Trinity Term
[2013] UKSC 50
On appeal from: [2010] EWCA Civ 1427

JUDGMENT

Benedetti (Appellant) *v* Sawiris and others (Respondents)

Sawiris and others (Appellants) *v* Benedetti (Respondent)

before

Lord Neuberger, President
Lord Kerr
Lord Clarke
Lord Wilson
Lord Reed

JUDGMENT GIVEN ON

17 July 2013

Heard on 26, 27 and 28 February 2013

Appellant
Mark Howard QC
Andrew Twigger QC
Jennifer Seaman
(Instructed by Herbert Smith Freehills LLP)

Respondent
Laurence Rabinowitz QC
Richard Hill QC
Gregory Denton-Cox
(Instructed by Kirkland & Ellis International LLP)

LORD CLARKE (with whom Lord Kerr and Lord Wilson agree)

Introduction

1. This is an unusual case. It involves a claim for unjust enrichment and, in the course of the argument, has led to a wide ranging discussion of the principles relevant to an aspect of unjust enrichment which has been the subject of lively debate among academics. It will be necessary to give consideration to at least some of the principles but, as is so often the case, the appeal can be determined on the facts without the necessity for the Court to express a final view on all the legal issues which have been the subject of argument.

The parties

2. Mr Benedetti is an Italian citizen resident in Switzerland. Mr Sawiris is an Egyptian and American national and was at all material times the Chairman and CEO of Orascom Telecom Holding SAE ("Orascom"), an Egyptian company quoted on the Egyptian Stock Exchange and (through Global Depositary Receipts) on the London Stock Exchange, which operates a telecommunications business concentrated in the Middle East, Africa and South East Asia. Cylo Investments Ltd ("Cylo") is Mr Sawiris' BVI registered company. April Holding ("April") and OS Holding ("OS") ("the Holding Companies") are Cayman Island companies set up by Mr Sawiris' brother and father respectively (who had held the shares in Orascom before the two companies were created), and held under discretionary trusts for the benefit of the wider Sawiris family. Immediately before the relevant events, Cylo had a holding of 4.1% in Orascom, April had a holding of 34.6% in Orascom and OS had a holding of 17.7% in Orascom; so that, between them, they held about 56.4% of Orascom's shares, with the remaining 43.6% of the shares being publicly held.

The claims, the judgment and the appeals

3. Mr Benedetti issued these proceedings in August 2007. In them he made a very large claim against all the respondents. At its most extravagant it amounted to €3.7 billion. He put his claim in a number of ways. His primary claim was made in contract under an agreement dated 31 January 2004 ("the Acquisition Agreement"). His alternative claims were variously based on an alleged oral understanding (which he said was enforceable in equity by reason of the principle in *Pallant v Morgan* [1953] Ch 43), collateral contract, breach of fiduciary duty,

unconscionable receipt, estoppel and quantum meruit. All the claims were in the same amount. The trial came before Patten J as he then was ("the judge") and lasted for some 31 days in the first half of 2009. In a very impressive judgment of 576 paragraphs, which was handed down on 15 June 2009, the judge dismissed all Mr Benedetti's claims except the claim for quantum meruit. He awarded Mr Benedetti €75.1m.

4. The judge rejected the principal ways in which Mr Benedetti had put his claim for quantum meruit but held that he was entitled to the sum of €75.1m on the basis of a proposal first made on behalf of Mr Sawiris in June 2005.

5. Ironically, this alternative claim was only made by Mr Benedetti at a very late stage of the trial. Until closing submissions it had been maintained on his behalf that the offer of €75.1m was irrelevant and inadmissible. This had the effect, which can now perhaps be seen as unfortunate, that the evidential basis for the claim which ultimately succeeded was not as fully explored as might otherwise have been the case. However that may be, the judge rejected the submission made on behalf of Mr Sawiris that it was too late for Mr Benedetti to alter his case to rely upon it. The judge held that all the respondents were jointly and severally liable to Mr Benedetti in that amount.

6. Mr Benedetti appealed to the Court of Appeal on the ground that the amount awarded was calculated on the wrong basis and should have been more. Mr Sawiris and Cylo cross-appealed on the basis that the sum should have been nil and, in any event, argued that it should have been less than €75.1m. The Holding Companies cross-appealed on the same basis. The Court of Appeal (Arden, Rimer and Etherton LJJ) handed down their judgments on 16 December 2010. So far as relevant in this appeal, Arden LJ identified the issues as being (1) whether the court should use the Acquisition Agreement as a template for determining the award by way of quantum meruit; (2) whether the judge should have taken Mr Sawiris' offer of €75.1m into account in valuing Mr Benedetti's services; (3) whether any award should have been made given the payment of the sum of €67m brokerage fee and, if so, what; and (4) whether the Holding Companies should be held liable.

