Neutral Citation Number: [2018] EWHC 2426 (Ch)

No. 2593 of 2017

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

BUSINESS LIST (ChD)

Manchester Civil Justice Centre

14 September 2018

Before

His Honour Judge Pearce,

sitting as a Judge of the High Court

PHILIP BARTON

Appellant

and

(1) TIMOTHY GWYN JONES
(2) JULIE ANN SWAN
(3) MARK RICHARD PHILLIPS
(4) FOXPACE LIMITED

Respondents

Appearances:

Appellant: Mr Brad Pomfret

First Respondent: Mr Robert Sterling

Second, Third and Fourth Respondents: not appearing

Note: references to the trial bundle are in bold, in the format **volume/page**.

Hearing on 12, 13, 14 and 15 June 2018

JUDGMENT

Introduction

1. In this application, the Appellant, Mr Philip Barton, seeks to appeal the decision of Mr Timothy Gwyn Jones ("the Respondent[1]"), as the convener of the deemed consent procedure, by which decision Mr Gwyn Jones rejected Mr Barton's proof of debt in the sum of £1.2 million for voting purposes in the liquidation of Foxpace Limited ("Foxpace") and appointed Ms Julie Ann Swan and Mr Richard Phillips as liquidators of Foxpace.

2. Mr Barton does not dispute that it is appropriate to liquidate Foxpace, but he seeks to nominate his own liquidator, for which purpose he seeks to prove his debt.

Background

3. By a contract dated 10 September 2013, Foxpace agreed to sell to Western UK (Acton) Ltd ("Western[2] ") a property known as Nash House in Northolt, London for the sum of £6 million plus VAT. The sale was completed on 4 February 2014. In brief, the Appellant contends that Foxpace is liable to him either in the sum of £1.2 million or in such other sum as the court may determine, pursuant to a contract entered into between Mr Barton and Foxpace under which Mr Barton was entitled to the figure of £1.2 million in the event that he introduced to Foxpace a purchaser for Nash House; or alternatively that Foxpace is liable to him in that sum or in a sum to be determined by the court as restitution for unjust enrichment obtained by Foxpace as a result of its free acceptance of the benefit of Mr Barton's services in introducing such a purchaser.

4. On 23 May 2017, Mr Barton, who claimed to be a creditor of Foxpace because of the sum that he alleged was due to him on the sale of Nash House, received notice of the proposed appointment of the Second and Third Respondents as liquidators of that company. Mr Barton objected to the proposal to appoint them as liquidators (**B8/2342**) and nominated Mr Andrew Bland so to act.

5. Mr Gwyn Jones, as sole director of Foxpace and convener of the creditors' meeting, recorded the debt to Mr Barton to be in the sum of £1. A company called Kingscastle Limited, the parent company of Boldhurst Properties Ltd which is the sole shareholder in Foxpace, was owed £13,339. Accordingly, its votes outweighed that of Mr Barton. At the meeting, the Second and Third Respondent were duly appointed liquidators.

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[1] Technically of course the First Respondent but since the Second and Third Respondents make no more than a fleeting appearance in this judgment and have taken no part in the trial before me, it is unnecessary to distinguish him from them save on a few occasions. As for Foxpace Limited, they will only be made a Respondent as a result of the final order in this case, for reasons set out below. They are simply called "Foxpace" throughout.

[2] The property was ultimately transferred to another company associated with Western UK (Acton) Ltd, namely Western UK Hilton Park Limited, pursuant to the contract of sale. Neither the Appellant nor the Respondent see the need to distinguish between the two companies in their witness statements and Mr Lipson indicates at paragraph 1 of this statement, **A1/60**, that he is the sole director of both. No further distinction between the two companies is necessary in this judgment.

6. Mr Barton challenges the value put upon his claim against the company. He contends that the value of his claim, being a liquidated sum, should have been allowed in full but marked as objected to (see AB Agri Ltd v Curtis [2016] All ER (D) 121).

7. Mr Barton has separately issued proceedings against Foxpace to recover the alleged debt. Those proceedings are stayed. During these proceedings, it has been agreed that the court should determine the issue as to whether Foxpace Limited is indebted to Mr Barton and, if so, in what amount. This issue was raised by His Honour Judge Davies in a hearing on 14 May 2018 and is recorded in his order of that date – see **A1/157**. During the hearing before me, the parties have agreed terms to this effect so as to ensure that Foxpace will be bound by the terms of the judgment in this case as to the amount (if any) of its indebtedness to Mr Barton. A finding as to the amount of the indebtedness will override any argument about what should have been put on as the value of a disputed claim and therefore will determine the issue as to who holds the majority of creditors' votes in the liquidation.

8. The terms of that agreement are as follows:

> *"1. Foxpace Limited should be joined as a party to the appeal on the basis that it takes no active part in the proceedings.*
>
> *2. There will be no costs consequences of Foxpace Limited in being joined as a party to the appeal;*
>
> *3. The aforementioned (sic) trial will be determinative of Philip Barton's claim against Foxpace Limited for all purposes;*
>
> *4. The issue of any indebtedness on the part of Foxpace Limited to Philip Barton shall be argued at the hearing of the appeal by or on behalf of Philip Barton and Timothy Gwyn Jones;*
>
> *5. Paragraphs 1-4 are without prejudice to Timothy Gwyn Jones' position as to costs including pursuant to Rule 15.35 (6) of the Insolvency (England and Wales) Rules 2016."*

9. Pursuant to paragraph 1 of that agreement, I formally join Foxpace Limited as the Fourth Respondent to this appeal. As a result, it will not be necessary to try the proceedings that have been stayed.

The trial

10. I heard oral evidence and submissions over 12, 13, 14 and 15 June 2018. During closing submissions, I raised a point as to the implication for the Appellant's argument of the decision of the Court of Appeal in Costello v MacDonald. Both parties filed supplemental written submissions on that issue.

The issues

11. As will become apparent, the factual disputes between the parties are relatively narrow in ambit though they are deep in emotion.

12. The Appellant's primary case is that Foxpace is liable to him in contract pursuant to an agreement ("the introduction agreement"), the terms being that, in the event that Mr Barton introduced a party that purchased Nash House from Foxpace, Foxpace would pay him £1.2 million.

13. The Appellant's original case as put in the debt proceedings against Foxpace was that the liability arose from an oral contract concluded at a meeting between Mr Barton and representatives of Foxpace on 10 July 2013. That meeting, called the Baker Street meeting, is referred to further below.

14. At trial, the Appellant abandoned this position and asserted that the contract comprised either:

    a. (Mr Barton's primary case) an offer contained in an email from Mr Barton to Mr Rooke (acting for Foxpace) dated 31 July 2013 at **B6/1561**, coupled with acceptance by Foxpace by its subsequent conduct; or

    b. (Mr Barton's secondary case) an oral offer in a telephone call or a series of telephone calls on or around 29 July 2013 and acceptance during those telephone calls or by subsequent conduct.

15. It will immediately be noted that Mr Barton's secondary case tends to undermine his primary case. If it were found that a contract had been concluded prior to the email of 31 July 2013 (one possible finding on his secondary case), his primary case would have to change to be either that the email was simply a confirmation of terms already agreed or that it was a variation of those terms.

16. The Respondent's case is that:

    a. No terms of a contract were agreed either in the telephone calls or through offer in the email and acceptance by subsequent contract;

    b. Even if terms were reached they were cloaked by the umbrella of being "subject to contract" and therefore no concluded contract was reached;

    c. Even if a contract were reached between the parties, the terms of the contract were that Mr Barton would be paid £1.2 million if, but only if, Nash House sold for £6.5 million (or alternatively at least £6.5 million). Since the property sold for £6 million, no liability therefore arises under the contract.

17. In light of the way that the Respondent puts his case, the Appellant brings an alternative case for damages for unjust enrichment through the application of the doctrine of free acceptance, on the basis that Foxpace freely accepted the provision of a service by Mr Barton, namely the introduction of a purchaser for Nash House, for which service Foxpace knew that he expected to be paid.

18. The Respondent replies that the only service (if any) which Foxpace freely accepted in the belief that the Appellant expected to be paid for it was the introduction of a person who purchased Nash House for £6.5 million (or more); and that the doctrine has no application where, as here, the parties reached a concluded agreement on the terms at which the introduction fee became payable, since liability should be governed by those terms rather than some other basis imposed by the Court.

The evidence - introduction

19. I heard evidence from the Appellant, Mr Philip Barton, and from Mr Keith Gannon and Mr Oliver Lipson on his behalf. I heard from the Respondent, Mr Timothy Gwyn Jones, and from Mr Marcus Rooke and Mr Nicholas Morris on his behalf.

20. It is helpful to identify at an early stage the significance of the oral evidence to the determination of the issues before me. In a passage from the judgment of Leggatt LJ (as he now is) in Gestmin v Credit Suisse [2013] EWHC 3560 at paragraphs 16 to 20 cited by him and expanded upon in paragraphs 66 to 70 of his judgment in Blue v Ashley [2017] EWHC 1928, Leggatt LJ set out the limitations of oral evidence in commercial disputes, concluding *"that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."*

21. Whilst I have the benefit that Leggatt LJ did not have of at least some contemporary documentation, the warnings that he sounded about the reliability of oral evidence apply equally to this case, perhaps more so in the light of my doubts about the accuracy of each witness for the reasons set out below.

22. Witnesses before me have sought to give evidence as to the terms of the discussions between the parties, which discussions are central to determining whether the parties entered into a contract and if so on what terms. However, each witness who gave evidence on this issue told me simply the case that suited the party who was calling them. Witnesses were unable to recollect what had been said. This is not necessarily surprising, particularly when one considers the research into memory summarised by Leggatt LJ in Gestmin and Blue v Ashley, but it is unhelpful if evidence of the witness' best recollection is replaced by evidence of what the witness believes or, still worse, hopes was said.

23. It may be said that some assistance can be drawn from oral evidence as to the context of the discussions between the parties which may assist the court in concluding what is more likely to have been the content of those discussions. There is some force in this, though even in this regard I was struck by the extent to which witnesses were seeking to promote a certain argument rather than genuinely to recollect what had happened.

24. For these reasons, I have grave doubts about the assistance to be drawn from the oral evidence in determining the contractual position as between the parties.

25. The oral evidence of the witnesses may assist the court in deciding the issues that arise in respect of the claim in unjust enrichment, in the event that the contractual claim is unsuccessful. However, again the value of the evidence is tainted by the tendency of witnesses simply to promote the cause of the party who called them.

26. Fortunately, most of the relevant history is not in dispute, at least as so far as material to the issues before me. I shall set out the relevant chronology from the documents, identifying where the factual issues arise.

The evidence – a chronology from the documents

27. On 30 June 2006, Foxpace purchased Nash House for £3.75 million plus VAT.

28. On 5 December 2012, Stonebridge Acton Limited ("Stonebridge") exchanged contracts with Foxpace to purchase Nash House for £6.3 million plus VAT ("the Stonebridge contract"). Stonebridge was a company with which Mr Barton had considerable links. Indeed, he believed himself to be a shareholder of the company, although seemingly such a shareholding was never formally recorded.

29. On 28 March 2013, Stonebridge and Foxpace agreed to extend the completion date to 9 May 2013, in consideration of payment of a fee of £200,000 plus VAT.

30. On 17 May 2013, the Stonebridge contract was rescinded by Foxpace after Stonebridge failed to complete.

31. On 7 June 2013, Mr Barton exchanged contracts with Foxpace to purchase Nash House for £5.9 million plus VAT ("the Barton contract"). Pursuant to that contract, a deposit of £885,000 plus VAT was payable in three equal instalments on exchange of contracts, 1 July 2013 and 4 July 2013.

32. Following Mr Barton's failure to pay the instalment of the deposit due on 1 July 2013, Foxpace rescinded the Barton contract.

33. On 10 July 2013, Mr Barton met Mr Gwyn Jones and Mr Marcus Rooke (who is an assistant to Mr Gwyn Jones) at a coffee house, apparently at 55 Baker Street, London ("the Baker Street meeting").

34. On 11 July 2013, Mr Rooke sent to Mr Barton an email (**B6/1528)** purporting to summarise the Baker Street meeting. In essence, the email records an agreement, subject to contract, pursuant to which Mr Barton would contract to purchase Nash House for £5.7 million plus VAT, with a view to a sub-sale, that is to say a right for Mr Barton to nominate another party to be the transferee on completion of the sale.

