Hilary Term
[2023] UKSC 3
On appeal from: [2019] EWCA Civ 1999

JUDGMENT

Barton and others (Respondents) *v* Morris and another in place of Gwyn Jones (deceased) (Appellants)

before

Lord Briggs
Lord Leggatt
Lord Burrows
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
25 January 2023

Heard on 2 November 2022

Appellant (Morris & Another)
Andrew Twigger KC
Robert Sterling
(Instructed by Phillips Law (Basingstoke))

Respondent (Philip Barton)
Brad Pomfret
Arnold Ayoo
(Instructed by Athena Solicitors LLP (Manchester))

Respondents
(1) Philip Barton
[(2) Julie Ann Swan]
[(3) Mark Richard Phillips]
[(4) Foxpace Ltd]

LADY ROSE (with whom Lord Briggs and Lord Stephens agree):

1. A claimant who has performed a service for the defendant and wants now to be paid something for those efforts has to establish a legal entitlement to the money claimed. There are, broadly, two ways in which such an entitlement can be established. The first is where the parties are in a contractual relationship and the terms of their binding agreement define if and when the defendant will be bound to pay for the service. If there is no contract between them, the claimant may base a claim on the assertion that if the defendant does not pay, then the defendant will have been unjustly enriched at the claimant's expense. It is the intersection of those two kinds of legal entitlement – and the scope of any overlap between them — that generates the issue that arises in this appeal.

2. The First Respondent, Mr Barton, performed a service for the Fourth Respondent, Foxpace Limited, by introducing to Foxpace a buyer who ultimately bought a property that Foxpace owned and was keen to sell. The buyer, Western UK (Acton) Limited ("Western"), paid Foxpace £6 million for that property. The judge at first instance, HHJ Pearce sitting as a High Court Judge, held that Mr Barton was not entitled to any payment: [2018] EWHC 2426 (Ch). There was no written agreement on which Mr Barton or Foxpace could rely, but the judge found that they had arrived at a binding oral agreement. According to that agreement, Mr Barton would be paid £1.2 million for making the introduction if Western bought the property for £6.5 million. Since the contract made no provision as to what would happen if the property was sold to Western for anything less than £6.5 million, there was no contractual obligation on Foxpace to pay anything to Mr Barton. As regards Mr Barton's alternative claim in unjust enrichment, the judge relied on the principle he said emerged from the decision in *MacDonald Dickens & Macklin v Costello* [2012] QB 244. He held that that principle applied to preclude any claim for unjust enrichment because such a claim would undermine the contractual terms agreed between the parties.

3. The Court of Appeal allowed Mr Barton's appeal: [2019] EWCA Civ 1999, [2020] 2 All ER (Comm) 652. The main judgment was given by Asplin LJ. Males LJ and Davis LJ agreed with her reasoning and gave short concurring judgments. They held that the silence of the contract as to what would happen if the sale to Western was for less than £6.5 million meant that the contract did not rule out a claim in unjust enrichment. They held, further, that Foxpace would be unjustly enriched if it took the benefit of the introduction without paying Mr Barton a reasonable fee. Asplin and Davis LJJ suggested that the same result might have been achieved by the implication of a term into the contract that a reasonable fee would be paid if Western bought the property for less than £6.5 million.

4. HHJ Pearce had helpfully assessed a reasonable fee as being £435,000 in case he was wrong about liability and the Court of Appeal held that Mr Barton was entitled to that amount.

5. In the appeal before this court, the appellants are the personal representatives of the estate of Timothy Gwyn Jones who was the sole director of Foxpace at the material time. As HHJ Pearce explained in the introduction to his judgment, the issue falls to be determined in the context of Foxpace's insolvency. On 30 May 2017, Mr Gwyn Jones convened a meeting of the creditors of Foxpace at which he rejected Mr Barton's proof of debt in the sum of £1.2 million for voting purposes in the Foxpace liquidation and recorded the debt owed as being £1. Mr Barton appealed against that rejection pursuant to rule 15.35 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024), raising the issue as to what, if any, debt was owed to him by Foxpace arising from the transaction. Foxpace Ltd was joined as a defendant to that claim. That is how the issue as to Mr Barton's entitlement to some payment for the introduction of Western comes before this court. I shall refer to the appellant as Foxpace, even though they are formally the Fourth Respondent, since effectively they are the party which is challenging the existence of the liability which the Court of Appeal held was owed to Mr Barton.

6. There are three grounds of appeal. The first is that the Court of Appeal was wrong in law to hold that it was possible for Foxpace to have been unjustly enriched by Mr Barton's performance of the agreement given the terms of the agreement as found by the judge. The second is that the Court of Appeal was wrong to assume that there was an unjust factor sufficient to entitle Mr Barton to relief on the basis of unjust enrichment. The third ground challenges the Court of Appeal's alternative conclusion that Mr Barton might have been entitled to relief on the basis of an implied term. Foxpace does not challenge the judge's quantification of the reasonable fee at £435,000.

1. The facts

7. At the time of the agreement between Foxpace and Mr Barton, Foxpace owned a property known as Nash House in Northolt, London. Foxpace wished to sell Nash House but arrangements did not go smoothly. In December 2012, a company with which Mr Barton had strong links exchanged contracts for the purchase of Nash House for £6.3 million. The purchaser failed to complete despite having paid substantial sums to Foxpace in exchange for successive extensions of the period for completion. Foxpace rescinded the contract in May 2013. On 7 June 2013, Mr Barton exchanged contracts with Foxpace to buy Nash House himself for £5.9 million. Mr Barton paid an initial deposit but failed to make further payments as they fell due and Foxpace

rescinded the agreement. The upshot of those two failed transactions was that deposits had been paid and costs incurred amounting in total to about £1.2 million, money which the parties treated as coming from Mr Barton. The judge accepted that Mr Barton "was about £1.2 million out of pocket across the two unsuccessful attempts to purchase Nash House": para 64.

8. The discussions which led to the agreement about a commission for the sale ultimately to Western were conducted between Mr Barton on the one side and Mr Gwyn Jones, Mr Marcus Rooke who was Mr Gwyn Jones' assistant and Mr Nicholas Morris a solicitor acting for Foxpace on the other side. Shortly after the failure of the second sale of the property, Mr Barton discussed with them a possible sub-purchaser for Nash House if Mr Barton bought the property himself for £5.7 million. There was then a month or so of correspondence between the solicitors of the potential purchaser, the solicitors for Foxpace and Mr Barton trying to finalise the arrangements.

9. In parallel with this correspondence, Mr Rooke was corresponding with Mr Javed Hussain acting for a different potential purchaser who was interested in buying Nash House for cash. Heads of terms for the sale of Nash House to a Mr Kherallah for a price of £6.3 million were prepared. Those discussions contemplated the payment of an introduction fee to Mr Hussain of £490,000. That alternative deal, of course, fell away when the property was bought by Western.

10. I will come in more detail later to the judge's findings as to what was agreed between Mr Barton and Foxpace. Documents were drawn up for the sale of Nash House to Western for £6.55 million. However, towards the end of August 2013, it came to light that Nash House fell within an area safeguarded for the purpose of the construction of the HS2 rail link. Western wanted to make the contract conditional on the HS2 project not affecting the site, but Foxpace was not prepared to agree to that. It was therefore agreed that Western would purchase the property unconditionally for £6 million plus VAT. Contracts were exchanged on 10 September 2013 and the sale of Nash House was completed.

2. Mr Barton's claim in contract

11. For present purposes there are three potential routes by which one could arrive at the conclusion that Foxpace is contractually bound to pay a fee to Mr Barton. The first is that it was an express term of the contract that he should be paid a fee in the events which have happened. The second is that a term should be implied into this particular contract in order to give effect to the unexpressed intention of the parties.

The third is that there is a term implied by law as an incident of this kind of contract. I shall consider each of these in turn.

(a) The express terms of the contract

12. When dealing with an oral contract, the terms which the parties expressly agreed must be divined from the evidence before the judge. In *Carmichael v National Power Plc* [1999] 1 WLR 2042, Lord Hoffmann (with whom Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreed) said at p 2049 that where the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct, the terms of the contract are a question of fact. In that case the House of Lords restored the decision of the Industrial Tribunal which had found that the parties had intended that their agreement should be partly contained in letters, partly in oral exchanges at the job interviews or elsewhere and partly left to evolve by conduct as time went on: p 2050.

13. In the present case, HHJ Pearce described the factual disputes as narrow in ambit but "deep in emotion". As often happens, the judge was faced with oral evidence and submissions from both parties which were all directed at supporting factual positions which he ultimately rejected. The first factual issue for the judge to resolve was whether there was any concluded agreement at all or whether, as Mr Gwyn Jones strongly contended, any discussions were regarded as "subject to contract" and therefore not binding because they were never reduced to writing. The second factual issue was whether the agreement with Mr Barton had been that he would only receive the £1.2 million payment if Nash House sold for £6.5 million or whether, as Mr Barton asserted, the £1.2 million was payable to him regardless of the purchase price.

14. The judge's difficulty in arriving at these crucial factual findings was that he was not able to accept very much of the evidence given by the witnesses at the trial, either in their witness statements or in oral testimony, and there was very little contemporaneous documentary evidence on which he could rely. The witnesses were unable to recollect what had been said in the critical conversations and he considered that their recollection might have been replaced by evidence of what the witness believed, or worse hoped, had been said: see para 22. Nonetheless, the judge had to come to some conclusion. Mr Rooke's evidence was that he had had no discussion with Mr Barton about what would happen if the sale price was less than £6.5 million. The judge preferred that evidence to what was said by Mr Morris who recounted a conversation he said had taken place between himself and Mr Rooke in which Mr Rooke told him that the prospective deal involved the payment to Mr Barton of the £1.2 million "if, and only if" the price of £6.5 million or higher was achieved: para 116.

15. The judge described the competing versions of events put forward by the parties. Mr Barton's version of the discussion would provide clear evidence of an agreement between him and Mr Rooke either in early discussions or in a later telephone discussion that Foxpace would pay him £1.2 million if Western bought Nash House. On Mr Rooke's version of events, there was equally clear evidence of an agreement that Foxpace would pay Mr Barton the £1.2 million only if he introduced a purchaser who completed a purchase of Nash House for £6.5 million or possibly any higher sum. The judge said:

> "154 This comes down to a simple question of fact. I accept that either version of events is possible, and neither would be illogical. The Respondent's [Foxpaces's] argument that the Appellant's [Mr Barton's] version is improbable (because Foxpace would be paying a flat percentage regardless of the purchase price) cannot be dismissed out of hand as being commercially ridiculous because there is evidence that Nash House was proving difficult to sell and Foxpace saw some urgency in completing the sale. On the other hand, the Appellant's criticism of the Respondent's argument, on the basis that it would make no sense for the Appellant to enter into an agreement in which he only obtained any fee if the price exceeded £6.5 million, at which point the whole fee became payable, supposes that Mr Barton fully thought through the implications of what he was discussing with Mr Rooke; if Mr Barton was confident that [Western] was a willing purchaser at £6.5 million then, given that Mr Barton had twice been involved on behalf of a buyer in the exchange of contracts for the purchase of Nash House, it is plausible that he simply did not anticipate anything coming to light prior to the exchange of contracts that might have caused [Western] to renegotiate the price, such that the only sale price Mr Barton contemplated was £6.5 million."

16. The judge then set out his findings as to the terms of the contract. He rejected Foxpace's case that all discussions had been 'subject to contract' and found that Mr Barton and Mr Rooke had concluded a binding agreement as to the payment of £1.2 million commission to Mr Barton. As to the circumstances in which that sum would become payable he said:

> "161 For these reasons, I am satisfied that, following discussions between Mr Barton and Mr Rooke during the

> period 29 to 31 July 2013, the Appellant and Respondent entered into a contract pursuant to which Foxpace was liable to pay Mr Barton the sum of £1.2 million in the event that Nash House was sold to a purchaser introduced by Mr Barton for the sum of £6.5 million. Since the property was sold for £6 million, the claim based on the contract fails."

17. It is therefore clear to me that the judge did not find that it was an express term of the agreement that Mr Barton would be paid a fee if the property was sold to Western for less than £6.5 million. The contract found by the judge was, thus, a straightforward, unilateral contract. Mr Barton was not under any obligation to make an introduction of a potential buyer to Foxpace in the sense that if, after he had concluded the agreement with Foxpace, he had decided for whatever reason not to disclose Western's name to Foxpace, he would not have been in breach of any contractual obligation. But if he did make the introduction and if Foxpace did sell Nash House to Western for £6.5 million, then Foxpace would be in breach of the express terms of the agreement if they failed to pay him £1.2 million. That was the extent of the express agreement reached by the parties.

18. I have some sympathy with HHJ Pearce in considering that that was all he needed to say so far as the contractual claim was concerned and, further, that the express terms of the contract as he had found them to be also disposed of the unjust enrichment claim as I describe further below. He had found that the obligation accepted by Foxpace was an obligation to pay Mr Barton a specified sum, £1.2 million, on the happening of a particular occurrence namely the sale of Nash House for at least £6.5 million to someone whom Mr Barton had introduced to them. That necessarily meant that there was no contractual obligation on Foxpace to pay anything in any other circumstances. As Lord Hoffmann said in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, para 17 when discussing the implication of terms into a written instrument:

> "The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls."

19. Whether the judge was right to jump in para 161 straight from that conclusion to the conclusion that "the claim based on the contract fails", depends on whether there is any reason here not to draw "the … usual inference" that the absence of any express term entitling Mr Barton to payment in the events which have happened means that there is no entitlement to any payment.

(b) A term to be implied into this agreement

20. The other potential source of a contractual obligation on Foxpace to pay something to Mr Barton is an implied term. A term can be implied either because as a matter of fact it falls to be included in this particular contract to give effect to the unexpressed intention of the parties or because the contract is one of a class into which the law implies a term - certainly if the parties have not expressly provided otherwise and sometimes, as provided for in statute, even where they have. HHJ Pearce recorded at para 164 of his judgment that Mr Barton had not sought to argue that in the event that the judge found against him on the express terms of the contract, he was entitled to £1.2 million (or any other figure) by way of introducer's fee pursuant to an implied term in the contract. The Court of Appeal dealt with the possible implication of a term after concluding that the claim in unjust enrichment could succeed. Asplin LJ concluded that a term might have been implied: para 41. Davis LJ went further and preferred to analyse the case as one where reasonable remuneration was payable as a matter of quantum meruit pursuant to an implied term rather than relying on unjust enrichment: para 75.

21. The leading authority on whether a term can be implied into a contract is *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742. Lord Neuberger of Abbotsbury (with whom Lord Sumption and Lord Hodge JJSC agreed) described at para 16 the "three classic statements, which have been frequently quoted in law books and judgments", namely per Bowen LJ in *The Moorcock* (1889) 14 PD 64, 68, per Scrutton LJ in *Reigate v Union Manufacturing* Co *(Ramsbottom) Ltd* [1918] 1 KB 592, 605, and the judgment of MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227. It was in the last of those that MacKinnon LJ famously stated that a term would only be implied into a contract "if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

22. Lord Neuberger described the notion that a term will only be implied if it satisfies the test of business necessity as supported in a number of observations in the House of Lords: see the authorities cited in para 17 of his judgment. He approved the principles set out in two earlier cases: the judgment of the majority in the Privy Council

case *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283, as extended by Lord Bingham MR's approach in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 ("*Philips*"), at p 482. Lord Neuberger then set out his own comments on those principles. It is enough here to say that he concluded at para 24 by emphasising that there had been no dilution of the requirements which have to be satisfied before a term will be implied.

23. The relationship between the "it goes without saying" test and the "business efficacy" test was discussed by Lord Hoffmann in *Belize*. He said at para 21 that these two formulations are not to be treated as different or additional tests but as different ways of expressing the "one question" which is what the contract, seen as a whole against the relevant background, would reasonably be understood to mean. Lord Hoffmann said further that the reference to business efficacy underlines two additional factors; that the notional reader will take into account the practical consequences of deciding that the contract means one thing or the other and whether a particular construction would frustrate the apparent business purpose of the parties. The fact that the term is only implied if it is 'necessary' conveys that it is not enough for the court to consider that the implied term expresses what would have been reasonable for the parties to agree to. The court must be satisfied that it is what the contract actually means.

24. Asplin LJ thought that a term could be implied that Mr Barton would be paid a reasonable fee if Western bought Nash House for less than £6.5 million. She said that such a term would not contradict the express terms of the agreement, it was capable of clear expression, it was so obvious that it went without saying and was necessary to give the agreement business efficacy because the agreement lacked commercial coherence without it.

25. As to the first point, I respectfully disagree. To hold that Foxpace are contractually bound to pay Mr Barton an unspecified sum if Western buy Nash House for less than £6.5 million does contradict the express terms of the contract under which Foxpace is obliged to pay him £1.2 million if Nash House sells for at least £6.5 million. The Court of Appeal placed great emphasis on the findings of the judge as regards the discussion between Mr Morris and Mr Rooke described in para 116 of HHJ Pearce's judgment where the judge rejected Mr Morris' evidence that Mr Rooke had told him (Mr Morris) that Mr Barton had agreed that he would be paid the fee 'if, and only if' the property sold for £6.5 million. They regarded the rejection of that evidence, taken together with the judge's conclusion that the parties had not discussed the possibility of the sale being for a lower sum, as meaning that it would not contradict the express terms of the contract to imply an obligation to pay something in other circumstances. As Davis LJ put it, 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"(para 69).

26. In my judgment, however, there is no material difference between those two descriptions of the contract. Whether or not the words "if, and only if" were used by the parties in their negotiations, the effect of the contract as found by the judge was indeed that Mr Barton was only entitled to be paid if the event that they agreed would be the trigger for that payment occurred. To imply a term that Foxpace is liable to pay a commission in any other circumstance goes directly against what the judge found the parties had agreed.

27. As to the need to give the contract business efficacy, the Court of Appeal were concerned that if the agreement was limited to the express terms found by the judge, it created the situation in which only a small reduction in the purchase price would deprive Mr Barton of a fee altogether. Asplin LJ referred to the judge as having described this result as "bizarre" (para 141) and she and Males LJ agreed with him (paras 41, 56-57).

28. The context in which the judge had described the arrangement as "bizarre" was not in the course of considering whether to imply a term for reasons of business efficacy since, as I have said, that was not an argument pursued by Mr Barton at first instance. He made the comment when rejecting Mr Morris' evidence as to the "if, and only if" conversation he had had with Mr Rooke. The judge also recorded at para 119 that, towards the end of his cross-examination, Mr Morris said that he recalled Mr Rooke saying that Mr Barton would receive nothing if the price received was less than £6.5 million. Mr Morris had said in the witness box that "this did not strike him as strange". The judge rejected that evidence as unconvincing for reasons he explained at para 141. He was, first, "highly surprised" that Mr Morris could remember the detail of his conversation with Mr Rooke five years earlier. Further, he said:

> "If, as Mr Morris asserts, he had been told that it was clear that nothing was payable if the sale price was less than £6.5 million, I would have expected Mr Morris not simply to consider this to be '*strange*' - it would be bizarre to think that Mr Barton would knowingly have entered into a contract on the terms that Mr Morris claims were repeated to him, since he would obviously open himself up to a small reduction in the sale price that deprived him of any introduction fee at all."

