deal, as a result of which Mr Sawiris had purchased a company. A written agreement between them proceeded, amongst other things, on the basis that third-party funding would be available and that Mr Benedetti would receive shares in the company as payment for his services in the event that the bid was successful. The agreement between them was superseded when it became clear that no outside investors could be found and that the takeover would be wholly financed by Mr Sawiris and his family. The parties disputed how much Mr Benedetti should be paid for his services. Mr Sawiris offered a sum of €75.1 million which was rejected by Mr Benedetti, who brought a claim on numerous bases, which totalled €3.7 billion. The question for the Supreme Court was how Mr Benedetti's services should be valued for the purposes of that claim and whether Mr Sawiris should be required to pay more than the market value of the services if it could be shown that he had subjectively valued them at a sum in excess of market value.

47. It is clear from the *Benedetti* case that an award made on the basis of unjust enrichment is concerned with the recovery of the benefit unjustly gained rather than compensation for loss. It is to be calculated as the value of the benefit received at the expense of the claimant. The starting point is normally the objective market value of the services rendered, tested by the price which a reasonable person in the recipient's position would have had to pay for them, taking into account conditions which

increased or decreased their objective value to any reasonable person in that position. See Lord Clarke JSC at paragraphs [9] and [13] – [17], Lord Reed JSC at paragraphs [100] – [106], Lord Neuberger PSC at paragraphs [180] - [184].

48. Lord Reed JSC held that "the amount which Mr Sawiris offered to pay Mr Benedetti for his services, after they had been provided, [was] significant only insofar as it provides evidence of the objective value of the services at the time they were provided . . ." and that the "significance of the sums offered by Mr Sawiris therefore, depends upon whether they provide evidence of the objective value of Mr Benedetti's services at the time they were provided". See paragraphs [139] and [140]. He went on at [140] as follows:

> ". . . In that regard, the fact that Mr Sawiris offered €75.1m for services which would ordinarily be valued at €36.3m plainly calls for an explanation. Was there something exceptional about the circumstances which rendered Mr Benedetti's services exceptionally valuable? The judge did not identify anything about the circumstances in which the services were provided which would indicate that they had a higher objective value in those circumstances than their ordinary market value. Or was Mr Sawiris's offer influenced by extraneous factors, such as the desire to settle Mr Benedetti's claim in the shadow of potential litigation? If so, the offer would not be reliable evidence of the objective value of the services at the time they were received. Or was Mr Sawiris simply being generous, as Mr Abdou said in the relevant emails, and as Mr Sawiris maintained in his witness statement? If so, the offer would again not be reliable evidence of the objective value of the services: generosity (or parsimony) may influence a person's attitude towards paying a given price, but it does not affect the objective value of what he has received. Or was Mr Sawiris influenced by the success of the venture in connection with which Mr Benedetti's services had been provided? If so, the offer would again not be reliable evidence of the objective value of the services, since that value has to be determined as at the time when the services are received, and cannot be quantified with hindsight in the light of their success."

49. Lord Neuberger PSC also noted that ". . . in the absence of any other evidence or any good reason to the contrary, where two parties agree, at arm's length, that one of them will pay a certain sum, or at a certain rate, for a type of benefit to be provided by the other, there must be a prima facie presumption that that amount is, or at least is good evidence of, the market value of that type of benefit". See paragraph [168].

50. In this case, it seems to me that there was good reason not to place any weight upon the figure of £1.2 million. The judge had found that the fee was related to the expenses which had been lost in previous transactions rather than the services provided. It seems that it was based on the generosity of Mr Gwyn-Jones and Foxpace or was otherwise influenced by extraneous factors and, accordingly, was not reliable evidence of the objective value of Mr Barton's services at the time they were

received. The judge was entitled, therefore, to reject the figure of £1.2 million as a benchmark. Furthermore, given the nature of the £1.2 million fee as found by the judge, in my judgment, it would not have been appropriate to take a pro rata approach based upon it. Neither, in this case, would it have been appropriate, as Mr Pomfret suggested, to determine the objective market value of the services on the basis of what the parties might have negotiated. To do so in this case would have been pure speculation. It is far from the circumstances in *ACLBDD Holdings Ltd & Ors v Staechelin & Ors* [2018] EWHC 44 (Ch). In that case, Morgan J had evidence before him of arm's-length negotiations between a seller and agent in relation to commission which, in the circumstances of that case, he took into account when determining the objective market value of the services.

