Speaking Silence?: Barton v Morris [2023] UKSC 3

1.On 25 January 2023, judgment was handed down by the UK Supreme Court in *Barton and others v Morris and another in place of Gwyn Jones (deceased)* [2023] UKSC 3. The case asks a deceptively simple question: where the seller of a property agrees to pay somebody a fee for introducing a buyer if the property is sold to that buyer for a certain sum, and the property is sold to that buyer for less than that sum, can the law fill the gap so that the introducer is entitled to reasonable remuneration for his services?

2. By a 3-2 majority, the Supreme Court concluded that the loss is to lie where it falls and Mr Barton is to receive nothing. The case is an important one for the scope of the implication of terms in contract and claims in unjust enrichment and the intersection between the two. It also illustrates, between the leading judgment of Lady Rose (with whom Lords Briggs and Stephens agreed) and the dissenting judgments of Lords Leggatt and Burrows, how judges of the highest court in the land, even in apparently familiar legal territory, can find themselves both at different destinations and fundamentally different starting points.

The Facts

3. The facts are, as Lord Burrows put it, "*beautifully simple*" [197]. Foxpace was the owner of Nash House and wished to sell it. Following two previous attempts by Mr Barton to purchase the property, in which he incurred costs and lost deposits in the sum of £1.2 million, he found a prospective buyer willing to pay £6.5 million for it.

4. Mr Barton proposed to Foxpace that he introduce the prospective buyer to Foxpace and that the latter pay him £1.2 million as an introduction fee. The proposed fee of £1.2 million was based on the sums Mr Barton had lost in his previous aborted attempts to purchase Nash House. On the findings of the trial judge, HHJ Pearce (sitting as a High Court Judge), Mr Barton and Foxpace then entered an oral agreement in which Foxpace agreed to 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.

5. Mr Barton went on to put the prospective buyer he had in mind in touch with Foxpace. The prospective buyer offered £6.5 million as expected, but the price was ultimately renegotiated when a potential issue with the HS2 rail link was discovered. A price of £6 million was finally agreed. Mr Barton requested £1.2 million and Foxpace refused to pay it. Mr Barton rejected the goodwill gesture payment of £400,000 which Foxpace offered to pay him instead.

The decisions of the High Court and Court of Appeal

6. The trial judge found that Foxpace was not obliged to pay Mr Barton anything because the purchaser Mr Barton introduced had paid an agreed price of less than £6.5 million and the contract was silent on the question of Mr Barton's remuneration in that situation. The argument that there was an implied term which could come to Mr Barton's aid was not pursued at first instance. Foxpace was found to have been enriched at Mr Barton's expense in the amount of £435,000, but the judge concluded that that enrichment was not unjust because otherwise the terms of the contract would be undermined. Mr Barton's claim therefore failed.

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7. The Court of Appeal unanimously allowed the appeal and held that Mr Barton was entitled to £435,000, the sum assessed as being reasonable remuneration for Mr Barton's services by the trial judge. Asplin and Males LJJ's reasoning was that the judge was wrong to decide that a claim in unjust enrichment would undermine the terms of the parties' contract because the contract was merely silent on the question of what would happen if a sale price of less than £6.5 million was achieved. Asplin LJ thought that, alternatively, £435,000 might be payable to Mr Barton on the basis of an implied term that that is what he would receive where he introduced Foxpace to a buyer, whatever the price achieved. Davis LJ agreed with Asplin and Males LJJ as to the outcome but preferred the implied term analysis.

The decision of the majority in the Supreme Court

8. Lady Rose (with whom Lord Briggs and Lord Stephens agreed) gave the leading judgment in the Supreme Court. The majority allowed the appeal, holding that:

a. The contract between Mr Barton and Foxpace did not contain an implied term that Mr Barton would be paid a reasonable fee if he introduced a purchaser who paid less than £6.5 million, either under section 15 of the Supply of Goods and Services Act 1982 or at common law; and

b. The claim in unjust enrichment fails because there was no failure of basis, and such a claim is excluded by the terms of the contract in any event.