7. The Court of Appeal answered the questions raised by issues (1) and (2) in the negative. The Court held that the correct approach was to take, at least as a starting point, the ordinary market value of the services in fact rendered by Mr Benedetti, which the judge held to be €36.3m. However, they held that Mr Sawiris had not been unjustly enriched in that amount because Mr Benedetti had already received a sum of €67m. They rejected the submission that, given that the figure of €36.3m was less than €67m, Mr Benedetti was not entitled to anything. Rather, in relation to issue (3), it was held that he was entitled to €14.52m calculated as

follows. The judge had held that the figure of €67m was referable to 60 per cent of the services in respect of which Mr Benedetti was claiming a quantum meruit in this action. The Court of Appeal held that it followed that Mr Benedetti had been paid for 60 per cent of those services and that Mr Benedetti was therefore entitled to receive the market value of the remaining 40 per cent of the services, that is to say 40 per cent of €36.3m, namely €14.52m. The Court of Appeal accordingly reduced the amount which Mr Sawiris was liable to pay Mr Benedetti from the €75.1m ordered by the judge to €14.52m. In relation to issue (4), the Court of Appeal held that the Holding Companies were not liable.

8. There were a number of other issues before the Court of Appeal, including issues of interest and costs, but they are not relevant in this appeal. The issues in this appeal as between Mr Benedetti and Mr Sawiris and his company Cylo are whether the judge and the Court of Appeal were correct to disregard the Acquisition Agreement ("the Acquisition Agreement point"), whether the judge was correct to have regard to the offer of €75.1m ("the €75.1m point"), both of which arise on Mr Benedetti's appeal, and whether the Court of Appeal were correct to award anything to Mr Benedetti, which arises on Mr Sawiris' and Cylo's cross-appeal. Permission to appeal and cross-appeal respectively was in each case given by this Court. Mr Benedetti also appealed against the part of the decision of the Court of Appeal in which they held that the Holding Companies were not liable to him. However, shortly before the hearing of this appeal he abandoned that part of his appeal.

The legal principles

9. It is common ground that the correct approach to the amount to be paid by way of a quantum meruit where there is no valid and subsisting contract between the parties is to ask whether the defendant has been unjustly enriched and, if so, to what extent. The position is different if there is a contract between the parties. Thus, if A consults, say, a private doctor or a lawyer for advice there will ordinarily be a contract between them. Often the amount of his or her remuneration is not spelled out. In those circumstances, assuming there is a contract at all, the law will normally imply a term into the agreement that the remuneration will be reasonable in all the circumstances. A claim for such remuneration has sometimes been referred to as a claim for a quantum meruit. In such a case, while it is no doubt relevant to have regard to the benefit to the defendant, the focus is not on the benefit to the defendant in the way in which it is where there is no such contract. In a contractual claim the focus would in principle be on the intentions of the parties (objectively ascertained). This is not such a case. Mr Benedetti did initially argue that Mr Sawiris, Cylo and the Holding Companies were in breach of the Acquisition Agreement, on the basis, inter alia, that an implied variation had taken place (see para 31A of the amended particulars of claim) or that they were in breach of a collateral contract. Those claims did not, however, rely on an implied

term requiring the payment of a reasonable sum. In any event, those arguments were rejected by the judge and there has been no appeal against his judgment in that respect. Mr Benedetti does not now rely upon a contractual claim, whether on the basis of a request for the services or otherwise. The focus is only on the law of unjust enrichment.

10. It is now well-established that a court must first 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? See *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227 per Lord Steyn; *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch) at para 38, per Henderson J.

11. On the facts of this case it is common ground that the first three of those questions must be answered in the affirmative. It is not disputed that Mr Benedetti did render services to Mr Sawiris which conferred a benefit on him and thus enriched him. The enrichment was at Mr Benedetti's expense and the enrichment was unjust, or would have been if Mr Sawiris did not pay for the relevant services. As to the fourth question, there are no defences available to Mr Sawiris. The question remains what is the value of the unjust enrichment.

Market value and subjective devaluation

12. There are essentially two issues which arise. The first is whether Mr Sawiris is liable to pay the market value of the services or something more than the market value and, if so, what. That issue requires consideration of whether it is permissible to have regard to a defendant's subjective opinion of the value of services rendered to him in order to: (i) reduce the amount which he would have to pay on a market value basis for those services (sometimes known as "subjective devaluation", a phrase first coined by Professor Peter Birks in 1985 in *An Introduction to the Law of Restitution* at p 109); or (ii) to increase that amount (sometimes known as "subjective revaluation"). As appears below, the consensus of academic opinion seems to favour the recognition of subjective devaluation. The second issue is whether Mr Benedetti has already been paid all or part of the sum so determined out of the €67m he received as explained in more detail below.