35. On 29 or 30 July 2013, a telephone conversation took place between Mr Barton and Mr Rooke. It is common ground that, during that conversation, Mr Barton spoke of a possible sub-purchaser, raised the issue as to whether the sub-purchaser could contract directly with Foxpace for the purchase of Nash House and proposed the payment of £1.2 million to him as an introduction fee. The details of this conversation are hotly contested. I shall return to them below.

36. On 30 July 2013, Mr Rooke emailed Mr Barton in the following terms:

> "*Following our discussion yesterday, please can you confirm when we are likely to hear from Andrew? As discussed, I am concerned that what you suggested was dramatically lower than what had been agreed previously."* (**B6/1559**).

37. On 31 July 2013, Mr Barton sent an email (**B6/1561**) to "Andrew/Jim" (Andrew Carrier and James Teare of his solicitors) into which "Marcus" (Marcus Rooke) was copied, stating:

"The buyer has come back with the following proposal they would exchange of (sic) *contracts within 10 days of having the draft contract they will complete four weeks thereafter + the normal two weeks' notice period. 10% deposit. Foxpace would at completion reimburse PB*[3] *1.2 million pound (as refund of deposits paid).*

Marcus

Could you please ask NW[4] *to act ASAP with AC*[5] *to close matters. Please give my kind regards to Tim*[6].

Philip"

38. On 1 August 2013:

    a. At 10.48, Mr Rooke forwarded to Mr Barton an email from Mr Gwyn Jones which appears at **B6/1563** asking for the identity of the proposed buyer and their solicitor and querying whether the proposed buyer would pay the cost of security.

    b. At 15.22, Mr Barton confirmed by email (**B6/1564**) that the proposed buyer would pay the security costs.

    c. At 15.37, Mr Rooke again asked Mr Barton to confirm the identity of the purchaser and their solicitor or whether in the alternative this was proposed to be a sub-sale (**B6/1565**).

    d. At 16.02, Mr Teare, another partner at Bridgehouse, the solicitors acting for Mr Barton in the sale of Nash House, emailed Nick Morris as follows:

    "*…I have just spoken with Philip Barton who has asked me to provide you with the contact details of the solicitor acting for the new sub-purchaser of Nash House. His details are:*

    Sean Daly

    Abacus Solicitors

    …

    Philip has asked me to confirm with you whether he will be paid on an undertaking out of completion funds, where he is the purchaser or if it is agreed that Philip will be paid by way of commission on an undertaking to Philip?

    Also, please could you confirm when you expect to be able to issue a contract and that it will contain a provision for completion 4 weeks later and a 10% deposit, with a purchase price of £6.5 m?"

[3] The Appellant
[4] It is common ground that this should read "NM" and is a reference to Nick Morris, solicitor acting for Foxpace,
[5] Andrew Carrier
[6] The First Respondent.

39. On 2 August 2013, Mr Rooke emailed Mr Barton asking whether the intended purchaser was North West Securities or The Western Property Group (**B6/1571**).

40. On 5 August 2013, Nick Morris sent to Mr Daly of Abacus Solicitors a letter annexing amongst other things a draft contract for the purchase of Nash House (**B6/1576 – B6/1587**). The contract states the purchase price to be £6.5 million plus VAT (£1.3 million).

41. On 6 August 2013, Mr Teare emailed Nick Morris in the following terms:

> "*Thank you for your time just now. I have spoken to Philip and he has clarified that the £1.2m is a rebate of deposits and costs incurred. Philip will discuss the calculation and invoicing with your client direct, but has confirmed that all of the £6.5m purchase price should be paid to you and that the rebate to him should be held for his benefit on an undertaking to hold and pay it for him.*
>
> *Please could you take instructions on the above and, if confirmed, let Andrew and I have a form of undertaking for consideration…" (***B6/1590**).

42. By 9 August 2013, the potential purchaser, Western, was offering an increase of £50,000 on the purchase price because of a delay in the proposed completion date (see **B6/1593**).

43. On 14 August 2013, Mr Teare on behalf of Mr Barton (at **B6/1603**) and Mr Rooke (at **B6/1604**) both emailed Mr Morris to chase up the terms of the proposed undertaking relating to the sum that it was anticipated would be paid to Mr Barton following the sale.

44. On 14 August 2013, Mr Javed Hussain, Manging Director of a company called J2 Global emailed Mr Rooke on the following terms:

> *"Subject: Park Place, Nash House…We are the retained agent for an investor who wishes to acquire the above property. He is willing to make a cash offer, not subject to any further planning being sought, with an attended exchange if so required. To forward this enquiry I would need from you terms on which you would entertain an offer from us…"* (**B6/1608**).

45. Mr Daly of Abacus Law on behalf of Western Property raised enquiries before contract of Foxpace in an email to Nick Morris on 14 August 2013 (**B6/1610**). There was a delay in response to these because, apparently, Mr Morris was on holiday (**B6/1616**).

46. In the meantime[7], Mr Morris emailed Mr Rooke and Mr Gwyn Jones asking them to confirm that they were happy, "*On exchange to give an undertaking to pay £1.2m to Phillip Barton. I have not been asked yet to pay VAT on this amount but if so please confirm that my undertaking can extend to payment of VAT in addition being £240,000 and of course we will get a VAT invoice.*" (**B6/1618**).

47. On 16 August 2013, Mr Rooke responded to Mr Morris, "*We are happy for you to give the undertaking but only on exchange on Tuesday. Regarding VAT, we do not intend to agree to paying VAT on the £1.2m.*" (**B6/1619**).

[7] In fact, this was stated in an email timed 2 minutes after that at **B6/1626** which had stated that Nick Morris was on holiday until the following Monday. Nothing turns on this apparent inconsistency.

48. On 16 August 2013, Mr Rooke emailed Mr Hussain, apparently confirming terms that they had discussed for the sale of Nash House for the sum of £5.6 million plus VAT (**B6/1620**).

49. On 17 August 2013, Mr Barton emailed Mr Rooke, apparently with the aim of applying pressure on Mr Morris to proceed with the legal side of the sale of Nash House, but also commenting, "*By the way no lawyer undertaking re the 1.2 nett back at completion has been received either (I appreciate that this has been agreed, but lawyers undertaking would be more comfortable)"* (**B6/1624**).

50. On 19 August 2013:

    a. Mr Morris emailed Mr Carrier asking for a draft of the proposed undertaking (**B6/1627**).

    b. Mr Morris on behalf of Foxpace replied to the enquires before contract (**B6/1628**).

    c. Mr Carrier provided a proposed undertaking, the terms of which were that Mr Morris would assert that *"my client has agreed to pay your client, Philip Barton, a commission from the proceeds of sale of the property"* and that Mr Morris was "*instructed by the seller to send you £1,200,000 from the proceeds of sale of the property immediately following completion of the sale"* (**B6/1632**).

51. Mr Barton was asked to comment on the proposed wording by Mr Carrier (**B6/1633**) and responded that he wanted the wording to be *"as refund of deposits and costs incurred"* (**B6/1634**), which wording was communicated to Mr Morris (**B6/1635**).

52. On 20 August 2013, Mr Morris on behalf of Foxpace indicated that it was a condition of the undertaking being given that notice of the rescinded Barton contract be removed from the title.

53. Further enquiries before contract were raised by Abacus Solicitors on 21 August 2013 (**B6/1652**) and Mr Morris responded to them on the same day (**B6/1654**).

54. On 22 August 2013:

    a. There was further communication between Mr Hussain and Mr Rooke about the potential deal with Mr Hussain's client (**B6/1662 -1664**).

    b. Mr Morris emailed Mr Carrier in these terms: *"I have further discussed this matter with my partners and as you will appreciate no firm of solicitors would be in a position to give an undertaking as requested. Having discussed the matter with my client the only alternative subject to contract is for Foxpace Limited to enter into an agreement with your client that on completion of the sale to Western UK (Acton) Ltd and upon receipt of the said sum on completion of £6,500,00 plus VAT my client will immediately pay to Philip Barton the sum of £1,200,000."* The email annexed an agreement in the same terms. (**B6/1666-1667**).

    c. Later that day, Mr Morris corrected the price in the draft agreement at **B6/16567** to £6,550,000 (**B6/1668-1669**).

d. Mr Hussain sent to Mr Rooke heads of terms for the sale of Nash House to Mr Abdul Haleem Kherallah for a price of £6.3 million plus VAT (**B6/1675-1677**).

e. Mr Carrier emailed Mr Morris to say that Mr Barton had approved "*the document"*, which appears to be a reference to the draft agreement for payment of £1.2 million to him (**B6/1683**).

f. Mr Rooke emailed Mr Morris to indicate his agreement to a "profit share" agreement pursuant to which, if Foxpace sold Nash House to Mr Kherallah, Mr Hussain would be paid 70% of the sale price less £5.6 million. Since the sale price was anticipated to be £6.3 million, the anticipated amount to be paid to Mr Hussain was £490,000. (See **B6/1685-1689**).

55. On 23 August 2013:

a. Mr Rooke emailed the relevant parties in respect of an intended exchange of contracts for sale with Mr Hussain (**B6/1708**).

b. Ms Sandra Connor of Abacus Solicitors emailed Mr Morris in the following terms: "*It has come to my attention that in July 2013 the HS2 Safeguarding*[8] *Consultation Phase One was published. I assume that your client is fully aware of the consultation provisions and would ask why these provisions have not been disclosed to us during the course of these negotiations. In particular I am informed that this site is identified in the draft environmental statement to accommodate a construction site." (***B6/1710**).

c. Mr Morris replied to Ms Connor that Foxpace had not received notice of the HS2 Safeguarding Consultation Phase 1 (**B6/1712**).

d. Mr Fairbrother (an assistant to the Respondent) emailed to Mr Rooke (**B6/1715-1716**) and Mr Rooke emailed to Mr Morris (**B6/1717**) documents entitled HS2[9].

e. Ms Connor on behalf of Western indicated that any exchange of contracts would have to be conditional upon either the HS2 project itself or the plan to use the Nash House site as part of the project being abandoned (**B6/1719**).

56. On 27 August 2013, Nayan Panchmatia, a Senior Property Acquisitions Manager within the HS2 project wrote to Mr Rooke explaining the proposed use of the Nash House site, and asserting that a letter had been sent to Foxpace on 24 July 2013 indicating the Secretary of State's position with regard to safeguarding Nash House (**B6/1733**).

57. On 9 September 2013, a revised sale price of £6 million plus VAT was agreed between Foxpace and Western UK (Acton) Ltd (**B6/1754**).

58. On 10 September 2013:

[8] "Safeguarding" is conveniently described in Nayan Panchmatia's letter as "*a planning tool used to protect the railway from conflicting development. A development application for a property within a safeguarded area requires the local authority to submit the application to HS2 for review to ensure that it does not interfere with the construction or operation of the railway."*

[9] In evidence, Mr Rooke said the attachments were the document about HS2 that appears at **B5/1464**, and a document attached to that described as a "*land interest questionnaire."*

a. Foxpace and Western UK (Acton) Ltd exchanged contracts for sale of Nash House for the sum of £6 million plus VAT. The contract signed by Mr Daly on behalf of Western Acton appears at **B6/1768**; there is confirmation of exchange at **B6/1777**.

b. Mr Carrier emailed Mr Morris (**B6/1775)** stating, *"Philip Barton has informed me that your client has exchanged contracts for the sale of Nash House to the party that Philip has been in discussion with. Please will you confirm your client's intention to pay Philip £1.2m in accordance with the terms of the agreement that the parties settled in August and please send me that agreement for execution."*

59. Thereafter, Foxpace refused to pay Mr Barton £1.2 million, though it offered to pay him £400,000 as evidenced by the email at **B7/1664**.

The evidence - witnesses

60. The Appellant's account of matters is contained in several documents:

a. The Particulars of Claim in his claim against Foxpace (**A2/3**), which is signed by Mr Barton with a statement of truth;

b. His first witness statement in these proceedings (**A1/3-17**);

c. His second witness statement in these proceedings (**A1/18-51**).

61. These documents between them set out the background to Mr Barton's involvement in the purchase of Nash House. As regards the Stonebridge agreement, Mr Barton asserts (and I see no reason to doubt) that he personally contributed a significant amount in respect of the proposed purchase. He puts that figure at £835,240 (see **A1/28**, paragraph 37). He explains that it had never been his intention to use his own capital to buy Nash House pursuant to the Stonebridge contract, but rather that one of the three options identified in paragraph 20 of his first statement (**A1/29**) would have been pursued, namely:

a. obtaining funding from a third party to enable Stonebridge or Mr Barton himself to complete the purchase;

b. completing the purchase and developing the site as a joint venture with a third party;

c. completing the purchaser but immediately selling on to a third party purchaser by way of sub-sale.

