UNJUST ENRICHMENT – VALUING SERVICES

WHERE parties have entered into a contract for services and the claimant provides additional services as requested by the defendant, the claimant will usually recover payment under an express or implied contract. But there will be circumstances where a contract for the additional services cannot be identified and the claimant will seek a *quantum meruit* remedy instead. The significance of this remedy in such circumstances was confirmed in *Benedetti* v. *Sawiris* [2010] EWCA Civ 1427, which also recognised that the underlying claim where a *quantum meruit* is sought is unjust enrichment.

Benedetti had facilitated the acquisition of an investment in an Italian company by Sawiris and two companies referred to as "AH/OS". Benedetti and Sawiris had previously entered into an agreement for different services. That agreement had been abandoned and so Benedetti pursued claims in unjust enrichment to recover remuneration for his services.

The claim against AH/OS turned on whether those companies had been enriched by Benedetti's work. Although AH/OS had benefited from the services, they had not contracted for them or requested them, having participated in the investment at the request of Sawiris. Could AH/OS be considered to have been enriched in those circumstances? Arden L.J., with whom Rimer and Etherton L.JJ. agreed, held that AH/OS had not freely accepted the services, following *Chief Constable of the Greater Manchester Police* v. *Wigan Athletic AFC Ltd.* [2009] 1 W.L.R. 1580, because they had no opportunity to reject the benefit. She also held that AH/OS had not been incontrovertibly benefited by the services because Benedetti had never expected them to pay for the service. But this is to confuse the distinct enrichment and unjust questions within the unjust enrichment claim. The reason why AH/OS could not have been liable to Benedetti was that there was no failure of consideration in respect of their enrichment; the basis for Benedetti's performance of the services having been payment by Sawiris and not AH/OS.

As regards the claim against Sawiris, Patten J. had held that he was liable to pay for the services. In assessing their value, he held that the measure of remuneration used in the earlier agreement between the parties was not relevant but that a subsequent offer of payment by Sawiris by way of compromise should be taken into account, even though Benedetti had rejected it. Patten J. assessed the usual market rate for such services at €36.3 million, but Benedetti was awarded €75.1 million, this being the amount offered by Sawiris. The Court of Appeal held that *quantum meruit* should be assessed by reference to the service's market value, that the prior agreement was not relevant to this assessment but neither was the later compromise offer.

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In reaching this decision there was a distinct difference of approach taken by the judges to the valuation of enrichments; a difference which could have significant consequences for the future development of unjust enrichment.

Arden L.J., with whom Rimer L.J. agreed as to the result and the reasons, held that the correct starting point when valuing a service is its objective market value. This value could be affected by particular factors, such as trade usage. A prior agreement or negotiations between the parties might also provide evidence of the value each party placed on the services, as had been held by the House of Lords in *Way* v. *Latilla* [1937] 3 All E.R. 759. This decision was applied by Arden L.J. who recognised that evidence of a prior agreement or other communications might increase the value of the service above the market value. So, to use her own example at [72], if a plumber charged 10% over the market rate and the customer had agreed that rate in the past, the court would take into account the parties' past dealings in preference to market rates, assuming (somewhat artificially) that there was no contract between the parties. If, however, a prior agreement had been abandoned by the parties it was no longer relevant evidence of value, so the agreement between Benedetti and Sawiris was ignored.

For Arden L.J. the essence of valuing an enrichment was that "the court must look to the outward manifestation of the parties' common intentions. It does not deal with the case where there is some subjective expression of one party's wishes in the matter which is not shared by the other party": at [72]. It follows that, if the defendant alone valued the enrichment more highly than the claimant, this cannot be taken into account. So any notion of "subjective [re]valuation" appears to have been rejected. It was for this reason that the compromise offer made by Sawiris was not relevant to the valuation exercise, because it had been rejected by Benedetti. The compromise would have been relevant had it been accepted, even though it was made after the services had been provided, because there would then have been "some engagement or rapport between the parties": at [85]. Arden L.J. did accept, at [84], that there might be some circumstances when it would be "appropriate to take the value of the benefit to the particular defendant" into account, but not where the value to the defendant was less than the market value. It follows that the defendant's valuation of the benefit could only be relevant when it was above the market value and, in the light of her conclusion about the relevance of the compromise offer, must be shared by the other party. The consequence is that the only time when the objective market value will not be adopted is where the parties have a shared understanding of a higher valuation. Arden L.J. considered that this emphasis on a shared

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valuation was consistent with *Way* v. *Latilla*, but, as she acknowledged, the analysis in that case was driven by the then current view that *quantum meruit* was founded on implied contract. The implied contract theory of unjust enrichment has since been rejected, but the effect of *Benedetti* v. *Sawaris* is to resurrect it, at least at the valuation stage of the enrichment analysis to establish a shared understanding of value.

It was for this reason that Etherton L.J. adopted a different, but equally troubling, approach to the valuation exercise. He accepted that the starting point was the identification of an objective value of the benefit assessed when it was received, which was "the price which a reasonable person in the defendant's position would have had to pay for the services": at [140]. This value could be reduced if the actual benefit to the defendant was less than the market value because of the defendant's characteristics and circumstances. The valuation might be increased in the same way. The compromise offer was not relevant because there were no characteristics of Sawiris which rendered the services as being of greater objective value than the market value. Etherton L.J. did not identify what characteristics or circumstances of the defendant might be relevant, other than that they do not include the defendant's emotions or personality. A relevant circumstance might be, for example, where the defendant has a burst water pipe and needs an emergency plumber. This necessity might be a circumstance which means that the reasonable person would pay more than the market value for the plumber's services.

The effect of this decision is that subjective theories of enrichment and valuation have been replaced by an essentially objective approach which can only be displaced by the "common intention of the parties" that a different valuation should be adopted.

GRAHAM VIRGO

## REVIEWING THE REVIEW OF FIDUCIARY DISCRETIONS

THE device that had become known as "the rule (or principle) in *Hastings-Bass*" has now been withdrawn from service by the Court of Appeal, in its decision in the combined appeals in *Pitt* v. *Holt* and *Futter* v. *Futter* [2011] EWCA Civ 197, and replaced with a more rational regime for reviewing decisions made by fiduciaries.

Under the erstwhile rule in *Hastings-Bass*, an exercise of a dispositive power held in a fiduciary capacity could be upset if the power-holder had considered irrelevant considerations or failed to consider

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