29. At the hearing before us, counsel for both parties accepted that the concern expressed by the judge and shared by the Court of Appeal was not a proper basis on which to imply a term that Mr Barton should be paid a reasonable fee if Nash House was sold for less than £6.5 million. In *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] QB 290, the plaintiff had introduced a buyer to the defendants for the purchase of 10,000 tonnes of cement at $49.50 per tonne, c & f to a port in Iran. The plaintiff and defendant entered into an agency contract for the payment of a commission fee on the sale of the cement at the rate of $1.50 per tonne. The defendants then failed to perform the contract with the buyer and refused to pay the plaintiff the commission. The Court of Appeal upheld the decision of Mocatta J that it was right to imply a term into the contract of agency to the effect that the defendants would not fail to perform their contract with the buyer so as to deprive the plaintiffs of their remuneration under the agency contract. Brandon LJ applied the 'officious bystander' test to hold that it was right for the court to imply such a term: p 304E-G. Templeman LJ made the same point at p 306B:

> "In my judgment, it is necessary to imply a term which prevents a vendor, in these circumstances, from playing a dirty trick on the agent with impunity after making use of the services provided by that agent in order to secure the very position and safety of the vendor. It is necessary to imply a term which prevents the vendor from acting unreasonably to the possible gain of the vendor and the loss of the agent. In my judgment, the term proper to be implied in the present circumstances is that the vendors will not deprive the agents of their commission by committing a breach of the contract between the vendors and the purchaser which releases the purchaser from its obligation to pay the purchase price."

30. Lawton LJ agreed with both judgments. He said that the implication of the term relied on by the plaintiff was necessary to give business efficacy to the contract because, as he put it at p 308: "The life of an agent in commerce is a precarious one. He is like the groom who takes a horse to the water-trough. He may get his principal to the negotiating table but when he gets him there he can do nothing to make him sign, any more than the groom can make a horse drink."

31. Similarly, in the present case it might well be necessary to imply into the agreement between Mr Barton and Foxpace a term that Foxpace would not, in effect, play a dirty trick by agreeing a reduced price with Western so as to avoid the liability to pay the £1.2 million to Mr Barton. Such a term might well meet the test set out in

Marks and Spencer and *Belize* because the contract must be reasonably understood as meaning that.

32. But such a term would be all that is necessary to avoid the pitfall which concerned the judge and the Court of Appeal. It is not necessary to go further and imply a term that Mr Barton is entitled to a reasonable fee if the sale went through for less than £6.5 million. It has always been clear that when the court implies a term to give a contract business efficacy, it must imply the least onerous term needed to achieve that goal: see *The Moorcock* per Lord Esher MR, p 67 and Bowen LJ at p 69.

33. The judge in the present case expressly absolved Foxpace from any such price manipulation. It was clear that the reduction in price to £6 million was genuinely the result of the HS2 problem that arose and not of any desire to deprive Mr Barton of his commission: see para 188.

34. I also respectfully disagree with Males LJ's observation that the contract as found by the judge would be bizarre because it 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 the £6.5 million but more than £5.3 million. As Mr Barton explained in his witness statements, the point of the agreement for him was that, as a result of the two failed transactions, Foxpace had already received £1.2 million of Mr Barton's money in forfeited deposits and payments for the extension of the completion dates. He pointed out in his first witness statement that the initial purchase price discussed between him and Mr Rooke in July 2017 was £5.7 million which "reflected [Foxpace's] recognition that I should have the chance to recoup my outlay, by allowing me to continue with my efforts to seek finance to develop the Property or to seek an onward sale". He says in his second witness statement that when he was negotiating with Foxpace for the purchase of Nash House for himself, he made it clear "that a reduction in the purchase price would be necessary in order for me to try and recoup the monies that I had loaned to Stonebridge in respect of its aborted purchase of Nash House". The negotiations between the parties show that they were not treating it as bizarre that the forfeited £1.2 million might in some circumstances be treated by Foxpace as part of the overall consideration they were content to receive for the sale of Nash House.

35. Further, even without that factor, an agreement whereby someone contracts for a higher than normal payment on the fulfilment of a condition and is prepared to take the commensurate risk of getting nothing if the condition is not fulfilled is not a bizarre or uncommercial contract. In the well-known case of *Cutter v Powell* (1795) 6 Term Rep 320, 101 ER 573, the master of a ship bound from Jamaica to Liverpool promised to pay Mr Cutter 30 guineas "provided he proceeds, continues and does his

duty as second mate" for the journey. Mr Cutter did his duty as second mate on the ship but died before it arrived at Liverpool. The usual wages of a second mate for such a voyage would have been about £8. Cutter's widow claimed a proportionate part of the wage as a quantum meruit for work done. The widow's claim was not based on the agreement because there was no express contract covering the circumstances that had happened. The claim was therefore based on a quantum meruit for work and labour done. In answer, the defendant argued "nothing can be more clearly established than that where there is an express contract between the parties, they cannot resort to an implied one". In his judgment, Lord Kenyon CJ emphasised that if Cutter had continued to do his duty for the whole voyage, the 30 guineas he would have earned would have been nearly four times as much as the normal wage:

> "Therefore if there had been no contract between these parties, all that the intestate could have recovered on a quantum meruit for the voyage would have been eight pounds; whereas here the defendant contracted to pay thirty guineas provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed: it was a kind of insurance." (p 576)

36. The other members of the Court agreed. Grose J said (pp 576 – 577):

> "And when we recollect how large a price was to be given in the event of the mate continuing on board during the whole voyage instead of the small sum which is usually given per month, it may fairly be considered that the parties themselves understood that if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive any thing unless he did continue on board during the whole voyage. That seems to me to be the situation in which the mate chose to put himself; and as the condition was not complied with, his representative cannot now recover any thing."

37. That is what Mr Barton bargained for here. What would be strange, in my judgment, would be for Foxpace to agree to what would become a one-way bet for Mr Barton; that he should receive a fee of almost three times the reasonable fee if the

sale price were £6.5 million or more and still receive the full reasonable fee of £435,000 if the sale price were something less than that. I do not see what benefit there would be for them in concluding such an agreement.

38. I bear in mind also the observation of Lord Bingham MR in *Philips* [1995] EMLR 472, 481-482 that it is difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully drafted contract but have omitted to make provision for the matter in issue:

> "… it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision; if the parties appreciate that they are unlikely to agree on what is to happen in a certain not impossible eventuality, they may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur."

39. Although one could not describe the contract between Mr Barton and Foxpace as being carefully drafted, that warning is apposite here because, given the surrounding circumstances of the case, the fact that they did not refer to the possibility of the sale being for less than £6.5 million does not mean that one can be confident that they would have agreed what should happen in that event. HHJ Pearce said at para 198 of his judgment:

> "The court cannot make any safe assumption as to what [Foxpace] would have agreed to if the possibility of a reduced sale price had been contemplated at the time of negotiating the contract. Foxpace might still have been willing to pay £1.2 million to Mr Barton (on the ground that this would have furthered a relationship between the two which might have been to Foxpace's advantage); it might have agreed to a reduction of the £1.2 million, perhaps pro rata or even by the sum of £500,000 to cushion it from the effect of the reduced sale price; it might only have been willing to offer 7.25% as a reasonable value of the service being proffered; it might even have been unwilling to offer any sum (though I accept that this is unlikely)."

40. I am therefore satisfied that it is not possible to imply a term into this agreement to the effect that Mr Barton will be paid a reasonable fee if the sale was for less than £6.5 million. It is not possible to say that there is any particular fee to which

the parties would clearly have agreed, or which is so obvious that it goes without saying and it is not necessary to imply such a term to give the agreement business efficacy or coherence.

(b) A term implied as a matter of law: the principles

41. Terms can be included in a contract by the operation of law in different ways. The most obvious is a statutory interpolation of a term into an agreement of a particular kind. At the hearing, the possible application of section 15 of the Supply of Goods and Services Act 1982 (as amended by the Consumer Rights Act 2015 section 100(5)) was discussed. This was not a point addressed by the parties either before HHJ Pearce or in the Court of Appeal but was raised by Mr Barton in his written case for this appeal. Section 15 provides that where under a "relevant contract" for the supply of a service, the consideration for the service is not determined by the contract, there is an implied term that the party contracting with the supplier will pay a reasonable charge. However, it seems clear that this section does not apply here since the consideration for the introduction was determined by the contract. It is also doubtful whether this is a "relevant contract" within the meaning of section 15, since section 12(1) defines this as meaning a contract under which the supplier agrees to carry out a service. Here Mr Barton did not come under a contractual obligation to provide the introduction to Foxpace, this was a unilateral contract by which his making of the introduction was what brought the contract into existence.

42. Mr Pomfret, appearing on behalf of Mr Barton, did not rely on section 15 directly but argued that the provision reflects the common law position that a term will be implied where services are provided and there is no agreement as to remuneration. The authority relied on by Mr Pomfret as demonstrating the common law position is *Way v Latilla* [1937] 3 ALL ER 759. In that case, Mr Latilla asked Mr Way to obtain information about gold mining concessions and promised to protect Mr Way's interests if he did so. Mr Way obtained the necessary information for Mr Latilla who then acquired the concessions which proved very valuable. Mr Way claimed that there had been a concluded contract that he should receive a share of the concession and he invited the court to award him one third of Mr Latilla's profit "by custom, or on a reasonable basis". The House of Lords was unable to accede to that because there was no material before the House upon which they could decide the share which the parties must be taken to have agreed. But whilst there was no concluded contract as to remuneration, it was plain that there was "a contract of employment" under which Mr Way was engaged to do work "in circumstances which clearly indicated that the work was not to be gratuitous" (per Lord Atkin at p 763). The House of Lords reduced the payment from the £30,000 awarded by the judge to £5,000.

43. That case can therefore be seen as one of many cases in which work is performed in anticipation of the conclusion of a contract to settle remuneration, where no such contract is ever concluded and where the court awards a reasonable sum to the claimant as payment for his services. Mr Pomfret asks rhetorically whether the fact not only that there was a concluded agreement here between Foxpace and Mr Barton but also that the agreement was that if Nash House sold for £6.5 million Mr Barton would be paid a fee of £1.2 million could alter the analysis. In my judgment it alters it entirely for the reasons I discuss in the following paragraphs. I do not consider that section 15 either on its own terms or as an indication as to what should happen at common law where there is a unilateral contract which is silent as to remuneration assists Mr Barton. That is because this contract was not silent as to remuneration.

44. Another route by which the law implies a term is where the term is an incident of the particular kind of contract in issue. This was explained in *Liverpool City Council v Irwin* [1977] AC 239 ("*Irwin*"). The appellants in that case occupied a council maisonette in a high rise block and withheld their rent in protest against the conditions in the building. They alleged that the council was in breach of an implied duty to repair and maintain the common parts of the building. The council denied the existence of such a duty. There was no formal demise of the maisonette but only a document described as 'conditions of tenancy' which set out obligations on the part of the tenants but none on the part of the council. The House of Lords held that the contract of letting represented by the conditions of tenancy was incomplete so that it had to be established what the complete contract was. The obligations which had to be read into the contract were such as the nature of the contract itself implicitly required.

45. Lord Wilberforce said (p 252H) that the first step was to ascertain what the terms of the contract were. The contract was partly but not wholly stated in writing. In order to complete it and to give it a bilateral character it was necessary to take account of the actions of the parties and the circumstances. He noted that to say that the construction of a complete contract out of these elements involved a process of 'implication' may be correct; "it would be so if implication means the supplying of what is not expressed" (p 253H). But importantly he went on to make clear that he was not talking about implying terms to which the parties would, if asked, have unhesitatingly agreed as part of the bargain, nor of implying terms because the contract will not work without them. This was a different kind of implied term – a different "shade on a continuous spectrum" – because: "The court here is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms." Turning to the lease before the House, clearly the tenants had an easement to use the stairs, lifts and rubbish chutes, but the question was whether the easement was accompanied by any obligation on the landlord to maintain them. That depended on the test to be applied, as to which Lord Wilberforce said this (pp 254F-255A):

> "In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity. … I do not think that this approach involves any innovation as regards the law of contract. The necessity to have regard to the inherent nature of a contract and of the relationship thereby established was stated in this House in *Lister* v *Romford Ice and Cold Storage Co Ltd* [1957] AC 555."

46. Lord Wilberforce said that in *Lister v Romford Ice*, Viscount Simonds drew a clear distinction between a search for an implied term such as might be necessary to give business efficacy to a particular contract and a search based on wider considerations for such a term as the nature of the contract might call for, or as a legal incident of this kind of contract. Lord Cross of Chelsea in *Irwin* also stressed the distinction between terms implied into the contract on the application of the business efficacy test and what the House was doing in the appeal before it:

> "When it implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type - sale of goods, master and servant, landlord and tenant and so on - some provision is to be implied unless the parties have expressly excluded it. In deciding whether or not to lay down such a prima facie rule the court will naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert. Sometimes, however, there is no question of laying down any prima facie rule applicable to all cases of a defined type but what the court is being in effect asked to do is to rectify a particular - often a very detailed - contract by inserting in it a term which the parties have not expressed. Here it is not enough for the court to say that the suggested term is a reasonable one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the term is necessary to give - as it is put – 'business efficacy' to the contract and that if its absence had been pointed out at the time both parties - assuming them to have been reasonable men - would have agreed without hesitation to its insertion." (pp 257H-258B)

47. Lord Cross firmly rejected the submission that the implied term for which the tenant was contending would pass the strict test for implying terms – he thought that

if an officious bystander had asked the council whether it would be under any legal liability to keep the common parts in working order the answer might well have been "Certainly not". But in the circumstances of the letting of flats in a high block, he concluded that in the case of ordinary commercial lettings the landlord should be under some obligation to keep the common parts in repair and the facilities in working order unless he has expressly excluded any such obligation.

48. Lord Edmund-Davies also agreed that *The Moorcock* implied term test was not satisfied because the council, if asked at the time it granted the tenancies, would have rejected the term that the tenants sought to imply: p. 266F-G. But he accepted the tenants' "more attractive" alternative submission that the obligation contended for by the tenants was implied by the general law as a legal incident of this kind of contract and that the landlords must be assumed to know about that as well as anyone else.

49. That there are these two kinds of implied terms has been stressed more recently in *Geys v Société Générale, London Branch* [2013] 1 AC 523, para 55 where Baroness Hale of Richmond said, in a case involving an employment relationship:

> "In this connection, it is important to distinguish between two different kinds of implied terms. First, there are those terms which are implied into a particular contract because, on its proper construction, the parties must have intended to include them: see *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988. Such terms are only implied where it is necessary to give business efficacy to the particular contract in question. Second, there are those terms which are implied into a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it: see *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, *Liverpool City Council v Irwin* [1977] AC 239."

50. Given that there is no basis for implying a term on the *Marks and Spencer* test and that there is no statutorily implied term here, I turn to consider whether the term on which Mr Barton seeks to rely is to be implied as an incident of this kind of contract.

(c) Implied terms: the estate agent cases

51. Mr Barton relies before this court on a series of cases dealing with estate agents. Some of these cases do not draw the distinction that was explained in *Irwin* and *Geys* as clearly as they might. The courts' concern to make sure estate agents get paid has a long history. The cases arise because the arrangement made between an estate agent and someone with a house they want to sell is often very informal – a phone call or a short face to face conversation – but then a substantial sum of money is claimed by the agent as a percentage of the purchase price and the vendor is unwilling to pay. The courts have had to piece together what the obligations to pay are and when they arise from what Denning LJ described in one case as "the common understanding of men": *Dennis Reed Ltd v Goody* [1950] 2 KB 277, 284.

52. The House of Lords considered when an agent becomes entitled to the fee in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 ("*Luxor*"). The agent in *Luxor* had agreed to a commission which would become payable on completion of the sale. He introduced prospective purchasers who were prepared to buy the property but the defendants changed their plans and no sale took place. It followed that no commission was payable under the contract but the agent argued that he was entitled to damages for breach of an implied term that the vendor would do nothing to prevent the satisfactory completion of the transaction and so deprive him of his commission. The House of Lords declined to imply such a term. Viscount Simon LC described the different kinds of arrangement that can arise between a vendor and the agent (pp 120 – 121). In one class of case, the agent becomes entitled to the commission as soon as he introduces a purchaser who makes an offer of a specified amount, whether the seller then goes through with the purchase or not. In other cases, there may be an implied term that, at least once the agent has expended substantial time and money in finding a purchaser, the vendor will not withdraw the authority given to the agent. In the third type of case, the express terms of the contract provide that the agent will receive the commission only upon completion of the transaction. In that third type of case, Viscount Simon said, there was no room for the suggested implied term:

> "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."

53. Viscount Simon distinguished the earlier case of *Prickett v Badger* (1856) 1 CB (NS) 296. In that case, the plaintiff was an estate agent and the defendant was the lord of the manor of Highbury seeking to sell 14 acres of land on the Seven Sisters Road, Holloway for £650 per acre. The plaintiff agreed to find a buyer and that the commission would be 1.5% of the purchase price. The plaintiff advertised the site and

found a buyer at £675 per acre. The defendant then disclosed that he was not in fact the owner of the land, and the owner declined to sell. The court in that case had held that the agent was entitled to sue for a quantum meruit. Viscount Simon said in *Luxor* that *Prickett v Badger* must be regarded as "turning on its special facts, which were very unusual" in that the vendor turned out to have no interest in the land. He went on (p 121):

> "The report attributes to Pollock C.B., who tried the case at Assizes, the assertion that if a man places in the hands of several house-agents a house which he is desirous of letting or selling, 'though the successful agent alone would be entitled to claim commission, the others would clearly be entitled to something for their trouble.' If the Chief Baron really made this observation, it certainly is not in accordance with the usual result of arrangements made with house agents, and it should be noted that Williams J [in the Court of Appeal in *Prickett,* at p 305] speaks of 'the implied understanding that the agent is only to receive a commission if he succeeds in effecting a sale, but, if not, then he is to get nothing.'"

54. Lord Russell of Killowen and Lord Wright agreed that the agent was not entitled to any payment if the sale did not go through. Lord Russell said (p 125):

> "As to the claim on a quantum meruit, I do not see how this can be justified in the face of the express provision for remuneration which the contract contains. This must necessarily exclude such a claim, unless it can (upon the facts of a particular case) be based upon a contract subsequent to the original contract, and arising from some conduct on the part of the principal."

55. Lord Russell also referred to the large commission that the agent would have earned if the sale had gone through as justifying the risk that he took. He noted that the sum of £10,000 promised to the agent was equivalent to the remuneration of a year's work by a Lord Chancellor and would have been "no mean reward" for work done by the agent within a period of eight or nine days. He held that there was no lack of business efficacy in the contract even if the principal were free to refuse to sell to the agent's client (pp 125-126).

56. The leading modern case on the 'understanding' from which an estate agent's entitlement to commission emerges is *Devani v Wells* [2019] UKSC 4, [2020] AC 129. In that case, the claimant estate agent telephoned the defendant regarding some flats that the defendant wished to sell. The claimant told the defendant that his standard commission was 2 per cent plus VAT but nothing was said as to the precise event which would trigger the obligation to pay. In due course the flats were sold to a purchaser who had been introduced by the claimant but the defendant refused to pay the commission, arguing that there had been insufficient agreement on the terms to give rise to a legally binding contract. The Supreme Court held that where an estate agent and a vendor agreed that the estate agent would find a purchaser then, absent a provision to the contrary, they would be taken to have made a legally binding contract under which the agent was entitled to commission on the completion of a sale to a purchaser that the agent has found.

57. On the facts found by the judge in *Devani*, the agent's standard terms of business provided for commission to be payable on exchange of contracts but the agent had only submitted his standard written terms to the vendor after he had introduced the purchaser so those terms were not incorporated into the contract. Lord Kitchin JSC (with whom the other Justices agreed) referred to a number of previous estate agent cases in the early 1950s including the judgment of Denning LJ in *Dennis Reed Ltd v Goody* to which I have already referred. Lord Kitchin said at para 23 that the case before them was:

> "… another in which the parties meant by their words and actions that the agent was engaged on the usual terms, that is to say that a commission became payable not upon the introduction by Mr Devani of a prospective purchaser to Mr Wells, nor upon the exchange of contracts, but rather upon completion of the sale and then from its proceeds, for it was at that time that Newlon actually bought and paid for the property and so became its purchaser."