13. The basic principle is that a claim for unjust enrichment is "not a claim for compensation for loss, but for recovery of a benefit unjustly gained [by a defendant] ... at the expense of the claimant": *Boake Allen Ltd v HMRC* [2006] EWCA Civ 25, [2006] STC 606 para 175, per Mummery LJ; see also *Goff and Jones, The Law of Unjust Enrichment*, 8th ed (2011) ("*Goff and Jones*"), para 4-01.

Given that Mr Benedetti's other claims have fallen away, the concern in the present case is not the value of Mr Benedetti's loss but of Mr Sawiris' gain. The question is whether an objective or subjective approach should be adopted when calculating that gain.

14. Whichever approach is adopted, it is clear that the enrichment is to be valued at the time when it was received by Mr Sawiris: *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 802, per Robert Goff J; see also *Goff and Jones*, para 4-34. As appears at para 52 below, in the present case, the services rendered were completed for all practical purposes by 26 May 2005, by which time there was no possibility of, or need for, further services from Mr Benedetti. Similarly, it is clear that, whether an objective or a subjective approach is taken to the evaluation of the benefit, the question is what is the value of the services themselves, not of any end-product or subsequent profit made by the defendant: see eg *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 at paras 41-42, per Lord Scott.

15. In my view, the starting point in valuing the enrichment is the objective market value, or market price, of the services performed by Mr Benedetti. That is consistent with the view taken by Professor Graham Virgo in *The Principles of the Law of Restitution*, 2nd ed (2006) ("*Virgo*"):

> "Much of the uncertainty concerning the definition of enrichment stems from the lack of consensus about where the analysis should start. Essentially there are two options available. Either we start with an objective test, ascertained by asking whether reasonable people would consider the defendant to have received something of value, or we start with a subjective test, by considering whether the defendant considers that he or she has received something of value. Whilst both the objective and subjective tests are relevant to the identification of an enrichment, the better view is that the objective test should always be considered first..." (p 64)

16. I agree. Although Professor Virgo is there considering the approach to the question whether a benefit has been conferred on the defendant at all, as opposed to the question how such a benefit should be valued, it is clear that he takes the same view in relation to valuation: see *Virgo* at p 98, where he says that the general test of valuation which should be adopted is an objective test. Both the editors of *Goff and Jones* (eg at para 4-08) and Professor Andrew Burrows in *The Law of Restitution*, 3rd ed (2011) ("*Burrows*"), (at p 61) also take this view. The approach is supported by, eg: *BP Exploration v Hunt* [1979] 1 WLR 783, 840, per Robert Goff J; *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47, [2004] 1 WLR 2775, at para 40, per Mance LJ; *Cobbe v Yeoman's Row* at para 42,

per Lord Scott; and *Sempra Metals Ltd v IRC* [2007] UKHL 34, [2008] AC 561, at paras 116-119, per Lord Nicholls. It is to be noted that Professor Virgo, in the passage quoted above, does not list as an available option the value which the claimant considers that he conferred on the defendant. That is because, as he puts it at p 69, "it is not the function of the law of restitution to assess relief by reference to the claimant's loss ... compensation is not a function of the law of restitution." It is to my mind for this reason that Mr Benedetti's request for €200-300m in June 2005 has little or no relevance. For these reasons I agree with Lord Neuberger and Lord Reed (whose judgments I have read in draft) that the general test, or prima facie position, is that the court should apply an objective test to the issue of market value.

17. There is a question as to exactly what the objective approach entails. Professor Virgo states the test (at p 98) as the identification of the market value, namely the sum "a willing supplier and buyer would have agreed upon". However I agree with Etherton LJ (at para 140) that the test is "the price which a reasonable person in the defendant's position would have had to pay for the services". On that approach, although a court must ignore a defendant's "generous or parsimonious personality", it can take into account "conditions increasing or decreasing the objective value of the benefit to any reasonable person in the same (unusual) position" as the defendant (para 145). The editors of *Goff and Jones* note that such conditions would seem to include the defendant's buying power in a market "so that a defendant who can invariably negotiate a better price for a product than any other buyer will be allowed to say that this price reflects the 'objective' value of the product to him, or in effect that there is one market for him and another for everyone else" (para. 4-10). Thus far, I detect no difference between my approach and that of Lord Neuberger or Lord Reed.

