



Cases Analysis

Sam O'Leary and Michael Watkins at One Essex Court report on the latest banking law cases

UNJUST ENRICHMENT: OBJECTIVITY IN THE VALUATION OF SERVICES

Benedetti v Sawiris

[2013] UKSC 50

Supreme Court (Lord Neuberger P, Lord Kerr, Lord Clarke, Lord Wilson, Lord Reed)

SUMMARY

The Supreme Court did not allow Mr Benedetti's appeal but did allow a cross-appeal. The Supreme Court held that any enrichment received by Mr Sawiris was less than the amount he had already paid to Mr Benedetti and, as such, Mr Benedetti was not entitled to a *quantum meruit*.

The Court held that the valuation of services in such cases involves, at least as a starting point, the ascertainment of the objective market price. A majority held that it may be relevant to consider a defendant's "subjective devaluation" of the enrichment if the defendant would have valued the services in question at less than the market price. However, a court may not award restitution of an amount greater than the market price on the basis that the defendant would have valued the services at more than the market price.

FACTS

In 2002, Mr Sawiris became aware that Enel SpA (Enel), which was the largest energy company in Italy, might be willing to sell its wholly-owned subsidiary Wind Telecomunicazioni SpA (Wind). Mr Benedetti and Mr Sawiris met in Cairo in December 2002. Mr Benedetti sought to persuade Mr Sawiris that it would be possible to acquire control of Wind through a pyramid structure with only a limited equity investment.

These discussions led to the signing of an "Acquisition Agreement" on 31 January 2004, pursuant to which Mr Benedetti and Mr Sawiris agreed to establish a special purpose vehicle, "Rain", with subscriptions of only £200,000 and with the aim of attracting investments which would allow Rain to acquire Enel. Mr Sawiris was to invest a total of no more than €50m.

However, by 2005 it had become clear that there were no outside investors and the Acquisition Agreement was abandoned. However,

Mr Sawiris and various family businesses continued to pursue their interest in Enel and Mr Benedetti continued to provide valuable services to Mr Sawiris, acting as a broker/adviser in respect of the prospective transaction.

Mr Benedetti then took various steps to protect his position. Weather Investments SpA (Weather I) was incorporated on behalf of Mr Benedetti and various third party investors with a view to acquiring Enel. However, that objective was not pursued and 99% of the shares in Weather I were transferred to Mr Sawiris on 25 March 2005. The day before that transfer took place, Mr Benedetti caused Weather I to enter into two agreements with his own companies without the knowledge of Mr Sawiris. The "First Brokerage Agreement" appointed International Technologies Management Ltd (ITM) to provide brokerage services in return for 0.7% of the ultimate cost of the acquisition of Wind (around €87m). The "Support Agreement" appointed Managest Media SA to provide support and logistic services for a fee of €3.4m.

On 26 May 2005 Enel and its holding company Enel Investment Holding BV entered into a sale and purchase agreement (SPA) for the disposal of 62.75% of the issued capital of its subsidiary Wind for just under €3bn. The shares were acquired by a new special purpose vehicle, Weather Investments Srl (Weather Italy), of which Mr Benedetti was a director, on behalf of companies controlled by Mr Sawiris and third parties connected to Mr Sawiris. On the same day, Mr Sawiris caused the rights and liabilities of Weather I (including to ITM) to be transferred to Weather Italy. Again, this was done without the knowledge of Mr Sawiris.

When Mr Sawiris discovered the existence of the First Brokerage Agreement, he believed that the payment of €87m was to be used to discharge Mr Benedetti's liabilities to third parties. Mr Sawiris was angry about the scale of expenses so Mr Benedetti agreed to reduce the payment from €87m to €67m. To effect this, Mr Sawiris agreed to a new agreement between Weather Italy and ITM (the Revised Brokerage Agreement), backdated to 26 May 2005, which provided that ITM would receive a brokerage fee of 0.55% of the value of the transaction (ie, €67m).