58. Lord Kitchin, disagreeing with the decision of the Court of Appeal, held that where there was no express term as to when commission was payable and the bargain was in substance "find me a buyer", then a reasonable person would understand that the parties intended the commission to be payable from the proceeds of sale on completion of the sale to a purchaser whom the agent had introduced.

59. The high point of Mr Barton's argument in reliance on this line of cases is *Firth v Hylane Ltd* [1959] EWCA Civ J0211-3 (vLex), [1959] EGD 212 ("*Hylane*"). That was a decision of the Court of Appeal, a judgment of Morris LJ with whom Sellers and Pearce

LJJ agreed. The estate agent claimed £500 for professional fees and £100 for advertising costs and out of pocket expenses. The defendants wanted to sell their property and engaged Mr Firth to assist them. As Morris LJ said: "Quite naturally, Mr Firth, whose work in life is that of an estate agent, would expect to be remunerated for his services" (Transcript, p 2). The agreement was formed in an exchange of letters and amounted to an agreement that Hylane would pay a commission of £1,000 together with expenses if the property was sold to a buyer introduced by Mr Firth for not less than £35,000.

60. The parties contemplated that an auction would be held to sell the property and Mr Firth duly arranged for an auction to take place. The highest offer at the auction was only £29,500. The defendant's case was that after the auction, Mr Firth's instructions had been cancelled. The trial judge rejected that on the facts because it was clear from correspondence between the parties that Mr Firth continued to search for a purchaser with the cooperation of Hylane and other lower amounts of remuneration were discussed dependent on other prices being achieved, with the property ultimately being sold for £31,000.

61. It was accepted that the £1,000 agreed by Mr Firth was a very high commission for such a sale – the seller would have been very fortunate to get £35,000 for the property. If he could achieve that price, he was content to pay the large commission of £1,000. Morris LJ said:

> "That was a special sum. 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 £1,000 would not be earned unless the sale at £35,000 was effected through Mr Firth. 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." (Transcript, pp 4-5)

62. He therefore held that the agent was entitled to reasonable remuneration and agreed with the trial judge's assessment that the reasonable amount was £450. Pearce LJ in *Hylane* agreed with Morris LJ and reasoned as follows:

> "The clear indication in the letter of 15 December 1955, was that the Plaintiff should be remunerated for his services if they came to a successful conclusion and were used by the Defendants. The Plaintiff was an estate agent. The Defendant was the owner of property, and the Defendant was instructing the Plaintiff to find a purchaser. It is argued that because an optimistic price was referred to and the remuneration in that event was to be unusually high, including something in the nature of a bonus, it was therefore intended that if the optimistic price was not reached, and the bonus was not earned, the Plaintiff was to get nothing. That would be a result which, in my view, is completely contrary to the normal expectations in such an employment. There is nothing inconsistent in paying a bonus in certain events and yet allowing a normal remuneration if the bonus is not earned. I think the learned judge was right in implying a term for reasonable remuneration." (Transcript, p 14)

63. Understandably Mr Barton relies on those passages to say that the same should apply in his case; indeed, he argued before the Court of Appeal that *Hylane* was binding on that court as to the outcome of the case. Asplin LJ held that the decision in *Hylane* turned on a particular course of dealing and correspondence between the estate agent and his client in that case (as had been said by Morgan J in *Berkeley Community Villages Ltd v Pullen* [2007] 3 EGLR 101, [2007] EWHC 1330 (Ch) at para 108). Davis LJ also distinguished *Hylane* on the basis that Mr Firth had continued extensively to negotiate with the prospective purchaser even after the originally stipulated price of £35,000 had proved unobtainable. Before this court, Mr Twigger on behalf of Foxpace, argued that *Hylane* was not relevant to the present appeal because the claimant in that case, Mr Firth, had clearly continued to provide valuable estate agent services after the auction leading to the sale of the property at the lower sum and must have done so in the expectation of receiving some fee.

64. I do not think one can dismiss *Hylane* so easily on that basis. Morris LJ described what had happened at the auction. When it appeared that the highest offer was one of £29,500, Morris LJ said: (emphasis added)

> "Mr Firth had no authority to accept that figure, but Mr Lane [of Hylane] was sitting beside him. Mr Firth referred the offer to Mr Lane. Mr Lane refused it rather peremptorily. So the property was not sold. **If Mr Lane had said: "Yes, I will take that sum", I cannot think that Mr Firth would not be entitled to some commission.**" (Transcript, p 6)

65. For Morris LJ at least, the outcome did not depend on the later work carried out by Mr Firth. However, it does seem to me that the fact it was always contemplated that the sale in *Hylane* would be by auction was important. That is because the significance of the specific figure of £35,000 was that Mr Firth as Hylane's agent had authority to bind Hylane to a sale at that figure at the auction without further recourse but would need to obtain further authority to sell at a lower figure. This view of the case is supported by the reference made by Morris LJ in his judgment to the speech of Lord Watson in *Toulmin v Millar* (1886-1887) 3 TLR 836, where Lord Watson said:

> "When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations."

66. Sellers LJ in his concurring judgment in *Hylane* similarly referred to the judgment of Scrutton LJ in *Price, Davies & Co v Smith* (1929) LT 490, 493-494 where the defence to a claim for commission was that the agent had not been given authority to sell the premises at a price lower than £4,500. It was held that given that the seller was prepared to accept the lower price, the agent was still entitled to the commission.

67. In the present case there was no question of Mr Barton being able to act as Foxpace's agent in the sense of having authority to bind Foxpace to a sale even at £6.5 million. That was not the nature of the relationship between them. I therefore agree with the Court of Appeal that the *Hylane* case is of limited assistance to Mr Barton.

(d) The application of the estate agent cases to the facts of this case

68. Can Mr Barton rely more generally on the estate agent cases to establish that as a matter of law it is an incident of his contract with Foxpace that he is entitled to a reasonable commission for having made a successful introduction of the purchaser for Nash House? In my judgment he cannot for the following reasons.

69. First, Mr Barton was not an estate agent. There is no evidence that suggests that he is in the business of introducing buyers to vendors. In his second witness statement in the insolvency proceedings, he describes how his involvement with Nash House came about. He had a substantial sum of money that he wanted to invest in property in the hope of making a profit. He was not the broker of the proposed first deal with Stonebridge but rather a lender to the consortium which hoped to buy the property. His role was always that of investor or of trying to put together, for his own benefit, a consortium which would finance the purchase of the property.

70. His role in introducing Western to Foxpace was, according to the evidence, a one-off. He had no scale of fees or other terms and conditions which he usually adopted and which a reasonable person engaging him would expect to govern the relationship. Foxpace did not approach him asking him to find a purchaser for Nash House. He describes in his second witness statement how he was himself introduced to Western by a colleague.

71. Secondly, as I have said, it is accepted that a fee of £1.2 million was several times the reasonable fee for this introduction.

72. This was, in my judgment, therefore a contract similar to that in *Cutter v Powell* discussed earlier. Mr Barton had no legal or moral entitlement to the return of the monies that he had spent in the course of the two failed transactions. If Nash House had been sold to someone else, there is no doubt that he would have forfeited the £1.2 million, as purchasers who fail to complete after exchanging contracts for the sale of property do. Mr Barton had the chance, unusually, to recoup his forfeited outlay either by buying the property himself for a reduced sum or by introducing someone who would buy the property for £6.5 million. He was not able to take advantage of

either of those opportunities, but that is a risk that he took, on the findings made by the judge. There is no basis for implying a term into the contract that removes that risk, or, looking at it from Foxpace's perspective, that requires them to risk having to surrender the £1.2 million which they were otherwise undoubtedly entitled to keep without having the commensurate chance of selling the property for a lower price, commission free.

73. Thirdly, the fee of £1.2 million was not in the nature of a bonus over and above a reasonable fee for getting a favourable price for the property; it was calculated in a completely different way. Mr Barton explained in his witness statement that he had provided the vast majority of the funds that Stonebridge paid Foxpace in respect of the first failed transaction and that, after the later failure of the sale to him personally, his personal investment in the project was £1,150,000 plus about £50,000 of professional costs making the £1.2 million. He explained that the agreement with Foxpace was focused on reimbursing him the £1.2 million. He gives more detail of the makeup of the £1.2 million in his second witness statement, in response to a challenge in the witness statement of Mr Gwyn Jones that Mr Barton had not provided any proof of his expenditure. He says that once it became clear there might be a direct sale of the property by Foxpace to Western (rather than a sale to him and a sub-sale from him to Western) he wanted to protect his own position as regards his earlier expenditure.

74. His witness statement does not, therefore, set out the extent or nature of the work he did other than saying that he "assisted with the negotiations" between Foxpace and Western and that he continued to be "heavily involved" in the discussions between Foxpace and Western after the problem with the HS2 project emerged – an involvement that he describes in a little more detail in his second witness statement. In his second witness statement (in which he deals with his unjust enrichment claim as well as his contractual claim) he squarely bases the claim on having provided to Foxpace "a clear benefit in introducing it to the ultimate purchaser of Nash House". His claim is not based on anything other than having made the introduction, Western having bought Nash House and the agreement of Foxpace that Mr Barton could get the benefit of the fact that he had in fact already paid Foxpace £1.2 million for the property.

75. The background to the transaction shows that this arrangement was nothing like the arrangements discussed in the estate agent cases. The fee agreed was not related to any effort or costs incurred by him in finding Western. His position was different from that of estate agents who rely on recovering fees from successful introductions to finance their business which inevitably involves much wasted effort for clients who fail to find a buyer or who find a buyer through some other route.

76. I therefore conclude that HHJ Pearce was right to say that the contract claim fails. There was no express term creating an obligation on Foxpace to pay Mr Barton a commission if Nash House was sold for less than £6.5 million; it is certainly not clear that Foxpace would have unhesitatingly agreed to pay him a reasonable fee in that event or that such a term is necessary to give business efficacy to the contract between them. The estate agent cases do not suggest that a 'common understanding' among people would be that Mr Barton would be entitled to such a fee because Mr Barton is not an estate agent, he did not make the introduction in the course of running a business of making such introductions and although the agreement was in a commercial context in which people do not tend to act gratuitously, he took a risk that if he did not find a buyer at £6.5 million, he would not be able to recover the sums which he had forfeited in the course of the two earlier transactions.

3. The claim in unjust enrichment

(a) Failure of basis: the principles

77. The evolution of the claim in unjust enrichment was described in the recent comprehensive and scholarly judgment of Carr LJ in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, [2022] 1 All ER (Comm) 1244 ("*Dargamo*") with which Sir Timothy Lloyd and Asplin LJ agreed: see paras 51 onwards. As she states there, there are four factors that a court needs to consider in a claim for unjust enrichment, as summarised in *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938, para 10. When faced with a claim for unjust enrichment, a court must first ask itself four questions: (1) has the defendant been enriched? (2) was the enrichment at the claimant's expense? (3) was the enrichment unjust? (4) are there any defences available to the defendant? In the present appeal, it is accepted by Foxpace that the answer to the first two questions is 'yes' and that the answer to the fourth question is 'no'. The issue between the parties is therefore whether Foxpace's enrichment arising from the introduction by Mr Barton of Western as the purchaser of Nash House was unjust unless they pay Mr Barton a reasonable fee.

78. The unjust factor on which Mr Barton relies is 'failure of basis' – the terminology which is generally preferred to 'failure of consideration' for the reasons explained by Carr LJ in *Dargamo* at paras 77 onwards. She said at para 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* [*sc* 7th

> edn, 2007] at 12-01). Whilst failure of basis ranks alongside the unjust factors of mistake, duress and undue influence as a factor negativing 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 edn, 2011))."

79. The two principal authorities on failure of basis are *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26, [2015] AC 1 ("*Barnes*") and the decision of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516 ("*Roxborough"*).

80. In *Barnes*, the Crown Court had made management receiver orders pursuant to the Proceeds of Crime Act 2002 against two companies linked with defendants who were suspected of fraud. The orders were made on the basis that the companies' assets were to be treated as the assets of the defendants, and provided that the expenses and remuneration of the receivers would be paid out of the receivership property in accordance with a letter of agreement sent by the Crown Prosecution Service to the receiver. The CPS made clear in that letter that they did not undertake to indemnify the receiver if the receivership assets were not sufficient to cover the fees. The receiver orders were later quashed on appeal on the grounds that the material before the Crown Court had been insufficient to justify making them. The receiver applied to the Crown Court for an order that his expenses and fees nonetheless be paid out of the receivership assets, an application opposed by the companies. The judge refused to order payment from the companies' assets but ordered the CPS to pay the fees and costs instead. The issue before the Supreme Court was whether there was any power to order the CPS to pay the fees.

81. Lord Toulson JSC (with whom Baroness Hale DPSC and Lord Kerr, Lord Wilson and Lord Hughes JJSC agreed) referred to the word 'unjust' in the term unjust enrichment as being in some respect a term of art. He approved of the statement in *Goff & Jones The Law of Unjust Enrichment* (8th ed (2011), now in 10th ed (2022) at 1-08) that unjust enrichment is not an abstract moral principle to which the courts must refer in deciding cases, but an organising concept that groups decided authorities that share a set of common features. Some of those decided authorities are cases where there has been a 'failure of basis'. Failure of basis does not necessarily require failure of a promised counter-performance: "it may consist of the failure of a state of affairs on which the agreement was premised": para 106. He held that the receiver had agreed to accept the burden of management of the companies on the basis that he would be entitled to take his remuneration and expenses from the companies' assets.

That state of affairs which was fundamental to the agreement had failed to sustain itself: para 114. Lord Toulson went on at para 115:

> "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."

82. Lord Toulson concluded therefore that although the CPS had fulfilled its contractual obligations to the receiver, the receiver was entitled to recover his fees and expenses from the CPS because the work done and expenses incurred by the receiver were at the request of the CPS and there has been a failure of the basis on which the receiver was asked and agreed to do that work.

83. In *Roxborough* the claimant, Roxborough, had bought cigarettes from the defendant wholesaler, Rothmans, paying a price that expressly included a periodic licence fee imposed on the wholesalers and retailers of tobacco. The licensed retailer did not have to pay the fee if the fee had already been paid on that particular tobacco product by the wholesaler. Wholesalers therefore included the fee in their charges to the retailers with the intention of accounting for it to the revenue authorities. Retailers then did not have to pay the fee themselves and could pass the cost that they had incurred to the wholesaler on to their own retail customers.

84. The licence fee was held to be invalid so that the wholesalers did not in fact have to account for the fee to the revenue. The retailers claimed the recovery of the

fees they had paid from the wholesalers. The majority judgment of Gleeson CJ, Gaudron and Hayne JJ described the position as one where reputable commercial people had entered into ordinary business dealings but where their "expectations were defeated by the supervening illegality of one aspect of those dealings": para 5. They regarded the issue before them as whether there had been a failure of a severable part of the consideration that the retailer had paid to the wholesaler (para 20). They held that there had, because the tax component of the total price was treated as a distinct and separate element by the parties: "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". Gummow J having analysed the facts in detail concluded that the retailers "had paid moneys on a basis that later became falsified" because the state of affairs presented by the operation of the legislation imposing the licence fee failed to sustain itself (para 60). He recognised that there had been no failure by Rothmans in the performance of any promise it had made (para 104). But it was still unconscionable for Rothmans to enjoy the payments in respect of the tobacco licence fee in circumstances in which it was not specifically intended or specially provided that Rothmans should so enjoy them. He said "Here, 'failure of consideration' identifies the failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellants seek to recover" (para 104).

(b) Was there a 'basis' which failed here?

85. In the light of those cases, I turn to consider what the 'basis' is that Mr Barton says has failed here. Although Mr Pomfret was not entirely clear as to the basis on which he was relying, it seems that the best description of it was in his written case. There he submitted that there was a common assumption as between Foxpace and Mr Barton that Western would buy Nash House for £6.5 million. He submits that HHJ Pearce found that the parties simply did not consider a lower sale price; that was a factor that was outside of either party's complete control and when it failed to materialise, their shared assumption and hence the basis of their agreement failed. Mr Barton therefore treats the reduction in the sale price in this case as equivalent to the setting aside of the receivership order in *Barnes* and the invalidity of the licence fee in *Roxborough.*

86. I am doubtful whether the judge did make a finding to support such an approach. It would be surprising to conclude that these parties simply did not envisage the possibility that Western would not be prepared to pay £6.5 million for Nash House. Two previous sales had fallen through following exchange of contracts and both had been for less than that amount. In parallel with the negotiations with Western, Foxpace was negotiating with Mr Kherallah for the sale of Nash House for £6.3 million.

Mr Barton's second witness statement describes a number of other unsuccessful attempts to sell Nash House between 2008 and 2013, all for substantially less than £6.5 million. There seems to be no rational basis on which the parties could have been so confident at the point when their agreement was concluded and Western was introduced that the sale of Nash House would go through for that amount.

87. In those circumstances, the fact that neither of them raised with the other what would happen in that event does not suggest to me that they were assuming that the sale would be for at least £6.5 million. I have already referred to Lord Bingham MR's warning in *Philips* that one cannot draw from the failure of the parties to deal with a potential eventuality in their contract an inference that such an eventuality was simply not contemplated by them. The most one can say is that Mr Barton, Mr Rooke and Mr Morris did not discuss it and they did not provide for it in the contract. What HHJ Pearce concluded at para 189 was 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". That is right but it does not amount, in my judgment, to a finding that the 'basis' on which Mr Barton introduced Western to Foxpace was that Nash House would be sold for £6.5 million, such that a sale for £6 million constituted a failure of that basis for the purposes of founding a claim for unjust enrichment.

(c) The effect of the contract on the claim for unjust enrichment

88. HHJ Pearce records at para 169 of his judgment that during closing submissions he raised with Counsel the decision in *MacDonald Dickens & Macklin v Costello* [2012] QB 244 ("*Costello*"). He regarded that case as establishing a principle that the parties' mutual obligations in a case in which they concluded a contract should be limited to the obligations which they have defined and allocated in the course of negotiating that contract, and that the court should uphold those contractual arrangements (see para 190). In *Costello*, the claimant builders contracted with a company owned by the defendants for the construction of buildings on land owned by the defendants. The defendants had informed the claimant that for tax reasons they were using their company, Oakwood, to enter into the contract rather than contracting themselves. Oakwood paid the claimant's first few invoices in full but then stopped paying. The claimant brought a claim in unjust enrichment against the Costellos personally. Etherton LJ (with whom Patten and Pill LJJ) agreed said that there could be no doubt that Mr and Mrs Costello had benefited from, or, in restitutionary terms, had been enriched by, the work carried out by the claimants on the site. He described the point of principle that arose in the following terms:

> "21 The second point of principle is whether a restitutionary claim should be allowed to undermine the contract between Oakwood and the claimants, that is to say, the way in which the parties chose to allocate the risks involved in the transaction. The parties arranged the transaction as one in which legally enforceable promises were made only between Oakwood and the claimants, even though the benefit of the contract was to be conferred on Mr and Mrs Costello. The obligation to pay for the claimants' services, and so the risk of non-payment, was contractually confined to Oakwood. If a claim was permitted directly against Mr and Mrs Costello it would shatter that contractual containment. It would also alter the usual consequences of Oakwood's insolvency, which was one of the risks assumed by the claimants in contracting with Oakwood, since a direct claim against Mr and Mrs Costello would improve the claimants' position over Oakwood's other unsecured creditors."

89. Etherton LJ held that the unjust enrichment against the Costellos must fail: (para 23)

> "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 provides certainty, and so limits disputes and litigation. The following cases support its application to the present case."