51. It seems to me that in the circumstances of this case and in the light of the judge's conclusion that he was not satisfied that the problems relating to Nash House were as serious as Mr Barton contended or that the sale was so urgent from the point of view of Mr Gwyn-Jones (see paragraph [211c] of the judgment), in the absence of any expert evidence, the judge was entitled to adopt the approach to the objective market value of the benefit provided which he did. He based his conclusion upon the only reliable evidence as to the objective market value of the services which was available to him in the form of the other agreements which Foxpace had reached with introducing agents in relation to the sale of Nash House.

52. I should add that in my judgment, in this case (although not in all cases) it is likely that the same conclusion would have been reached if the matter had been approached by means of an implied term for reasonable remuneration. This is despite the fact, as Lord Clarke JSC pointed out at paragraph [9] of the *Benedetti* case, that in such circumstances, "the focus is not on the benefit to the defendant in the way in which it is where there is no such contract. In a contractual claim the focus would in principle be on the intentions of the parties (objectively ascertained)". Nevertheless, on the facts of this case, it seems to me that the "special bonus" figure of £1.2 million enabling sums which had been forfeited to be re-couped, if the purchase price of £6.5 million were achieved, would be likely to be irrelevant when determining the objective intentions of the parties and the terms of the previous agreements would be some guide.

53. For the reasons set out above, I would allow the appeal in relation to the judge's rejection of the claim in unjust enrichment.

Lord Justice Males:

54. I agree that the appeal must be allowed. Although the background is complex, the critical facts are straightforward and my reasons can be shortly expressed.

55. The judge found that there was an oral agreement pursuant to which Foxpace would pay Mr Barton the sum of £1.2 million in the event that Nash House was sold for the sum of £6.5 million to a purchaser introduced by him.

56. The judge rejected evidence that it was expressly agreed that Mr Barton would not be entitled to any payment if the property was sold to a purchaser introduced by him, but for a lesser sum. He said that it would be "bizarre" to think that Mr Barton would

knowingly have entered into a contract on such terms, since he would obviously open himself up to a small reduction in the sale price that deprived him of any introduction fee at all.

57. Such an agreement would indeed have been bizarre, not only for the reason which the judge gave. It would also have meant that Foxpace would have been better off if the property was sold to a purchaser introduced by Mr Barton for any price less than £6.5 million but in excess of £5.3 million.

58. As it was, the judge's finding of fact was that nothing was said on either side about whether any payment would be due if the property was sold for a sum less than £6.5 million. Indeed, he went further, finding that neither party even had this possibility in mind.

59. Nevertheless the judge's conclusion was that on the true construction of what the parties had agreed, and even though it would have been bizarre for them to have agreed this expressly, nothing was payable to Mr Barton if the property was sold for less than £6.5 million.

60. Since they did not agree this expressly, the judge's conclusion can only stand if it was necessarily implicit in what they did agree. But there is no room for a process of construction or an implied term the obvious effect of which would be to bring about a result which the judge had earlier characterised as bizarre.

61. The judge appears to have reached his conclusion by reasoning that the parties had allocated the risk that the property might be sold for less than £6.5 million to Mr Barton and that, because the risk had been allocated in this way, any claim based on unjust enrichment was excluded, applying the principle stated by Etherton LJ in *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930, [2012] QB 244 at [23]:

> "I am clear, on the other hand, that the unjust enrichment claim against Mr and Mrs Costello must fail because it would undermine the contractual arrangements between the parties, that is to say, the contract between the claimants and Oakwood and the absence of any contract between the claimants and Mr and Mrs Costello. The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provide certainty, and so limits disputes and litigation."

62. The principle that unjust enrichment will not step in to provide one party with a remedy where the relevant risk has been allocated to him by contract is not in doubt, but I cannot accept the judge's reasoning as to its application in this case. It is obvious that Mr Barton would not get his £1.2 million if the property was sold for less than £6.5 million: the only circumstance in which this was agreed to be payable had not occurred. In that sense only, the risk that the property was sold for less fell on him.