62. Unfortunately, Mr Barton was unable to obtain adequate third-party funding, as a result of which he defaulted on an obligation to pay the deposit and the contract was rescinded.

63. Mr Barton explains that, following the failure to complete on the Stonebridge contract, he saw an alternative opportunity to develop Nash House and to recoup the money that he had lost by forfeiture of the deposit on the Stonebridge contract by himself purchasing Nash House at a lower price, with the possibility again of developing the property and

recouping his money. This led to negotiations for him to buy Nash House in his own name, culminating in the Barton contract.

64. Again, Mr Barton was unable to obtain adequate third-party funding, defaulted on payments under the contract and the contract was rescinded. Mr Barton's loss on this contract was £295,000 plus VAT, a total of £354,000. Thus, he says (and I accept) that he was about £1.2 million out of pocket across the two unsuccessful attempts to purchase Nash House.

65. This was the context of Mr Barton attending the Baker Street meeting.

66. His first account of that meeting is at paragraph 8 of the Particulars of Claim in his claim against Foxpace, Mr Barton stated at paragraph 9 (**A2/4**), "*it was recognised that [Mr Barton] had lost or was likely to lose £1.2 million on the putative purchase of [Nash House] by Stonebridge and then [Mr Barton]. It was orally agreed that if [Mr Barton] introduced [Foxpace] to a purchaser who paid £5.75 million or more for the property, [Foxpace] would pay to [Mr Barton] the sum of £1.2 million on completion of that purchase in consideration of the said introduction."*

67. In his first witness statement, Mr Barton did not correct his account that he had entered into the agreement at the Baker Street meeting, even though he had by then seen the email from Mr Rooke which he now says demonstrates that his assertion in the Particulars of Claim was incorrect – see paragraph 13 at **A1/6**. Paragraphs 15 and 16 of his witness statement at **A1/6** might be taken, in particular in light of the contents of his second witness statement, to be an assertion that the introduction agreement was entered into following the Baker Street meeting and therefore to be consistent with the account referred to below given in the second witness statement, but if at that time he had a clear recollection of matters, it is surprising that he did not expressly put right the error in the Particulars of Claim.

68. His description of the circumstances of his entering into the introduction agreement in the first witness statement is limited to the first sentence of paragraph 16 (**A1/6**), where he states, "*at all times it was understood and agreed that the sale of the property would achieve an outcome whereby I would recover the monies I had out laid by this time i.e. £1.2 million ("the debt").*" No detail is given as to when he said this agreement was reached, nor are the terms of the agreement laid out. The use of the word "*understood*" might be thought to suggest that the agreement is to be implied into the dealings between the parties, though the word "*agreed*" might suggest an express discussion of the issue. The reader is left unsure.

69. In his second witness statement, Mr Barton stated that he had misremembered the detail of that discussion. He accepted that Mr Rooke's email of 11 July 2013 at **B6/1528** accurately records the substance of the discussion at that meeting, which involved a further proposal by Mr Barton himself to purchase Nash House, this time for £5.7 million plus VAT.

70. As to the reason for the error about events at the Baker Street meeting, Mr Barton appears to attribute it to having not previously had the opportunity to consider the relevant documents in detail (see paragraph 64, **A1/34**). Whilst this may well be correct in reference to the time at which he signed the Particulars of Claim, he had in fact had the

opportunity to read the only relevant document, the email at **B6/1528**, by the time that he signed his first witness statement, as I have indicated above.

71. In the second witness statement, Mr Barton explains that two acquaintances, Mr Keith Gannon and Mr Dave Sumner, had contact with Mr Oliver Lipson of Western Acton, who expressed an interest in purchasing Nash House. Mr Barton says at paragraphs 68 to 71 of that statement (**A1/36**) that he identified Mr Lipson as being eminently suitable as a potential purchaser for Nash House, because he was a cash buyer and wished to proceed quickly. It was also Foxpace's wish to proceed quickly and thus the parties seemed a good match.

72. At paragraph 72 of the second witness statement, Mr Barton refers to the email of 31 July 2013 (**B6/1561**), which mentions the payment of the sum of £1.2 million to him and refers in paragraph 73 to an earlier telephone conversation with Mr Rooke in which he had referred to a potential sub-purchaser.

73. He explained his position at paragraph 74 of the statement as follows:

> "*In view of the fact that there was now the possibility of a direct sale from Foxpace to Western, I wanted to protect my own position. This is why I made it a term of the above agreement and in my telephone conversation with Marcus that Foxpace would pay to me the £1.2 million on completion of the purchase. Marcus agreed to this. I made sure this was agreed before I provided Foxpace with the details of Western".*

74. At paragraph 78 of the statement, Mr Barton states: *"During this exchange of emails[10] and discussion[11] with Marcus Rooke, the payment of the debt was not conditional on a sale price been achieved of £6.5 million. The point was that the site was proving difficult to sell and so if I could introduce a purchaser, I would be repaid if a deal could be done by Foxpace with that purchaser at a level that was acceptable to Foxpace… It was obviously a matter for Foxpace if they sold to Western and if so, what price, but on completion of the purchase of Nash House, the debt immediately became repayable to me."*

75. In his oral evidence at trial, Mr Barton stated that the introduction agreement was reached in telephone conversations with Mr Rooke. He stated that Mr Rooke would always refer back to the Respondent, so for example he might say that a particular matter that they had discussed was acceptable, but he would need confirmation from Mr Gwyn Jones. He accepted that the figure of £1.2 million was not in fact even mentioned at the Baker Street meeting, which was concerned with the new proposal for purchase by Mr Barton summarised in the email at **B6/1528**.

76. It was Mr Barton's account at trial that, during June, July and August he was speaking to Mr Rooke daily, sometimes twice per day. He rejected the suggestion that the email at

[10] The statement does not in fact disclose which emails are here being referred to, apart from that at **B6/1528**. It is probably that email, and the subsequent ones referred to in the chronology of documents above, insofar as they are relevant to this issue.

[11] The discussion is not fleshed out beyond what is said in paragraph 74 of the statement. At no point does Mr Barton assert that it was expressly agreed that the fee would be paid regardless of the price; rather he simply asserts that payment of the fee was not agreed to be conditional upon a particular sale price being achieved.

B6/1542 arose because Mr Rooke was having difficulty contacting him. Mr Barton accepted that he said to Mr Rooke in a conversation that took place around 29 July that he had found a purchaser who was willing to pay £6.5 million for Nash House and that he, Mr Barton, wanted £1.2 million. As he put it, "*I said I wanted £1.2 million for bringing a buyer*." He said that he wanted his solicitor to formalise the deal, hence the email at **B6/1561**. He said that this deal was based on him "*wanting my money back*". He believed that the introduction agreement had been concluded by 1 August.

77. At one point in cross examination, Mr Barton appeared to accept that the deal he had entered into was dependent upon there being a sale for £6.5 million. But later in his evidence, he said "*I said if they go ahead with a buyer at a figure that is acceptable to them, I want my £1.2 million. That was said in the conversation on 29th or 30th." Shortly* after that, he appeared to change his account again saying, "*No one mentioned what would happen if the price were different to £6.5 million."*

78. Mr Barton rejected the suggestion that he had no independent recollection of events at the time that the negotiations were taking place and was simply reconstructing matters to fit his own case. Indeed, he maintained that he remembered the Baker Street meeting very well.

79. Mr Barton said that the discussions that led to the offer of £400,000 referred to at **B7/1856** had taken place in September 2013 and December 2013. He had not accepted the offer because he thought that Foxpace were trying to "*chip him down."*

80. Mr Keith Gannon was called to give evidence in support of the Appellant's case. His statement appears at **A1/52**. At paragraph 21, he describes Mr Barton as being "*old school"* meaning "*if he shook hands or agreed something verbally, then that was sufficient."*

81. Both in his statement and in oral evidence, Mr Gannon explained his involvement in introducing Mr Barton to Mr Oliver Lipson. He said he was aware of the previous failed purchases by Stonebridge and by Mr Barton. When he spoke to Mr Lipson about buying the building, it was as a result of an introduction to him through his business partner, David Sumner. He said that he had made clear to Mr Lipson that Mr Barton was "*owed*" £1.2 million and that he had to be repaid this as part of any purchase flowing from an introduction of the purchaser by Mr Barton.

82. Mr Lipson gave evidence on behalf of the Appellant. His statement appears at **A1/60**. At paragraphs 8 to 11, he sets out his background in the property development industry, emphasising the importance for a person such as himself to be able to "*move quickly"* within that industry, for which purpose it is important to have a "*strong network of contacts."*

83. Mr Lipson spoke in oral evidence of having discussions with Mr Sumner about a potential purchase of Nash House. Originally, Mr Sumner was looking at a purchase price of between £8 million and £10 million. Mr Lipson had access to money from a company in Hong Kong and was interested in the purchase. He considered that the price needed to be in the range £5 million to £7 million. Eventually, Mr Lipson became involved, with the assistance of Mr Barton, in negotiations with Mr Rooke for purchase of the property for

£6.5 million by Western, that was to be set up for the purpose. He was aware that the proposal was for Foxpace to pay an introducer's fee to Mr Barton.

84. Mr Lipson recalled that the discovery of the issue relating to HS2 had led to difficulties in the negotiations. In the light of the potential effect of HS2 on the site, Mr Lipson considered one possibility was a contract for sale conditional upon HS2 not affecting the site, but he was aware that Foxpace were not willing to agree to this. He said that Mr Barton was keen to salvage the deal, suggesting that Mr Lipson offer a reduced price.

85. Mr Lipson explained that he was concerned that Mr Barton was not going to receive any kind of fee from him or his company for the work involved in the negotiations. For this reason, he enquired whether, if the parties agreed a sale price of £6 million, Mr Barton was still going to be paid the introduction fee.

86. Mr Lipson was asked whether he had spoken to Mr Rooke about money being paid to Mr Barton. His initial response was that he had indeed spoken to Mr Rooke although, as he answered the question in greater detail, it became apparent that he was referring to a conversation with Mr Barton. It was pointed out to him that his witness statement only referred to conversations with Mr Barton about this issue (see **A1/66**, paragraph 38). After considering the matter further, Mr Lipson asserted that he had discussed this issue with Mr Rooke and Mr Rooke had made it clear that he would ensure that the money was paid to Mr Barton.

87. Mr Lipson revisited the point later in his evidence when he sought to clarify his conversations with Mr Rooke and Mr Barton. He described an afternoon during which the parties were discussing a reduced price of £6 million. He spoke both to Mr Rooke and to Mr Barton on that afternoon. He was concerned about Mr Barton's behaviour and he said to Mr Barton words to the effect, "*Philip, don't you need to take care of your affairs*?" meaning that Mr Barton needed to ensure that he was paid the introducer's fee. When he was speaking to Mr Rooke, he thought it relevant to mention Mr Barton's position. Mr Rooke said, "*I will deal with Philip, I'll sort it out*." Mr Lipson took the word *"it"* to mean the payment of £1.2 million.

88. At paragraph 39 of his witness statement, Mr Lipson asserts that he has *"every confidence*" that no other purchaser would have bought Nash House unconditionally for £6 million. His explanation, at paragraph 41, is based on the unusual position of the investors who were behind his purchase of Nash House.

89. Mr Lipson explained that he had subsequently sold the building on for a little over £6 million, though when pushed on the precise figure he was reluctant to tell the court exactly how much he had sold the building for. His attention was drawn to a subsequent purchase of the property on 25 April 2014, when the price was said to have been £9,282,730 plus VAT (see **B8/2364**). He said that he was unaware of this figure and emphasised that it is difficult to make assumptions about how much people will pay for commercial property.

90. The Respondent's witness statements appear at **A1/76** and **A1/78**. The first of these refers to and confirms a witness statement from Mr Woolf (the Respondent's solicitor) which itself is at **A1/68.** Mr Woolf's statement deals largely with legal and procedural issues

and insofar as it deals with the factual issues within the case is based almost entirely upon other people's dealings (including the dealings of Mr Gwyn Jones himself).