90. An earlier warning against relying on unjust enrichment in circumstances where there is a subsisting contract came from an impeccable source in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd ("The Trident Beauty")* [1994] 1 WLR 161. In that case, Pan Ocean, the time charterer of the vessel was seeking to recover an instalment of the time charter hire because the vessel had been off hire for the whole period in respect of which the relevant hire instalment was paid. The claim was brought not against the shipowner but against an assignee of the shipowner's debt. Lord Goff of Chieveley (with whom Lord Lowry agreed) referred to the "usual practice" in the administration of time charters that where a vessel was off hire from time to time, an adjustment would be made to the next instalment of hire which fell due. Most time charters

include express provision for the repayment of hire but if necessary a term would be implied into the contract to that effect. He said at p 164E:

> "All this is important for present purposes, because it means that, as between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate. … It follows that, in the present circumstances and indeed in most other similar circumstances, there is no basis for the charterer recovering overpaid hire from the shipowner in restitution on the ground of total failure of consideration."

91. Lord Goff held that the position was no different as regards a claim against an assignee who was a stranger to that contract. He said later (p 166D) that he was well aware that writers on the law of restitution have been exploring the possibility that in exceptional circumstances a plaintiff may have a claim in restitution when he has conferred a benefit on the defendant in the course of performing an obligation to a third party. He went on:

> "But, quite apart from the fact that the existence of a remedy in restitution in such circumstances must still be regarded as a matter of debate, it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract."

92. The same principle was applied by the Court of Appeal in *Dargamo* cited earlier. There, the parties entered into a written agreement for the transfer of certain assets under a share purchase agreement for a consideration of US$950 million. The assets were transferred and the consideration paid but the claimants sought to recover a proportion of the purchase price on the basis that the parties' common understanding when they entered into the contract was that they would subsequently enter into an agreement to transfer other substantial assets, for which some of the US$950 million was intended to be an advance payment. That subsequent contract was never concluded and the additional assets were never transferred. The claim in unjust enrichment was dismissed. Despite the common understanding, there had been no failure of basis amounting to an unjust factor and so no trigger to an entitlement to a payment. The parties must be held to the express terms of the contract into which

they chose to enter. They had both complied fully with those terms and the law of unjust enrichment did not provide a means of subverting that agreement.

93. In applying these principles in the present case, HHJ Pearce observed that our legal system recognises the importance to be given to parties to exercise freedom of choice in contractual negotiations so that courts "will look with scepticism at any attempt to use a principle such as unjust enrichment to redefine their rights and obligations" (para 186). Relying on *Costello*, he held that the court should decline to interfere with the agreement by which the parties had determined the circumstances in which a sum of money will be payable by granting relief which amounts to imposing an obligation to pay in different circumstances. The judge discussed and rejected Mr Barton's arguments to the contrary, one of which was the likelihood that Foxpace would have agreed to the payment of a fee if the possibility of a reduced purchase price had been contemplated when the agreement was entered into: (para 198)

> "The very uncertainty over what [Foxpace] may have been willing to pay demonstrates in my judgment a further danger in interfering in the contractual relationship between the parties to give effect to what they might have agreed in circumstances which they did not contemplate. The court would be speculating about what parties in a commercial relationship might have been willing to agree to and would be substituting assumptions as to how they would have behaved in place of their freedom to negotiate."

94. He therefore decided that despite feeling some sympathy for Mr Barton's circumstances, the claim for unjust enrichment failed.

95. The Court of Appeal came to a different conclusion as to whether the unjust enrichment claim was excluded by the principle in *Costello*. Asplin LJ held that although there was 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 the contract, that principle did not apply in this case. That was because the agreement between Mr Barton and Foxpace was "entirely silent" as to what was to happen if the sale completed for a purchase price of less than £6.5 million: para 32. Mr Barton had taken the risk that he would not be paid if there was no sale at all and she also accepted that he took the risk that if the sale was for less than £6.5 million, he would not receive the full £1.2 million. But there was no allocation of risk in other circumstances. Had the parties wished to exclude any remuneration other than in relation to a sale at £6.5 million, they could have included an express term to that effect. If there had been an express term then the principle in *Costello* would apply but in the absence of an

express term excluding a claim in unjust enrichment the principle in *Costello* did not apply.

96. I disagree with that analysis for reasons which mirror the reasons for rejecting the implication of a contractual term. When parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances; both any obligation to pay under the contract and any obligation to pay to avoid an enrichment they have received from the counterparty from being unjust. The "silence" of the contract as to what obligations arise on the happening of the particular event means that no obligations arise as Lord Hoffmann made clear in *Belize* cited earlier. This excludes not only an implied contractual term but a claim in unjust enrichment.

97. It is true that if a buyer is entitled to reject goods he has bought because they are not of the specification ordered but instead decides to accept the goods, he must pay their value to the buyer – he cannot get them for free despite the seller's breach of contract. But here Foxpace could not expunge from their minds that Western were able and willing to buy Nash House once Mr Barton had effected the introduction. There is no suggestion that Foxpace should have declined to sell the property to Western once it became clear that Western were not prepared to pay the full £6.5 million. Such self-denial would not help Mr Barton, given that it is common ground that he would not earn any commission if Nash House was sold to someone else or remained unsold. In that sense Foxpace have "kept" rather than "returned" the benefit of the introduction made by Mr Barton but that is different from a buyer deciding to keep rather than return goods to the seller if they do not meet the contractual specification.

98. I recognise that the estate agent cases establish that in a typical arrangement between an estate agent and the vendor of the property, the naming of a specific price for the property is not generally to be treated as the 'if, and only if' trigger for the obligation to pay the commission. But this case is, as I have explained, not a typical estate agent/vendor relationship and there is no reason to construe the contract as meaning anything other than the judge found, namely that the parties agreed that Mr Barton would receive £1.2 million if Nash House sold to Western for at least £6.5 million.

99. The present case is similar, therefore, to *Howard Houlder and Partners Ltd v Manx Isles Steamship Co Ltd* [1923] 1 KB 110 on which Foxpace relied. In that case the plaintiff was entitled under a commission note from the vessel owner to a 5 per cent brokerage on the hire under a charterparty for the vessel SS Manx Isles. The

charterparty gave the charterer the option of buying the vessel for £125,000 and the commission note provided that if that option was exercised, the brokerage would be 3.5 per cent payable on final completion of the purchase. The vessel operated under the charter for eight months and was then sold to the charterers for £65,000. The plaintiff claimed 3.5 per cent of the £65,000 or alternatively a reasonable remuneration as on a quantum meruit for the services they had provided. McCardie J dismissed both the contractual claim and the quantum meruit. As to the contract claim, he said: (pp 113 – 114)

> "It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers. If not, he fails. There appears to be no halfway house, and it matters not that the plaintiff proves expenditure of time, money and skill."

100. As to the quantum meruit claim, McCardie J said: (pp 114 – 115)

> "This point calls for attention, inasmuch as it raises a question of interest and importance to all agents who rely on the payment of commission as their means of income. I must point out that the commission note before me represented the result of discussion between the plaintiffs and the defendants. It embodied their bargain. They reduced their agreement to writing. There was no collateral arrangement whatsoever. The rights of the plaintiffs are to be found in the commission note alone, and so the parties intended. If this be so, then it follows, … that the rule 'Expressum facit cessare tacitum' here applies. There is no scope on the present facts for the operation of the quantum meruit principle.

101. McCardie J cited a number of Court of Appeal authorities supporting his analysis that a plaintiff cannot claim on a quantum meruit where they have chosen to tie themselves down by the express terms of an agreement. There, as in the present case, the contract covers the ground so far as concerns when Mr Barton is entitled to receive a commission for the introduction of the purchaser and there is no room for an unjust enrichment claim.

102. Carr LJ arrived at a similar conclusion nearly a century later at para 133 of *Dargamo*:

> "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."

103. The Court of Appeal held in the present case that a claim for unjust enrichment succeeded because, to adopt the terminology of Carr LJ there, it was not at odds with the relevant contractual provisions. In my judgment an obligation on Foxpace to pay any commission to Mr Barton when there has been no sale to Western for £6.5 million is at odds with what was agreed by them. I agree therefore with the criticism of the Court of Appeal's decision in the article by William Day and Professor Graham Virgo *Risks on the contract/unjust enrichment borderline* (2020) 136 LQR 349 – 354 that the Court of Appeal was mistaken in the inference it drew from the 'silence' of the contract and the judge's rejection of the "if, and only if" evidence:

> "But the natural interpretation of A agreeing to pay B *£x* if B procures *y* is that, if B does not procure *y,* A is under no obligation to pay B anything (be it *£x* or any other sum). Adding 'but only if' emphasises the point but ultimately is surplusage. The parties' silence on the question of A paying something less than *£x* for B procuring something less than *y* 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 their agreement in clear and comprehensive terms. Had the parties intended some smaller sum to be triggered for something other than *y,* they would have said so. In *Barton,* therefore, silence did not mean that the risk of someone buying Nash House at less than the target price had not been addressed by the contract; rather, the terms of the contract envisaged that this risk remained with Barton."

104. Males LJ analysed the issue on the basis that the contract had not allocated the risk of receiving nothing if the purchaser whom he introduced purchased the property for less than £6.5 million. One must be careful, however, not to elevate the 'allocation of risk' concept from its proper place as an explanation for the principle in *Costello* to being the principle itself. The difficulty with this risk allocation approach is that it requires the court to draw a distinction between the allocation of the risk that no sale would take place to Western and the allocation of the risk that the sale would take place at less than £6.5 million. Given the findings of the judge as to the terms of the contract, there is no reason for distinguishing between those two risks. In other words, since the express terms of the contract, as found by the judge, were that Mr Barton would be paid £1.2 million if the sale went through to Western at not less than £6.5 million, I do not see why Mr Barton can be said to bear the risk of no sale but not to bear the risk of a sale at a lower price.

105. Mr Barton's case at trial was that he did not take the risk that Western would buy Nash House for less than £6.5 million because his case was that his entitlement to the fee was not conditional on the price at which Nash House was sold. That case was rejected by the judge on the facts. This case therefore exemplifies the criticism made of the allocation of risk terminology by Frederick Wilmot-Smith in his article *Replacing risk-taking reasoning* (2011) (October) 127 LQR 610-630. He describes "risk taking reasoning" as circular, ambiguous, inconclusive, incapable of explaining the decided cases and unnecessary. He points out that risk taking reasoning does not explain how one distinguishes between risks that a claimant runs and those he or she does not run: "Risk-taking reasoning, therefore, always relies on a deeper, unstated analysis."

106. The analysis proposed by Mr Barton appears to be at base, an appeal to what Lord Reed deprecated in *Investment Trust Companies v Revenue and Customs Comrs* [2017] UKSC 29, [2018] AC 275, para 39 as a claim based on perceived requirements of fairness applied on a case-by-case basis (see also the authorities to similar effect in *Dargamo* paras 60 onwards). I would reject that analysis and hold that the claim in unjust enrichment also fails.

Conclusion

107. I do not consider that there is to be found in this court's judgments on this appeal any fundamental disagreement about the underlying legal principles, although they may be given different levels of emphasis. The real difference between us concerns whether the express term, that Mr Barton was to receive £1.2 million if the property was sold for £6.5 million to a purchaser introduced by him, was a complete statement of the circumstances in which he was promised some reward under the agreement, or only a partial statement, leaving it to be implied that he would also

receive some unspecified reward if the property was sold to such a purchaser, but for less than £6.5 million. If it was a complete statement, then a lesser reward for a sale below £6.5 million could not be implied, because it would be inconsistent with the condition for the reward expressly agreed. Nor could there be a remedy in unjust enrichment, because a nil reward for such a sale was what the parties had agreed. The enrichment consisting of the benefit to Foxpace of a sale to a purchaser introduced by Mr Barton, for no reward to him, would not be unjust, because it was an outcome provided for by the agreement. Unjust enrichment mends no-one's bargain.

108. For the reasons I have set out above I would allow the appeal and set aside the order of the Court of Appeal dated 21 November 2019.

LORD LEGGATT (dissenting):

Introduction

109. Mr Philip Barton, a property dealer and developer, found a buyer for Nash House, a commercial property which its owner, a company called Foxpace Limited, wanted to sell. It was orally agreed that Foxpace would pay Mr Barton £1.2 million in the event that Nash House was sold to a purchaser introduced by him for £6.5 million. The purchaser introduced by Mr Barton initially offered £6.5 million, but this was reduced to £6 million after it emerged that the ability to develop the site might be affected by the HS2 railway project. A sale was completed at this price.

110. The trial judge decided that, as the property was sold for £6 million and not £6.5 million, Foxpace was not liable to pay anything to Mr Barton. In case he was wrong, the judge assessed the commercial value of the services provided by Mr Barton, which he found was £435,000. The Court of Appeal allowed Mr Barton's appeal and awarded him this sum. From that decision this appeal is brought by parties who represent the interests of Foxpace. They argue that Foxpace was entitled to enjoy the benefit of Mr Barton's services for free because, under the terms agreed, his right to remuneration was dependent on a sale taking place at £6.5 million, and this did not happen.

111. In my opinion that argument is erroneous because it assumes that, in the absence of express agreement, Mr Barton had no right to be paid any remuneration for the services that he provided to Foxpace at their request. That is a wrong assumption. In accordance with settled law as well as normal commercial expectations, Mr Barton was entitled to a reasonable remuneration for the valuable service that he provided, unless expressly agreed otherwise. On the judge's findings

there was no contrary agreement, as the express term agreed orally between the parties only specified the remuneration that would be payable in the event of a sale at a price of £6.5 million and said nothing about what was to happen in the event of a sale at a lower price. What was expressly agreed therefore did not negative Mr Barton's right upon such a sale to be paid what the service he provided was worth. There is no challenge to the judge's assessment of this sum.

112. This, in my view, is the short answer to this appeal which I will now explain at greater length.

The facts found

113. Before he introduced the purchaser who ultimately bought Nash House, Mr Barton had been involved in two unsuccessful attempts to buy the property. First, a company with which he was connected entered into a contract with Foxpace to buy Nash House for £6.3 million. Mr Barton personally contributed £835,000 towards deposits paid by the buyer which were forfeited when it failed to complete the purchase. Mr Barton then entered into a contract in his own name to buy Nash House at a price of £5.9 million. A deposit was payable under this contract in three instalments. Mr Barton was only able to pay the first instalment of £354,000 and, as a result, this contract was also rescinded by Foxpace and his payment forfeited. As a result, Mr Barton was now out of pocket in a sum of around £1.2 million.

114. Mr Barton perceived that Foxpace was keen to sell the property and persisted in his attempts to make money from the opportunity. He found a prospective buyer willing to pay £6.5 million for Nash House. Mr Barton initially made a new purchase offer himself of £5.7 million with a view to a sub-sale to this prospective buyer. But he then had second thoughts and proposed that, instead of a sub-sale, he would introduce the prospective buyer with a view to the buyer entering into a direct contract with Foxpace and Foxpace would pay £1.2 million to Mr Barton as an introduction fee. The figure of £1.2 million was based on Mr Barton's desire to recover his losses on the two earlier abortive transactions. This proposal was discussed in telephone conversations between Mr Barton and a representative of Foxpace, Mr Rooke, between 29 and 31 July 2013.

115. There was a dispute at the trial about what, if any, agreement was reached in these conversations. Mr Barton's case was that an agreement was reached that Foxpace would pay him £1.2 million if a purchaser introduced by him bought Nash House from Foxpace, regardless of the price for which the property was sold. Foxpace

on the other hand maintained that all the discussions were subject to contract and that no binding contract at all was made.

116. The trial judge (HHJ Pearce) did not accept either of these contentions. He found that an agreement was made that Foxpace would pay Mr Barton the sum of £1.2 million in the event that Nash House was sold to a purchaser introduced by him for the sum of £6.5 million: [2018] EWHC 2426 (Ch), para 161. The judge also made findings that the only price mentioned in the relevant conversations was £6.5 million and there was no reference to a figure lower or higher than that (paras 156, 162). He found that the parties did not address the possibility that Nash House might be sold for less than £6.5 million. Mr Barton did not address his mind to that issue because he had no reason to think that the price would be renegotiated (para 187); and the representatives of Foxpace also did not have in mind the consequence of a sale at a lower price (para 188). The parties had no shared or even individual expectations 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 (para 189).

117. On 1 August 2013 Mr Rooke sent two emails to Mr Barton requesting the identity of the prospective purchaser. In response, Mr Barton provided this information to Foxpace. As contemplated, the price offered by the purchaser introduced by Mr Barton was £6.5 million. However, after the purchaser found out about the issue relating to HS2, the price was renegotiated and a reduced amount of £6 million was agreed. Upon completion of the sale at this price, Mr Barton requested payment of £1.2 million from Foxpace but Foxpace refused to pay. Following discussions, Foxpace offered Mr Barton £400,000 as a "goodwill gesture" but he declined it.

The decision of the High Court

118. At the trial Mr Barton did not seek to argue that, if his case about the express terms of his oral contract with Foxpace was rejected, there was nevertheless an implied term of the contract that he would be entitled to an introduction fee if a sale took place at a price less than £6.5 million. But he argued that, in this situation, he was entitled to a remedy under the law of unjust enrichment. His counsel submitted - and the judge agreed - that by introducing a buyer who would not otherwise have bought the property, Mr Barton had conferred a valuable benefit on Foxpace for which Foxpace would, in accordance with usual business practice, expect to pay (para 185). Foxpace had thus been enriched at Mr Barton's expense. As already mentioned, the judge assessed the commercial value of the services provided by Mr Barton at £435,000. In the absence of expert evidence, the judge based this assessment on the amounts of introduction fees which Foxpace had agreed to pay on two earlier

potential sales of the property (one being the abortive sale to Mr Barton) and the amount that Foxpace had been willing to pay Mr Barton as a "goodwill gesture" (paras 213-214).

119. The judge concluded, however, that although Foxpace had been enriched at Mr Barton's expense in the amount of £435,000, the enrichment was not unjust. The judge acknowledged that there was an "obvious apparent iniquity" in finding that Mr Barton was entitled to £1.2 million if the property was sold for £6.5 million but nothing if it was sold for any less (para 196), and that it was a reasonable assumption that Foxpace would have been willing to pay some fee, even if a reduced one, for a sale at just £500,000 less than that for which it was willing to pay £1.2 million (para 197). But the judge thought that to impose an obligation on Foxpace to pay an introduction fee in circumstances which were not contemplated when the contract was concluded would interfere with the freedom of the parties to define and allocate their obligations (paras 190, 198). He accordingly held that Foxpace was not liable to pay anything to Mr Barton.

The decision of the Court of Appeal

120. Mr Barton appealed. The Court of Appeal allowed the appeal and held that Mr Barton was entitled to be paid the reasonable value of his services as assessed by the judge: [2019] EWCA Civ 1999; [2020] 2 All ER (Comm) 652. Although the decision was unanimous, the members of the court each gave their own reasons for this conclusion. Asplin and Males LJJ considered that the judge was wrong to suppose that awarding a remedy based on unjust enrichment would undermine the contractual allocation of risk negotiated by the parties. On the judge's findings, the contract simply did not address the situation in which a sale took place at a price less than £6.5 million and said nothing one way or the other about what was to happen in that event. In these circumstances there was no contractual allocation of risk which stood in the way of a remedy in unjust enrichment (paras 32-33, 62-63).

121. Davis LJ agreed that the contract was simply silent about what was to happen if the price paid by the purchaser introduced by Mr Barton was less than £6.5 million and did not exclude the payment of reasonable remuneration for Mr Barton's services in that event (para 70). He considered, however, that in circumstances where the parties had made a contract the correct legal analysis is to regard the case not as one of unjust enrichment but as a case where reasonable remuneration is payable pursuant to an implied term (para 75). In his view, it "was inherent in - that is to say, an implied term of" - the introductory agreement which was concluded that Mr Barton would be reasonably remunerated for successfully introducing a purchaser (even if at a price less than £6.5 million).

The appellants' case

122. On this appeal counsel for the appellants submit that, as the services provided by Mr Barton were provided in performance of a contract, there is no room in this case for a claim based on unjust enrichment. Unless there was either an express or an implied term of the contract that obliged Foxpace to remunerate Mr Barton in the event of a sale at a price less than £6.5 million, the consequence is that nothing was payable in that event.