18. The question then arises whether it is permissible to reduce the objective market value in order to reflect the subjective value of the services to the defendant. In my opinion, it is. The present case does not, of course, concern subjective devaluation, but that is the hook on which Mr Howard seeks to hang the principle of "subjective revaluation". It is on the possibility of subjective devaluation that my approach and that of Lord Reed is I think somewhat different. A defendant, in my view, is entitled to prove that he valued the relevant services (or goods) provided by the claimant at less than the market value. That principle is widely accepted by academic commentators and is based on the fundamental need to protect a defendant's autonomy. It is important to note that subjective devaluation is not about the defendants' intentions or expectations but is an *ex post facto* analysis of the subjective value of the services to the defendant at the relevant time. The editors of *Goff and Jones* put it thus at para 4-06:

> "People have different means and spending priorities, and they value benefits differently according to their personal tastes. Consequently,

> as Lord Nicholls said in *Sempra*, 'a benefit is not always worth its market value to a particular defendant', and 'when it is not it may be unjust to treat the defendant as having received a benefit possessing the value it has to others'. The common law 'places a premium on how to spend one's money' [see *Peel v Ontario* [1992] 3 SCR 762 at para 25, per McLachlin J], and this right might be unfairly compromised if a defendant were forced to make restitution of the market value of a benefit which he would not have bought at all. To avoid this, the court may therefore assess the value of the benefit by reference to the defendant's personal value system rather than the market."

Professor Andrew Burrows makes the same point at *Burrows* p 44:

> "The question of whether the defendant has been benefited/has received value is not straightforward because of the need to respect freedom of choice and individuality of value. Even if the defendant has been objectively benefited (i.e. a reasonable man could regard himself as benefited by what has occurred or, put another way, the claimant's 'performance' has a market value) he or she may validly argue that benefit has been of no value to him or her."

19. It is clear (from p 61) that Professor Burrows takes the view that subjective devaluation applies to both the identification and the value of a benefit. See also, to the same effect, *Virgo* at pp 67 and 68, where he noted that, even if the defendant used what had been received it does not necessarily follow that he or she valued it because, as Pollock CB said in his well-known dictum in *Taylor v Laird* (1856) 25 LJ Ex 329 at 332, '[if the claimant] cleans another's shoes, what can the other do but put them on?" As Mance LJ said in *Cressman v Coys* at para 28, "[t]he law's general concern is with benefit to the particular defendant, or so-called 'subjective devaluation'."

20. I would not accept Mr Rabinowitz's submission that a distinction is to be drawn between the identification of a benefit and the value of the benefit to a defendant and that, while the former can be subjective, the latter is to be objective. He relied upon the approach adopted by Justice James Edelman as to 'The Meaning of Loss and Enrichment' in *Philosophical Foundations of the Law of Unjust Enrichment* (eds Chambers, Mitchell and Penner, 2008), pp 211-241). In my opinion Professor Burrows is correct to conclude (*Burrows* at p 61) that "a sharp distinction between choice and valuation may ... be artificial" because "a person may choose something but only at a particular price or even on the basis that it is gratuitously rendered".

21. After the claimant has adduced evidence of the objective value of the benefit which the defendant received, the burden of proof falls upon the defendant to prove that he did not subjectively value the benefit at all, or that he valued it at less than the market price: *Goff and Jones*, para. 4-08; *Virgo*, pp 64 and 66-67. That principle was established by the majority of the House of Lords in *Sempra Metals*: see para 48 per Lord Hope, para 116 per Lord Nicholls and para 180 per Lord Walker. The minority took a different view, namely that it was for the claimant to establish the actual benefit obtained by the defendant: see especially per Lord Mance at paras 231-232 and Lord Scott at para 147. As I see it, the difference between them is really no more than a different approach to the burden of proof. In each case the question is what was the value to the defendant.

22. When I first drafted this judgment I thought that *Sempra* was an example of subjective devaluation in practice. It was held that the claimant could not recover the market interest rate on the sums it had paid to the Revenue by way of unlawfully levied advance corporation tax because the Government was able to borrow money at lower rates than the market rate. The amount saved by the Government was thus less than that which would have been saved by a commercial entity borrowing the same sums of money (see *Goff and Jones* at para 4-07). However, having read Lord Reed's judgment I can now see that it may be an example of the objective value of the money to a person in the position of the defendant, namely the Government. This perhaps shows the narrowness of the difference between our two approaches. This can I think be seen from an important passage in the speech of Lord Nicholls at para 119:

> "What is ultimately important in the law of restitution is whether, and to what extent, the particular defendant has been benefited: see *Burrows, The Law of Restitution,* 2nd ed (2002), p 18. A benefit is not always worth its market value to a particular defendant. When it is not, it may be unjust to treat the defendant as having received a benefit possessing the value it has to others. In Professor Birks's language, a benefit received by a defendant may sometimes be subject to 'subjective devaluation': *An Introduction to the Law of Restitution* (1985), p 413."

