Express contract and implied quantum meruit

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Case Comment

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Cases cited

Barton v Gwyn-Jones [2023] UKSC 3; [2023] A.C. 684; [2023] 1 WLUK 234 (SC)
MacDonald Dickens & Macklin v Costello [2011] EWCA Civ 930; [2012] Q.B. 244; [2011] 7 WLUK 935 (CA (Civ Div))

L.Q.R. 531 *Barton v Morris [2023] UKSC 3; [2023] A.C. 684* is the second recent case involving fees for an introduction, after *Wells v Devani [2019] UKSC 4; [2020] A.C. 129*, in which simple facts have attracted elaborate judgments up to Supreme Court level. The unfortunate Mr. Barton persuaded five out of eight appellate judges, but the other three were the majority in the Supreme Court.

At issue were the interpretation and effect of an oral agreement to introduce a purchaser for a property and the scope of the principle established by *MacDonald Dickens & Macklin v Costello [2011] EWCA Civ 930; [2012] Q.B. 44* and earlier cases excluding claims for restitution and quantum meruit that contradict defined contractual arrangements "allocating the risk of failure" to the claimant.

On the facts found by the judge, the parties agreed that Mr. Barton would be paid the unusually high fee of £1.2 million if the purchaser he introduced to Foxpace Ltd for a property purchased it for £6.5 million, but said nothing, and did not even consider, what if anything would be payable if the price was reduced. Apart from the contract would there be an implied contractual or restitutionary obligation to pay a reasonable fee and if so was this inconsistent with, and therefore excluded by, the contract?

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The analysis is complicated by the different legal grounds on which the claim was advanced. At first instance it was based on the alleged express terms of the contract (rejected by the judge on the facts), alternatively on unjust enrichment, in the Court of Appeal on unjust enrichment and on an implied term of fact, but in the Supreme Court additionally, without objection by Foxpace, on a term implied as a matter of law into an introduction agreement or on s.15 of the Supply of Goods and Services Act 1982.

Before the judge, H.H. Judge Pearce (*[2018] UKHC 2426 (Ch)*), Mr. Barton was appealing against the rejection of his £1.2 million proof of debt in Foxpace's liquidation. Foxpace had owned a property in Northolt which it wished to sell. Mr. Barton was a property dealer and developer and had been involved in abortive transactions relating to the property as a result of which he had lost £1.2 million in forfeited deposits and other expenses that he wished to recover. He knew of a purchaser willing to buy for £6.5 million. There was a lengthy dispute at trial and the judge disbelieved much of the evidence on both sides, but found that it had been agreed that Mr. Barton would be paid his £1.2 million if he introduced a purchaser for £6.5 million (see at [152]–[157]). He found as a fact (at [187]–[189]) that nothing had been said as to what if anything would be payable if the purchaser negotiated a reduction, and that neither party had even thought about it: there was "no shared or even individual expectation as to how the risk of the purchase price being less than £6.5m was allocated".

Part of the evidence rejected by the judge was that of Foxpace's solicitor, who said it had been agreed that Mr. Barton would be paid nothing if the property was sold for less than £6.5 million. The judge said this would have been "bizarre", as any reduction would have left him with nothing for the valuable introduction (see at [116] and [141]). ***L.Q.R. 532**

In the event, the price was reduced to £6 million because the property was affected by HS2. Mr. Barton claimed the full £1.2 million on the basis that it had been agreed that this would be the fee for introducing a purchaser at any price, alternatively as restitution for his valuable services. Foxpace denied liability, but offered £400,000 for "goodwill", which Mr. Barton refused. The judge rejected the contract claim on the facts, and the restitution or unjust enrichment claim because it was inconsistent with the contract. For completeness, he valued Mr. Barton's services at 7.5% or £435,000.

On the unjust enrichment claim, the judge asked himself the four questions set out by Lord Clarke in *Benedetti v Sawiris [2013] UKSC 50; [2014] A.C. 938*. He found that Foxpace had been enriched at Mr. Barton's expense "by the communication of (the purchaser's) name in circumstances where (Foxpace) would expect (Mr. Barton) would charge for the introduction". In accordance with normal business practice Foxpace would expect to pay for the benefit, the retention of which without payment would be unjust (see at [179]–[181] and [185]). Foxpace had received "a very real benefit" (see at [196]).