91. The second statement deals with the factual issues. Of note, at paragraph 12, Mr Gwyn Jones said that he did not believe that Mr Barton provided the finance to Stonebridge for the Stonebridge contract. (It is not obvious to me either why Mr Gwyn Jones thinks this issue is relevant to the case or why he does not believe Mr Barton in what he says about the issue. It is perhaps an indication of the depths of enmity between the parties that Mr Gwyn Jones feels it necessary to say this.)

92. As regards the introduction agreement, Mr Gwyn Jones set out his account at paragraph 24 of his witness statement as follows:

> "*Following the* [Baker Street] *meeting, Mr Barton approached Mr Rooke (who discussed the conversations with me) in which Mr Barton said that he no longer wanted to sub-sell the property and instead wanted to introduce a purchaser for a fee. This was discussed and Mr Barton informed us that he wanted to be reimbursed the sums that had he* (sic) *and Stonebridge had forfeited to Foxpace, and which he calculated at £1.2 million. He said that he had found a potential buyer for £6.5 million, and suggested that if the sale went through at that price, then he would receive £1.2 million. Whilst I was not opposed to this suggestion, so far as I was concerned, any payment of £1.2 million to Mr Barton was necessarily contingent on the property being sold to the introduced buyer at a price of not less than £6.5 million."*

93. Mr Gwyn Jones also contended that the introduction agreement was not in fact contractually binding. At paragraph 31 of his statement, he said:

> "*… Had the discussions not been subject to contract, they would have been out of step with the way that the sale of the property was being conducted generally. At the same time as Foxpace were negotiating with Mr Barton and Mr Western, who was also negotiating with another prospective purchaser (Mr Abdul Haleem Kherallah) in a deal that would have involved a payment to the introducer (Mr Javed Hussain) in the event of it being successfully completed. A written introduction agreement was signed by Mr Hussain on 22 August 2013. Whilst the sale ultimately didn't proceed, as the legal work with Western was at a more advanced stage, it nevertheless shows clearly my (and Foxpace's) standard practice. There is no reason why this practice would be departed from in respect of Mr Barton and I had no intention of doing so."*

94. In cross-examination, Mr Gwyn Jones was asked about Foxpace's financial circumstances. He accepted that Nash House was charged to Lloyds Bank and that they were looking for repayment of £2.4 million on sale of the property (see **B7/1882**). The bank was pressing for repayment of that facility.

95. Foxpace had sought and indeed obtained outline planning permission for the demolition of Nash House and construction of a new building. The planning permission, dated 6 October 2011, appears at **B1/162**. However, Foxpace fell out with BNB Developments Ltd who had worked with Foxpace to produce the scheme for the development of the site and indeed this dispute ended in litigation (see for example **B5/1290**, a statement of Mr Gwyn Jones in the proceedings between those two companies).

96. Mr Gwyn Jones was asked about an email from one Simon Ashdown at **B6/1537**. This related to discussions in respect of the proposed development of the site. He agreed that the tone of Mr Ashdown's email was fairly negative in respect of the future development of the site, but he said that different developers might show different degrees of enthusiasm in different circumstances. He did not think that they heard from Mr Ashdown again after this email.

97. In relation to communications with a man called Philip Farnham (**B2/386**), Mr Gwyn Jones said that Mr Farnham was potentially introducing a company called Primesite Developments Ltd as a purchaser of Nash House. The proposed fee was 5% (see **B2/389**), though in evidence Mr Gwyn Jones described this as being "*extortionate*"[12].

98. Mr Gwyn Jones was also asked about replies to contract at **B6/1629**. He acknowledged that there appeared to have been encroachment on the land by trespassers. He accepted also that there was an outstanding issue of an enforcement notice for the site, which had been put on hold in the expectation that the planning permission would be implemented but which might become an issue once again if the permission expired without the site being developed.

99. To a greater or lesser extent, all of these issues made sale of the property desirable. Further, in 2013, the property was empty. The building had asbestos within it, as a result of which usual business rates charged for an empty property did not apply. However, Mr Gwyn Jones accepted that in 2013 there was, all in all, a good case for selling the property. He was asked about his previous use of the word "*nightmare"* to describe the situation in which Foxpace found itself relating to the property (see paragraph 15, **B5/1292**). He denied that Foxpace were "*desperate to sell*" but he accepted that they "*wanted to move forward*", saying that he would not describe the situation as a "*nightmare".*

100. At one point in his oral evidence, Mr Gwyn Jones accepted that Foxpace was bound to pay £1.2 million to Mr Barton if Nash House was sold for £6.5 million. At a later point, he changed this position, saying that the payment to Mr Barton would have been *ex gratia* and that "*there was no responsibility on our part to pay him a penny*." Yet later, he seemed to change position again, saying "*we did have an agreement at £6.5 million*".

101. When asked what would have happened if there had been discussions about a fee payable at the lower purchase price of £6 million, Mr Gwyn Jones was, "*I would have wished to renegotiate with Mr Barton if we were not getting what we had agreed. I am not running a charity*."

102. Mr Gwyn Jones maintained both in written and oral evidence that he did not know about the HS2 proposals until the issue was raised by Mr Lipson's solicitors. He was not able to explain the emails between Mr Fairbrother and Mr Rooke at **B6/1715-1717**, though he accepted that Mr Fairbrother was an employee of his group of companies.

103. Mr Gwyn Jones was asked about his use of the phrase "*fictitious agreement"* in paragraph 28 of his witness statement in Mr Barton's claim against Foxpace Ltd at **B8/2309**. The

[12] Though there is no contemporaneous note of anyone on the Respondent's side expressing criticism of the fee.

obvious point was that Mr Gwyn Jones was accepting that there was an agreement (arguably subject to contract) relating to the payment of a fee following the introduction of a purchaser and the use of the words "*fictitious*" is therefore inaccurate. Mr Gwyn Jones maintained that it was "*ridiculous*" to suggest that Mr Barton might be entitled to any sum of money unless the agreement were reduced to writing. He pointed out that there were written agreements with Mr Farnham (see the email at **B2/386**) and Mr Hussain (see the "profit share agreement" at **B6/1686**), this being the "*standard practice"* referred to in paragraph 31 of his statement.

104. Of the offer of £400,000 made to Mr Barton in late 2013, Mr Gwyn Jones said that it was a "*very generous goodwill offer*."

105. Throughout oral evidence, Mr Gwyn Jones accepted that Mr Rooke was his representative in discussions in particular with Mr Barton.

106. Mr Rooke gave evidence for the Respondent. His statement appears at **A1/90**.

107. He confirmed that he regularly communicated with Mr Gwyn Jones and spoke on his behalf and with his authority.

108. In respect of the introduction agreement, he says this at paragraphs 17 to 19 (**A1/94**):

> "*[17] … In or about mid-to-late July 2013, Mr Barton broached the idea with me over the telephone that if Western ultimately purchased the property for £6.5 million plus VAT, then he might be paid £1.2 million out of the proceeds of sale.*
>
> *[18] I was not averse to this suggestion, neither was Mr Gwyn Jones, whose authority I needed in order to act on behalf of Foxpace, though I would not have entertained the idea had I not been told that Mr Barton had funded Stonebridge. If Mr Barton was indeed the funder of Stonebridge then it may well have been that developing a relationship with Mr Barton could have benefited us in the future, though I am confident that Foxpace would have received other offers to purchase the property that would have been at least as beneficial as the offer made by Western, particularly after it was negotiated down, had Western not been introduced to Foxpace. However, as far as I was concerned the discussions were, naturally, subject to contract. It was also clear to me and to Mr Barton that Mr Barton's suggestion necessarily meant that if the property was sold for less than £6.5 million then Mr Barton would receive nothing.*
>
> *[19] On 31 July 2013, Mr Barton emailed me to confirm that he had found a purchaser and referred to the £1.2 million that he hoped to receive. On reflection it now appears that Mr Barton was referring to Western in this email. In my view it was (at best) disingenuous for Mr Barton to send that email without being transparent as to what we had previously discussed; namely that any agreement to pay him £1.2 million would be contingent on the property being purchased by somebody he had introduced for a price of £6.5 million or more (plus VAT) …"*

109. In cross-examination, Mr Rooke said of his conversation with Mr Barton in which the question of an introduction fee was first raised that *"Mr Barton said he had found a buyer for £6.5 million and in the same breath he said he wanted to recoup his £1.2 million."*

110. Mr Rooke said that he needed to discuss this proposed arrangement with Mr Gwyn Jones. He thought he said to Mr Barton that he was concerned that the deal would be less beneficial to Foxpace than the discussion summarised in the email of 11 July 2013 (since obviously the earlier deal would have given Foxpace a clear £5.7 million, whereas the later deal gave them £6.5 million less the £1.2 million to be paid to Mr Barton, a net figure of £5.3 million). He said that this was what he was referring to when he said in the email of 30 July 2013 at **B6/1559** that he was concerned about the proposal being "*dramatically lower than what had been agreed previously*."

111. In further cross-examination, Mr Rooke said that there was no discussion about what would happen if the sale price were less than £6.5 million, but that he had said to Mr Barton that, for the fee of £1.2 million to be payable, the sale price should be "*no less than £6.5 million."*

112. Mr Rooke maintained that he had not known about the HS2 issue until it was brought to his attention on 23 August 2013. He acknowledged that Foxpace's files included the document **B5/1464**, dated 12 June 2013 and stamped as received on 17 June 2013. He said that the emails from Mr Fairbrother attached this letter and the enclosed document (a 'land interest questionnaire'). His investigations showed that the HS2 documents had been put on his desk in around June 2013, but he had not actually looked at them prior to 23 August 2013.

113. When asked about the reduced offer from Mr Lipson of £6 million, Mr Rooke said that Mr Barton was not, to his knowledge, involved in brokering that deal. He accepted that Mr Barton may have said to him something like *"£6 million would do it*" as an alternative to the conditional offer of sale that was being discussed. He accepted that Mr Barton was obviously involved with Mr Lipson in negotiating the deal.

114. Mr Rooke further accepted that he had discussed the offer of £6 million directly with Mr Lipson. He thought that Mr Lipson had said that Mr Barton was behaving "*irrationally"*. He accepted that he had said that he would "*deal with Mr Barton,*" but denied reassuring Mr Lipson that he would ensure that Mr Barton was paid £1.2 million.

115. Mr Morris, who acted as Foxpace's solicitor in respect of the sale of Nash House, gave evidence. His witness statement appears at **A1/101**. Both in his statement and his oral evidence, he confirms that he was not involved in any of the discussions between Mr Barton and Mr Rooke.

116. At paragraphs 11 and 12 of his witness statement he says this:

> *[11] … I was informed by Mr Rooke that the prospective deal involved the sale of the property to Western at a price of £6.5 million plus VAT with a payment of £1.2 million being made to Mr Barton if, and only if, that price (or higher) was achieved. It was made clear to me that Mr Barton would receive (and be entitled to) nothing if the property was sold to Western for less than £6.5 million plus VAT. In any event I also understood all discussions to be subject to contract. I was later informed by Mr Rooke that the purchase price had increased to £6.55 million plus VAT.*
>
> *[12] I therefore drafted the various agreements on the basis of those instructions. This included, on or about 22 August 2013, my drafting contracts for Mr Barton's approval*

which to my mind explicitly made clear that the payment of £1.2 million was contingent on Foxpace receiving the sum of £6.5 million plus VAT (later £6.55 million plus VAT) …"

117. Mr Morris was asked in cross-examination about how he had come to learn of the proposed payment to Mr Barton. He said that the conversation was in a telephone call with Mr Rooke and that he considered the proposed amount of money to be "*extraordinary*", saying "*I have never heard of so high a commission*". Mr Morris said that he could remember this conversation *"vividly"* even though he had not recorded the fact that the payment was said to be conditional on achieving a sale price of £6.5 million.

118. He was asked about the email at **B6/1666**. He indicated that the use of "*undertaking*" in discussions about how Mr Barton was to be paid was a loose use of that word and that there was never any question of a solicitors' undertaking being given. He denied the suggestion that, by this time, he was deliberately trying to delay the execution of any contract pursuant which Mr Barton was to be paid.

119. Towards the end of his cross examination, Mr Morris said that he recalled Mr Rooke saying that Mr Barton would receive nothing if the price received was less than £6.5 million. He said that this did not strike him as strange.

120. After the conclusion of the evidence and oral submissions, I reserved judgment. Thereafter solicitors for the Respondent sent a letter dated 19 June 2018 to me personally (though it is obvious that the Appellant was aware of the contents of the letter). The letter annexes office copy entries and an email. It is said to be sent pursuant to the Respondent's continuing duty of disclosure under CPR 31.11.