Mr Benedetti also pressed Mr Sawiris for a personal payment in respect of the services he had provided to Mr Sawiris. Mr Sawiris offered Mr Benedetti €75.1m but this amount was not accepted by Mr Benedetti. Negotiations continued well into 2006. By January 2006 Mr Sawiris suspected that Mr Benedetti had taken the €67m for himself. He nevertheless continued to offer €75.1m (apparently, therefore, on top of the €67m) and Mr Benedetti accepted this offer in principle. However, by this point litigation was in prospect and such offers were intended to

settle any and all claims Mr Benedetti might have had. In October 2006, Mr Sawiris's agent sent Mr Benedetti a draft Supplemental Agreement to the Revised Brokerage Agreement which expressly acknowledged receipt of €67m by ITM and provided that ITM would be paid a final fixed success fee of €75.1m. However no binding agreement was ever made and instead Mr Benedetti commenced legal proceedings.

PATTEN J

Mr Benedetti brought claims against Mr Sawiris in contract (under the Acquisition Agreement); on an alleged oral understanding (which he said was enforceable in equity by reason of the principle in *Pallant v Morgan* [1953] Ch 43); collateral contract; breach of fiduciary duty; unconscionable receipt; estoppel and *quantum meruit*. Patten J dismissed all Mr Benedetti's claims except the claim for *quantum meruit*.

Patten J held that Mr Sawiris and his co-defendants had been unjustly enriched by the receipt of Mr Benedetti's services. Patten J held that the market value of the services provided by Mr Benedetti would be within the range 0.1% to 0.3% of the transaction value, which would amount to between €12m and €36.3m. Patten J concluded that it would in all the circumstances be appropriate to take a figure at the top end of the range. He accordingly held that the market price for the services in fact performed by Mr Benedetti for Mr Sawiris was €36.3m.

However, Patten J held that the value to Mr Sawiris of the services provided by Mr Benedetti was higher than the market value. Patten J held that the payment of €67m had been referable to 60% of the work done by Mr Benedetti. Patten J held that the figure of €75.1m represented the value to Mr Sawiris of the balance of the value of Mr Benedetti's services and awarded Mr Benedetti that amount.

COURT OF APPEAL (ARDEN, ETHELTON, RIMER LJJ)

The Court of Appeal rejected Mr Benedetti's argument on appeal that his quantum meruit should be based on the terms of the Acquisition Agreement.

The Court also held that the offer of €75.1m was irrelevant to the valuation of Mr Benedetti's services. The Court held that the correct approach was to take, at least as a starting point, the ordinary market value of the services in fact rendered by Mr Benedetti, which the judge held to be €36.3m.

The Court accepted Patten J's finding that the payment of €67m was made in respect of only 60% of the services provided by Mr Benedetti and held that Mr Sawiris had therefore been unjustly enriched in respect of the receipt of the other 40% of Mr Benedetti's services, in respect of which no payment had been made. The Court valued those additional services on the basis of the market value, that is to say 40% of €36.3m, being €14.52m.

SUPREME COURT

The Supreme Court rejected Mr Benedetti's argument that he should have been awarded a higher amount based on the terms of the Acquisition Agreement. The parties had abandoned the Acquisition Agreement and it was not appropriate to have regard to that contract in determining the sum, if any, to which Mr Benedetti was entitled.

The Supreme Court also agreed that the Court of Appeal had been right to find that the offer of €75.1m was not relevant to the valuation of Mr Benedetti's services. Mr Sawiris had considered this amount to be generous and had made the offer under the shadow of litigation. There was no reliable evidence of the subjective value to Mr Sawiris of Mr Benedetti's services.

The Supreme Court held that the Court of Appeal was wrong to award Mr Benedetti €14.52m. The market value of his services was €36.3m and, as Patten J found, he has already received €67m. Patten J gave no reasons for his finding that the payment of €67m related only to 60% of Mr Benedetti's services, and it was inconsistent with other findings.

Since Mr Benedetti had already received more than the market value of his services, there had been no unjust enrichment and his claim for a *quantum meruit* failed.