123. Leading counsel for the appellants, Mr Andrew Twigger KC, sensibly did not maintain that Mr Barton is precluded from asserting a claim based on an implied term by the fact that his case was not put in that way before the judge. Mr Twigger accepted that the existence or otherwise of an implied term is a matter of law which can properly be addressed on this appeal. But he submitted that the requirements for an implied term are not satisfied here. If the parties had considered what should happen in the event of a sale at a price less than £6.5 million, it is not at all obvious what, if anything, they would have agreed; nor is it necessary to imply a term that a reasonable fee would be payable in that event in order to give their agreement business efficacy. Furthermore, where - as here - the contract made express provision for remuneration to be paid upon the happening of a specified event, the effect of the agreement was that no remuneration was payable if the event did not occur. Hence there is no room for an implied term that Mr Barton was entitled to a reasonable remuneration for his services.

The consequence of saying nothing

124. The difficulty in this case derives from the fact that the parties' contract did not expressly state what was to happen if, as in fact occurred, Nash House was sold to the purchaser introduced by Mr Barton at a price less than £6.5 million. The key question is: what is the legal consequence of this omission? The appellants contend that the consequence of failing to make express provision for Mr Barton to be paid a fee in the event of such a sale is that no fee is payable. By contrast, Mr Barton argued in the courts below that the consequence of this omission is that his entitlement or otherwise to a fee in the event of such a sale is not governed by the law of contract at all, so that it is open to him to claim payment for his services by relying on the law of unjust enrichment.

125. In my view, both these contentions are mistaken and the result has been to take the legal analysis of this case down a wrong path. The fact that the contract did not expressly deal with whether a fee was payable in the circumstances which occurred

does not mean that the law of contract is inapplicable. But nor does it entail that pursuant to the law of contract nothing was payable in those circumstances. Both approaches fail to recognise that the law of contract provides a set of rules for ascertaining the legal rights and obligations of contracting parties which extend well beyond their expressly stated intentions.

Sources of contractual obligations

126. The idea of freedom of contract is that contractual obligations should be freely chosen. But that does not mean that the choice to be bound by an obligation must be expressly stated. If it did, there would be very little to the law of contract. A principal function of contract law is to provide a framework of rules which apply to contractual relationships unless the parties expressly opt out of them.

127. The essential reason why such rules are necessary is, to put the point colloquially, that life is too short to negotiate contract terms designed to cover every contingency that may occur. Even the most comprehensive and carefully drafted written contract cannot anticipate and provide expressly in advance for every possible contingency. And even where contingencies are foreseeable, commerce would be stultified if time and cost was routinely incurred in discussing and making provision for situations that are not thought likely to happen.

128. Establishing default rules serves to reduce the costs and inconvenience of negotiating terms and also to avoid unfair outcomes in cases where parties, whether through inertia, lack of opportunity or foresight, or deliberate choice, have not negotiated express terms to cover certain significant contingencies. Such default rules are generally optimal when they reflect prevailing social norms and expectations and therefore create rights and obligations which reasonable parties would be likely to agree between themselves.

129. Many default rules that are part of English contract law apply to contracts of all types. For example, contracts seldom state that a breach of a promissory term will render the other party liable to pay damages for losses caused by the breach. However, the law of contract has developed rules (including rules about remoteness of damage, mitigation of loss, and so on) which govern when such liability will arise in the absence of contrary agreement. Similarly, contracts frequently do not specify whether or when a breach of a promissory term will release the other party from its own obligations. Again, the law of contract provides rules which determine the rights and obligations of the parties in such situations unless they expressly agree something different. The same can be said of many other matters.

130. There are other default rules that apply, not to all contracts, but to all contracts of a particular type. Again, establishing such legal rules does not interfere with freedom of contract because the parties remain free to agree something else. As Lord Diplock explained in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848:

> "… parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words."

131. As the law of contract developed in the eighteenth and nineteenth centuries in response to the rising volume of trade, the courts recognised the need, if they were to reach decisions that accord with what people doing business with each other would reasonably expect, to have regard not only to what the parties to a contract had expressly agreed but also to unwritten usages and norms of commerce. Over time many such usages and norms were transposed into rules of law: see Ross Cranston, *Making Commercial Law Through Practice 1830-1970* (2021), esp pp 47-60. Lord Radcliffe did not much exaggerate when he said that "the corpus of commercial law has been built up largely by [the] process of supplying from the common usage of the trade what is the unexpressed intention of the parties": *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93 at 122.

132. A familiar example of a body of commercial law which developed in this way is the law applicable to contracts for the sale of goods. By the time the law was codified in the Sale of Goods Act 1893 the common law had developed a sophisticated set of rules that apply to this type of contract unless a contrary intention is expressed. Many of these rules were (and are) expressed in the codifying legislation simply as rules of law (eg sections 4 - 7 of the Sale of Goods Act 1979); others are expressed as duties or rights of the seller or buyer (eg sections 8 and 27); and others as implied terms of the contract of sale (eg sections 12, 14 and 15). Nothing turns, however, on these different formulations. There is no difference in substance between a rule which says that there is an implied term of the contract that the buyer must do X and a rule which says simply that the buyer must do X. For example, section 8 of the 1979 Act (which

replicates section 8 of the 1893 Act) provides that, if the price in a contract of sale is not fixed by, or in a manner agreed by, the contract (or by a course of dealing), the buyer must pay a reasonable price. The drafter could equally well have adopted the device of providing that such an obligation is an implied term of a contract of sale.

133. In addition to these methods of supplementing what parties expressly agree, English common law has developed rules which, when satisfied, require a tailor-made term which the parties have not expressly agreed to be treated as part of their contract. The principal criteria are that the term is necessary to give business efficacy to the contract and/or so obvious that "it goes without saying": see eg *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, paras 16-21. Terms implied in this way are now often referred to as terms implied in fact to distinguish them from standardised terms that are treated as terms of a contract of a particular type by virtue of a rule of law: see eg *Chitty on Contracts*, 34th ed (2021), para 16-005.

The distinction between terms implied in law and terms implied in fact

134. The distinction between terms implied in law and terms implied in fact has come to be recognised relatively recently in the development of the common law but is now well established. There is an early statement of it in the speech of Lord Wright in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 137. In *Liverpool City Council v Irwin* [1977] AC 239, 257-258, the distinction was drawn with conspicuous clarity by Lord Cross of Chelsea, who said:

> "When it implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type - sale of goods, master and servant, landlord and tenant and so on - some provision is to be implied unless the parties have expressly excluded it. … Sometimes, however, there is no question of laying down any prima facie rule applicable to all cases of a defined type but what the court is being in effect asked to do is to rectify a particular - often a very detailed - contract by inserting in it a term which the parties have not expressed."

In *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 458-459, Lord Steyn (adopting terminology used in the United States) pithily described the two types of implied term as operating, respectively, as "general default rules" and "ad hoc gap fillers".

135. The distinction between the two types of implied term is not merely one of generality. There are two more important differences. First, where a term is implied in law, cases establishing the applicable rule of law have the force of precedent in relation to other contracts of the same type. A term implied in fact, on the other hand, is an individualised term "which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made": *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, para 15 (Lord Neuberger of Abbotsbury). As with decisions on the interpretation of contract terms, judicial decisions relating to different contracts made in different circumstances are usually of little assistance. Second, there is a difference in who bears what may be called the burden of expression: see E Allan Farnsworth, "Disputes over Omission in Contracts" (1968) 68 Colum L Rev 860, 884. A contract is presumed to include any term implied in law as a standard incident of a contract of that type, unless such a term is expressly excluded: see eg the passage quoted above from the speech of Lord Cross in *Liverpool City Council v Irwin*; *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 AC 523, para 55 (Baroness Hale of Richmond); *Marks and Spencer plc*, para 15. By contrast, a party contending that a term is to be implied in fact has to overcome a presumption that, at any rate where the parties have entered into a detailed written contract, they have expressed all the terms particular to their individual bargain. This point was made by Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1998, para 17, when he said that, if the contract does not expressly provide for what is to happen when some event occurs, the "most usual inference … is that nothing is to happen. … If the event has caused loss to one or other of the parties, the loss lies where it falls." Lord Hoffmann was there concerned with terms implied in fact. His remarks were not directed, and do not apply, to terms implied in law, where the opposite presumption applies.

136. Who bears the burden of expression may be important and is potentially critical in the present case. On the judge's findings, the contract between Foxpace and Mr Barton was silent about whether Foxpace was obliged to pay Mr Barton any remuneration if it sold Nash House to the purchaser introduced by him for less than £6.5 million. An argument that it is necessary to imply a term on the particular facts of this case that Foxpace must pay a reasonable remuneration would therefore have to overcome the presumption that, as nothing was said about what was to happen in these circumstances, nothing was payable. By contrast, if the default position is that Foxpace was obliged to pay Mr Barton a reasonable remuneration for such a service pursuant to a term implied in law, it is Foxpace which bore the burden of expression and must show that the parties agreed otherwise by express words.

Reasonable remuneration for services

137. In the same way as the common law developed default rules, some in the form of standardised implied terms, that apply to contracts for the sale of goods, such rules were also developed in relation to the supply of services. One such rule imposes a duty on the supplier to exercise reasonable skill and care in doing the work. Another requires the party contracting with the supplier, if no consideration for the services is fixed by the contract, to pay a reasonable charge.

138. The obligation to pay a reasonable sum reflects the ordinary expectation that those who, in a commercial context, provide valuable services to others do so for reward and not simply out of charity or benevolence; and by the same token someone who requests such services does so on the understanding that they are to be paid for. The law gives effect to this common understanding by imposing, in the absence of contrary agreement, an obligation to pay a reasonable sum which represents what the services were worth (quantum meruit).

139. This rule of law is of very longstanding. It was already recognised in *Blackstone's Commentaries*, vol II, Of *the Rights of Things* (1766) p 443, which drew the following distinction:

> "*Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making … *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves."

This statement was quoted in the second edition of *Chitty on Contracts*, published in 1834 (at p 16), and continued to appear in similar form right up until (and including) the 22nd edition of *Chitty* in 1961. The 25th edition of *Chitty*, which was the last to be published before Part II of the Supply of Goods and Services Act 1982 (the "1982 Act") came into operation in July 1983, cited numerous authorities (in vol I, para 2050) for the proposition that:

> "In a contract for work to be done, if no scale of remuneration is fixed, the law imposes an obligation to pay a reasonable sum (quantum meruit)."

140. This common law rule was codified in section 15 of the 1982 Act. Unlike its counterpart in section 8 of the Sale of Goods Act, the obligation imposed by this section is formulated as an implied term; but, as I have already indicated, that has no special legal significance. As Professor Glanville Williams pointed out many years ago in an influential article, there are some implied terms that "are in fact merely rules of law that apply in the absence of an expression of contrary intent: whether we choose to call them implied terms or not is simply a matter of terminology": see G Williams, "Language and the Law – IV" (1945) 61 LQR 384, 404; also eg JW Carter, *The Construction of Commercial Contracts* (2013), para 3-31. In such cases it is more transparent to dispense with the artifice of implied terms, as done for example in section 8 of the Sale of Goods Act (see para 132 above) and section 51 of the Consumer Rights Act 2015: see also F Wilmot-Smith, "Express and Implied Terms" (2022) 20 OJLS 1, 21.

141. Section 15 of the 1982 Act, which adopts the terminology of an implied term, says:

> "(1) Where, under a relevant contract for the supply of a service, the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge.
>
> (2) What is a reasonable charge is a question of fact."

A "relevant contract for the supply of a service" is defined in section 12(1) to mean "a contract under which a person ('the supplier') agrees to carry out a service."

142. The question arose in argument on this appeal whether the definition of a "relevant contract for the supply of a service" includes a unilateral contract. I think it should be so construed. If A supplies a valuable service to B at B's request for which no fee is specified, the implication of a term that B will pay a reasonable charge for the work cannot rationally depend on whether a contract is concluded when A starts to carry out the work (a unilateral contract) or at an earlier stage before any work is carried out (a bilateral contract). Such a term is equally necessary in either case to give effect to the ordinary commercial expectation that services supplied to others at their request must be paid for. I would therefore interpret the words "agrees to carry out a service" in section 12(1) as including cases where agreement is manifested and the contract concluded by actually carrying out the service as well as cases where the

contract is concluded by a prior exchange of promises. Even if section 15 were not itself applicable to unilateral contracts, I would reach the same conclusion on the basis that they fall within the scope of the common law rule and it is clear from section 16(3)(b) that Part II of the 1982 Act does not displace the common law.

143. Whether section 15 applies is not an all-or-nothing question. Under a relevant contract for the supply of a service, the consideration for the service may be determined by the contract (or left to be determined in a manner agreed by the contract or determined by the course of dealing) in some circumstances that may arise but not in others. In cases of this kind (of which the present case is an example), insofar as the service is not determined by the contract etc, the implied term will operate to fill the gap.

Commission agreements

144. One distinct type of contract for the supply of services is a commission agreement - that is to say, a contract under which an agent (or other intermediary) who sells or brings about a sale of property for another is entitled to remuneration (often described as a commission) for any sale made. The ordinary expectation is that, unless otherwise agreed, someone engaged on this basis will be paid a commission if, but only if, a completed sale results from their actions. To reflect this expectation, the "service" supplied under this type of contract must be seen, not as looking for, or finding, a prospective purchaser, but as bringing about a sale. It is only in consideration of a sale brought about by efforts of the agent that, in the circumstances described in section 15(1) of the 1982 Act, there is an implied term that the party contracting with the agent will pay a reasonable charge.

145. Many of the reported cases concerned with this type of contract have involved estate agents. It is well established in such cases that, where a person looking to sell property engages an estate agent, unless different terms are expressly agreed, the agent will not be entitled to remuneration for introducing a purchaser willing to buy the property, let alone for work done in marketing the property, but only if an introduction made by the agent is an effective cause of a completed sale.

146. In the leading case of *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 an estate agent found a purchaser who made an offer which was accepted "subject to contract", but in the end the owners of the properties in question chose not to sell. The agent had been promised a commission on completion of a sale but argued that, although no sale was completed, there was an implied term that the principal would do nothing to prevent the agent from earning the commission, such as by selling the property

independently to a purchaser not introduced by the agent or by deciding not to sell at all. The House of Lords unanimously held that there was no room for such an implied term, at least where no binding contract had been concluded with the purchaser whom the agent had introduced, and also made it clear that the agent could not have claimed a reasonable remuneration for time and expense incurred. One reason was that such a claim would be inconsistent with the express contract made in that case. But Lord Wright also explained that this is the ordinary nature of a commission agreement. He said, at p 141:

> "In the case of the commission agent, to whom payment is dependent on completion or the like condition, the principal does not promise that he will complete the contract … His only promise is that he will pay commission if the contract is completed. There is no promise to pay a reasonable remuneration if the principal revokes the authority to the agent. And it is a further objection to a claim on a quantum meruit that the employer has not obtained any benefit. The agent has earned nothing until the event materializes."

147. The presumption that no commission will be payable unless and until the principal derives the benefit of a completed sale resulting from the agent's efforts was spelt out by Lord Denning in a number of later cases. For example, in *Dennis Reed Ltd v Goody* [1950] 2 KB 277, 284, Denning LJ (as he was at the time) said:

> "The common understanding of men is … that the agent's commission is payable out of the purchase price. The services rendered by the agent may be merely an introduction. He is entitled to commission if his introduction is the efficient cause in bringing about the sale: *Nightingale v Parsons* [1914] 2 KB 621. But that does not mean that commission is payable at the moment of the introduction: it is only payable on completion of the sale. The house-owner wants to find a man who will actually buy his house and pay for it."

See also *Fowler v Bratt* [1950] 2 KB 96, 104-105. Lord Denning later returned to this theme (as Master of the Rolls) in *Jaques v Lloyd D George & Partners Ltd* [1968] 1 WLR 625, 630, where he said:

> "When an estate agent is employed to find a purchaser for a business or a house, the ordinary understanding of mankind

> is that the commission is payable out of the purchase price when the matter is concluded. If the agent seeks to depart from that ordinary and well-understood term, then he must make it perfectly plain to his client."

148. The same point had been made in *Midgley Estates Ltd v Hand* [1952] 2 QB 432, 435-436, where Jenkins LJ, with whom the other members of the Court of Appeal agreed, said that:

> "… prima facie the intention of the parties to a transaction of this type is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. The vendor puts his property into the hands of an agent for sale and, generally speaking, contemplates that if a completed sale results, and not otherwise, he will be liable for the commission, which he will then pay out of the purchase price."

Devani v Wells

149. This line of authorities was expressly approved by the Supreme Court in *Devani v Wells* [2019] UKSC 4, [2020] AC 129. In that case the seller of some flats had instructed an estate agent on the basis, agreed orally, that the agent's commission would be 2% + VAT. Nothing was said or agreed, however, about what event would trigger the obligation to pay this commission. The estate agent subsequently introduced a purchaser, who bought the flats. The agent claimed his commission, but the seller resisted the claim, arguing (among other things) that no legally binding contract had been made because an essential term, namely the event which was to trigger payment of the commission, had not been agreed and it was not permissible to imply a term into an incomplete bargain so as to make it a binding contract.

150. The Supreme Court unanimously rejected this argument. Lord Kitchin JSC, who gave the principal judgment with which the other members of the court agreed, cited the line of cases mentioned at paras 147-148 above and drew the conclusion (at para 19 of the judgment) that, although there had been no discussion of the precise event which would give rise to the obligation to pay commission:

> "absent a provision to the contrary, … it would naturally be understood that payment would become due on completion and made from the proceeds of sale."

151. Lord Kitchin also made clear (at paras 33-34) that whether parties have made an agreement which is sufficiently certain and complete to constitute a binding contract must be considered in the light of any implied terms as well as the express terms of their agreement. Where there is a clear intention to create a legal relationship, the question whether there is an implied term is anterior to the question whether there is a binding contract and it is not a bar to the implication of a term that the contract would be incomplete without it. Lord Kitchin gave the example of a situation where no term as to price has been expressly agreed but a term may be implied that a reasonable price must be paid (see eg *Foley v Classique Coaches* [1934] 2 KB 1; *British Bank for Foreign Trade Ltd v Novinex Ltd* [1949] 1 KB 623). Similarly, he saw no reason why a term cannot be implied into an agreement between a property owner and an estate agent that the agreed commission will be payable on completion of a sale of the property to a person introduced by the agent.

152. The example given by Lord Kitchin is instructive as it is directly relevant to the present case. The price is an essential element of a contract for the sale of goods or the supply of services in that there can be no enforceable contract unless a price has been fixed or is capable of being fixed without further agreement between the parties. Failure to agree a price, however, does not prevent the formation of a binding contract where the omission is cured by law. As already discussed, section 8 of the Sale of Goods Act 1979 and section 15 of the 1982 Act provide that, if no price is determined by, respectively, a contract for the sale of goods or the supply of a service, a reasonable sum must be paid. These provisions assume that the agreement made by the parties amounts to a contract despite its failure to fix the price. Thus, the legal framework within which parties contract may not only supplement the express terms of a binding contract but may help to create a binding contract by supplying an essential element of it.

153. Lord Kitchin also disposed of a suggestion that it is not possible to imply a term imposing a legal obligation into a unilateral contract, observing that, although such an obligation cannot arise while the bargain remains unilateral, there is "[no] reason why [such a term] cannot be implied if and when the contract becomes bilateral in the course of its performance" (para 36).