121. It appears to me that the author of the letter is under some misunderstanding both as to the nature of the duty of disclosure and as to the appropriate manner in which to deal with an issue of this nature. Whilst the duty under CPR 31.11 is indeed a continuing duty owed to the court, it is not a duty to produce documents to the court. The duty is to disclose the existence of documents to the opposing party. It is neither necessary nor indeed appropriate to send documents to the court by way of disclosure.

122. What may seem a relatively innocent error looks a little more suspicious when the so-called disclosure takes place after the end of evidence and oral submissions. It appears to be an attempt to bolster or to plug a perceived gap in the Respondent's case. On behalf of the Appellant, Mr Pomfret took the opportunity in supplemental written submissions (which I had required on the issue of unjust enrichment) to deal with the additional documents. Whilst I am obliged to him for his thoroughness in so addressing the issues, I am quite satisfied that I should have no regard to the documents at all. Beyond being aware of the general nature, I have not read either the documents nor Mr Pomfret's submissions in respect of them, lest I be in any way influenced adversely to his case.

The evidence – Appellant's submissions

123. The Appellant invited me to prefer his evidence and that of his witnesses in preference to that of the Respondent and witnesses called on his behalf. In particular, in terms of attacking the credibility of the Respondent and his witnesses, he relies on the following:

a. Inconsistencies in the evidence of Mr Gwyn Jones as to the urgency with which Foxpace was approaching the sale of Nash House, especially as between his oral evidence and what was said in the statement at **B5/1290**;

b. The implausibility of Mr Gwyn Jones and Mr Rooke being unaware of the HS2 issue at the time the documents were admittedly received by Foxpace in the circumstances described by Mr Rooke at paragraph 112 above.

124. As to the inherent likelihood of what the parties would have agreed as to the terms of the payment of the introduction fee, the Appellant relies upon the following:

a. It is implausible that Mr Barton would have provided contact details for Western unless a contract had been reached;

b. If contractual terms had been concluded, it is implausible that it would not have dealt with the possibility of a reduced purchase price.

125. The Appellant contends that the Respondent's position lacks sense. By the time that Mr Barton was offering to introduce a purchaser, several difficulties had arisen with the sale of Nash House and that his was a difficult sale. In particular, my attention is drawn to:

a. The length of time that the property had been unoccupied;

b. The relatively large number of failed attempts to sell the property;

c. The difficulties with the planning permission, in so far as it appeared to offer a development scheme that no one was interested in;

d. The need to comply with the enforcement notice;

e. The planning blight introduced by the HS2 safeguarding process.

126. In those circumstances, it is understandable that Foxpace should be willing to pay Mr Barton a commission of £1.2 million to achieve a sale. Foxpace is of course protected from being under compensated by its right simply to decline to sell to the purchaser introduced by the Appellant. It could not be forced to sell Nash House to anyone unless it wished to do so.

127. The Appellant contends that it makes more commercial sense that the parties agreed a deal that the Appellant was entitled to a fee of £1.2 million regardless of the actual sale cost than that he is only entitled to a fee if the sale cost was £6.5 million (or alternatively at least that figure).

128. The Appellant also draws attention to the email of 31 July 2013 at **B6/1561** and asserts that it is consistent with an agreement to pay a fee of £1.2 million regardless of the sale price of the property.

129. Further, the Appellant contends that the offer of £400,000 to Mr Barton by Foxpace is an indication that they accept a liability to him.

The evidence – Respondent's submissions

130. In respect of the Appellant's evidence, the Respondent points to inconsistencies and inadequacies.

a. The Appellant accepts that his account of entering into the alleged contract, to introduce a purchaser in exchange for a fee of £1.2 million, at the Baker Street meeting in paragraph 9 of his Particulars of Claim (**A2/4**) is incorrect, in that the agreement was not reached during the Baker Street meeting, but rather in subsequent communication between the parties. The Respondent points out that Mr Barton's error in this regard is not limited simply to the circumstances in which the agreement was entered into (namely by telephone and/or email communication, rather than at a face-to-face meeting) but also that the alleged terms of the agreement differ. His account in the Particulars of Claim is an agreement that £1.2 million was payable if the purchaser paid £5.75 million or more for the property. His subsequent account, including that given in oral evidence at trial, is that there was no minimum price for the property which gave rise to the obligation on the part of Foxpace to pay £1.2 million.

b. Whilst Mr Barton asserts that he was responsible for the introduction of Mr Lipson to Foxpace, the reality is that the original connection was through Messrs Sumner and Cannon. The Respondent doubts that the Appellant played the major part in dealing with Mr Lipson that he asserts.

131. The Respondent contends that the evidence adduced by him or on his behalf is more reliable particularly than that of Mr Barton, but also than that of Mr Lipson.

132. The Respondent contends that there is nothing inherently improbable in the case that the only discussion was as to the payment of a fee of £1.2 million in the event of the sale in the sum of £6.5 million. This sale price was agreed at the same time as the commission and there is no reason to think that the sale, if it went through it all, would not go through at that price. On the other hand, it would not make commercial sense for Foxpace to agree to pay commission of £1.2 million regardless of the price. Given an assumed price of £6.5 million, the commission, at in excess of 18%, is already very high. It would be absurd to suggest commissions as high as 20% (which would be the case if commission were payable of £1.2 million on a sale at £6 million; if the sale had been at an even lower price, the commission would have been an even higher percentage).

The evidence – Discussion

133. I have indicated above a general scepticism about accepting oral evidence in so far as it is inconsistent with contemporary documentation. In this case, a further factor arises. It would appear that Mr Barton and those called to give evidence on his behalf believe that he has been very badly treated by Mr Gwyn Jones and his group of companies. Insofar as it is contended that people in the position of Mr Barton and Mr Gwyn Jones should act in what might once have been called a gentlemanly manner, it is possible to have sympathy with this position. But this dispute has reached a stage where it is obvious that emotions run very deep. I have drawn attention to some of the occasions where the language used by witnesses seems to me to be unjustifiable, whatever the rights and wrongs of the case. The corollary is that witnesses have become deeply identified with one side of the cause or the other. I repeatedly got the impression that witnesses for both sides were tailoring their evidence to support the side of the case who was calling them rather than genuinely recalling what was said. In fairness to Mr Gannon, I should say that this tendency was less marked in his case than it was in respect of others.

134. I found Mr Barton to be an unreliable witness. He was unable to explain the significant change in his case from that pleaded in the original claim against Foxpace to that now relied upon. When I asked him directly to give an account of the telephone call in which he says an agreement was reached, he was only able to speak in terms of what would have happened and what he believed happened rather than his actual recollection. During his evidence he became highly excitable at times and some of his answers appeared to be very much a knee-jerk reaction to what was being put him rather than a considered reflection on the questions. Whilst I have no reason to doubt that Mr Barton genuinely believes in the merits of his own case, I cannot place great weight upon his evidence as to what took place in the various discussions, insofar as it is contradicted by other witnesses.

135. During Mr Gannon's evidence, I saw a tendency for him to support Mr Barton's case even when he did not necessarily have direct knowledge of matters as to which he spoke. However, I saw no reason to doubt what he said about his dealings with Mr Lipson, Mr Sumner and Mr Barton, this being the main reason for which he was called to give evidence and I accept what he said in this regard.

136. As the ultimate purchaser of the property, I had expected Mr Lipson to come over as a relatively dispassionate witness. On the contrary, he showed himself to be a great advocate for the Appellant's case. As I have summarised above, he contradicted himself about conversations with Mr Rooke and I was left with the sense that he was simply providing answers that he thought supported Mr Barton. I place no great weight on what he had to say.

137. Mr Gwyn Jones' evidence as to the extent to which Nash House was a millstone around the neck of his group of companies was contradictory and unconvincing. At times he indicated that there was an urgent need to sell, describing the situation at one point as a "*nightmare*". At other times, he said that there was no great urgency and indicated a willingness on the part of his companies to defer the sale. In the absence of any written documentation as to the precise terms of his discussions with Mr Rooke and his instructions to him, I do not accept that they expressly discussed that the commission was only payable if the sale price were £6.5 million (or if it was that price or more). Again, I do not think that Mr Gwyn Jones was trying to deceive the court, but his evidence was unreliable.

138. The witness statement signed by Mr Rooke is, like that signed by Mr Gwyn Jones, somewhat overstated in its tone and its dismissal of the merits of the Appellant's case. However, I found Mr Rooke to be straightforward in giving evidence in the witness box. He avoided the hyperbole of his witness statement and gave evidence with reasonable caution. For example, in respect of the disputed telephone discussion with Mr Barton, his evidence was as to what he "*probably*" said, reflecting to my mind the reality that he was unlikely to remember the details of the conversation at such a distance of time.

139. By far the most controversial area of Mr Rooke's evidence is that as to the HS2 documentation referred to at paragraph 112 above. The receipt of the safeguarding information would no doubt have concerned Mr Rooke and Mr Gwyn Jones had they read it. It seems highly surprising that a document stamped as received and placed on Mr Rooke's desk was not in fact read by him, in particular when it was as significant as this

one. The obvious inference that the Appellant seeks to draw is that Mr Rooke (and therefore probably Mr Gwyn Jones) was aware of the HS2 safeguarding issue but deliberately kept quiet about it, in the hope that Nash House would be sold without the matter coming to light. It would be disreputable to behave in that way and dishonest to lie about it in court. These are serious allegations and I am conscious that, whilst the standard of proof remains the balance of probabilities, such serious allegations need compelling evidence in support.

140. On balance, I am not persuaded that Mr Rooke is lying about this issue. His general conduct as a witness, considered above, indicates that he took care in giving evidence. That weighs in his favour. Further, I am not convinced that it would make sense for him simply to "bury" the document in the manner described above. Had he been aware of this issue, it is highly likely that he would have realised that it was extremely improbable that the sale of Nash House could have been achieved without the matter coming to light. It seems to me more likely that, had Mr Rooke been aware of the HS2 issue, he would have taken steps to try to mitigate its consequences, rather than cover it up.

141. I found the evidence of Mr Morris relating to his original discussion about payment to Mr Barton, as set out at paragraph 116 above, to be unconvincing. I am highly surprised that he would have been able to remember the details of such a discussion in a witness statement signed on 16 January 2018, given that the discussion took place five years earlier. The discussion that he describes is different in detail to that described by Mr Rooke, given that Mr Rooke denies any discussion with Mr Barton about what would happen if the sale price were less than £6.5 million. If, as Mr Morris asserts, he had been told that it was clear that nothing was payable if the sale price was less than £6.5 million, I would have expected Mr Morris not simply to consider this to be "*strange"* – it would be bizarre to think that Mr Barton would knowingly have entered into a contract on the terms that Mr Morris claims were repeated to him, since he would obviously open himself up to a small reduction in the sale price that deprived him of any introduction fee at all.

142. I also found Mr Morris' evidence that there had never been any prospect of his firm offering Mr Barton a solicitors' undertaking for the payment of the introduction fee to be unreliable. Whilst I can understand why a solicitors' firm in that position would not wish to offer an undertaking, it seems to me that the clear language of Mr Morris' email at **B6/1618** indicates that he was contemplating giving such an undertaking. The email at **B6/1666** indicates that the decision not to do so was because of Mr Morris' discussions with his partner. Whilst this issue is peripheral to the matters that I have to decide, it enhances my concern about Mr Morris' reliability as a witness.

143. My overall sense of Mr Morris's evidence was that he was seeking to support the position of his client, Mr Gwyn Jones and his group of companies, in respect of the terms of this contract rather than that he was independently recollecting what they had said to him five years earlier. I do not accept his evidence about his discussion with Mr Rooke as summarised at paragraph 117 above.

The contract claim – Appellant's submissions

144. The Appellant's primary case on the contract is that the email of 31 July 2013 at **B6/1561** is a clear unambiguous offer to pay him £1.2 million if a buyer introduced by Mr Barton

completed the purchase of Nash House. That offer was accepted by the Respondent's conduct in asking for confirmation of the purchaser in the email of 1 August 2013 at **B6/1565**.