9. On the question of whether a term could be implied on the basis of business efficacy and/or that it was so obvious as to go without saying (as per the test in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72), Lady Rose found that such a term would contradict the express terms of the contract [24]. The parties had agreed that Mr Barton would be paid £1.2 million if a sale price of £6.5 million was achieved, and even though the words "*if, and only if*" were absent from what was agreed according to the trial judge, the effect of what the parties agreed was that Mr Barton would only be paid if the contractually agreed "trigger" for payment occurred [26].

10. Lady Rose also found that the implied term contended for by Mr Barton was not necessary to give business efficacy to the contract because an implied term that Foxpace would not in bad faith negotiate a lower sale price to avoid paying Mr Barton £1.2 million would be all that is necessary to avoid the commercially odd result that a small reduction in the sale price would deprive Mr Barton of his fee [31]-[32].

11. Further, there is nothing uncommercial about a party agreeing to receive a higher payment than usual if a condition is fulfilled while taking the risk that he will receive nothing if that condition is not fulfilled [35]. Lady Rose went further, concluding that the agreement would have been uncommercial if it were otherwise because it would have involved Mr Barton having his cake and eating it: Foxpace would have agreed to pay him an inflated fee if the sale price was £6.5 million and a reasonable fee if the sale price was less than that [37].

12. Lady Rose went on to dismiss Mr Barton's argument that section 15 of the Supply of Goods and Services Act 1982 applies so as to imply into the contract a term that Mr Barton is to be paid a reasonable fee for his services. That was on the basis that the contract dealt expressly with remuneration and so section 15 had no application, but it was also said to be "*doubtful*" whether the contract was a "*relevant contract*" within the meaning of section 15. The contract was unilateral and was brought into existence by Mr Barton providing his service; it was not a contract under which he agreed to carry out a service because he was under no obligation to do so [41].

13. It was also held that the term contended for was not implied into the contract at common law on the basis that the contract was of a particular type. Mr Barton relied on cases which held that there is an implied term that a

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reasonable fee will be paid to an estate agent for introducing a purchaser to the seller, including *Devani v Wells* [2019] UKSC 4 and *Firth v Hylane Ltd* [1959] EWCA Civ J0211-3 (vLex).

14. Lady Rose decided that Mr Barton could not rely on the estate agent cases to that end because (i) Mr Barton was not an estate agent, (ii) his role as introducer in this case was a one-off (he was not in the business of introducing buyers to sellers) and (iii) the agreed fee of £1.2 million was not based on the sort of efforts or costs an estate agent might make or incur in making an introduction, being several times the reasonable commercial fee for doing so and calculated so that Mr Barton could have a chance of recovering his previous wasted expenditure [69]-[76].

15. As for the claim in unjust enrichment, Mr Barton argued that the failed basis was that Nash House would be purchased for £6.5 million and that it was the parties' common assumption that that is what would happen. Lady Rose rejected that argument on the basis that the most that could be said is that the parties simply did not discuss the possibility that Nash House would sell for any less than £6.5 million or provide for it in the contract [87]. In any event, her Ladyship concluded that the claim in unjust enrichment fails because there was an agreed contractual obligation on Foxpace to pay in certain circumstances which necessarily excluded any obligation to pay in the absence of those circumstances [96].

The dissenting judgments

16. Lords Leggatt and Burrows gave separate and developed dissenting judgments. Their Lordships were both agreed that a term is to be implied at common law that Mr Barton is entitled to reasonable remuneration if the sale price achieved for Nash House on the basis of Mr Barton's introduction was less than £6.5 million as an incidence of the type of contract the parties entered. Lord Leggatt, however, concluded that had he been wrong about that he would have held that the claim in unjust enrichment fails, while Lord Burrows concluded that unjust enrichment would have stepped in to Mr Barton's rescue to fill the gap left open by the contract if the implied term had not done so.

The judgment of Lord Leggatt

17. Lord Leggatt evidently believed that the majority had begun their analysis at the wrong place. The default position is that Foxpace was obliged to pay Mr Barton a reasonable remuneration for his services under an implied term at law unless it can be shown that the parties expressly agreed otherwise, not that nothing was said by the parties and so nothing was payable [136].