But the contract said nothing one way or the other about whether he would be entitled to payment of something if he introduced a purchaser who purchased the property for a lesser sum. In those circumstances the risk of receiving nothing if the purchaser which he introduced purchased the property for less than £6.5 million cannot be regarded as having been allocated by the contract to Mr Barton.

63. Accordingly the contract does not stand in the way of a remedy in unjust enrichment (or, if necessary, *quantum meruit*: on the facts of this case it makes no difference) if that is otherwise appropriate. I agree that such a remedy is appropriate. Any other conclusion would work a clear injustice.

64. I agree also that the reasonable value of the services which Mr Barton provided should be as assessed by the judge, that is to say 7.25% of the purchase price of £6 million, which equates to £435,000.

65. I would add that although there was a good reason why the judge made a finding that neither party actually contemplated a sale at a price of less than £6.5 million, that reason being to make clear that there was no question of the sale price of £6 million being deliberately chosen to enable Foxpace to evade payment of Mr Barton's fee, the question whether on its true construction the contract made provision for what was to happen in the event of a sale for less than £6.5 million must be answered by reference to the objective evidence as to what the parties agreed and not their subjective thoughts. In circumstances where the parties' agreement was as the judge found it to be, with nothing said about what should happen in the event of a sale for a lesser price, neither the parties' actual uncommunicated thoughts if they had any or the absence of such thoughts if they did not can affect the construction of their contract, including its allocation of risk between the parties.

Lord Justice Davis:

66. It is a general principle that where an agent is only contractually entitled to remuneration upon the happening of a specified event he can only claim such remuneration if that event happens. If it does not happen he gets no recompense at all; and that is so even if he has undertaken a considerable amount of work in the meantime. The rationale is clear: entitlement to recompense for such work is precluded by the terms of the contract.

67. The respondent, invoking cases such as *Luxor*, relies on that principle and says that it governs the situation here. It is thus a feature of the respondent's case that he thereby achieves precisely the same result as he unquestionably would have achieved had his, and his witness Mr Morris's, evidence been accepted by the judge: rather than, as it was, rejected by the judge.

68. Ultimately, however, (as *Luxor* itself stresses) all depends on the terms of the contract in question. Here, the contract was an oral contract. It was most unfortunate that the parties did not reduce their agreement into proper legal form.

69. In my opinion, the error in the respondent's argument, with all respect, is that it wrongly analyses the terms of the contract as found by the judge. I entirely agree with Asplin LJ on this. The contract was *not* "you will only get remuneration if you

introduce a purchaser at a price of £6.5 million". Rather, it was: "you will be entitled to £1.2 million if you introduce a purchaser at £6.5 million": paragraph 161 of the judgment.

70. It follows that, in the circumstances which happened here, the appellant had no entitlement to £1.2 million (there was no suggestion that the price had artificially or in bad faith been reduced to £6 million). But the contract was simply silent as to what was to happen if the price paid by the purchaser so introduced by the appellant was less than £6.5 million. Indeed, if it be relevant, the judge found as a fact that (most surprisingly, to my way of thinking, given the commercial property context) the parties had not even applied their minds to such a scenario.

71. In such circumstances, one would expect an introducer to be entitled to receive remuneration. And, on the facts as found, nothing in the contract precluded such a result. Accordingly, I would view the appellant as being entitled to remuneration for the (valuable) introductory services which he offered: services which the respondent had accepted and from which the respondent had benefited.

72. I agree with Mr Sterling that the case of *Firth v Hylane* (heavily relied upon in this court by Mr Pomfret, although it was not cited below) is not binding as to the outcome of this case. That is because all such cases depend on the precise terms of the contract agreed and on the individual factual circumstances. *Firth* is, I accept, distinguishable. There, the claimant was an estate agent who (with the knowledge and concurrence of the vendor) continued extensively to negotiate with the prospective purchaser even after the originally stipulated price of £35,000 had proved unobtainable. Those facts potentially distinguish it from the present case. But the general approach of each member of the court is, to my mind, nevertheless instructive. For example, as Morris LJ put it: "what the parties did here was merely to define the terms upon which the commission was to be quantified and fixed at particular amounts. That did not exclude the payment of reasonable remuneration for services rendered and accepted by the defendant." So here, in my opinion.