145. In arguing that the course of correspondence, communication and conduct in this case leads to a contract, the Appellant draws my attention to the decision of the Supreme Court in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14. At paragraph 45 of his judgment, Lord Clarke states:

> "*The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."*

146. The Appellant also cites paragraph 2.027 of Chitty on Contracts, 32nd edition, dealing with the issue as to whether there has been an offer and acceptance during continued negotiations between parties:

> "*The court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms. If so, there is a contract even though both parties all or one of them had reservations not expressed in correspondence. The court will be particularly anxious to hold that continuing negotiations have resulted in a contract where the performance which was the subject matter of the negotiations has actually been rendered."*

147. On the central issues, namely the amount of the introduction fee and the circumstances of its payment, the terms of the contract are clear and in Mr Barton's favour. The court should find that there was a concluded contract between the parties, given that Mr Barton rendered performance of his side of the deal (providing the details of the potential buyer) and the anticipated sale of Nash House was achieved.

148. As to the argument that any agreement was not intended to create legal relations and was simply "subject to contract", the Appellant draws my attention to the unequivocal nature of the terms agreed by the parties. It is simply unnecessary to go behind the clear agreement of the parties.

149. In his supplemental submissions, the Appellant draws my attention to Chapter 16, Section 2 of Lewison, The Interpretation of Contracts, Sixth Edition, in support of the contention that the court requires clear words for a condition precedent to have effect. The Appellant contends in favour of there being a concluded contract on the basis that £1.2 million was payable as commission regardless of the sale price, but against there being a concluded contract on any other terms because *"the contingency on which payment of [the Appellant] depended was (a) not express and/or (b) too uncertain to be enforceable."* (see paragraph 11 of the Supplemental Submissions).

The contract claim – Respondent's submissions

150. The Respondent contends that, on the basis of the factual findings that I make, I should conclude in his favour that the only terms discussed were as to the payment of an introduction fee of £1.2 million if the property were sold for £6.5 million. If I find those to be the essential terms of any contract between the parties, the Appellant is bound to fail since the property sold for only £6 million.

151. Even if I were to find for the Appellant on the factual issue as to the terms of any agreement, the Respondent contends that I should find that no concluded contract was reached between the parties since the discussions were "subject to contract". It is unquestionable that the negotiations for the sale of the property itself were subject to contract. The relevant communications were headed in this way and in any event the need for formality in contracts for the sale of land strongly supports the conclusion that negotiations of this kind are "subject to contract." In support of this position, the Respondent relies upon the decisions in Attorney General of Hong Kong v Humphreys Estate (Queens Gardens) Ltd [1981] 1 AC 114, Haq v Island Homes Housing Association [2011] EWCA Civ 805 and Generator Developments Ltd v Lidl UK GmbH [2018] EWCA 396 as showing that, where negotiations begin on a "subject to contract" basis, they cannot unilaterally be converted into binding negotiations.

The contract claim – discussion

152. Notwithstanding the Appellant's contention in his primary case that the contract was contained in the email of 31 July 2013, in my judgment the court must look first to the discussions between Mr Barton and Mr Rooke which took place prior to that email. If the parties had already concluded a contract in such discussions, the email could only be either evidence of that contract or a variation of it.

153. On Mr Barton's version of the discussion (or discussions), the court would have clear evidence of an agreement between him and Mr Rooke (either in their original discussions or more probably in a subsequent telephone conversation in which Mr Rooke confirmed that he had spoken to Mr Gwyn Jones who was agreeable to such a contract) pursuant to which Foxpace were liable to pay Mr Barton the sum of £1.2 million if the purchaser whom he proposed to introduce to them completed on the purchase of Nash House. On Mr Rooke's version of events, it seems to me that there is equally clear evidence of an agreement that Foxpace would pay Mr Barton the sum of £1.2 million only in the event that he introduced a purchaser who completed a purchase on Nash House for £6.5 million (or possibly any higher sum), subject to the Respondent's contention that there was no intention to create legal relations by such a discussion.

154. This comes down to a simple question of fact. I accept that either version of events is possible, and neither would be illogical. The Respondent's argument that the Appellant's version is improbable (because Foxpace would be paying a flat percentage regardless of the purchase price) cannot be dismissed out of hand as being commercially ridiculous because there is evidence that Nash House was proving difficult to sell and Foxpace saw some urgency in completing the sale. On the other hand, the Appellant's criticism of the Respondent's argument, on the basis that it would make no sense for the Appellant to enter into an agreement in which he only obtained any fee if the price exceeded £6.5

million, at which point the whole fee became payable, supposes that Mr Barton fully thought through the implications of what he was discussing with Mr Rooke; if Mr Barton was confident that Mr Lipson was a willing purchaser at £6.5 million then, given that Mr Barton had twice been involved on behalf of a buyer in the exchange of contracts for the purchase of Nash House, it is plausible that he simply did not anticipate anything coming to light prior to the exchange of contracts that might have caused Mr Lipson to renegotiate the price, such that the only sale price Mr Barton contemplated was £6.5 million.

155. The email of 31 July 2013 at **B6/1561** is good evidence to support the conclusion that the parties discussed an introduction fee in the sum of £1.2 million payable in the event that Foxpace completed a sale to the purchaser who Mr Barton was proposing to introduce, but is silent on the crucial issue as to the precise circumstances in which the fee was payable.

156. In my judgment, it is more probable than not that the only purchase price mentioned in the discussions between Mr Rooke and Mr Barton was £6.5 million, there being no reference to a figure lower or higher than this. I reach this conclusion for the following reasons:

    a. By the time of this discussion, Mr Barton had twice attempted to purchase the property. He had considerable knowledge of the property and of the issues relating to its purchase. He could therefore be confident when speaking to Mr Lipson and Mr Rooke that the figure of £6.5 million would be acceptable to the other.

    b. None of the contemporaneous documents suggests that any price other than £6.5 million was discussed.

    c. Mr Barton's evidence as to the discussion is considerably tainted by his previous erroneous account of a discussion about the introduction fee having taken place at the Baker Street meeting. It is conceivable that Mr Barton may have misremembered the circumstances in which the discussion had taken place. But the differences between his original account of the discussion and that which he now advances relate not only to the time and place of the discussions and the means of communication between the parties (telephone rather than face-to-face), but also as to the content of the discussions, he previously having said that the introduction fee was payable if the property sold for a figure in excess of £5.75 million. This, together with other inconsistencies in Mr Barton's evidence as set out above, leads me to the conclusion that he cannot remember the contents of that conversation and is seeking to reconstruct the contents by reference to subsequent events and what he thinks he would have agreed to.

    d. Mr Rooke's account of matters is also suspect for reasons that I have identified above. However, I acquit him of the allegation of dishonesty relating to the HS2 information. Given the points made at (a) and (b) above, it is more likely than not his version of events is correct.

157. I am satisfied that Mr Barton and Mr Rooke agreed the necessary terms of this contract, namely the circumstances in which Mr Barton would be paid the commission of £1.2

million. I agree with the Appellant's submission that further discussions relating to the agreement were ancillary matters about precisely how payment was to be made rather than matters central to the contract. Thus, the evidence of further negotiations on these details does not in my judgment undermine the finding that the parties were in sufficient agreement to have reached a concluded contract.

158. On the face of it, there appears to be an inconsistency between the Appellant's argument that the negotiations led to an unambiguous agreement and a binding contract in the event that the agreed circumstances for payment of the fee was a sale at any price, but against such a contract if the finding was that payment was stated to be conditional upon sale for at least £6.5 million. The reason behind this inconsistency is the understandable concern that, on one reading of the decision of the Court of Appeal decision in Costello v MacDonald [2011] EWCA Civ 930, the Appellant's case in unjust enrichment may fail if there was a contract on the terms contended for by the Respondent yet might succeed if the finding was that no concluded contract was reached at all. I deal with the unjust enrichment claim and the effect of the decision in Costello v MacDonald below, but in any event, I reject the suggestion that the agreement was in too vague or imprecise terms as to be capable of giving rise to a binding contract.

159. Having determined the factual issue in Mr Rooke's favour, I turn to consider whether these discussions in fact led to the parties entering into a binding contract. It seems to me that it is neither necessary nor appropriate to cloak these discussions with the "subject to contract" umbrella, as contended for by the Respondent. I say so for the following reasons:

    a. The contract that the Appellant contends he entered into is of a very different nature than the contract for the sale of Nash House, with which it was associated. The latter is required by law to be in writing and it is obvious that detailed consideration would have needed to be given to the terms of the contract before the parties could reasonably have been expected to be irrevocably bound by the negotiations. No such limitations apply in respect of the introduction of the purchaser. The terms of the proposed agreement that the parties were discussing was simple.

    b. The conduct of the Respondent in other cases does not seem to me support the contention that he either believed or intended these discussions to be "subject to contract". To the contrary, his discussions with Mr Hussain, referred to above, led to an introduction before a written contract was entered into, just as was the case with Mr Barton. It seems to me more likely than not that the Respondent himself saw such written contracts as simply evidencing discussions between the parties rather than being the prerequisite of such discussions being binding.

    c. The willingness of Foxpace to invite the introduction of the purchaser without a written contract having been in place is an indication that they did not consider this aspect of the negotiation to be "subject to contract" at all.

160. The authorities referred to by the Respondent as set out at paragraph 151 above are in each case distinguishable on the ground that the alleged contract found to be cloaked with

the protection of the "subject to contract" umbrella related to the very subject matter of the negotiations which were agreed to be subject to contract. In this case, the negotiations that were stated at the outset to be subject to contract (the first reference being the email of 11 July 2013 at **B6/1528**, referred to at paragraph 34 above) related to the sale of Nash House to Mr Barton, rather than comprising negotiations for the payment of a fee for the introduction of a purchaser. The possibility of a contract for an introducer's fee was simply not contemplated when the original negotiations commenced between the parties.

161. For these reasons, I am satisfied that, following discussions between Mr Barton and Mr Rooke during the period 29 to 31 July 2013, the Appellant and Respondent entered into a contract pursuant to which Foxpace was liable to pay Mr Barton the sum of £1.2 million in the event that Nash House was sold to a purchaser introduced by Mr Barton for the sum of £6.5 million. Since the property was sold for £6 million, the claim based on the contract fails.

162. Given that the property was not sold for that (or indeed a higher figure), it is not necessary to consider the issue as to what if any liability Foxpace would have had if the property had sold for more than £6.5 million. However, to avoid any lack of clarity about my judgment, I should make clear that I find that the only figure discussed between the parties was £6.5 million. Thus, the express terms of the contract did not cover the circumstances of a sale at a higher price.

163. It may be that, had the sale taken place at a higher price and had Foxpace declined to pay Mr Barton, he would have brought an argument based upon an implied term of the contract. No such argument has been advanced before me and it is unnecessary for me to consider it.

164. As I have indicated above, the Appellant has not sought to argue that, in the event that I find that the express terms of the contract did not provide for the payment of a fee in the event of a sale price below £6.5 million, that he is entitled to £1.2 million (or any other figure) by way of introducer's fee pursuant to an implied term in the contract. Given the judgement of the Supreme Court in Marks and Spencer plc v BNP Paribas [2015] UKSC 72, this position is well understandable.

The unjust enrichment claim – Appellant's submissions

165. The alternative case brought by the Appellant is that Foxpace is liable pursuant to the doctrine of unjust enrichment. In Benedetti v Sawiris [2013] UKSC 50, Lord Clarke stated at paragraph 10 of his judgment:

> "*It is well established that a court must ask itself four questions when faced with a claim for unjust enrichment, as follows: (1) Has the Defendant been enriched? (2) Was the enrichment at the Claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the Defendant?...*"

166. In the context of this case, the Appellant relies on the doctrine of free acceptance. In the seventh edition of Gough and Jones, The Law of Unjust Enrichment, cited at paragraph 17–03 of the ninth edition of the same work, that principle is set out as follows:

> *"[a Defendant] will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the Claimant who rendered the services*

expected to be paid for them and yet did not take a reasonable opportunity open to him to reject the proffered services. Moreover in such a case, he cannot deny that he has been unjustly enriched."

167. As the authors of Goff and Jones point out, the emphasis here is on the intention of the Defendant in accepting the receipt of a benefit which enriches it at the expense of another party in circumstances where the retention of the enrichment would be unjust.

168. The Appellant contends that the behaviour of the Respondent here falls exactly into this category:

    a. Foxpace received a benefit from Mr Barton, namely the introduction to Mr Lipson, a cash buyer who was able to exchange swiftly and unconditionally at a good price.

    b. At the time that Mr Barton rendered the benefit, he expected to be paid, as Foxpace well knew given their negotiations relating to paying an introduction fee.

    c. Not only did Foxpace fail to reject the proffered service, namely the introduction of the purchaser, they positively encouraged Mr Barton to provide the name of the purchaser – see in particular the emails at **B6/1563** and **B6/1565**.

    d. It would be unjust to allow Foxpace to be enriched by this benefit.