154. The kind of implication to which the court in *Devani v Wells* thought that resort could, if necessary, be had in that case was implication of a term in fact. There was no discussion of a term implied in law. It was said to be unnecessary, however, to imply a

term in fact that the agent's commission was payable on completion of a sale and not before, as this conclusion could be arrived at by a process of interpretation (see paras 27, 35, 61). I say nothing to cast doubt on the proposition that there was no need to imply a term in fact specifying when the commission was payable. As pointed out in commentary on the case, however, to describe the route to this conclusion as a process of interpretation of the contract is problematic in the light of this court's holding in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, that interpretation and implication must be kept distinct and that the process of interpretation is limited to ascertaining the meaning of the express terms of the contract: see Paul S Davies, "Interpretation and implication in the Supreme Court" (2019) 78 CLJ 267. In the *Marks and Spencer* case the court firmly rejected the controversial suggestion made by Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, that a contract as a whole might be construed as meaning something that none of its express terms means. Lord Neuberger, who gave the principal judgment, said at para 27:

> "When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context."

155. In *Devani v Wells*, as Lord Kitchin noted at para 26, there was no express term stating when the agent's commission was payable. The judge had found that "there was no discussion of the precise event which would give rise to the payment of that commission" (para 19). There were therefore no relevant words to be interpreted. Thus, the conclusion that "absent a provision to the contrary, … it would naturally be understood that payment would become due on completion" must have been based on something more than the express terms of the contract.

156. What that basis was can be seen from Lord Kitchin's reasoning. After citing as support for his conclusion the line of cases to which I referred at paras 147-148 above, he said, at para 23:

> "All of this reasoning remains as principled and cogent today as it was when expressed and I respectfully endorse it. The case before us is another in which the parties meant by their words and actions that the agent was engaged *on the usual terms*, that is to say that a commission became payable not upon the introduction by [the agent] of a prospective

> purchaser to [the seller], nor upon the exchange of contracts, but rather upon completion of the sale …" (emphasis added).

What "the usual terms" were was not established in *Devani v Wells* by evidence of any custom or usage but by reference to case law recognising a presumption that commission is only payable upon completion of a sale, and not before. That presumption is itself derived from "the common understanding" in the community or the "ordinary understanding of mankind". This is a classic case, in other words, where a commercial norm has been incorporated into the common law and thus acquired the force of precedent. It has led to the recognition of a default rule that will prevail in the absence of an express term providing otherwise. It is unnecessary to formulate this rule as creating a term of the contract but, if it is framed in this way, the relevant term is a term implied in law.

157. There is indeed a process of interpretation required to arrive at the conclusion reached in *Devani v Wells*. But it is a process which has a negative orientation because the burden of expression was on the seller. The question was whether the terms expressly agreed negatived the default position or presumption that the agent's commission would be payable on completion, and not before. It was plain that they did not.

The default position in this case

158. In *Devani v Wells* the amount of the commission payable to the agent was expressly agreed. Even if nothing had been said about commission, however, the estate agent (Mr Devani) would have been entitled to a reasonable sum for the service supplied to Mr Wells at the latter's request of introducing a prospective purchaser who had gone on to purchase and pay for the flats. It would naturally have been understood that Mr Devani was acting on the usual terms that a commission would be payable in that event. The law would give effect to that understanding and complete what would otherwise be an incomplete contract by imposing an obligation to pay a reasonable charge on completion of the sale of the property. Although unilateral, a legally binding contract between the seller and the agent containing such an obligation would be created when the agent introduced a prospective purchaser to the seller.

159. The same analysis would apply in the present case if no oral agreement at all had been made about the amount of any commission payable to Mr Barton or the event in which it would be payable. On behalf of the appellants, Mr Twigger KC submitted that the present case can be distinguished from one in which an estate agent is engaged because Mr Barton was not an estate agent so that the usual basis on

which an estate agent is understood to act did not apply to him. I do not accept that this is a material distinction. On the judge's findings, even if nothing had been said about remuneration, it was plain that Mr Barton was introducing a prospective purchaser to Foxpace, not as a gratuitous favour, but with a view to being paid for the benefit thereby conferred. That was obvious enough simply from the fact that Mr Barton was not a friend or associate of any of the representatives of Foxpace but a businessman dealing with them at arm's length in the course of his business as a property dealer and developer. It was placed even further beyond doubt by the fact that the introduction of the prospective purchaser whom Mr Barton had identified was proposed by him in place of an earlier proposal that Mr Barton would buy the property himself with a view to a sub-sale (see para 114 above). This made it plain that Mr Barton was, and would reasonably have been understood to be, making the introduction as an alternative way of making money from the contemplated sale.

160. There was in these circumstances a clear objective intention to create a legal relationship between Foxpace and Mr Barton under which Mr Barton would be remunerated for the service that he supplied. Hence, if nothing had been expressly agreed about the amount of remuneration that would be payable (or when), that gap would have been filled by an obligation imposed by law on Foxpace to pay a reasonable sum to Mr Barton on completion of a sale of the property to the buyer whom he had introduced.

Negativing the implied obligation

161. The remaining question is therefore whether this obligation was excluded or modified by the express terms of the oral agreement which the judge found was made. The general common law rule that the contracting parties are free to exclude or modify an obligation implied by law is embodied in section 16 of the 1982 Act, which provides:

> "(1) Where a right, duty or liability would arise under a relevant contract for the supply of a service by virtue of this Part of this Act, it may (subject to subsection (2) below …) be negatived or varied by express agreement …
>
> (2) An express term does not negative a term implied by this Part of this Act unless inconsistent with it."

162. In principle the duty imposed by section 15(1) of the 1982 Act to pay a reasonable charge for the supply of a service can be negatived by express agreement either in all circumstances or only in some. (In the latter case it might be said that the duty has been "varied" by express agreement.) In circumstances not covered by an express term as to remuneration, the consideration for the service "is not determined by the contract" etc and therefore remains subject to the implied term imposed by section 15(1).

Firth v Hylane Ltd

163. An example of a case where the implied obligation to pay a reasonable charge was negatived only for a sub-set of the circumstances in which it would otherwise apply is *Firth v Hylane Ltd* [1959] EWCA Civ J0211-3 (vLex), [1959] EGD 212. An estate agent, Mr Firth, was initially engaged by the defendant on terms that upon an introduction which resulted in a sale of the defendant's property he would be paid a commission of £1,000 "on completion of a sale at not less than £35,000". Mr Firth later agreed to accept a commission of £500 on completion of [a] sale which also included some fixed plant for what amounted to a total price of £34,000 or £35,000. Mr Firth introduced a purchaser and helped to secure a sale at a price of £31,000. The defendant argued that, in circumstances where the price achieved was less than either of the prices specified, no commission at all was payable.

164. The Court of Appeal, affirming the decision of the judge, disagreed. Morris LJ started from the proposition that:

> "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." (Transcript, p 4)

A specific charge had been agreed upon as payable on completion of a sale at a price of not less than £35,000 (or later £34,000). But the terms expressly agreed did not state what commission would be payable on a sale at a lesser price and "certainly did not provide that there was to be no remuneration" in that event. Accordingly, those terms did not negative the obligation that "would arise because if you ask somebody to do work for you you expect to pay for it." (Transcript, pp 4, 8)

165. Sellers LJ likewise saw in the express terms agreed "nothing inconsistent with an implied contract or term to pay a reasonable remuneration on a sale at a [lesser price]." The third member of the court, Pearce LJ, agreed with both the other judgments. He also addressed in his own words an argument made by the defendant that "because an optimistic price was referred to and the remuneration in that event was to be unusually high, including something in the nature of a bonus, it was therefore intended that if the optimistic price was not reached, and the bonus was not earned, the [agent] was to get nothing." Commenting on this, Pearce LJ said:

> "That would be a result which, in my view, is completely contrary to the normal expectations in such an employment. There is nothing inconsistent in paying a bonus in certain events and yet allowing a normal remuneration if the bonus is not earned."

He added that the judge "was right in implying a term for reasonable remuneration" (Transcript, p 14).

166. Counsel for the appellants on this appeal submitted that characterising the specified commission as a "bonus" payable if a particularly high price was achieved necessarily implied that a standard amount would be paid on completion of a sale even if that price was not achieved. I do not think, however, that Pearce LJ was begging the question in that way. The argument he was rejecting was an attempt to suggest that an agreement to pay an unusually high fee if a particular minimum price was achieved could be taken to mean that, as some sort of quid pro quo, nothing would be payable if the sale achieved was at a lower price. All the members of the court gave short shrift to that argument, with Sellers LJ remarking that he had "found the greatest difficulty in understanding" it. The essence of the Court of Appeal's reasoning was that an agreement to pay a specified sum if a sale at a particular price was achieved could not reasonably be taken to mean that, if the seller accepted a lower price, the agent would not be entitled to any remuneration. They thought it plain that, in that event, the ordinary implied term requiring a reasonable remuneration to be paid would still operate.

167. This case illustrates the possibility that the implied duty to pay a reasonable sum if no remuneration is fixed by the contract may be partly but not wholly excluded by an express term which negatives the duty in certain events but not others. The case also illustrates the obvious point that there is no inconsistency between an express term requiring a specific (unusually high) charge to be paid in event A and a duty to pay a normal charge in event B.

168. The facts of *Firth v Hylane Ltd* bear a striking analogy with those of the present case. In my view, the case is good authority (if it be needed) for the proposition that the ordinary implied obligation of the seller of property to pay a reasonable charge to an introducer for the service of bringing about a sale may be only partly and not wholly negatived by an express agreement as to remuneration. In particular, the obligation to pay a reasonable charge will remain if the terms of the express agreement apply only to a sale on certain specific terms which are not the terms on which the sale in fact takes place.

169. The decision in *Firth v Hylane Ltd* is not dispositive of this case, however, as the scope of any such express agreement is a matter of fact and interpretation which is necessarily case-specific and on which a decision in another, albeit similar case does not carry the force of precedent. It is therefore necessary to examine whether the terms of the parties' agreement in this case had the effect of excluding the implied obligation of Foxpace to pay a reasonable sum to Mr Barton if it sold Nash House to the purchaser introduced by him at a price which was less than £6.5 million.

The effect of the agreement made in this case

170. In addressing this question, it is relevant that the agreement was made orally and was never reduced to writing. The judge was not in a position to make any finding about the precise words used, but he found the substance of what was agreed to be that Foxpace promised "to pay Mr Barton the sum of £1.2 million in the event that Nash House was sold to a purchaser introduced by Mr Barton for the sum of £6.5 million" (see para 116 above). As I will discuss shortly, identifying the effect of such an oral agreement is not simply a question of interpretation when, as here, there is no definitive record of the words spoken. It is nevertheless useful to consider first what the position would have been if the parties had entered into a written agreement in the precise terms in which the judge expressed his finding. In particular, would an agreement in those terms be inconsistent with an obligation to pay a reasonable sum?

171. On the literal meaning of the words the answer is plainly "no". This is not conclusive, however, as speakers often use a sentence to convey something other than what that sentence literally means. To take a simple example: if a speaker says "Jill walked to the edge of the cliff and jumped", a hearer would naturally understand the speaker to mean that Jill jumped off the cliff, even though in their literal meaning the words used are consistent with Jill simply jumping in the air.

172. There are circumstances in which a statement of the form "if …" or "in the event that …" is reasonably understood to mean "if, and only if …" For example, suppose that

Mr Rooke on behalf of Foxpace had simply said to Mr Barton: “We will pay you £1.2 million in the event that you introduce someone to us who purchases Nash House.” Taken literally, this promise is only a one-way conditional. There would be no logical inconsistency if Mr Rooke had added: “And as a matter of fact, even if you don’t introduce such a purchaser, we will reimburse you the £1.2 million you lost as a result of the earlier transactions anyway.” But if made without any such qualification, the statement would naturally be understood to mean that the payment obligation would arise *if and only if* such an introduction was made. The reason is that, if Foxpace had intended to pay the sum of £1.2 million to Mr Barton without the need for him to do anything at all, there would have been no point in referring to the introduction of a purchaser. It is a basic assumption underpinning communication that words used by a speaker are relevant to what the speaker wishes to convey. This assumption also explains my simple example. The hearer assumes that the reference to Jill walking to the edge of the cliff must be relevant to the statement that she jumped and infers that the speaker intended to convey the most obvious connection between the two pieces of information.

173. Such reasoning also applies to how the conditional statement which, on the judge’s findings, was made in this case would reasonably be understood. It is reasonable to infer that the reference to a sale price of £6.5 million was included for a purpose and would not have been included if it was intended that Mr Barton should receive the sum of £1.2 million as a commission in the event of any sale to a purchaser introduced by him, irrespective of the price at which the sale took place. The natural inference is that, at any rate if the sale price was less than £6.5 million, Mr Barton would not be entitled to receive the sum of £1.2 million.

174. This does not signify, however, that Mr Barton would have no right to any remuneration in that event. There is no inconsistency between, on the one hand, the inference that, if the property was sold for less than £6.5 million, the promise to pay Mr Barton the sum of £1.2 million would not apply and, on the other hand, the default obligation to pay a reasonable sum in the event of such a sale. The one does not negative the other. The agreement of Foxpace to pay a sum of £1.2 million if it was able to sell the property for £6.5 million does not convey that Foxpace would not have to pay anything at all if the introduction enabled Foxpace to sell the property at a lower price which Foxpace chose to accept. To the contrary, it strongly indicates that Foxpace was willing to pay a reasonable commission in that event, in accordance with what would anyway be the normal commercial expectation and implied obligation upon an effective introduction which results in a sale.

175. The judge gave a further compelling reason why no inference could reasonably be drawn that nothing would be payable if a sale was completed at a price less than

£6.5 million. A solicitor who acted for Foxpace, Mr Morris, gave evidence at the trial that he was told by Mr Rooke that this was what had been agreed. In considering this evidence (at para 141 of the judgment), the judge commented that:

> "… it would be bizarre to think that Mr Barton would knowingly have entered into a contract on the terms that Mr Morris claims were repeated to him, since he would obviously open himself up to a small reduction in the sale price that deprived him of any introduction fee at all."

176. No doubt if those had been the terms agreed, Mr Barton would not have been entirely without legal protection, as a term would be implied that Foxpace would act in good faith and would not deliberately negotiate a small reduction in the sale price with the aim of escaping the obligation to pay an introduction fee to Mr Barton. To do so would be an obvious instance of bad faith conduct. But this does not detract from the point made by the judge. It would still be bizarre to think that Mr Barton would knowingly have entered into a contract on terms which meant that he would receive nothing at all in the event that a small reduction in the sale price was agreed for a good faith reason. Inquiries made by a prospective buyer before entering into a contract to purchase property often reveal impediments of one kind or another which result in a (perhaps minor) adjustment of the sale price without there being any improper motivation on the part of the seller in agreeing to such an adjustment. The risk that, if this were to happen (a matter which would be entirely outside his control), Mr Barton would lose the right to receive any introduction fee at all is not a risk to which a rational person in Mr Barton's position would consciously expose himself unless there was a commercial imperative for doing so.

177. There was no such commercial imperative in this case as it was clear that a seller in the position of Foxpace would not rationally choose to sell Nash House for £6.5 million and pay Mr Barton £1.2 million and yet not choose to sell Nash House for £6 million and pay Mr Barton £435,000. It was clearly to the commercial advantage of Foxpace to agree to pay Mr Barton at least a normal introduction fee in the latter event and there was, accordingly, no commercial incentive for Mr Barton to agree to forgo such a fee.

The wager theory

178. It was suggested by the appellants that normal commercial logic does not apply to the terms agreed in this case, as the sum of £1.2 million represented the amount which Mr Barton had lost as a result of the failure to complete the two earlier

transactions in which he was involved and was a far higher amount than any ordinary commission which an estate agent would have charged. It was suggested that, in return for the chance to get this large amount of money back if a sale for £6.5 million could be achieved, Mr Barton was willing to take the risk that he would get nothing in the event that Foxpace sold the property to the buyer introduced by him at a lower price, especially if such an eventuality appeared unlikely. It was argued that an agreement of this kind cannot therefore be regarded as improbable or irrational.

179. This is similar to the argument made by the seller in *Firth v Hylane Ltd* which (as discussed at paras 165-166 above) was roundly, and in my view rightly, rejected by the Court of Appeal. Counsel for the appellants sought to support their contention by referring to the old case of *Cutter v Powell* (1795) 6 Term Rep 320, 101 ER 573. In that case a mariner (Cutter) agreed to serve on a ship sailing from Jamaica to Liverpool. For a round trip from England to Jamaica and back the usual rate was £4 per month but for a single voyage from Jamaica to Liverpool a gross or lump sum was usually agreed upon. The defendant agreed to pay Cutter a lump sum of 30 guineas "provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool". Some six weeks into the voyage (of around eight weeks) Cutter died. It was held by the Court of King's Bench that, because of the terms of the contract, no remuneration could be recovered on a quantum meruit for the service actually performed. The court accepted the defendant's argument that Cutter had "preferred taking the chance of earning a large sum in the event of his continuing on board during the whole voyage to receiving a certain, but smaller, rate of wages for the time he should actually serve on board" (see p 323). Lord Kenyon CJ was particularly impressed by the fact that, if he had completed the voyage, Cutter would have received almost four times the monthly rate, describing the arrangement as "a kind of insurance" (p 324).

180. The court does not seem to have appreciated that the going rate for a round trip from England to Jamaica and back was not directly comparable to the rate for a single run from Jamaica and that the explanation for the high price of 30 guineas was the scarcity of seamen in the West Indies: see Martin Dockray, "Cutter v Powell: a trip outside the text" (2001) 117 LQR 664, 677. But even if one reason for the arrangement made was to protect the shipowner against defection before then end of the voyage, it is "a most artificial and untenable view" to interpret the contract as an insurance against the risks of death or personal accident: see the incisive discussion of the case by Samuel J Stoljar, "The Great Case of Cutter v Powell" (1956) 34 Canadian Bar Review 288, 293. It is more plausible to infer that no provision was made for what would happen if the mariner died during the voyage because this contingency was unforeseen or unexpected rather than because the mariner was gambling his wages on survival. If the case were decided today, Cutter's death would be likely to be seen as an event which frustrated the contract, allowing his widow to recover the value of the

service he had actually provided under section 1(3) of the Law Reform (Frustrated Contracts) Act 1943.

181. *Cutter v Powell* is in any event a world away from the present case where an aleatory interpretation of the contract is wholly unrealistic. One reason is the sheer commercial improbability that an experienced businessman and a company engaged in property development would make a reckless gamble over which of them would get a sum of £1.2 million. Another is the point already mentioned that it would be bizarre to think that Mr Barton would knowingly have entered into an arrangement under which he stood to forfeit the ordinary right to remuneration for a valuable service if (what might be a very small) reduction in the sale was agreed between seller and purchaser in circumstances entirely outside his control. A further reason is that, while it is apparent that Mr Barton saw the arrangement as an opportunity to recover his losses on the previous failed transactions, there is nothing to suggest that the agreement of Foxpace to pay £1.2 million as an introduction fee was motivated by anything other than calculation that it was in its commercial self-interest to sell the property, if it could, for a net sum of £5.3 million. People carrying on a business do not go around giving out large sums of money which they have no need to pay when no charitable purpose is apparent. In the highly unlikely event that Foxpace had been minded to make a present to Mr Barton of all or any part of the sum of £1.2 million, Foxpace would either not have kept that money in the first place or would not have made its return conditional on the introduction of a buyer who purchased Nash House for £6.5 million. The judge was satisfied that "Foxpace was getting a very real benefit from the introduction of a purchaser for which it was willing to pay £1.2 million (if the sale price was £6.5 million)": see para 196. It may also be noted that the net sum of £5.3 million that Foxpace stood to receive was not a great deal less than the net sum of around £5.5 million (£5.9 million less commission of just under £400,000) which Foxpace would have obtained if the previous abortive sale to Mr Barton had been completed.

182. It would make no commercial sense in these circumstances for Foxpace to refuse to offer, or for someone in Mr Barton's position to agree to forgo, payment of any introduction fee in the event that Mr Barton's introduction of a purchaser resulted in a sale of the property for a price that was less than £6.5 million. Indeed, it is a reasonable inference that, if the possibility of a sale at a lower price had been contemplated, Foxpace would have been willing to pay an introduction fee which was reduced from the figure of £1.2 million by the amount of any reduction in the sale price.