23. Recognising the principle of subjective devaluation raises the question of what a defendant relying on that principle must prove. A defendant can always simply assert that he valued a benefit at less than the market value. However, a court will be very unlikely to accept such an assertion unless there has been some objective manifestation of the defendant's subjective views. In principle, this can occur before or after a transaction, although conduct after the transaction is likely to carry little weight. *Goff and Jones* put it thus at para 4-09:

> "A defendant is unlikely to persuade a court that he attached a low value to a benefit simply by relying on self-serving testimony that he has a (previously unexpressed) value system that attributes a low value to such benefits, particularly if this testimony is not borne out by his previous conduct. If a defendant can produce stronger evidence of his personal spending preferences, however, then we believe that he should be able to rely on this evidence consistently with the view expressed in the foregoing authorities that the law is concerned to protect his freedom to make his own spending choices."

24. An example of subjective devaluation in practice is perhaps *Ministry of Defence v Ashman* (1993) 25 HLR 513, although caution is needed because that was a case about restitution for a wrong (trespass). The Ministry of Defence in that case were awarded, not the market rent for the property, but a rent equivalent to what would have been charged for suitable local authority accommodation because "Mr and Mrs Ashman would probably never have occupied the premises in the first place if they had to pay £472 a month [i.e. the market rate] instead of the concessionary licence fee of £95" (see p 520, per Hoffmann LJ). See also *Ministry of Defence v Thompson* (1993) 25 HLR 552, where, in a differently constituted Court of Appeal, Hoffmann LJ, with whom Glidewell LJ and Sir John Megaw agreed, said this:

> "The principles in *Ashman* may, in my judgment, be summarised as follows: first, an owner of land which is occupied without his consent may elect whether to claim damages for the loss which he has been caused or restitution of the value of the benefit which the defendant has received. Secondly, the fact that the owner if he had obtained possession would have let the premises at a concessionary rent, or even would not have let them at all, is irrelevant to the calculation of the benefit for the purposes of a restitutionary claim. What matters is the benefit the defendant has received. Thirdly, a benefit may be worth less to an involuntary recipient than to one who has a free choice as to whether to remain in occupation or move elsewhere. Fourthly, the value of the right of occupation to a former licensee who has occupied at a concessionary rent and who has remained in possession only because she could not be rehoused by the local authority until a possession order has been made, would ordinarily be whichever is the higher of the former concessionary rent and what she would have paid for local authority housing suitable for her needs if she had been rehoused at the time when the notice expired."

25. If the principle of subjective devaluation is accepted, it can be defeated by a claimant proving that: (i) the defendant received an incontrovertible benefit (eg if the services saved the defendant necessary expense), or (ii) the defendant requested or freely accepted the benefit: see *Goff and Jones*, paras 4-12 - 4-33 and (as to free acceptance) chapter 17; *Virgo*, pp 72-88; *Burrows* pp 47-60). These sources show that many different problems may arise, but it is fortunately not necessary in this case to define the circumstances in which the principle of subjective devaluation can be defeated. I agree with Lord Neuberger that the difference between my approach and that of Lord Reed is not likely to lead to a different result in more than very few cases.

26. The only real difference may be this. We agree that in the case where services have been rendered which, viewed objectively, confer a benefit on the defendant, but a benefit which the defendant did not and does not want and would not have paid for, as in the examples of Pollock CB's cleaned shoes or Professor Virgo's cleaned windows (at *Virgo* p 67), the claimant is not entitled to payment for the services because failure to pay would not unjustly enrich the defendant. The question is whether, in such circumstances, where there was no free acceptance of the services before or at the time they are rendered, but the defendant has accepted that he has received some benefit but not that the value of the benefit is as much as its market value, the defendant's figure should be accepted. In my opinion it should be open to the court so to conclude on the basis, on the one hand there would be unjust enrichment if the defendant paid nothing but, on the other hand, that it would not be just to award more than the benefit conferred on the defendant so calculated. Such an approach seems to me to respect the principle of freedom of choice or autonomy and to meet the case where the defendant sees the value of the benefit but would not have ordered the services save perhaps at a substantial discount to the market rate. I see no reason why a court should not take into account a defendant's subjective opinion of the value of the claimant's services in order to reduce the value of them to him, provided of course that the court is satisfied that it is his genuine opinion. If Lord Reed's approach would produce a choice between a nil award and an award of the market value of the services, I would respectfully disagree. I prefer a nuanced approach, which seems to me to be more consistent with principle. However, given Lord Reed's conclusions in para 138 of his judgment, there may be little, if anything, between us, especially since we both recognise the importance of respect for the defendant's autonomy or freedom of choice. It is not necessary to reach a final conclusion on these questions on the facts of this case. I certainly agree with Lord Reed that the expression 'subjective devaluation' is somewhat misleading.

