IMPLIED TERMS AND COMMISSION AGREEMENTS

Mr Barton wanted to purchase Nash House, a commercial property, from Foxpace. He made two attempts to do so, but both transactions fell through. As a result, Barton lost £1.2m in forfeited deposits. Barton and Foxpace then agreed that if Barton introduced a purchaser who bought Nash House for £6.5m, Foxpace would pay Barton £1.2m. Barton subsequently found a purchaser who agreed to pay Foxpace £6.5m, but during the conveyancing process potential problems developing the land were discovered. Consequently, Foxpace agreed to reduce the price, and Nash House sold for £6 million. Was Barton entitled to payment, and, if so, how much?

This case, on "beautifully simple facts" (*Barton v Morris* [2023] UKSC 3, [2023] A.C. 684 at [197] per Lord Burrows), elicited a range of views from the senior judiciary. At first instance, H.H.J. Pearce held that Barton could not recover anything, since the property had not sold for £6.5m ([2018] EWHC 2426 (Ch)). The Court of Appeal unanimously allowed the appeal ([2019] EWCA Civ 1999, [2020] 2 All E.R. (Comm) 652). Asplin L.J. and Males L.J. held that Barton should be paid a reasonable sum for the services provided (established at trial to be £435,000) on the basis of unjust enrichment, whilst Davis L.J. preferred an analysis based on a term implied in fact. In the Supreme Court, a bare majority reinstated the decision of the trial judge (Lady Rose, with whom Lord Briggs and Lord Stephens agreed). The minority judges, Lord Leggatt and Lord Burrows, would have allowed Barton to recover £435,000 on the basis of a term implied at law. Lord Burrows alone would have allowed Barton to succeed in unjust enrichment if no term could be implied.

The contract between Barton and Foxpace was wholly oral, and it was difficult to establish the terms of the agreement. At trial, H.H.J. Pearce accepted the case of neither Foxpace nor Barton. He held that the only express term agreed was that Foxpace would pay £1.2m to Barton if the latter introduced a purchaser who bought Nash House for £6.5m. The judge found that the parties simply did not turn their minds to what should happen if the property sold for less than £6.5m. The interpretation of an oral contract is (unlike a written contract) a question of fact, and there was no appeal from the judge's finding concerning this express term.

That express term could be understood in either a “strong” or “weak” sense (at [203] per Lord Burrows). The former would mean that Foxpace only had to pay Barton *anything* if the property sold for £6.5m. The latter that Foxpace only had to pay Barton *£1.2m* if the property sold for £6.5m – but that would not exclude an obligation to pay an alternative sum if the sale price was lower.

The majority favoured the “strong” sense. Lady Rose concluded that in return for the chance of receiving a very high rate of commission, Barton ran the risk of not receiving anything if the property sold for less than £6.5m (relying on the notorious decision of *Cutter v Powell* (1795) 6 Term Rep 320; but that decision was on very different facts and has been much-misunderstood: see e.g. Lord Leggatt at [180]-[181]; see too Lord Burrows at [223]-[224]). There was no scope to imply a term either in fact or at law that Barton would be remunerated if the sale price was below £6.5m: to do so would be inconsistent with the express term.

That conclusion was powerfully rejected by the minority. Silence as to what should happen if a sale price of £6.5m was not achieved did not mean that the risk of non-payment had been allocated to Barton. Rather, the parties had not turned their minds to this scenario, which did leave room to imply a term regarding alternative payment. The facts of *Barton* bear a striking resemblance to those of *Firth v Hylane Ltd* [1959] EWCA Civ J0211-3 (vLex), [1959] E.G.D. 212. That case concerned also the sale of property. It was agreed that Hylane would pay a (very high) commission of £1,000 if the property was sold for £35,000 to a buyer introduced by Firth. The property was sold for £31,000. Hylane argued that it should not have to pay any commission since the sale price of £35,000 was not attained. But, as Morris L.J. put it (cited in *Barton* at [61] and [217]): “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 majority’s sidelining of *Firth* on the basis that it concerned an auction and the authority of an agent is unconvincing: the basic structure of *Firth* is mirrored in *Barton*. That Foxpace offered Barton £400,000 as a “goodwill gesture” following the sale of Nash House (which Barton unwisely rejected) indicates that Foxpace itself probably expected to pay Barton in the circumstances which arose.

The parties’ expectation of payment should have been given effect through an implied term. Neither party argued for an implied term at trial, which

made it difficult to imply a term in fact (although the majority judgment perhaps quietly rehabilitates *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1998; contrast Lord Leggatt at [154] and *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742). The burden was on Barton to show that a term implied in fact was necessary. By contrast, if there were, presumptively, a term implied at law into in the contract – as one instance of a general type – then the burden would shift to Foxpace to negative that implied term. It is suggested that Lord Leggatt and Lord Burrows convincingly demonstrated that, in the commercial context, commission or introducer agreements do ordinarily contain a term implied at law that a reasonable sum must be paid if one party introduces to the other a purchaser and the sale goes through. (This is probably implied at common law, although it is arguable that such a term is implied under section 15 of the Supply of Goods and Services Act 1982: see Lord Leggatt at [142], but compare Lady Rose at [41] and Lord Burrows at [213]). The issue then is whether, on the facts of *Barton*, that term was displaced by the parties. The majority thought the express term of the agreement permitted no further implied term. It is clearly right that, in the event of a sale at £6.5m, any implied obligation to pay a reasonable sum was negatived by the express term. But it is difficult to accept that the implied obligation was displaced in circumstances where the property sold for less than £6.5m: since neither Foxpace nor Barton contemplated such a scenario, and the contract was silent about what should happen in such circumstances, it is hard to understand how the usual term implied at law was displaced (cf. *Firth v Hylane*, above).

The judgments also tackle the thorny question of when a claim in unjust enrichment will be possible in a contractual setting. Only Lord Burrows thought it was possible for Barton to recover in unjust enrichment if there were no implied term. Yet a decision not to imply a term also indicates that the parties did not operate on a shared basis that there should be payment if the property failed to sell for £6.5m, so no claim grounded upon "failure of basis" could succeed. As Lord Leggatt pointed out (at [191]) "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".

Although 3 out of 5 judges in the Supreme Court held that Barton should be unable to recover anything, 5 out of the 9 judges who heard the case held that he should be paid a reasonable sum: £435,000. It is suggested that this would have been the preferable outcome. It is unsatisfactory for a commercial party

not to pay for the services rendered by another commercial actor. It is entirely proper to hold parties to their bad bargains, but it is important first to establish clearly what that bargain is. The bargain consists not only of express terms, but also implied terms. After all, "life is too short to negotiate contract terms designed to cover every contingency that may occur" (per Lord Leggatt at [127]).

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