He nevertheless held that receipt of the benefit without payment was not unjust. But for the agreement to pay £1.2 million if the purchaser paid £6.5 million, Mr. Barton would have been

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entitled to a reasonable, if much lower, fee. But to impose such an obligation on Foxpace would be "an obvious interference in the freedom of parties to define and allocate their obligations" and with their "allocation of risk" (see at [190]–[191])—despite having found three paragraphs earlier that there had been no such allocation: not surprisingly both Asplin L.J. and Davis L.J. found this to be inconsistent.

Thus the judge arrived at the result that he in the end considered the law required, notwithstanding that, if agreed between the parties, it would have been "bizarre". He referred (at [192b] and [196]) to "the obvious unfairness to Mr. Barton" and to the "obvious apparent inequity".

The Court of Appeal (Asplin L.J., Males L.J. and Davis L.J.) unanimously allowed the appeal: *[2019] EWCA Civ 1999; [2020] 2 All E.R (Comm.) 652*.

Asplin L.J. held that the issue was whether the terms of the agreement defined the mutual obligations of the parties so as to exclude remuneration if the property sold for less than £6.5 million. They did not: they were "entirely silent" on what fee should then be paid and the judge had rejected evidence that it should be nothing and had found that neither party had thought about it (see at [29] and [32]–[33]). To exclude Mr. Barton's claim, there would have had to be an agreement that he would not be entitled to any fee unless the purchaser paid £6.5 million; upholding a claim for a reasonable fee, when he had provided a benefit for which payment would normally be expected, would not undermine the contract (see at [33], [34] and [37]). The contract said nothing about what was to be payable in the circumstances, and therefore, applying *Costello*, it presented no obstacle to a claim for a reasonable fee: this would not interfere with "the contractual allocation of risk". She also considered that, so far from it being implicit that nothing should be paid, the contract carried an implied term of fact, necessary to give business efficacy to it, that a reasonable fee should be paid (see at [39]–[41]).

Asplin L.J. also referred (at [22]–[26]) to the decision of the Court of Appeal in *Firth v Hylane Ltd (1959) EWCA Civ J0211-3 (vLex); [1959] E.G.D. 212*, in ***L.Q.R. 533** which an estate agent had been promised fixed fees if a property was sold to a purchaser he introduced for £35,000 or £34,000: it sold for less. The court held that he was entitled to a reasonable fee. Morris L.J. said:-

"it could not be that the Plaintiff was not to be remunerated at all. That would be most unreasonable. 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 … the contract certainly did not provide that nothing was to be payable in the case of the introduction of a purchaser to whom the company decided to sell for less than £35,000…"

Asplin L.J. held that the decision was not binding, because all such cases depend on the exact terms of the contract and the contractual background, but said that it was "generally supportive" of Mr. Barton's case.

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Males L.J. and Davis L.J. gave short judgments agreeing with Asplin L.J. Males L.J. said (at [60]) that the contract "obviously" could not be interpreted so as to provide that Mr. Barton would get nothing, nor could there be an implied term to that effect.

In the Supreme Court, no member of the court agreed with Asplin L.J.'s view that it was an implied term of fact of this contract that Mr. Barton was entitled to a fee if the property was purchased for less than £6.5 million. The possibility of a claim under s.15 of the Act was also raised without objection, but only Lord Burrows supported it.

Lord Leggatt and Lord Burrows, dissenting, agreed with the result in the Court of Appeal. Lord Leggatt held (*[2023] A.C. 684* at [144]) that, where agents introduced the purchaser of a property who completed the purchase, there was a term, implied as a matter of law, entitling them to a reasonable fee. Often the agent was an estate agent; in this case:

"[O]n the judge's findings … it was plain that Mr. Barton was introducing a prospective purchaser, not as a gratuitous favour, but with a view to being paid for the benefit thereby conferred…(he) was not a friend …but a businessman dealing with them at arm's length in the course of his business as a property dealer and developer" (see at [159]).

It followed that Foxpace bore "the burden of expression", so that, nothing having been said about a fee if the price was below £6.5 million, the default position was that Mr. Barton was entitled to a reasonable fee pursuant to a term implied by law (see at [136]). *Firth*, while not dispositive because all such cases are case-specific, shows that "the obligation to pay a reasonable charge" is not negatived by an express agreement which does not exclude it for the terms on which the sale takes place (see at [168]). There was nothing in the facts of the case to exclude the implied term, and much to support it, including the "bizarre" effect of doing so noted by the trial judge. There was no inconsistency between Mr. Barton not being entitled to £1.2 million if the property sold for only £6 million and his entitlement to a reasonable fee if it sold for less than £6.5 million.