183. Accordingly, even if the language in which the judge expressed his finding is treated as if it were a formal written record of the parties' agreement, I see no justification for interpreting that language as meaning that, in the event that Foxpace

sold Nash House to the purchaser introduced by Mr Barton for a sum less than £6.5 million, he would have no right to be paid a reasonable charge for his services.

The significance of oral agreement

184. The matter does not end there, however, as the agreement made in this case was an oral agreement, the terms of which were never put in writing. When interpreting a written contract, English law adopts an objective approach which requires the court to decide what reasonable people in the situation of the contracting parties would have understood the words used to mean. What the parties thought their obligations were is of no consequence. However, as Lord Hoffmann observed in *Carmichael v National Power Plc* [1999] 1 WLR 2042, 2050, that "austere rule" does not apply to an oral agreement of which no definitive record was made. In such a case the court is not ascertaining the meaning of an agreed text as ex hypothesi there is no agreed text. Nor, unless a recording of the relevant conversation(s) was made, can the court know the exact words spoken nor the full context in which they were spoken, including other potentially relevant details and innuendos of the discussion. In these circumstances, the parties' subjective understanding of what they agreed is admissible as evidence of what as a matter of fact they did agree: see also *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776, para 82 (Lord Neuberger). Of course, as Lord Hoffmann commented in *Carmichael* at p 2051, the court may reject such evidence as unreliable. But where the judge makes findings of fact about what the parties understood the content and scope of their agreement to be, there would need to be a very powerful reason for an appeal court either to reject those findings or to conclude that the parties actually agreed terms which meant something different from what they both thought they had agreed.

185. The judge in this case made clear findings, summarised at para 116 above, about what the parties did and did not think they had agreed. To recap, he found that the only price mentioned in the relevant conversations between Mr Rooke and Mr Barton was £6.5 million and there was no reference to a figure lower or higher than that; and that the parties did not address the possibility that Nash House might be sold for less than £6.5 million. Mr Barton did not address his mind to that issue because he had no reason to think that the price would be renegotiated; and the representatives of Foxpace also did not have in mind the consequence of a sale at a lower price. The parties had no shared or even individual expectations 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.

186. These findings have not been challenged. Indeed, they form part of the agreed statement of facts for this appeal. They are wholly inconsistent with the notion that

the oral agreement made between Mr Rooke and Mr Barton represented a form of wager in which Mr Barton was assuming the risk of getting nothing at all for his services if a sale took place at anything less than £6.5 million in exchange for the chance of winning the jackpot of getting all his lost deposits back if a sale went through at £6.5 million; and that Foxpace was making an opposite all or nothing bet. The judge's findings demonstrate that this was not what the parties actually intended or understood themselves to be doing. There was no intention to restrict the entitlement of Mr Barton to receive commission on a sale resulting from his introduction to the situation in which the sale price was £6.5 million and to exclude any entitlement to a commission if the property was sold for less. The judge's findings make it clear that the parties simply did not address their minds to that possibility.

187. There is therefore no justification in this case for attributing to the parties' agreement an effect different from the effect they intended it to have on the theory that, even though they actually thought they were agreeing X, the court must treat them as if they had agreed Y because this is what, 'objectively', a reasonable person would have understood their words to mean. The court can and should give effect to what the judge found to be the reality of the transaction.

Conclusion on the contractual claim

188. I conclude that, in the event that - as in fact happened - Foxpace sold the property to the purchaser introduced by Mr Barton at a price less than £6.5 million, the terms of the oral agreement reached between the parties did not negative Mr Barton's right (pursuant to a term of the contract implied by law) to be paid a reasonable sum for the valuable service that he supplied in bringing about the sale.

The claim in unjust enrichment

189. In the light of this conclusion, there is no need to consider whether the law of unjust enrichment provides an additional basis for the claim, nor whether a claim based on unjust enrichment would lie if the conclusion of the contractual analysis had been that Mr Barton had no right to be paid any remuneration. Given the division of opinion on these points in the Court of Appeal, however, I think it worth saying that in my view the answer to both questions is "no" and that the appellants are correct in their submission that there is no room for an unjust enrichment claim where there is a subsisting contract between the parties.

190. One general reason for this is that a party cannot be said to have been unjustly enriched by the receipt of a benefit to which he or she was legally entitled. Put another way, the existence of a contractual or other legal obligation to confer the benefit necessarily means that the resulting enrichment at the claimant's expense is not unjust. The authorities for this principle were helpfully reviewed in a recent decision of the Court of Appeal: *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, [2022] 1 All ER (Comm) 1244, paras 67-70. I do not think that this reasoning is applicable in the present case, however, since - as Lord Burrows points out at para 202 of his judgment - Mr Barton was not under any obligation to do anything. The contract in this case was a unilateral one concluded when Mr Barton introduced a prospective purchaser at the request and in response to offer of an introduction fee from Foxpace, albeit that he was not obliged to do so.

191. Nevertheless, there is also another broader reason why the existence of a contract precludes a claim based on the law of unjust enrichment. This is that there already exists a system of law for determining what rights and remedies contracting parties have in relation to the subject matter of their contract. It is called the law of contract. In relation to the subject matter of the contract, the law of contract determines, and governs the consequences of, not only the existence but also the absence of an obligation on one contracting party to confer a benefit on the other. To redistribute the allocation of benefits and losses provided for by the law of contract by applying another set of legal principles would undercut this regime.

192. A leading authority in which this point is made is *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161. In that case the House of Lords held that there could be no claim in unjust enrichment to recover unearned hire paid in advance under a charterparty when the charterparty made express contractual provision for repayment of overpaid hire (and, even in the absence of such provision, there would have been an implied obligation to make repayment). It followed, as Lord Goff of Chieveley explained, at p 164, that "the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate".

193. As Lord Goff noted in *The Trident Beauty*, different considerations may arise where the contract is discharged or is shown never to have been binding. So too where work is done under an anticipated contract which never materialises. Even where there is a valid and subsisting contract, questions may arise about the scope of the applicable contractual regime as, for example, where a party performs or claims to have performed services additional to or different from those covered by the contract. In such cases the law of unjust enrichment may have a part to play. But this is not such a case. The service which Mr Barton provided to Foxpace of introducing a purchaser

who bought Nash House was the subject of a binding contract. It is in these circumstances the law of contract which governs whether Mr Barton is entitled to any, and if so what, remuneration for this service. There is no scope for a claim founded on the law of unjust enrichment.

Conclusion

194. As a result of an occurrence which neither party had contemplated - that the purchaser introduced by Mr Barton negotiated a reduction in the initial offer price - Mr Barton lost out on the payment of £1.2 million that he had expected to receive and Foxpace obtained a much higher net sum than it had expected to obtain from the sale. On the assumption (accepted before him) that on the facts found Mr Barton had no contractual claim, the judge felt bound to compound Mr Barton's loss by holding that he was not entitled to be paid anything at all for the valuable service that he supplied and from which Foxpace benefited. In my view, the judge was right to reach that conclusion, unjust as it is, on the arguments presented to him. The assumption on which those arguments were based, however, was wrong. The correct legal analysis, as Davis LJ held in the Court of Appeal, is that this is not a case to which the law of unjust enrichment applies but a case in which Mr Barton was entitled to a reasonable remuneration pursuant to the ordinary obligation implied by law in a contract for the supply of services to pay a reasonable sum where no sum is fixed by the contract.

195. The obligation to pay the amount of £435,000 assessed by the judge still leaves Foxpace in the satisfactory position from its point of view of being significantly better off as a result of the reduction in the sale price to £6 million than it would have been if the property had been sold for £6.5 million. But it averts the injustice of disregarding the basic norm of commerce and contract law that a party who requests and enjoys the benefit of a valuable commercial service must pay for it.

196. For these reasons, I would dismiss the appeal.

LORD BURROWS (dissenting):

1. Introduction

197. This case, on beautifully simple facts, raises some interesting issues on contractual implied terms and on the relationship between the law of contract and the law of unjust enrichment.

198. The central facts can be shortly stated. An oral contract was made between Mr Barton, who was a property dealer and developer, and Foxpace Ltd ("Foxpace"), who owned a property called Nash House which it wanted to sell. The only express terms of that oral contract, as found by the trial judge, were that if Mr Barton introduced to Foxpace a prospective purchaser, who then went ahead and concluded a sale of Nash House for £6.5m, Foxpace would pay Mr Barton £1.2m. That sum of £1.2m represented deposits (and other expenses) that Mr Barton had himself lost on two previous attempts to buy Nash House. The parties did not give any thought to the consequences of a sale under £6.5m. Mr Barton introduced Western UK (Acton) Ltd ("Western") to Foxpace. Western went ahead and bought Nash House. The initially agreed price had been £6.5m but, on learning of a potential issue with the high-speed rail-link HS2, the final purchase price was knocked down to £6m. There is no suggestion of any dishonesty by Foxpace in so doing (ie Foxpace did not lower the price to undermine Mr Barton's claim to £1.2m). As the sale price had been lower than £6.5m, Foxpace refused to pay Mr Barton the £1.2m promised and argued that they were not legally liable to pay him any sum for his services in introducing Western to them (although they did offer him £400,000 as a goodwill gesture which he refused).

199. The trial judge, His Honour Judge Pearce sitting as a Judge of the High Court [2018] EWHC 2426 (Ch), decided that Mr Barton was not legally entitled to any payment for the beneficial services he had rendered to Foxpace. The contract expressly provided only for a payment to Mr Barton (of £1.2m) if the price paid for Nash House was £6.5m. No implied term for reasonable remuneration had been pleaded. And a claim for unjust enrichment, based on free acceptance, could not succeed on these facts because there was a valid contract and any such claim would undermine the contractual allocation of risk. However, had there been such a successful claim for unjust enrichment, the trial judge put a market value of £435,000 on the services rendered to Foxpace by Barton which he would have awarded as restitution.

200. The Court of Appeal (Davis, Asplin and Males LJJ) unanimously reversed that decision: [2019] EWCA Civ 1999, [2020] 2 All ER (Comm) 652. The leading judgment was given by Asplin LJ with whom, in his short concurring judgment, Males LJ agreed. Their reasoning was that Mr Barton was entitled to £435,000 as restitution for unjust enrichment. Both indicated that a possible alternative analysis was that there was a contractual right to reasonable remuneration, comprising the same sum, which Asplin LJ explained might have rested on there being an implied term (of fact). Davis LJ preferred to reason that that sum was payable, not within the law of unjust enrichment, but as reasonable remuneration based on an implied term in the contract. Davis LJ said that there was an implied term because it was "inherent in" the contract (see para 75) that Mr Barton would be reasonably remunerated for successfully introducing a purchaser.

201. The executors of the estate of Mr Gwyn Jones, who was the sole director of Foxpace, now appeal to the Supreme Court and argue that Foxpace has no legal obligation, whether in contract or unjust enrichment, to pay Mr Barton anything. If the appellants are correct the consequence - which at least at first sight seems unattractive - is that Foxpace has obtained from Mr Barton the benefit of requested services worth £435,000 for nothing in return.

202. It is worth stressing at the outset that the oral contract containing the express terms as found by the trial judge was a unilateral contract. Mr Barton was not agreeing or promising to do anything. He could not be sued for breach of contract. The offer of the unilateral contract was made by Foxpace and was accepted by Mr Barton when he provided the name of Western to Foxpace. Foxpace could not then lawfully withdraw from the unilateral contract but, by the express terms of that unilateral contract, Foxpace was only bound to pay Mr Barton the £1.2m if Western went ahead and purchased Nash House for £6.5m.

203. A central issue is whether the contract excluded any legal obligation, whether contractual or non-contractual, that Foxpace might otherwise have had to pay reasonable remuneration to Mr Barton for his beneficial services. In other words, is the correct interpretation of the contract that Barton was not to be paid any reasonable remuneration for the beneficial services rendered should the price of the completed sale not reach £6.5m? In answering that question, it is helpful and important to clarify that there is an ambiguity in describing the contract as an "if, but only if" contract. The judge interpreted the contract as an "if, but only if" contract in the weak sense that the agreed sum of £1.2m was only to be paid if the sale price reached £6.5m ie Mr Barton was not entitled to £1.2m if the sale price was lower than £6.5m. But that interpretation is different from this being an "if, but only if" contract in the strong sense that, if the sale price did not reach £6.5m, the contract was excluding any other obligation to make a payment for Mr Barton's beneficial services. In other words, this strong sense means that if the sale price was less than £6.5m, Mr Barton was not merely not entitled to £1.2m he was also not entitled to any remuneration at all for his beneficial services. In short, reasonable remuneration was being excluded. The judge did not interpret the contract as an "if, but only if" contract in that strong sense.

204. However, logically prior to that exclusion issue is the question whether Mr Barton had any prima facie right (ie a right that applies subject to exclusion) to be paid for his successful services, whether under the law of contract or by reason of the law of unjust enrichment. It should be noted that the right to be paid for services, where that right is not to an agreed specified sum, is the right to a quantum meruit, which means "as much as he deserved" or, as it is commonly expressed in the law of contract, a reasonable remuneration (or a reasonable charge or a reasonable price).

The Latin label, which is a description of the remedy, transcends the boundary between contract and unjust enrichment. That is, on the one hand, there can be a contractual quantum meruit, and, on the other hand, there can be a quantum meruit that effects restitution of an unjust enrichment. That label does not in itself explain whether it is a contract or an unjust enrichment that is triggering the right to a quantum meruit. As Charles Mitchell and Paul Mitchell have stressed, it is unhelpful merely to plead a claim for a quantum meruit (just as it would be unhelpful merely to plead a claim for damages) because such a claim does not clarify the cause of action: see "Recurring Issues in Failure of Basis" [2020] LMCLQ 498, 501-502.

2. Does Mr Barton have a prima facie contractual right to reasonable remuneration?

205. In my view, the answer to this question is "yes". While I accept that Mr Barton is not entitled to contractual reasonable remuneration by way of interpretation or a term implied by fact, I do consider that there was a term implied by law to that effect. It is strongly arguable that this is what Davis LJ had in mind when he referred to there being an implied term "inherent" in the contract. And it is important to note that, at the start of his submissions, Andrew Twigger KC, counsel for the appellants, made clear that he was not going to take any pleading or procedural point as to whether an implied term had been pleaded or had been eschewed at first instance.

206. As a matter of interpretation, which in the modern law requires an objective and contextual approach (see, eg, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173), one cannot here interpret the express terms of the contract as entitling Mr Barton to payment if the sale to Western was at a lower price than £6.5m. The express terms were silent on this issue.

207. There are also difficulties with here implying a right to reasonable remuneration through a term implied by fact. A term implied by fact seeks to reflect the parties' (objective) intentions. The leading case of *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 made clear that one of the two traditional tests for implying a term by fact (the "officious bystander" obviousness test or the "necessary for business efficacy" test) must be satisfied. It is insufficient for a term to be implied by fact that such a term is reasonable and fair: see paras 21 and 23.

208. On these facts, it is problematic to say that an implied term requiring reasonable remuneration was either so obvious that it went without saying or was required to make the contract work. In particular, a relevant feature of the express

terms was that the sum of £1.2m represented Mr Barton's deposits (and expenses) lost in the two previous failed purchases. It was not a sum that reflected the market rate for successfully introducing the purchaser. Had an officious bystander asked what the contractual position would have been if the purchase price did not reach £6.5m, a range of possible answers might have been given by the parties (for example, that a pro-rata amount of £1.2m was payable or that a market rate was payable). And as regards the business efficacy test, the contract could work without dealing with the position of a sale at less than £6.5m: the parties' expectations were that the sale would go through at £6.5m in which case there would have been no problem at all in determining Mr Barton's contractual entitlement.

209. In contrast a term implied by law, whether by statute or by the courts at common law, rests on a wider range of factors than seeking to give effect to the (objective) intentions of the parties. Clearly the Legislature may require such a term to be implied (usually subject to the parties' contrary intention) for various policy reasons. At common law, the courts may imply a term by law where it is considered necessary to the type of contract or relationship in question. In the leading case of *Liverpool City Council v Irwin* [1977] AC 239, such a term was implied by the House of Lords into a contract between a landlord and tenant that the landlord should use reasonable care to keep the common parts of a block of flats in reasonable repair. Other important common law cases include *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 where a term was implied by law into an employment contract that the employer should inform the employee of the right to purchase "added" pension years; and *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20 in which a term of mutual trust and confidence was implied by law into an employment contract. In the last case, Lord Steyn, at p 45, helpfully referred to this type of implied term as a "standardised term implied by law" and said that such implied terms operate as "default rules".

210. At the hearing before us, although this provision was not mentioned in the courts below, Brad Pomfret, counsel for Mr Barton, placed reliance on section 15 of the Supply of Goods and Services Act 1982. In order to understand the context of that section, it is helpful also to set out sections 12(1) and 16.

> "**12. The contracts concerned**
>
> (1) In this Act a 'relevant contract for the supply of a service' means … a contract under which a person ('the supplier') agrees to carry out a service…

…

15. Implied term about consideration

(1) Where, under a relevant contract for the supply of a service, the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge.

(2) What is a reasonable charge is a question of fact.

16. Exclusion of implied terms, etc.

(1) Where a right, duty or liability would arise under a relevant contract for the supply of a service by virtue of this Part of this Act, it may (subject to subsection (2) below and the [Unfair Contract Terms Act 1977]) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.

(2) An express term does not negative a term implied by this Part of this Act unless inconsistent with it.

(3) Nothing in this Part of this Act prejudices—

…

(b) … any rule of law whereby any term not inconsistent with this Part of this Act is to be implied in a relevant contract for the supply of a service.

(4) This Part of this Act has effect subject to any other enactment which defines or restricts the rights, duties or

> liabilities arising in connection with a service of any description."

211. At first blush, one might think that section 15 provides a straightforward solution in our case. While it is not in dispute that there could be no right to payment of a reasonable charge unless the introduction turned out to be successful, there is no difficulty in interpreting the relevant service in section 15 as including a service that must produce a successful outcome. Nevertheless, there are two possible reasons why section 15 may not apply directly to the facts of this case. Mr Twigger relied on them both. The first is that the wording of section 12(1) appears to be confined to a bilateral contract whereby the supplier "agrees to carry out a service". On the facts of this case, as I have made clear at para 202 above, the contract in question was a unilateral contract. Mr Barton was not agreeing to do anything. The second objection is that it might be said that the consideration for the service has been determined by the contract through the express terms so that there is no gap for section 15 to fill.

212. Of these two objections, I am not convinced about the second. While the consideration has been determined by the contract in relation to where the sale of Nash House was for £6.5m, no consideration has been determined by the contract for the services rendered where the sale price did not reach £6.5m. In that sense, there is a gap so that "the consideration for the service is not determined by the contract". Put another way, the consideration for the service has only been partly determined by the contract.

213. However, the first objection has considerable force. Strictly speaking, Mr Barton did not agree to carry out a service. While it is possible to argue that, on a purposive interpretation, those words should be interpreted to include a unilateral contract, such an interpretation goes beyond the natural and ordinary meaning of "agrees to carry out".

214. But even if that first objection holds sway (and indeed, even if contrary to my view, the second objection were thought persuasive), what can certainly be said is that section 15 gives a strong steer to the courts that it is appropriate to imply a term as to reasonable remuneration into such a unilateral contract. And in this respect, it is relevant that this sort of statutory provision has tended to codify what was the position at common law so that there is a close link between the statute and the common law. In deciding on the common law the courts can apply the statute by analogy: see Rupert Cross and Jim Harris, *Precedent in English Law* 4th ed, (1991)), pp 173-177; *Samuels v Davis* [1943] KB 526; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282, 298. On the facts of this case, it surely could not make all the difference whether Mr Barton had, or

had not, undertaken to provide the name of the willing purchaser (Western) to Foxpace. Even accepting that the statute does not apply directly, it is closely analogous to our situation and provides a strong indication that it is appropriate for a term to be implied by law at common law.