169. During closing submissions, I raised with Counsel the decision of the Court of Appeal in Costello v McDonald [2011] EWCA Civ 930. At paragraph 23, Etherton LJ states the following principle:

    "The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general law reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty and so limits disputes and litigation."

170. In his supplemental submissions, the Appellant draws my attention to a passage from the judgment of Mr Stephen Morris QC (as he then was) in Diamandis v Wills [2015] EWHC 312 at paragraphs 83 and 84:

    "[83] The Defendants submit that this claim has no real prospect of success. First they submit it is bound to fail in law. There can be no claim for restitution where a subsisting contract between the parties allocates the risk between them, relying in particular upon the case of Re Richmond Gate Property Co Ltd [1965] 1 WLR 335. Secondly …
    [84] As regards the first submission, the relevant principle is that where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will generally lie whilst the contract is subsisting: Goff and Jones, supra, §3-13. This general principle is justified on the basis that the law should give effect to the parties' own allocation of risk and valuations, as expressed in the contract and should not permit the law of unjust enrichment to be used to overturn those allocations or valuation: Goff and Jones, §3-16 citing Re Richmond Gate, where Plowman J

stated: "since there was an express contract with the company in regard to the payment of remuneration it seems to me that any question of quantum meruit is automatically excluded". Goff and Jones accepts that the same principle applies today. Goff and Jones continues (at §3-29):

> *"The terms of the contract between the parties will frequently provide for payment to be due only once specified conditions are satisfied. Where the conditions for payment are not satisfied, a party who has done work or incurred expense in some other way in a failed attempt to complete the contractual performance is not permitted to have recourse to a claim in unjust enrichment for the value of that work or expense"*

Goff and Jones cites the well-established authorities of Cutter v Powell (1795) 6 TR 320 and Sumpter v Hedges [1898] 1 QB 673 and the more recent decision in Cleveland Bridge UK Ltd v Multiplex Construction (UK) Ltd [2010] EWCA Civ 139 at §§135-138. The principle was recently restated by Lord Reed in Benedetti v Sawiris [2014] AC 938 at 980F-G at §91. There are two principal exceptions to this principle: the provision of services (a) over and above those contracted for and (b) in anticipation of a contract which does not result: Chitty on Contracts (8th edition) paragraphs 29-075, 29-076[13]."

171. The latter passage cited from *Chitty on Contracts* refers to the decision of Christopher Clarke J in MSM Consulting Ltd v United Republic of Tanzania [2009] EWHC 121 at paragraph 171, where he derives the following propositions to be applied to a claim in unjust enrichment arising from work done in anticipation of a contract that did not materialise:

> *"(a) Although the older authorities use the language of implied contract the modern approach is to determine whether or not the circumstances are such that the law should, as a matter of justice, impose upon the defendant an obligation to make payment of an amount which he deserved to be paid (quantum meruit): Lacey; …*
>
> *(b) Generally speaking a person who seeks to enter into a contract with another cannot claim to be paid the cost of estimating what it will cost him, or of deciding on a price, or bidding for the contract. Nor can he claim the cost of showing the other party his capability or skills even though, if there was a contract or retainer, he would be paid for them. …*
>
> *(c) The court is likely to impose such an obligation where the defendant has received an incontrovertible benefit (e.g. an immediate financial gain or saving of expense) as a result of the claimant's services; or where the defendant has requested the claimant to provide services or accepted them (having the ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely;*
>
> *(d) But the court may not regard it as just to impose an obligation to make payment if the claimant took the risk that he or she would only be reimbursed for his expenditure if there was a concluded contract; or if the court concludes that, in all the*

[13] Paragraphs 29-076 and 29-077 pf the 32nd edition.

circumstances the risk should fall on the claimant: Jennings & Chapman v Woodman Matthews & Co [1952] 2 TLR 406

(e) The court may well regard it as just to impose such an obligation if the defendant who has received the benefit has behaved unconscionably in declining to pay for it;"

172. The Appellant contends that either:

    a. There is no concluded agreement by which a claim in unjust enrichment may be barred;

    b. Alternatively, the parties should not be held to have allocated the risk of the property selling for less than £6.5 million to Mr Barton.

173. It seems to me that the argument could be put in an alternative way – following one of the exceptions identified in Chitty on Contracts and referred to by Morris J (as he now is) in Diamandis v Wills, the service provided by Mr Barton was over and above that contracted for, since the service contracted for was the introduction of a purchaser who purchased Nash House at the specific price of £6.5 million, whereas the service in fact provided was the introduction of a purchaser who purchased Nash House for a different sum.

The unjust enrichment claim – Respondents' submissions

174. The Respondent contends that the relationship between the parties was governed by contract and, in those circumstances, there is no scope for the claim in unjust enrichment. He relies on the passage from MacDonald v Costello cited above in favour of this argument. He also cites the Australian decision of Lumbers v W Cook Building Property [2008] 4 LRC 683, as analysed in Edelman and Bant, Unjust Enrichment (Second Edition), p141 and summarised as demonstrating the following principle:

    "*Where a Defendant is enriched by a benefit conferred by contract, the contract will usually justify the Defendant's retention of the enrichment. If restitution were allowed, it would generally contradict the contract and operate to redistribute the contractual allocation of risk."*

175. As Lord Goff put it in Pan Ocean Shipping v Creditcorp Ltd, The Trident Beauty [1994] 1 WLR 161, "*it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract."*

176. The Respondent further relies on the contention that the Court should uphold the freedom of choice of the parties to contract on such terms as they wish. As the authors of Edelman and Bant put it at page 82:

    "*Full protection for the Defendant's freedom of choice can be given by the objective exercise of characterising precisely what it was that was chosen by the Defendant."*

177. Applying that test to the facts of the present case, the Respondent contends that its choice was to reward Mr Barton's services if he introduced a purchaser who paid £6.5 million for Nash House. No such sale was achieved, and the Court should not go behind the contract or indeed redraw it by allowing a claim in unjust enrichment.

178. In any event, the Respondent contends that it is clear from the evidence that it was in large part Mr Gannon and Mr Sumner who introduced Mr Lipson to the purchase. Thus, even if the Respondent is enriched, Mr Barton has not provided the benefit.

The unjust enrichment claim - discussion

179. In considering the application of the doctrine of unjust enrichment to the facts of this case, I start by asking the four questions identified at paragraph 10 of the judgement of Lord Clarke in Sawiris:

    a. Has the Respondent been enriched?

    b. Was the enrichment at the Appellant's expense?

    c. Was the enrichment unjust?

    d. Are there any defences available to the Respondent?

180. In my judgment the answer to the first question is obviously yes. The Respondent had a property it needed to sell. The Appellant introduced a buyer. The evidence suggests that the buyer would not have bought but for that introduction. That is a clear enrichment to the Respondent.

181. As to the second question, again I consider the answer to be yes. The Appellant had something of value, as demonstrated by the Respondent's willingness to offer to pay him £1.2 million for the introduction. For reasons set out below, I consider that the Respondent was in fact paying for rather more than just the name of a buyer, but I have no doubt that the communication of the name, in circumstances where the Respondent would expect the Appellant to charge for the introduction, caused an enrichment at Mr Barton's expense.

182. In so far as the Respondent points to the efforts of Messrs Gannon and Sumner as being the effective introduction of Mr Lipson as purchaser, I reject the suggestion that this in some way disqualifies Mr Barton from being the person who provided the benefit to the Respondent. The benefit that Mr Gwyn Jones sought was the name of a purchaser who completed on the purchase. That is exactly what Mr Barton provided to him. The detail as to how Mr Barton came to be aware of Mr Lipson as a potential purchaser is a matter between him, Mr Gannon, Mr Sumner and Mr Lipson himself. It does not undermine his right to claim that he provided the benefit.

183. I deal next with the fourth issue. There is no suggestion that any defence arises here.

184. This leaves the third issue which is at the heart of this dispute.

185. As a starting position, the free acceptance by the Respondent of the benefit conferred by the Appellant in circumstances where the Respondent would, in accordance with usual business practice, expect to pay for the benefit, supports the argument that it would be unjust to allow the Respondent to retain that benefit.

186. However, our legal system recognises the importance to be given to parties to exercise freedom of choice in contractual negotiations. For this reason, it is understandable that, where the parties have defined their relationship in contractual negotiations, the Courts

will look with scepticism at an any attempt to use a principle such as unjust enrichment to redefine their rights and obligations.

187. The difficulty posed by the facts of this case is that, on my findings of fact, the parties simply did not address their negotiations to the particular circumstance that arose here, namely sale of Nash House for less than £6.5 million. In Mr Barton's case, I am entirely satisfied that he did not address his mind to that issue simply because he had no reason to think that the price would be renegotiated.

188. I am less sure on this issue in the case of the Respondent. It may be that Mr Rooke (and by virtue of discussions between Mr Rooke and he, Mr Gwyn Jones) thought that the terms that they had discussed and agreed meant that they would not have to pay a fee to Mr Barton if the sale price was less than £6.5 million. On balance, I think it more likely that they did not have this possibility in mind. Had they done so, one might expect to see evidence that they deliberately acted so as to reduce the purchase price below £6.5 million, thereby saving them the payment of £1.2 million. There is no such evidence and that favours the view that they too did not have in mind the consequence of sale at a lower price. In addition, Mr Rooke's oral evidence as to his discussions with Mr Barton suggest that he did not have this issue in mind. I have rejected the suggestion that Mr Rooke discussed the issue with Mr Morris.

189. Accordingly, I conclude that the parties to the contract had no shared or even individual expectation as to how the risk of the sale price being less than £6.5 million should be allocated for the purpose of determining whether Mr Barton should be entitled to payment. The Court must therefore consider whether to impose an obligation on Foxpace to make payment in circumstances which were not contemplated when the contract was concluded.

190. In favour of the argument that Mr Barton should be treated as assuming the risk of not being paid for the introduction, it seems to me that the only substantial argument is that the parties failed within the contract to define an obligation on Foxpace to pay the fee in the circumstances of the sale of Nash House for a figure of less than £6.5 million when they could have done so. The principle set out in MacDonald v Costello should therefore be applied, namely that the parties' mutual obligations in a case in which they concluded a contract should be limited to those which they have defined and allocated in the course of negotiating that contract, so as to give effect to the need for the court to uphold contractual arrangements.

191. In my judgment, there is a strong argument for the court declining to interfere with the agreement by which the parties have determined the circumstance in which a sum of money will be payable by granting relief which amounts to an imposing an obligation to pay in different circumstances. Granting such relief amounts to an obvious interference with the freedom of parties to define and allocate their obligations. In circumstances such as those of the instant case, it is in my judgment incumbent on the Appellant to show why the court should in effect interfere with the allocation of risk by imposing an obligation on the Respondent to pay money in circumstances other than those contemplated by and defined in the contract.

192. In favour of the argument that the court should hold that Mr Barton was not taking the risk of being unpaid for the introduction and that an obligation to do so should be imposed on Foxpace, the Appellant can pray in aid:

    a. the undesirability of allowing the fact that the parties reached a concluded contract to stand in the way of the court granting relief;

    b. the obvious unfairness to Mr Barton of limiting his right to recover to the strict terms of the contract;

    c. the likelihood that the Respondent in fact would have agreed to the payment of a fee if the possibility of a reduced purchase price had been contemplated when the agreement was entered into.

193. On the first point, if the conclusion of a contract which is silent on the issue of the allocation of risk for payment in circumstances not contemplated by the parties defeats any claim in unjust enrichment, one can see how that puts a premium on the Appellant arguing that there was no concluded contract, in contradiction to his primary case as to the conclusion of a contract on terms that he favours. So, for example, if the Court were to find that the discussions between Mr Barton and Mr Rooke had raised the possibility that the payment of £1.2 million was dependent upon on a particular sale price being achieved but had not reached any consensus upon that point, the Court would probably find that the agreement was too vague to amount to a concluded contract.

194. In that scenario, the principle in Costello v MacDonald would seem not to defeat a claim in unjust enrichment. It may be argued that it is unjust to allow relief in those circumstances but not on my findings in this case. Whether the parties' negotiations were too vague to allow the court to conclude that a concluded contract was achieved might be thought to be essentially coincidental to the fairness that the doctrine of unjust enrichment is seeking to achieve by granting relief, namely fair payment for services rendered in circumstances where the recipient of the services is expecting to pay for them.