Lord Burrows also held (at [215]) that there was a "standardised" term implied by law in this kind of contract, which he termed an introduction or commission ***L.Q.R. 534** contract. Generally the law implied an obligation to pay a reasonable fee (see at [219]). On the facts, the parties had never been, subjectively or objectively, concerned to exclude this if the target price was not met. Silence did not mean that nothing was payable: the default position was that the implied term was applicable unless the contract ousted it, which this contract did not (see at [224]–[225]).

Lady Rose (with whom Lord Briggs and Lord Stephens agreed) allowed Foxpace's appeal. She held that Mr. Barton had no contractual entitlement to a fee implied by law, because he was not an estate agent or in the business of providing introductions, and because his role in the transaction did not give rise to the expectation of a fee, unless expressly agreed. This was an all or nothing gamble, as in *Cutter v Powell (1795) 6 Term Rep. 320; 101 E.R. 573*, in which he would gain an exceptionally high fee if the target price was met, otherwise nothing (see *[2023] A.C. 684* at [68]–[72]).

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She also considered that any implied term or unjust enrichment claim would be inconsistent with the express contract and therefore with *Costello*. She stated in absolute terms (at [96) that:

"When parties stipulate in their contract the circumstances that must occur in order to impose on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances…"

She held that this excluded any implied term in this case, apparently overlooking the fact that the parties in this case had only stipulated £6.5 million as the price to be achieved to entitle Mr. Barton to recoup his £1.2 million loss, and had been silent on the effect of a sale at a lower price.

She also agreed with, and quoted at length (at [103]) from a note by Day and Virgo (2020) 136 L.Q.R. 349 entitled "Risks on the Contract/Unjust Enrichment borderline", including the following passage (at 351):

"The parties' silence on the question of A paying something less than £x (£1.2m.) for B procuring something less than y (£6.5m.) is objectively unambiguous. A reasonable person would appreciate that A and B had turned their minds to what needed to be done in order to trigger A's contingent payment obligation and that they had expressed themselves in clear and *comprehensive* terms …" (emphasis added).

One difficulty with this is that it flatly contradicts the judge's unappealed against finding that the parties neither discussed nor even thought about what would happen if the property was sold for less than £6.5 million. This was an oral contract and the court was not rigidly bound by the evidential rules concerning written contracts, and was entitled to take account of the parties' subjective understanding of the agreement: see per Lord Hoffmann in *Carmichael v National Power Plc [1999] 1 W.L.R. 2042 at 2051; [1999] 4 All E.R. 897* at 904–905. Another is that the parties plainly, on the judge's findings, did not reach a comprehensive agreement. A third is that silence is usually ambiguous not unambiguous: see for example per Bingham L.J. in the *Philips case [1995] E.M.L.R. 472* at 481–482. Here, even without the judge's finding, it would have been unclear whether the parties had intended a *Cutter v Powell* gamble, or had just agreed what was needed to entitle ***L.Q.R. 535** Mr. Barton to retrieve his £1.2 million loss and left everything else open—as the judge found to be the case.

It is respectfully submitted that the minority judgments were correct and that the case was wrongly decided, for the following reasons:

(1) The majority's reasons for holding that there was no implied contractual entitlement to a fee because Mr. Barton was neither an estate agent nor in the business of providing introductions are most unconvincing for the reasons given by the minority and all the judges below: he was clearly involved in the transaction as a matter of business, not to confer a free present.

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(2) The majority's view that this was a *Cutter v Powell* gamble had no foundation and was anyhow impermissible because it contradicted the judge's findings of fact.

(3) The contract did not say that *no* (my emphasis) fee was payable if the target price was not met, nor could this be implied whether to provide business efficacy or to answer the officious bystander or otherwise.

(4) All that was excluded by the contract in the event of the target of £6.5 million not being met was a claim for £1.2 million. A claim for a lesser reasonable fee was not inconsistent with the contract. There was nothing to indicate that, as the majority held (at [107]), it was a "complete statement" of Mr. Barton's right to remuneration. On the contrary, they had not thought about it.

(5) The note relied on by the majority was flawed for the reasons stated above.

(6) The result, as the trial judge said, was bizarre and unfair, and unnecessarily so, since it was not compelled by any legal principle or previous authority.

The decision that Mr. Barton's introduction did not attract an implied contractual entitlement to a fee was highly case-specific and, however eccentric, should do little harm as a precedent. Of more general importance is the need to recognise that the *Costello* principle should not be invoked unless, on an analysis of the contract, it contains an express or implied term excluding any other form of remuneration: otherwise there is no inconsistency and no interference with the parties' allocation of the risk of failure. It is also important for appellate courts to take care to respect rather than disregard unappealed against findings of fact.

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