73. The case of the appellant below, alternative to that of the express contractual entitlement claim (which failed), in fact was formulated on the basis of unjust enrichment. It was not based on any argument by reference to an implied contract or implied term.

74. If the case is properly to be analysed as one of unjust enrichment, then I would certainly accept, in agreement with Asplin LJ, that the claim cannot be defeated on the basis that the parties by their contract had allocated the risk (as was the position in *Costello).* That would be contrary to the judge's findings of primary fact, which were to the effect that the parties had made no agreement as to the allocation of risk if the sale price was less than £6.5 million. With all respect to the judge, his observations on this aspect of the case in subsequent paragraphs of his judgment are not consistent with his prior findings as to the terms of the contract. Indeed while, as he said in paragraph 191, the parties had "determined the circumstances in which a sum [viz. the £1.2 million] was payable" he was wrong to go on to say that granting relief would "amount to an obligation to pay in different circumstances" as though that created an inconsistency. But to conclude that that creates an inconsistency with the contract wrongly conflates an obligation to pay a specified sum of £1.2 million in one set of

circumstances with an obligation to pay some other (unspecified) sum in a different set of circumstances. The positions are distinct. The short point thus is that it cannot be said that the terms of the contract precluded restitution.

75. In my own opinion, however, as will be gathered, the correct legal analysis, in the circumstances of this case, is that this should not be regarded as a case of unjust enrichment. Rather, reasonable remuneration is payable as a matter of quantum meruit pursuant to an implied term. In terms of the actual outcome here, given the particular facts, it may not matter too much whether the remedy lies by way of unjust enrichment or by way of quantum meruit. But in terms of conceptual approach, and even though both kinds of claim ultimately form part of the law of obligations, there is a real difference. For claims of unjust enrichment ordinarily operate outside any subsisting contract and focus on the benefit said to have been received by the defendant; whereas claims for payment by way of quantum meruit pursuant to an implied term operate within a contractual setting and focus on a sum claimed to be due to the claimant. I consider that the present case is to be analysed as a quantum meruit case just because I consider that it was inherent in -that is to say, an implied term of – the introductory agreement which was concluded that the appellant would be reasonably remunerated for successfully introducing a purchaser (even if at a price less than £6.5 million).

76. Mr Sterling objected that – whilst the case had not been the subject of pleadings for the purposes of the insolvency issue that had arisen – that was not the case presented below; and he said that it would be unfair if the appellant were now to be allowed to formulate the claim in this way. But Mr Pomfret (whilst disclaiming reliance on an implied contract as such), maintained that in practical reality in this particular case a remedy in the form of recompense as a matter of unjust enrichment and a remedy in the form of recompense as a matter of implied term by way of quantum meruit were, in his phrase, "two sides of the same coin." In my view, on the particular facts of this case as found by the judge, the value of the benefit that the respondent undoubtedly received - viz. the introduction of Western as purchaser – can be said to correspond to the amount of a reasonable fee due to the appellant for his introductory services. As to Mr Sterling's suggestion that the respondent may have presented his evidence and case differently had the claim been presented below as one of implied term, I do not accept that. Indeed, the respondent's oral evidence and case was such that (if accepted) it would have conclusively rebutted any such implied term in the same way as it would have conclusively rebutted unjust enrichment. The problem for the respondent was that his evidential case failed on the facts.

77. As to the amount of the recompense, the £1.2 million figure, if there was a sale at £6.5 million, was arrived at in such odd circumstances that it cannot be used as some kind of governing benchmark for assessing recompense or benefit where a sale price of £6.5 million was not achieved. The position is a long-way removed from the kinds of example given by Lord Reed at paragraphs 101 – 106 in *Beneditti*: and, as was there confirmed (in the context of an unjust enrichment claim), the required approach is objective. So also is the approach if the remedy is formulated by way of quantum meruit. In the present case, on the limited materials before him, the judge in my opinion adopted a sensible and pragmatic approach; and I too would not interfere with

his conclusion on that aspect of the matter, even though I would myself formulate the claim as a quantum meruit claim.

78. For these reasons, I agree that the appeal should be allowed to the extent that the appellant is entitled to the sum of £435,000.