18. Lord Leggatt decided that section 15 of the 1982 Act applies to this contract because the words "*agrees to carry out a service*" in section 12(1) include unilateral and bilateral contracts for services, and that even if that is wrong, a term as to reasonable remuneration is implied under common law. As a matter of common law, the default position is that (following *Devani v Wells*) a seller is liable to pay an introducer a fee on completion of a sale to a buyer, and it does not matter that Mr Barton was not an estate agent because it is sufficient that he was introducing a prospective purchaser to Foxpace with a view to being paid for doing so [158]-[160].

19. As to whether the implied term as to reasonable remuneration was negatived by the express term as to the obligation to pay £1.2 million if the property was sold for £6.5 million or more, Lord Leggatt decided the answer was 'no'. His Lordship concluded that while it was reasonable to infer that the parties did not intend that Mr Barton should receive £1.2 million whatever the sale price (since otherwise their express reference to the figure of £6.5 million would serve no purpose), it was not a reasonable inference based on what they agreed that Mr Barton should receive nothing if the sale price was less than £6.5 million [173]-[174]. Further, Mr Barton would never have undertaken the risk of receiving nothing if there was a very small reduction in the purchase price due to matters

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outside his control [181].

20. Lord Leggatt rejected the unjust enrichment claim on the basis that it is precluded by the existence of a contract. The law of contract, his Lordship said, determines "*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*" [191].

The judgment of Lord Burrows

21. Lord Burrows rejected the argument that the term contended for by Mr Barton could be implied by fact under *Marks and Spencer* [208] (in common with the other justices). His Lordship was also unconvinced that section 15 of the 1982 Act alone provided the answer [213]. The term could however be implied as necessary to the type of contract in question for reasons almost identical with those given by Lord Leggatt: the estate agent cases apply to that effect even though Mr Barton was not an estate agent because the position is the same where there has been a "*requested successful introduction in an introduction or commission contract*" [219]. His Lordship also found, in common with Lord Leggatt, that the express terms of the contract did not exclude the implied term because the contract was merely silent on what should happen if a sale price of £6.5 million was not achieved [224].

22. Where Lord Burrows diverges from Lord Leggatt is in his treatment of the unjust enrichment claim (which he also went on to consider although it was not strictly necessary given his decision on the implied term issue). Lord Burrows concluded that, had he decided that there was no contract term for reasonable remuneration implied by law, he would have decided that Mr Barton was entitled to reasonable remuneration under the law of unjust enrichment because:

a. There was an unjust factor in the form of failure of basis: Mr Barton rendered beneficial services to Foxpace on the basis (which was objectively shared with Foxpace) that he would be paid £1.2 million for those services if the property was sold for £6.5 million. That basis failed to materialise as the property was sold for less than £6.5 million [226]-[236].

b. A restitutionary quantum meruit to reverse unjust enrichment was not excluded by the contract (assuming there was no implied term as to reasonable remuneration) because the contract was merely silent on remuneration in the event that the property was sold for less than £6.5 million [237]-[240].

Conclusion

23. The reasoning of the majority and the reasoning of the minority begin and end, in essence, with simple (and starkly different) propositions. The majority view is that silence in the contract about what should happen if the property was sold for less than £6.5 million cannot be filled without overriding what the parties expressly agreed. The minority view is that silence in the contract demonstrates that the parties were not excluding the default position at common law about what should happen if the property was sold for less than £6.5 million. In other words, the majority view was that, at least in this contract, silence speaks volumes. The minority view was that silence is not really silence at all.

24. That difference in approach might be explained by two different ideological strands in the law of contract. The majority view might be said to be in the tradition of the conservative non-interventionist, who is literalist and wary of inadvertently rewriting the parties' bargain. The minority view might be said to be in the tradition of the pragmatist, who starts from the position that parties contract against the background of commercial norms and expectations and that the literal word of a bargain is not the end of the matter. Far from settling that perennial

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debate, *Barton v Morris* shows that it is alive and well.

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