195. It may indeed be the consequence of the decision in Costello v MacDonald and the principles set out above that relief would be allowed in the scenario raised in paragraph 193 above. I am however reluctant to draw any general conclusion as to the proper application of those principles based on a hypothetical circumstance (a finding that there was no concluded contract) which, on my findings of fact simply does not arise here. For example, it might be countered on behalf of the Respondent that there is no true unfairness in allowing relief in the circumstances posited above whilst refusing relief on my findings of fact because the hypothetical circumstances include an implicit finding that some sale price other than £6.5 million was contemplated by the parties. If the parties had contemplated a lower sale price from the introduction, it might be said to be unjust to refuse Mr Barton relief. In contrast on my findings of fact as set out above, no lower sale price was even contemplated by the parties. Thus, it is less obviously unjust to Mr Barton to refuse him relief.

196. On the second point, I am satisfied for reasons set out above that Foxpace was getting a very real benefit from the introduction of a purchaser for which it was willing to pay £1.2 million (if the sale price was £6.5 million). An obvious apparent iniquity on my findings of fact is that Mr Barton was contractually entitled to £1.2 million if the property was

sold for £6,500,000 but nothing if it was sold for £6,499,999, in circumstances where Mr Barton had no control over the price at which the property was sold and where the value to Foxpace was hardly any different to that actually contemplated in the contract. It is arguable (though it has not been argued before me) that there might be implied in the contract between Mr Barton and Foxpace a term that the latter would have used its best endeavours to sell the property for £6.5 million, thereby protecting Mr Barton from being the victim of a deliberate deflation of the purchase price by Foxpace. I cannot reach any conclusion on whether it would in fact be right to imply such a term but the possibility of such an argument succeeding demonstrates the danger of determining the issue before me by looking at the application of the general principle relied on by the Respondent to other hypothetical scenarios which might in turn give rise to alternative arguments for the Appellant.

197. On the third point, it is a reasonable assumption that Foxpace would have been willing to pay some fee, even if a reduced one, for sale at just £500,000 less than that for which it was willing to pay £1.2 million, a point supported by its willingness to offer Mr Barton a reduced sum on an allegedly *ex gratia* basis. It is superficially attractive to use this assumption to impose some liability upon Foxpace. But in my judgment it is not appropriate to do so. The fee that Foxpace agreed to pay Mr Barton in the event of a sale at £1.2 million in fact does not reflect the value of the service that was being provided. As Mr Rooke himself readily accepted, the figure was based upon him recovering his losses from the abortive Stonebridge and Barton contracts. For reasons dealt with at paragraph 210 below, it does not represent the true market value of the introduction of a willing purchaser even at a sale price of £6.5 million. Indeed, for reasons set out below, doing the best I can I consider the true value of the service to be 7.25% of the sale price. If a sale of £6.5 million had been achieved, this would have been a fee of £471,250. In that case, the reduction of the sale price by £500,000 exceeds the amount that the Respondent would have been liable to pay the Appellant as the true value of the services at a higher price.

198. The court cannot make any safe assumption as to what the Respondent would have agreed to if the possibility of a reduced sale price had been contemplated at the time of negotiating the contract. Foxpace might still have been willing to pay £1.2 million to Mr Barton (on the ground that this would have furthered a relationship between the two which might have been to Foxpace's advantage); it might have agreed to a reduction of the £1.2 million, perhaps pro rata or even by the sum of £500,000 to cushion it from the effect of the reduced sale price; it might only have been willing to offer 7.25% as a reasonable value of the service being proffered; it might even have been unwilling to offer any sum (though I accept that this is unlikely). It would certainly seem from the email at **B6/1559** that Mr Rooke and by extension Mr Gwyn Jones harboured some doubts about the proposed sale price of £6.5 million and it might be thought that they would have baulked at paying £1.2 million as an introduction fee if the sale price were still lower. The very uncertainty over what the Respondent may have been willing to pay demonstrates in my judgment a further danger in interfering in the contractual relationship between the parties to give effect to what they might have agreed in circumstances which they did not contemplate. The court would be speculating about what parties in a commercial relationship might have been willing to agree to and would

be substituting assumptions as to how they would have behaved in place of their freedom to negotiate.

199. In as far as it might be argued that the Appellant should be able to bring himself within the circumstances referred to by Morris J citing Chitty on Contracts in the case of Diamandis v Willis, namely that the services provided were over and above those contracted for, I have not heard detailed argument on this issue. In my judgment, there is considerable uncertainty as to how far this principle may extend. However, I am not satisfied that it can have any application here, where the service that was provided (the introduction of a purchaser) was in fact exactly that contemplated, the only difference in the service being the price at which the purchase would complete the sale. To include the facts of this case within the exception of the provision of a service over and above that contracted for would in my judgment be an extension of the principle referred to by Morris J which I am not satisfied is justified by the facts of this case.

200. For these reasons, notwithstanding a sympathy for Mr Barton's circumstances and the superficial attraction that he should be entitled to at least some figure to compensate for the undoubted enrichment of the Respondent resulting from his introduction of Mr Lipson, I am not satisfied that he in fact brings himself within the principle of free acceptance as currently recognised.

The amount of the benefit – Appellant's submissions

201. As to the value of the enrichment, this does not need to be determined given that I do not uphold the claim that any enrichment is unfair. However, in my judgment I should, for the sake of completeness, make a decision on the true value of the enrichment.

202. The Appellant relies upon the decision of the Supreme Court in Benedetti v Sawiris op. cit., to the effect that the starting point for valuing the unjust enrichment was the normal objective market value of the services, assessed as the price which a reasonable person in the Respondent's position would have had to pay for those services, taking into account any particular conditions which increased or decreased their objective value (see Lord Clarke, speaking for the majority, at paragraph 15). Where the parties agree a figure at arm's length, there must be a prima facie assumption that that amount is or at least is good evidence of the market value (see paragraph 168 of the judgment of Lord Neuberger).

203. In this case, the parties agreed a figure for the valuation of the service, namely £1.2 million. The Appellant contends that the amount of the benefit is to be determined by looking at that figure. As Lord Neuberger put it at paragraph 168 of his judgment in Benedetti v Sawiris:

"In the absence of any other evidence or good reason to the contrary, where two parties agree, at arm's length, that one of them will pay a certain sum, or at a certain rate, for a type of benefit to be provided by the other, there must be a prima facie presumption that the amount is, or at least is good evidence of, the market value of that type of benefit."

204. That is the best available evidence of the value of the service provided. If the argument is raised that the commission of £1.2 million only related to sale at £6.5 million, the

Respondent can contend for a pro rata reduction of the fee to represent the lower sale price, namely a figure just in excess of £1.1 million[14].

205. The Appellant relies on the summary of Morgan J in Acibdd Holdings Ltd v Staechlin [2018] EWHC 44 of the actual decision in Benedetti as follows:

"*So far as is relevant to the relatively straightforward circumstances of this case, I take the principles to be:*

(1) in a case where there is a contract for services to be provided but no price for the services is agreed, it will be an implied term of the contract that the provider of the services will be paid reasonable remuneration for those services;

(2) in considering what is reasonable remuneration, the court asks what a reasonable person in the position of the Defendant would have had to pay for the services;

(3) what a reasonable person in the position of the Defendant would have to pay for the services is usually the objective market price for the services;

(4) it is not appropriate to consider whether the objective market price should be reduced to reflect the subjective views of the Defendant in a case where the Defendant has requested or freely accepted the benefit of the services;

(5) the court will not award a sum in excess of the objective market price to reflect any subjective views of the Defendant to that effect."

206. The Appellant draws my attention to the difficulties in selling the property, referred to at paragraph 125 above. He contends that these justify a fee which is higher than might typically be charged for a service of this kind.

207. I have also had my attention drawn to other fees that would have been payable for the sale of this property in other circumstances:

a. If the sale had concluded on the Barton contract (for £5.9 million), Mr Farnham would have been entitled to 5% (see **B5/1312**), It is asserted that, in addition, Jones Lang Lasalle would have been entitled to £100,000, giving a total fee of £395,000 (6.7% of the purchase price).

b. If Mr Kherallah had purchased the property for £6.3 million, the sum of £490,000 would have been payable pursuant to the "profit share agreement" (7.8% of the purchase price).

The amount of the benefit – Respondent's submissions

208. The Respondent contends that the Appellant overstates the value of the services he provided. Nash House was not such a difficult property to sell, as demonstrated by the number of purchasers who were interested in it. Further, the property was sold on by Western and at a later stage achieved a higher price than the sale price to Mr Lipson. The

[14] To be precise £1,107,692.30.

site has now been redeveloped and very large values were attributed to it, though the lack of detail causes me to be cautious to accept any particular figure.

209. In any event, it is apparent that the Respondent was willing to be generous in the proposed introduction fee, given Mr Barton's history with the property and the lost deposits. Whilst Mr Gwyn Jones said at one point during his evidence that he was not providing charity, it is apparent that a good deal of business in the field of commercial property development is based on personal relationships and trust. Mr Rooke's comment at paragraph 18 of his witness statement (**A1/94)** makes the point that a developing relationship with Mr Barton might have assisted Mr Gwyn Jones' group of companies. Thus, the benefit to the Respondent through achieving a sale introduced by Mr Barton potentially went beyond the immediate financial consequences of disposing of Nash House. To this extent, the court should have little regard to the fee that was agreed here since it did not truly reflect the commercial value of what Mr Barton was providing.

The amount of the benefit - discussion

210. For the reasons set out above, it is not necessary for me to consider the amount of the benefit. However, it may assist for me to set out the approach that I would have taken had I been satisfied that the Appellant was entitled to relief for unjust enrichment obtained by the Respondent.

211. I agree with the Respondent's argument that little weight can be put on the fee agreed with Mr Barton in determining the true value of the service provided for the following reasons:

    a. The fee reflected sale at a higher price than that actually achieved;

    b. The fee is far higher than any of the other figures that I have seen for providing a service of this nature, including the figures referred to by the Appellant as summarised at paragraph 207 above;

    c. I am not satisfied that the problems relating to Nash House were as serious as the Appellant contends or that the sale of the property was so urgent from the point of view of the Respondent;

    d. It is apparent from the dealings between these parties (as well as what can be seen of the dealings between the Respondent and Mr Farnham) that dealings between property developers and intermediaries involve a great deal of trust and associated close relationships. Mr Rooke's comments from paragraph 18 of his witness statement cited above ring true as to why Mr Gwyn Jones should be apparently willing to pay so high a figure for the introduction in this case.

    e. In any event, the fee was based upon Mr Barton recovering his losses rather than on any attempt to value his services upon the open market.

212. Given my rejection of the fee of £1.2 million as the proper valuation of the services provided by Mr Barton, I have considered what alternative approach to take. During the course of the trial, the possibility of obtaining expert evidence on this issue was canvassed. Whilst superficially attractive, I see three disadvantages to this course of action:

a. it would involve the parties in further expense;

b. it would cause further delay;

c. in any event, I am not satisfied that it would provide a more reliable figure than that which the court can discern from the material before it.

213. The reality is that the parties have chosen to go to trial without obtaining such evidence and in my view the court must do the best it can on the available information. I am assisted in doing so by the consistency of the figures referred to by the Appellant in paragraph 207 above, both of which were contractual obligations that Foxpace was willing to enter into, and the offer of £400,000 made by Mr Gwyn Jones to Mr Barton. The latter figure reflects 6.7% of the actual sale price of the property. Accordingly, all three figures lie in the range 6.7% - 7.8%, with two of them at the bottom of that range one of them at the top.

214. The first two figures were agreed to by Foxpace and potential introducers. This is a good indication of the market price for the services being proffered in circumstances where the sale price was similar. In those cases, the agreement was not entered into with the background of the dealings between Mr Barton and Foxpace referred to at paragraph 210 above. Given that Mr Gwyn Jones' figure was made by way of an offer at a time when there was a brewing dispute between him and Mr Barton, it seems to me inappropriate to give it any particular weight, other than to note its similarity to the other two figures. In those circumstances, it seems to me that a proper valuation is the midpoint of the other two figures, that is to say 7.25%, that is £435,000.

Conclusion

215. For the reasons set out above, I conclude that Foxpace Ltd is not liable to Mr Barton either in contract or applying the principles of unjust enrichment. It follows that there are no grounds for allowing this appeal.