SELBORNE CHAMBERS

Contract: The Consequences of Saying Nothing

The decision of the Supreme Court in Barton v Morris and another (in place of Gwyn Jones, dead) [2023] UKSC 3 contains an interesting analysis of the extent to which terms can be implied into a contract.

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The Facts

Mr Barton sought to buy a property ("Nash House") from Foxpace Ltd ("Foxpace"). On two separate occasions he, or a company he controlled, entered into an agreement to purchase the property from Foxpace. On both occasions the deposit was paid but the remaining money for completion was not. On both occasions Foxpace rescinded the agreement. Mr Barton accordingly incurred wasted expenditure of about £1.2m.

In order to try to recover his £1.2m Mr Barton made an oral agreement with a Mr Rooke acting for Foxpace. The agreement was a unilateral contract under which: "*Foxpace was liable to pay Mr Barton the sum of £1.2m in the event that Nash House was sold to a purchaser introduced by Mr Barton for the sum £6.5m*" (as found at first instance). That was the full extent of the agreement. Further, there was not even a discussion as to what would happen if the property were sold for less than £6.5m.

Mr Barton introduced a buyer. Mr Barton and Foxpace envisaged that the buyer would buy for at least £6.5m. Documents were drawn up for a sale at £6.55m. The purchase price was then reduced to £6m when it came to light that Nash House was within an area safeguarded for the purpose of the construction of HS2. It was expressly found by Pearce J at first instance that the reduction in the purchase price had nothing to do with Foxpace trying to avoid paying Mr Barton the agreed sum above.

Foxpace consequently refused to pay Mr Barton any sum. Mr Barton issued a claim, asserting a) that he was entitled to be paid a reasonable sum by the implication of a term to that effect, and/or b) that he was entitled to the same in unjust enrichment/quantum meruit.

Pearce J dismissed Mr Barton's claim at first instance on the bases that a) the express term of the agreement precluded the implication of a term because the parties

had negotiated a bargain that allocated the risk between them, and b) there was no claim in unjust enrichment because of the existence of that contract between the parties. The Judge held that, if he were wrong, the value of the work done by Mr Barton was £435,000.

The Court of Appeal allowed Mr Barton's appeal. The main judgment was given by Asplin LJ, with whom Males and Davis LJJ gave short concurring judgments. They held that the silence of the contract as to what would happen if the sale were for less £6.5m meant that the contract did not rule out a claim in unjust enrichment. They further held that Foxpace would be unjustly enriched if it took the benefit of the introduction without paying for it. They also stated that the same result might have been achieved by the implication of a term that a reasonable fee would be paid if the buyer bought Nash House for less than £6.5m.

Foxpace appealed on 3 grounds:

a. That it was not possible for Foxpace to be said to have been unjustly enriched given the terms of the agreement.
b. That there was no 'unjust factor' for the purposes of unjust enrichment.
c. That it was wrong that Mr Barton might have been entitled to relief on the basis of an implied term.

By 3 to 2 (Lord Legatt and Lord Burrows JJSC dissenting) the Supreme Court allowed Foxpace's appeal, so restoring the decision at first instance.

This article is concerned with the third of those three grounds of appeal above.

The Court of Appeal had suggested that in the absence of words such as "*if, but only if*" to describe the scenario in which Mr Barton would be paid, it had not been expressly agreed that he would be entitled to nothing in other scenarios.

In paragraph 26 of the leading judgment Lady Rose JSC disagreed. She held that by positing a scenario in which Mr Barton would be paid, the parties had agreed that that was the *only* scenario in which he would be paid. The distinction drawn by the Court of Appeal was a distinction without a difference. The result was that to imply a term that Mr Barton would be paid if Nash House were sold for less than £6.5m would be to imply a term that went directly against what they had agreed.

Further Lady Rose held that there was no need for such a term to be implied for business efficacy. Any concern that Foxpace might have deliberately reduced the purchase price for Nash House so as to avoid paying Mr Barton would be overcome simply by the implication of the different, 'usual' term that Foxpace would not agree such a reduction in order to achieve that goal. That would be all that would be necessary.

There was nothing bizarre about the agreement that Mr Barton would only be paid in a given scenario. He was free, as any contracting party is, to enter into a risky deal under which his potential gain increases but so does his prospect of obtaining nothing. He had a good reason to do so; a desire to recoup his money already spent. It was certainly not clear that the "officious bystander" would have regarded it as obvious that Mr Barton would still be paid some sum if a sale occurred at less than £6.5m.

The result was as stated in paragraph 94:

"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".

Lord Legatt's dissenting judgment focused not so much on what Mr Barton and Mr Rourke had expressly agreed, but on what they had not. In an opening four paragraphs which he described as "*the short answer to this appeal*", he stated that it is settled law that Mr Barton was entitled to a reasonable remuneration unless it was expressly agreed otherwise (which would plainly be right; a quantum meruit by a term implied in law (rather than on the facts)), and that on the facts of this case there was no contrary agreement because Mr Barton and Mr Rourke:

"only specified the remuneration that would be payable in the event of a sale at a price of £6.5m 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".

This proposition was put slightly differently at para.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".

Discussion

The central issue was neatly described by Lord Legatt as being *"the consequence of saying nothing"*.

The first point to note is that (as ever) the precise facts of each case must be carefully considered. Most obviously, Lord Legatt's line of reasoning would not have worked if the trial Judge had found that Mr Barton and Mr Rourke's discussion of terms had included what would happen in the scenario that the Property would be sold for less than £6.5m.

Beyond that, and at the risk of generalising in a way that is contrary to the caution above, this writer's view is that there is, perhaps, a logical unattractiveness in the suggestion that where parties have concluded that one should be paid in scenario A, they have not excluded the idea of payment in scenario B. Can it be right, when addressing an oral agreement, that silence on any given scenario means that the paying party is still impliedly liable for payment in that scenario? Doesn't that mean that a paying party under an oral agreement would have to discuss with the other party *every possible scenario* in order for payment in that scenario to be ousted? Suppose Mr Rourke and Mr Barton had discussed payment of a sum (calibrated and reducing for example) if the Property sold not only for £6.5m, but also for £6.45m,

£6.4m, £6.35m, £6.3m, £6.25m, £6.2m, £6.15m, and £6.1m, and that the Property then sold for £6,09m. Does the failure to consider that scenario mean that there is an implied term that Mr Barton be paid something? That would seem a strange result.

In the course of Mr Barton's litigation five judges agreed with him and four did not. Yet he lost. This, notwithstanding that the facts were simple and short, and the law supposedly settled and clear. The case is a nice reminder that sometimes the answer to a question is not as clear and obvious as one might think.

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