Market value and subjective revaluation

27. The real issue in the present case is whether a defendant should be required to pay the claimant more than the market value of his services if it can be shown

that the defendant subjectively valued the claimant's services at a sum in excess of the market value (ie subjective revaluation, sometimes called subjective overvaluation). The editors of *Goff and Jones* suggest (at para 4-11) that, if one accepts the principle of subjective devaluation, it might be argued that fairness between the parties requires subjective valuation arguments to cut both ways, so that the claimant is entitled to rely upon subjective revaluation. Professor Burrows says at *Burrow*s p 60:

> "It is possible to argue that the law should go even further than 'subjective devaluation' in recognising the subjectivity of value; and that where there is evidence (e.g. using the request test) that the particular defendant overvalues something that has no (or a lower) objective value, it is the defendant's own valuation – rather than the objective market value – that should count.
>
> So, for example, if the defendant requests services at a higher rate than the market rate then, in so far as there is a claim for restitution of an unjust enrichment (eg because there is no valid contract) it would seem that the contract price is the best guide to the value of the services to the defendant and that that, therefore, should be central to the measure of restitution."

28. In his recent work *Restatement of the English Law of Unjust Enrichment*, 2012, ("*Restatement*") p 158, Professor Burrows states that "the correct view is probably that, without a valid contract, the claimant should not be entitled to overvaluation. In other words ... restitution allows downward subjectivity only so as to protect a defendant". This view is expressed in the light of the decision of the Court of Appeal in the present case and it is possible that Professor Burrows prefers the view expressed at *Burrows* p 60 quoted above. In relation to the question of whether a defendant has received a benefit at all (because the goods or services had no market value), Professor Virgo, after referring to the principle of subjective devaluation, states:

> " ... logically and for reasons of consistency it should be possible to use the defendant's own valuation of what has been received to identify an enrichment, even though the reasonable person would not regard the defendant as having received anything of value." (*Virgo*, pp 68-69)

29. However, in my view, the principle of subjective revaluation should not be recognised. Unlike the principle of subjective devaluation, it is not necessary in order to protect a defendant's freedom of choice. It is for this reason, as it seems

to me, that it would not be unprincipled to recognise subjective devaluation whilst rejecting the notion of subjective revaluation. In any event, the principle of subjective revaluation seems to be unnecessary in the context of identifying whether a defendant received a benefit at all, that is in cases where the services or goods have no market value. In such a case, the defendant would in most cases be estopped from denying that the service constituted a benefit: see *Virgo* at pp 90-91.

30. In the present case, it is accepted that Mr Benedetti's services had an objective value. The issue is whether subjective revaluation can be relied upon, not in order to identify a benefit, but in order to value the benefit so conferred. In my opinion, that is not permissible. Although there is some academic support for such a solution, there is no authority for the proposition that, in cases where a benefit has an objective market value, the claimant should be entitled to invoke the defendant's subjective willingness to pay a higher sum for the benefit as a reason for valuing the benefit at a higher rate.

31. I agree, for the reasons given above, that there should be no subjective revaluation in the two hypothetical examples described by Professor Burrows in his *Restatement* (at pp 158-159). In example 2, C enters into a contract for the carriage of D's goods by sea. D is most anxious to secure the services of C and therefore agrees to pay twice the market rate. After C completes two-thirds of the journey, the contract of carriage is frustrated when war breaks out and the ship is requisitioned. The goods are unloaded and D is able to complete their carriage by a different route at a cheaper rate. Assuming that C is entitled to a restitutionary monetary award (or quantum meruit) for the value of C's services based on unjust enrichment, it seems to me that the assessment should be based on the market rate. C would only be entitled to the agreed higher rate if it could bring a contractual action.

32. In example 3, C mistakenly delivers heating oil to D (rather than D's neighbour) just before Christmas. D's neighbour has plenty of oil and was just topping up out of an abundance of caution. By contrast, D was running on near-empty, facing a houseful over Christmas, and would have happily paid double the market rate. Without a valid contract with D, it is hard to see that C should be entitled to restitution for the enhanced value of the oil to D. Rather, in a claim in unjust enrichment, C would be entitled to a restitutionary award against D for the value of the oil assessed at the market rate. (*Restatement*, p 158).

33. In these examples the enrichment of the defendant is, in my view, only unjust insofar as it represents the market value. The law of restitution, unlike the law of contract, is not primarily concerned with the intentions of the parties.