OBJECTIVE APPROACH TO VALUATION OF SERVICES

Where services have been provided on a basis which has not been fulfilled, subject to the qualification that since the services themselves cannot be returned, the remedy must take the form of restitution of their monetary value.

Such enrichment is to be valued at the date on which it was received: *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 followed. The question is what is the value of the services themselves, not of any end-product or subsequent profit made by the defendant.

In the absence of a final contract, neither party's intentions or expectations can be determinative of their mutual rights and obligations. Nor can the court make the parties' contract for them: a contract which might have included many other terms and conditions besides a price.

The starting point in valuing the enrichment is the objective market value, or market price, of the services performed. The test is "the price which a reasonable person in the defendant's position would have had to pay for the services". On that approach, although a court must ignore a defendant's "generous or parsimonious personality", it can take into account "conditions increasing or decreasing the objective value of the benefit to any reasonable person in the same (unusual) position" as the defendant. For example, the court may take into account the claimant's superior bargaining power if it would have enabled him to obtain a price better than the market price.

SUBJECTIVE DEVALUATION

Lord Clarke (with whom Lords Kerr and Wilson agreed) held that a defendant is entitled to prove that he valued the relevant services (or goods) provided by the claimant at less than the market value. After the claimant has adduced evidence of the objective value of the benefit which the defendant received, the burden of proof falls upon the defendant to prove that he did not subjectively value the benefit at all, or that he valued it at less than the market price. Lord Clarke recognised that an incontrovertible benefit, or a benefit freely accepted, may prevent or limit a defendant's assertion of subjective devaluation.

Although Lord Reed noted that it was not necessary to decide this principle in order to decide the case at hand, he would prefer to

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analyse such questions in terms of the defendant's freedom of choice whether to accept the responsibility of paying for services rather than in terms of subjective devaluation. If the defendant has not accepted the responsibility of paying for the goods or services in question, that will be relevant to the question whether there has been any *unjust* enrichment. A qualified acceptance of responsibility to pay for services may similarly be relevant to limit the extent of liability for unjust enrichment. Lord Reed also observed that the authorities did not appear to support:

“a principle of ‘subjective devaluation’ in the sense in which that expression is employed in the present case, namely the valuation of a benefit by which the recipient was unjustly enriched according to his personal opinion of its value.”

Lord Neuberger preferred to express no concluded view as to which approach is correct.

SUBJECTIVE REVALUATION

The Supreme Court held that a court may not have regard to a defendant's subjective opinion of the value of services rendered to him in order to increase the amount of restitution payable.

Unlike the principle of subjective devaluation, such an approach (often referred to as “subjective revaluation”) is not necessary in order to protect a defendant's freedom of choice. Thus it is not unprincipled to recognise subjective devaluation while rejecting subjective revaluation.

COMMENT

As Lord Clarke pointed out, the difference between his approach and that of Lord Reed appears very narrow and may make a difference in only a very few cases (if at all). Lord Clarke gave the example of *Sempre Metals Ltd v IRC* [2007] UKHL 34. In that case, it was held that the claimant could not recover the market interest rate on the sums it had paid to the Revenue by way of unlawfully levied advance corporation tax because the Government was able to borrow money at lower rates than the market rate. The amount saved by the Government was thus less than that which would have been saved by a commercial entity borrowing the same sums of money. Lord Clarke commented that while he had initially considered *Sempre* to be an example of subjective devaluation, he could see (having read Lord Reed's judgment) it may instead be a case of the objective value of the money to a person in the position of the defendant in that case, namely the Government.

As to subjective revaluation, the Supreme Court was unanimous in rejecting the principle. Lord Neuberger suggested that a possible exception to the rule that a claimant cannot claim subjective revaluation may be where the defendant has led the claimant to believe that he will be prepared to pay more for the benefits than the market value, and the claimant reasonably and foreseeably relies on that indication. However, the claimant's case in such circumstances may, on analysis, be said to involve an overlay of estoppel on top of, or

even a contractual claim in lieu of, his claim in unjust enrichment.