215. Turning then to implying a term by law at common law, it would seem clear that, applying *Liverpool City Council v Irwin,* such a term can be implied as being necessary to the type of contract in question. The type of contract might be labelled an introduction or commission contract and it need not matter that the contract is unilateral rather than bilateral. In the relevant sense, it is a necessary feature of that type of contract - ie it is a standardised default term - that the provider of the requested service is paid a reasonable remuneration for a successful introduction. And that can be so even if there is also an express provision for a particular sum to be paid if a particular sale price is reached.

216. Although that was not the overt reasoning in *Firth v Hylane Ltd* [1959] EWCA Civ J0211-3 (vLex), [1959] EGD 212 it is, in my view, the best explanation of the implied term in that case, which was heavily relied on by Mr Pomfret. The claimant, Mr Firth, was an estate agent. Mr Lane was the agent of the defendant company, Hylane Ltd, who wanted to sell a garage and car showroom which it owned. It was agreed by the parties at a meeting, followed by an exchange of letters, that £1,000 commission would be paid to Mr Firth if the property were sold for £35,000 (although subsequently this was reduced to £500 commission for a sale at £34,000). There was no express agreement as to what would happen if there were a sale to a purchaser, introduced by Mr Firth, for less than £35,000 (or £34,000). In the event, the property was sold for £31,000 to a purchaser introduced by Mr Firth. It was held by the Court of Appeal that, while the agreed commission of £1,000 (or subsequently, £500) was not payable because the sale price of £35,000 (or £34,000) had not been realised, Mr Firth was entitled to reasonable remuneration for the requested beneficial services which he had rendered to Hylane Ltd, which was assessed at £450. That entitlement was explained by there being an implied term and that implied term is best analysed as being a term implied by law.

217. Morris LJ said the following:

> "So what was set out in the letters was that Mr Firth was making a note of the fact that Mr Lane had said that he would pay £1,000 commission if Mr Firth introduced somebody who did in fact buy at £35,000. That was a special sum. 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 £1,000 would not be earned unless the sale at £35,000 was effected through Mr Firth. 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. …

[I]t does not seem to me that what was here expressed could exclude what is the ordinary implication if you invite a professional service to be performed, namely, that you will pay for it. Nothing in this document, as it seems to me, could reasonably be taken to involve that, if less than £35,000 were accepted by the company from somebody introduced by Mr Firth and a sale were effected, Mr Firth was to go without any remuneration at all." (Transcript, pp 4-5)

218. Similarly, Pearce LJ said the following:

"The Plaintiff was an estate agent. The Defendant was the owner of property, and the Defendant was instructing the Plaintiff to find a purchaser. It is argued that because an optimistic price was referred to and the remuneration in that event was to be unusually high, including something in the nature of a bonus, it was therefore intended that if the optimistic price was not reached, and the bonus was not earned, the Plaintiff was to get nothing. That would be a result which, in my view, is completely contrary to the normal expectations in such an employment. There is nothing inconsistent in paying a bonus in certain events and yet

> allowing a normal remuneration if the bonus is not earned. I think the learned judge was right in implying a term for reasonable remuneration." (Transcript, p 14)

219. It is true that the contracts of estate agents have traditionally given rise to difficult questions as to when an estate agent is entitled to commission and that the courts have indicated that one cannot generalise, which may be thought to count against the idea that, in an introduction or commission contract, there can be an implied term by law as to reasonable remuneration: see, eg, *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, especially at pp 120 and 124 – 125. But it is tolerably clear that, subject to express terms to the contrary, a starting point – and this can readily be explained by reason of there being a term implied by law - is that an estate agent is entitled to reasonable remuneration/commission for introducing a purchaser who completes the sale: see, eg, *Dennis Reed Ltd v Goody* [1950] 2 KB 277, 284 (per Denning LJ), approved in *Devani v Wells* [2019] UKSC 4, [2020] AC 129, at para 23. And although Mr Barton was not an estate agent one can say the same more generally about there being a term implied by law as to reasonable remuneration for a requested successful introduction in an introduction or commission contract.

220. It is my view, therefore, that, in this case, there was a term implied by law at common law prima facie entitling Mr Barton to reasonable remuneration (ie to a contractual quantum meruit). Such a term is necessary to the type of contract in question (a commission or introduction contract including a unilateral contract). Even accepting that section 15 of the Supply of Goods and Services Act 1982 may not apply directly to a unilateral contract, the close analogy to that statutory provision reinforces the point that here there should be such a term implied by law at common law.

3. Has the term as to reasonable remuneration, implied by law, been excluded?

221. I here return to the important question raised in para 203 above. An implied term (including one implied by law) may be excluded (whether by an express exclusion clause or, more generally, by the express terms being inconsistent with there being the implied term). And see, by analogy, section 16(1)-(2) of the Supply of Goods and Services Act 1982 which has been set out at para 210 above. On these facts one might argue that the express terms of the contract were indeed excluding a term implied by law which would otherwise give Mr Barton a contractual right to reasonable remuneration. That is, one can argue, and Mr Twigger submitted, that this was an "if, but only if" contract in the strong sense that what the express terms meant, on their true interpretation, was that Mr Barton would be paid nothing unless the sale price to Western was £6.5m.

222. Several linked factors may be put forward to support such an interpretation. First, it might be said that the sum of £1.2m was a special sum reflecting the deposits (and expenses) Mr Barton had lost on the two previous failed sales. It might be argued that such a high sum meant that this was a high reward, high risk contract for Mr Barton. Secondly, it might be said that Mr Barton was a gambling risk-taker who was risking being paid nothing in the expectation that the sale would go through at the high price of £6.5m thereby triggering the promise to pay £1.2m. Thirdly, it can be argued that, by not expressly providing for any remuneration if the price did not reach £6.5m, the parties objectively intended that, if there were a sale at less than £6.5m, the loss would lie where it falls.

223. In terms of past authority supporting such an interpretation, Mr Twigger submitted that the contract here was equivalent to that in the old case of *Cutter v Powell* (1795) 6 Term Rep 320. There the administratrix of a crew member, who died before the ship on which he was second mate reached Liverpool from Jamaica, was held unable to recover anything for the value of the services over several weeks that the deceased had performed before his death. This was because, on the reasoning of Lord Kenyon CJ and Grose J, there was a very high remuneration promised for full performance designed as an incentive for crew members to ensure that the ship reached Liverpool and to rule out any remuneration for part performance. Mr Twigger also relied on *Howard Houlder & Partners Ltd v Manx Isles Steamship Co* [1923] 1 KB 110. There, in a written contract between a shipowner and a chartering broker, the broker was entitled to a 5% commission for the chartering of a ship and 3.5% if the ship were sold to the charterer for £125,000. After some nine months of the charterparty, the owner sold the ship to the charterer without the involvement of the broker for £65,000. It was held that the broker was not entitled to any commission on that sale.

224. I am wholly unconvinced by those arguments. As Asplin LJ made clear at para 32, the best interpretation of what the judge decided - and he was correct to do so - was that this was not an “if, but only if” contract in the strong sense. The contract fixed a price based on Barton recouping his lost deposits (and expenses) but the parties were never concerned, subjectively or objectively, to preclude reasonable remuneration for the requested beneficial services rendered. The judge himself did not take the strong sense interpretation of “if, but only if” because he made clear (see paras 187-189) that Barton and Foxpace had never contemplated what should happen if the £6.5m price was not achieved. That is, Barton and Foxpace had simply never thought about what would happen if the price did not reach £6.5m. The silence of the contract did not mean that the loss lay where it fell. Rather it meant that the default law, embodied in the term implied by law, applied. This was not a case where the parties fixed a higher than usual rate of commission in order to encourage Mr Barton to find a purchaser who would pay a particularly high price: the sum of £1.2m was

chosen because it represented recoupment of what Mr Barton had previously lost and it was not chosen, as against other rates of commission, as a high incentivising rate. *Cutter v Powell* was, therefore, far removed from the facts of this case. In any event, it is likely that that case would not be decided in the same way today following the enactment of the Law Reform (Frustrated Contacts) Act 1943. That would turn on whether, under section 2(3) of the 1943 Act, the parties had contracted out of the statutory regime providing for restitution of the value of the services: see *Goff & Jones, The Law of Unjust Enrichment* eds Mitchell, Mitchell and Watterson, 10th ed (2022) ("*Goff & Jones"*), paras 15-52 – 15-59. The *Howard Holder* case is also distinguishable because McCardie J interpreted the written contract as an "if but only if" contract in the strong sense; and, in any event, although McCardie J did not see his decision as turning on this, the broker had not performed relevant services for the owner in relation to the sale.

225. The correct view is that the contract did not exclude, and was consistent with, a term implied by law giving Barton reasonable remuneration for his services. Put another way, the default position, embodied in the term implied by law, of a reasonable remuneration being payable for the requested successful services rendered, was not ousted by the express terms of the contract.

4. Does Mr Barton have a prima facie right to a restitutionary quantum meruit to reverse unjust enrichment (assuming no contract term implied by law for reasonable remuneration)?

226. In the light of my decision that there was a contract term implied by law entitling Barton to reasonable remuneration, there is no need to go on to consider the possibility of a claim in unjust enrichment. Indeed, it would appear that the existence of the implied contractual right to payment for the conferral of the requested beneficial services, under what is a valid enforceable contract that has not been terminated or rescinded, rules out a claim in unjust enrichment for restitution of the value of those services. In other words, there can here be no concurrent unjust enrichment claim: the implied contractual term ousts unjust enrichment. For a helpful general discussion of the interrelationship between contract and unjust enrichment, putting forward the idea that contract is a justifying ground which can nullify what would otherwise be a right to restitution, see, eg, *Goff & Jones*, paras 1-14 – 1-17, 3-12 – 3-27. However, on these facts, the position is not quite as straightforward as in a standard situation where a contractual obligation ousts unjust enrichment. This is for two reasons. The first is that the relevant contractual obligation to pay the reasonable remuneration has been implied by law rather than resting on the parties' intentions so that it may be thought artificial to say that the parties have themselves allocated the risks involved. The second is that Mr Barton had no contractual obligation to confer

the services (ie this was a unilateral contract) so that one cannot directly apply the general rule that an enrichment is not unjust if the benefit was owed to the defendant under a valid contractual, statutory or other legal obligation (see for that general rule, *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, [2022] 1 All ER (Comm) 1244 at paras 67-71). Nevertheless, and despite those complications, I am content to accept that Mr Barton's subsisting contractual right to payment of reasonable remuneration by reason of the term implied by law rules out a claim for restitution of an unjust enrichment.

227. However, had I decided that there was no contract term for reasonable remuneration implied by law, I would have reached the same conclusion, that Mr Barton was entitled to a quantum meruit comprising the market value of the services, by application of the law of unjust enrichment. Although this is not always the case, on these facts it is not in dispute that the reasonable remuneration (ie the quantum meruit) in contract and the quantum meruit in unjust enrichment would give Mr Barton the same sum (and that sum is £435,000). As unjust enrichment was the primary ground for the decision of the Court of Appeal and was fully argued before us, it will be helpful to look at the issues (albeit relatively briefly) through the lens of unjust enrichment.

228. It is now well-established (see, eg, *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938, para 10; *Investment Trust Companies v Revenue and Customs Comrs* [2017] UKSC 29; [2018] AC 275, paras 24, 39-42; *Samsoondar v Capital Insurance Ltd* [2020] UKPC 33, [2021] 2 All ER 1105, paras 18-20; and *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, [2022] 1 All ER (Comm) 1244), paras 51-63) that a claim in the law of unjust enrichment has three central elements which the claimant must prove: that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment at the claimant's expense was unjust (ie that there is an "unjust factor"). If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence, such as change of position.

229. Here the first two elements are not in dispute. Foxpace has been enriched by the value of Mr Barton's requested services; and that enrichment was at Mr Barton's expense because he rendered those services directly to Foxpace. It has also not been suggested that Foxpace has any defence to an unjust enrichment claim. However, what is disputed is whether there was any unjust factor. Although the majority of the Court of Appeal based its decision primarily on unjust enrichment, neither Asplin LJ nor Males LJ articulated the unjust factor. Free acceptance (which was treated as the unjust factor by the trial judge) was mooted but was noted to be controversial. Asplin LJ said this at para 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."

230. In my view, free acceptance is not an unjust factor in English law. It appears that past authorities supposedly embracing free acceptance as an unjust factor are better explained as examples of different unjust factors, in particular failure of consideration. And in terms of principle, free acceptance is flawed as an unjust factor because it entails giving restitution to a risk-taker. The objection to free acceptance as an unjust factor was well-put by William Day and Graham Virgo in their note on the Court of Appeal decision in this case, "Risks on the contract/unjust enrichment borderline" (2020) 136 LQR 349 at 354:

> "The problem with free acceptance is that it is a watered-down version of a claim for failure of consideration (or failure of a mutual basis for the transfer), which is a long established ground for restitution that does not undermine the allocation of risk between parties to a contract. The dilution arises because failure of consideration requires the claimant's condition for conferring the benefit to be *shared* by the defendant. For free acceptance, however, it suffices that the defendant is merely *aware* that the claimant expects to receive a quid pro quo for the benefit. Because the claimant need not have secured the defendant's agreement to that exchange, it follows that free acceptance rewards risk-taking… Thus, rather than respecting the parties' autonomy, free acceptance cuts across it."

231. However, if one puts to one side free acceptance, as Asplin LJ did, is there an unjust factor on these facts and what is it? In my view, the unjust factor here is what has traditionally been called failure of consideration but is now often referred to as failure of condition or failure of basis. The terminology of failure of consideration invites confusion with consideration as a requirement for the formation of a contract; and failure of condition may also cause confusion because the word "condition" is

used in many different senses in the law. Provided it is borne in mind that failure of basis is referring to an objective basis, it is my view, in line with *Goff & Jones*, paras 12-10 – 12-15 and with what several other judges have said (see, eg, Lord Toulson, giving the leading judgment, in *Barnes v Eastenders Cash & Carry Plc* [2014] UKSC 26, [2015] AC 1, para 105, and Carr LJ in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, [2022] 1 All ER (Comm) 1244, paras 77-80) that failure of basis is the most appropriate terminology which should be adopted in future. However, that terminological shift makes no difference to the substantive law.

232. A definition of failure of consideration or, as I would now say, failure of basis was helpfully given by Peter Birks in *An Introduction to the Law of Restitution* (revised ed, 1989) p 223 and has since been cited with approval by Toulson LJ, with whom Black LJ and Laws LJ agreed, in *Sharma* v *Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch 23 at para 24 (and see, similarly, Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516, at para 104). That definition is that failure of consideration or basis 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." Although that definition focuses on the restitution of money, it applies equally to the restitution of the value of other benefits, including services. Identifying the basis is a matter for objective interpretation.

233. On the facts of this case, there has been a relevant failure of basis. Mr Barton rendered the beneficial services to Foxpace on the basis, objectively shared with Foxpace, that he would be paid £1.2m for those services if Nash House was sold to Western for £6.5m. That basis failed (in Birks' words, the basis failed to materialise) when the sale to Western was for a price lower than £6.5m so that Mr Barton was not entitled to, and was not paid, the promised £1.2m. It is this failure of basis that supplies the unjust factor that Asplin LJ left unclear having (correctly) put to one side free acceptance.

234. Mr Pomfret put forward a very similar analysis of the failure of basis when he submitted as follows:

> "Mr Barton did not promise that Western would pay £6.5 million for Nash House, the parties merely assumed that would be the purchase price. The trial Judge found as a fact at [189] that the parties shared that assumption in that they each simply did not consider a lower sale price. As in *Roxborough* and *Barnes*, that was a factor that was outside of either party's complete control. When it failed to materialise,

> their shared assumption … failed. Again, the right to restitution follows, as it did in *Barnes* and *Roxborough*."

235. With respect, Mr Twigger did not answer this submission when, in supposed refutation, he pointed to the findings of the judge at paras 189 and 195 to the effect that neither party contemplated anything else happening other than a sale at £6.5m. Rather than supporting Mr Twigger's submission, those findings directly support the contrary position which is the analysis of failure of basis that I have set out above. We are not here talking about a shared expectation that Mr Barton would be paid reasonable remuneration if the sale price was less than £6.5m. What we are here talking about is a failure of the basis on which they were operating when Mr Barton introduced Western and Foxpace accepted that introduction. That shared objective basis was that there would be a sale to Western at £6.5m on which the promise to pay £1.2m rested: Mr Barton and Foxpace contemplated nothing else. It was that basis which failed.

236. In my view, therefore, if there had been no contractual implied term by law for reasonable remuneration, Mr Barton would have had a prima facie right to a quantum meruit in the law of unjust enrichment where the unjust factor was the failure of basis that I have explained.

5. Would such a restitutionary quantum meruit to reverse unjust enrichment have been excluded (assuming no contract term implied by law for reasonable remuneration)?

237. On the assumption that there was no term implied by law for reasonable remuneration, the only remaining question for the unjust enrichment analysis is whether restitution for unjust enrichment was otherwise contractually excluded. Clearly restitution for unjust enrichment may be contractually excluded by the parties (whether by an express exclusion clause or, more generally, by inconsistent contractual terms): see, eg, *Pan Ocean Shipping Co Ltd v Creditcorp Ltd, The Trident Beauty* [1994] 1 WLR 161, 164; *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930, [2012] QB 244, paras 23 -35; *Goff & Jones*, paras 3-28 – 3-38. The parties' own allocation of risk can override the law of unjust enrichment that would be imposed if there were no such exclusion. If the unilateral contract was an "if, but only if" contract in the strong sense, restitution for unjust enrichment would have been excluded.

238. However, for essentially the same reasons as have been set out in para 224 above in relation to the term implied by law not being excluded (which I shall not now repeat), restitution for unjust enrichment has also not been excluded. This was not an

"if, but only if" contract in the strong sense that any other obligation to pay a quantum meruit was excluded.

239. With respect, therefore, I disagree with the central thrust of the note by William Day and Graham Virgo on the Court of Appeal decision in this case (referred to at para 230 above). I do not accept that the silence in the contract, as to what would happen where the price did not reach £6.5m, meant that the loss should lie where it fell. Rather the silence in the contract meant that any default law should apply; and here there is the default law of unjust enrichment. Nor do I accept that there is any inconsistency here between the express terms of the contract and the law of unjust enrichment. On the assumption on which I have been working in going on to look at the law of unjust enrichment (ie that there was no term implied by law that reasonable remuneration was payable), the contract simply did not provide for what was to happen where the contract price was less than £6.5m: the contract (even if regarded as subsisting) has "run out" and there is no good reason to stop unjust enrichment stepping in.

240. My conclusion is that if, contrary to my view, there was no contract term implied by law entitling Mr Barton to reasonable remuneration, he would have been entitled to the same sum as a restitutionary quantum meruit measured by the market value of the services in the law of unjust enrichment. In that sense, restitution for unjust enrichment was an alternative claim on these facts.

6. Conclusion

241. In summary, it is my view that:

(i) There was a term implied by law into the unilateral contract made between Foxpace and Mr Barton that Mr Barton would be paid reasonable remuneration by Foxpace if he successfully introduced the buyer of Nash House to Foxpace. Even if section 15 of the Supply of Goods and Services Act 1982 does not directly apply (because the contract was unilateral), that term is implied by law at common law as being necessary to the particular type of contract (whether one describes that as an introduction or commission contract); and that common law analysis is supported by the close analogy to section 15.

(ii) The express terms of the unilateral contract, for payment of £1.2m if the purchase price of Nash House was £6.5m, did not exclude, and were not inconsistent with, that implied term.

(iii) Had there been no such implied term, the same result would have been reached in the law of unjust enrichment with the unjust factor being failure of basis.

242. For these reasons, my view is that the appeal should be dismissed.