The legal principles - summary

34. In summary, in my opinion, in a case of this kind, (i) the starting point for identifying whether a benefit has been conferred on a defendant, and for valuing that benefit, is the market price of the services; (ii) the defendant is entitled to adduce evidence in order subjectively to devalue the benefit, thereby proving either that he in fact received no benefit at all, or that he valued the benefit at less than the market price; but (iii) save perhaps in exceptional circumstances, the principle of subjective revaluation should not be recognised, either for the purpose of identifying a benefit, or for valuing a benefit received.

The facts

35. I turn to the facts, so far as they are relevant to the issues identified above. This involves a consideration of the Acquisition Agreement point, the €75.1m point and of what, if anything Mr Benedetti is entitled to. I will focus only on the facts which are directly relevant to the issues in this appeal. The full facts are set out with admirable clarity in the judge's judgment.

The Acquisition Agreement point

36. The Acquisition Agreement was signed on 31 January 2004. The story however began in 2002 when Mr Benedetti became aware that Enel SpA ("Enel"), which was the largest energy company in Italy, might be willing to sell its wholly owned subsidiary Wind Telecomunicazioni SpA ("Wind"). Mr Benedetti and Mr Sawiris met in Cairo in December 2002. The events were explained in detail by the judge at paras 102-117. The judge held that Mr Benedetti sought to persuade Mr Sawiris that it would be possible to acquire control of Wind through a pyramid structure with only a limited equity investment. Mr Sawiris made it clear that he would not be prepared to consider an investment of more than €50m. Between paras 118 and 168 the judge described in detail the events between the meeting in December 2002 and the signing of the Acquisition Agreement in January 2004. He also gave his reasons for rejecting Mr Benedetti's case that there was any relevant oral understanding between himself and Mr Sawiris. During that period Mr Benedetti explored alternative deals in connection with Wind.

37. The judge described the events leading up to the signing of the Acquisition Agreement in paras 169-190 and his conclusions as to the true construction of it are at paras 191-225. His findings in this respect are not and could not be challenged. In short, the Acquisition Agreement provided by clause 2 for the establishment, within a limited period, of a special purpose vehicle to be called

Rain Investments SpA ("Rain"), of which Mr Sawiris' company would initially own two-thirds and Mr Benedetti's company would own one-third. Each company would provide two of the four directors in Rain, although the chairman would be appointed by Mr Sawiris' company and would have the casting vote. The purpose of the Acquisition Agreement was expressed to be the acquisition of Wind. By clause 4 the negotiation was to be handled by Mr Benedetti with the support and advice of Mr Sawiris, both of whom were to use their best endeavours to obtain all finance obtained from third parties for the acquisition and Mr Benedetti was to use his best endeavours to obtain the necessary co-operation and approval of the Italian government and the management of Wind. By clause 5, Mr Sawiris' company was to subscribe €200,000, of which Mr Sawiris was to subscribe two-thirds and Mr Benedetti one-third. For that purpose, Mr Sawiris agreed to lend Mr Benedetti his share, namely just under €67,000 which, by clause 5.6, was to be repayable out of dividends when Rain became profitable or was able to declare dividends. By clause 5.4, the companies were to use their best efforts to raise between €1 billion and €1.2 billion to complete the acquisition. The only other provision of the Acquisition Agreement which entitled Mr Benedetti to payment was clause 6, which provided by clause 6.1 that all directors were entitled to receive directors' fees and expenses and, by clause 6.2, that in consideration of Mr Benedetti allocating approximately 60 per cent of his working time to Rain and the acquisition, he would be entitled to €5,000 per month until the acquisition was completed.

38. Thus, under the Acquisition Agreement Mr Sawiris was to invest no more than €50m and it was the role of both Mr Benedetti and Mr Sawiris to find third party investors. The remuneration to be paid to Mr Benedetti under it was limited. It was no doubt hoped that both Mr Benedetti and Mr Sawiris would be able to earn very substantial sums as a result of the investments made by others. The judge and the Court of Appeal held that the parties abandoned the Acquisition Agreement and that the transaction which replaced it was very different from it: see in particular the judge's judgment at paras 463 to 477 and para 493. As Arden LJ put it in the Court of Appeal at para 3, the parties had an agreement under the Acquisition Agreement for other services but no agreement for the services in issue, namely the services in respect of which the claim in quantum meruit is advanced. In short, their agreement under the Acquisition Agreement was for the provision of services in connection with Wind by a different route from that ultimately adopted. In para 493 the judge held that the parties knew that the Acquisition Agreement had no relevance to the changed circumstances.

39. It did not prove possible for the parties to the Acquisition Agreement to find third party investors, so that it was not possible for Mr Benedetti to receive any payment from that source. It is true that, as the judge held at para 143, Mr Sawiris accepted that at some stage he agreed that Mr Benedetti should have one-third of the €50m share capital on the terms of a loan but the judge held that there is no

evidence that that arrangement was ever extended to cover the totality of Mr Sawiris' eventual investment. The proposed position under the Acquisition Agreement is set out diagrammatically in para 15 of Arden LJ's judgment which is reproduced as Annex 1 to this judgment.