Lord Reed's judgment may be of particular interest to academic lawyers. He (very clearly) explains his view that unjust enrichment is grounded in corrective justice and suggests that the object of the remedy in a case such as this is to correct the injustice arising from the defendant's receipt of the claimant's services on a basis which was not fulfilled:

“That injustice cannot be corrected by requiring the defendant to provide the claimant with the reward which either party might have been willing to agree. That is because, in the absence of a contract, neither party's intentions or expectations can be determinative of their mutual rights and obligations. Nor can the court make the parties' contract for them: a contract which might have included many other terms and conditions besides a price. In such circumstances, the unjust enrichment arising from the defendant's receipt of the claimant's services can only be corrected by requiring the defendant to pay the claimant the monetary value of those services, thereby restoring both parties, so far as a monetary award can do so, to their previous positions.”

Nevertheless, because the case did not ultimately require the resolution of the issues raised, several points are left for review in future cases (and “exceptional circumstances”).

FURTHER CONFIRMATION OF A BROKER'S DUTIES WHEN CLOSING OUT ITS CLIENT'S TRADING POSITIONS

Marex Financial Limited v (1) Creative Finance Limited & (2) Cosmorex Limited

[2013] EWHC 2155 (Comm), Field J

SUMMARY

The Claimant (Marex) was entitled to close out its clients' positions following a failure to meet a minimum margin requirement and to recover the negative balance that remained on the clients' trading accounts. However, Marex had no contractual right to charge a mark-up as part of the close-out process and could only recover the negative balance without the mark-up. The Defendants' attempt to reduce or extinguish the amounts owed to Marex by a counterclaim failed. Marex owed a duty to act rationally when closing out the Defendants' positions but did not assume a broader duty to act with reasonable care and skill. Marex did not act irrationally when closing out the positions and nor did it act negligently (if it had owed such a duty).

FACTS

Marex is a foreign exchange broker that held trading accounts with the Defendants, who both engaged in “carry trading”. This type of trading required the Defendants to build up forward currency exchange trades that aimed to profit from differences in central bank interest rates. In accordance with the relevant agreements, the Defendants were obliged to provide margin calculated as a percentage of their notional positions. A failure to provide the relevant margin amounted to an event of default that entitled Marex to close-out the positions and establish the final balance in the relevant accounts.

By 10 March 2011, both Defendants had built up substantial positions in forward contracts that obliged them to purchase large amounts of New Zealand Dollars (NZD) and Euros (EUR) in exchange for Japanese Yen (JPY). However, on 11 March 2011, Japan was hit by a severe earthquake and tsunami that threw the Japanese financial markets into turmoil. Initially, the Yen fell, which would have been good news for the Defendants because they needed to buy in order to meet their future obligations. However, the Yen then rallied as substantial amounts of money were repatriated to assist with the recovery efforts. This coincided with unusual volatility in the USDJPY price and the Defendants’ margin began to fall dramatically. Marex considered that it might become necessary to close out the Defendants’ positions and began to think about how this could best be done, although no detailed plans were made.

Between 10am and 5pm on 16 March 2011, the Defendants’ margin fell from USD28m to USD18m. Marex was concerned that a close out would be required that evening and it took steps to ensure that an additional member of staff was present for the evening shift. The market continued to move radically and by 9pm, Marex’s traders began to contact Citibank in Sydney and ANZ in Melbourne to make sure they would be available to trade if necessary. Very shortly thereafter, the Defendants’ margin fell below the required level and Marex decided to close out the account. By 9:55pm, Marex had closed out the entire account through a combination of “at best” trades with Citibank and ANZ together with smaller trades on the Currenex platform.

Once the close out had been completed, Marex calculated the USD balance in the accounts by converting the average cost of the close out transactions into USD together with a mark-up by way of profit which left an overall negative ledger balance of USD7,959,383.03, which Marex claimed from the Defendants pursuant to the terms of the relevant agreements. The Defendants resisted this claim by arguing that Marex was not entitled to charge a profit and that one way or another, Marex breached its duties to the Defendants by negligently closing out the positions. This was said to give rise to a substantial counterclaim that could be set off against the alleged negative balance. Marex denied this counterclaim by arguing that it owed a limited duty to act rationally, that no further duty could be imposed consistently with the relevant contract and that in any event, it acted rationally and (insofar as relevant) with reasonable care and skill.

Accordingly, the following issues arose for determination:

- Was Marex entitled to charge a profit on the transactions that it entered into when closing out the Defendants’ positions?

- Did Marex owe a duty to exercise reasonable care and skill when closing out the Defendants’ positions or was it limited to a duty to act rationally?

In either case, did Marex breach its duties in the manner in which it closed out the Defendants’ positions?

THERE WAS NO CONTRACTUAL BASIS FOR MAREX TO MAKE A PROFIT OUT OF THE CLOSE OUT

It was common ground that Marex ordinarily charged a mark-up on the trades that it executed with the Defendants. However, there was no express term that granted Marex the right to do so. Instead, it appears that the mark-up was included in the price quoted to the Defendants by Marex and accepted by the clients on a transaction-by-transaction basis. Since the close out took place without the Defendants’ consent or approval, there was no possibility of Marex quoting a price in advance of each trade being placed. Instead, Marex unilaterally imposed a mark-up when it calculated the negative ledger and claimed that it was entitled to do so as part of the discretion afforded to it when closing out the accounts. Field J rejected this argument, finding that the right to charge a profit could not form part of the discretion to close out the accounts. On the contrary, a profit could only be charged as part of the close out process if there was an express term to this effect, which there was not (see paras 50 to 56).

MAREX OWED A DUTY TO ACT RATIONALLY BUT DID NOT ASSUME ANY MORE ONEROUS DUTY WHETHER UNDER THE CONTRACT OR THE GENERAL LAW

Marex accepted that it owed a duty to act rationally when closing out the traders in accordance with the decision of the Court of Appeal in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] 1 Lloyd’s Rep 558 and the recent decision of Gloster J in *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm). However, the Defendants argued that Marex owed a more onerous duty to act with reasonable care and skill. In this regard, the Defendants relied upon the express or implied terms of the contract, the Sale of Goods and Supply of Services Act 1982 (the 1982 Act), the general law of negligence or the Unfair Contract Terms Act 1977 (the 1977 Act).

Field J rejected each of these arguments for the following reasons:

- **Express terms:** The relevant contract included a general exclusion clause expressed to apply to “any losses ... whether arising out of negligence, breach of contract ... unless such loss is a reasonable foreseeable consequence or arises directly from our ... gross negligence, wilful default or fraud.” The Defendants argued that this amounted to an acceptance that Marex was responsible for loss that was reasonably foreseeable and that arose as a result of gross negligence which, on a true construction, was no different to the ordinary standard that applied under the general law of negligence. Field J rejected this submission, holding that the exclusion clause did not amount to *acceptance* of a duty. It simply explained what consequences would follow if Marex was found to be liable

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for breach of duty. Whether Marex owed a duty in the first place depended on the other terms of the contract and the general law (see paras 61 to 67). In any event, Field J suggested that “gross” negligence meant something different to ordinary negligence, relying upon dicta of Mance J in *Red Sea Tankers Ltd v Papachristidis* [1997] 2 Lloyd’s Rep 547 and Andrew Smith J in *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm).

- **Section 13 of the 1982 Act:** The Defendant next tried to invoke the statutory implied term in s 13 of the 1982 Act on the basis that Marex was providing a “service” when closing out the positions. This was given short shrift by Field J who followed Gloster J’s reasoning in *Euroption*, without hesitation. In closing out the positions, Marex was exercising a right conferred on it for its own benefit, rather than performing a service (see paras 68 to 71).
- **Implied terms at common law:** The Defendants argued that a duty to act with reasonable care and skill should be implied at common law because it reflected what the agreement would be reasonably understood to mean, in accordance with the guidance of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988. This was also rejected by Field J, again for the reasons given by Gloster J in *Euroption*. Such a duty was not necessary in order to make the agreement work and would not obviously have been agreed by Marex, who had intended to reserve to themselves a broad discretion as to the manner in which they closed out the positions (see paras 72 to 77).
- **Duty of care in tort:** The Defendants next said that there was a sufficiently close relationship of proximity for a duty of care to arise under the general law of negligence in accordance with the test in *Caparo Industries plc v Dickman* [1990] 2 AC 605. This was also rejected in light of the Judge’s decisions on the statutory and common law implied terms. Having refused to imply a term imposing such a duty, there was no room for such a duty under the general law (see paras 78 to 89).
- **The 1977 Act:** Finally, the Defendants appeared to argue that the exclusion of a duty of care in the contract would be inconsistent with the 1977 Act. This was roundly dismissed: the terms of the agreements were fair and reasonable. The Defendants were represented by sophisticated businessmen who were capable of looking after themselves (see paras 90 to 92).

MAREX DID NOT ACT IRRATIONALLY WHEN CLOSING OUT THE POSITIONS

In light of Field J’s decision on the scope of Marex’s duties, the Defendants needed to prove that Marex acted irrationally in order to establish a breach of duty. They attempted to do this by reference to expert evidence to the effect that Marex should have sought to close out the position by a single transaction with a market maker, rather by the series of piecemeal trades they in fact carried out. The Defendants alleged that the manner in which Marex closed out the positions drove the market down and increased the Defendants’ losses.

Field J rejected this argument on the evidence, preferring the views of Marex’s expert that Marex had acted rationally and reasonably in the circumstances. As Field J noted at paras 149 to 150:

“One of the essential differences between the duty to act rationally and the duty to take reasonable care is that when the court considers the former it is the decision of the decision maker that is focused upon, whereas consideration of the latter involves the court making its own judgment on the basis of objective criteria (see *Socimer* at para 66 and *Euroption* ... para 106 ...)

The decisions made by Marex when closing out the Defendants’ positions were made pursuant to its right to close out under the [agreements]. The power conferred by this right involves a very wide discretion as to when and how the Defendants’ positions would be closed out; its purpose is to enable Marex to protect its own position quo ad the Defendants. In exercising the power, Marex might also serve the Defendants in an indirect sense, since the greater the price achieved in obtaining equal and opposite positions in the market, the less will be the Defendants’ liability to Marex under the positions being closed out. However, the essential purpose of the power is not to protect the interests of the Defendant but to protect the interests of Marex.”

Applying this standard, it was rational and (if it had been relevant) reasonable for Marex to close out the positions through a series of “at best” trades with Citibank and ANZ together with smaller transactions over the relevant platforms. Accordingly, the Defendants’ counterclaim failed and was dismissed, leaving Marex with its claim to recover the losses incurred on the trades (albeit not the profit element that it had factored into the overall bill).

COMMENT

This case is yet further illustration of the limited duty owed by a broker when exercising the right to close out positions following an event of default. In light of the decision of Gloster J in *Euroption*, the Defendants faced an uphill battle in their counterclaim and it is perhaps of little surprise that Field J followed *Euroption* without hesitation. As both judges noted, the purpose of a power to close out positions is to protect the interests of the broker who is potentially exposed by the lack of margin in the account. In these circumstances, a wide discretion is often reserved to the broker as to the manner and timing of the close out and there is very little room for a duty to act with reasonable care and skill.

On the other hand, this case provides useful guidance on the circumstances in which a broker can charge a profit on transactions entered into as part of the close-out process. The short point here is that an express term will be required before a broker can seek to make a profit out of a close out. It is one thing to reserve a broad discretion in order to minimise a potential loss. It is quite another thing to mark-up the trades in order to earn a profit. If brokers wish to reserve to themselves the power to do this in the future, they should ensure that the terms of the relevant agreements provide in unambiguous terms for the right to charge a mark-up when closing out an account. ■