40. From para 226 the judge described in detail the events after the signing of the Acquisition Agreement. A critical aspect of the Acquisition Agreement was that third parties would invest in a company controlled by Mr Sawiris and Mr Benedetti, in which Mr Sawiris would have the majority share. When it proved difficult to find investors Mr Benedetti began to look for other ways of proceeding, but they came to nothing. The judge held that Mr Sawiris was at no stage willing to proceed on any basis other than that he would have control of the new company. Under the new arrangement there were no third party investors of the kind anticipated under the Acquisition Agreement, so that the basis upon which Mr Benedetti had hoped to make a substantial profit fell away.

41. The judge held at para 493 that the Acquisition Agreement ceased to have effect. It is not now contended that he was wrong about that but it is said that the Acquisition Agreement continues to have some effect relevant to the assessment of the benefit which Mr Benedetti conferred on Mr Sawiris by his services. I would not accept that submission. As Arden LJ concisely described the position in the Court of Appeal at para 16, in spite of Mr Benedetti's best endeavours, by 2005 it had become apparent that there would be no outside investors. Instead of a maximum investment of €50m, Mr Sawiris, Cylo and the Holding Companies invested very substantially more in a new scheme described by the judge in detail at the beginning of his judgment. On 26 May 2005 Enel and its holding company Enel Investment Holding BV entered into a sale and purchase agreement ("the SPA") for the disposal of 62.75% of the issued capital of its subsidiary Wind for €2.986 billion. The SPA contained an option enabling Enel to dispose of further shares in Wind for €328m which it subsequently exercised. The transaction was brought into effect by means of two closings, the first on 11 August 2005 and the second on 8 February 2006.

42. The acquisition, as contemplated as at the First and Second Closings, is set out in diagrams at Annexes 2 and 3 of this judgment respectively. Annex 2 is taken from para 17 of the judge's judgment and Annex 3 is taken from para 17 of Arden LJ's judgment and para 24 of the judge's judgment. As can be seen, the new arrangements were radically different from those contemplated under the Acquisition Agreement. In these circumstances, I can see no basis upon which it can be relevant to an assessment of the benefit which Mr Benedetti conferred upon Mr Sawiris. It is wholly irrelevant to the market value of the services rendered. Nor is it relevant to the issue of subjective revaluation.

The €75.1m point

43. It is not in dispute that Mr Benedetti rendered services to Mr Sawiris of considerable value. In the course of his judgment, the judge described them in some detail. He summarised them between paras 534 and 571. He correctly rejected the relevance of the Acquisition Agreement at para 550. He then considered (at paras 551-563) in some detail the evidence of two expert witnesses, namely Mr Sottile on behalf of Mr Sawiris and Mr Reynolds on behalf of Mr Benedetti. He preferred the evidence of the former, who said that Mr Benedetti's role was essentially that of a broker or adviser, to that of Mr Reynolds, who said that he was a promoter and that, as such, his remuneration package should be that relevant to other types of market participants, such as private equity firms or hedge funds.

44. In essence, the judge concluded at para 560 that equity based awards were only typically available when the person involved would continue to have some part to play in the management of the company or the investment after the transaction completed, that it was clear from the Acquisition Agreement itself that it was never the intention that Mr Benedetti should assume that role and that he did not seek remuneration on that basis. In paras 561 and 562 the judge concluded that all the tasks carried out by Mr Benedetti fell within the agreed scope of a broker or adviser role. He accepted Mr Sottile's evidence that on that basis a fair fee in the market for what Mr Benedetti did would be within the range 0.1% to 0.3% of the transaction value, which would amount to between €12 and €36.3m. The judge concluded that it would in all the circumstances be appropriate to take a figure at the top end of the range. He accordingly held that the market price for the services in fact performed by Mr Benedetti for Mr Sawiris was €36.3m.

45. Those conclusions were not directly challenged on behalf of Mr Benedetti. In any event I see no basis upon which they could be challenged in this Court. In so far as there were or appeared to be suggestions in the course of the argument that the market in which Mr Benedetti was rendering the services was different from that assessed by Mr Sottile, whose evidence the judge accepted, I would not accept them. I therefore proceed on the basis found by the judge, namely that the objective market value of Mr Benedetti's services was €36.3m.

46. The judge did not, however, award that sum but the greater sum of €75.1m. He did so on the basis that Mr Benedetti was entitled to more than the market rate because there was evidence that Mr Sawiris himself regarded the benefit of the services to him as being at least €75m. The Court of Appeal disagreed and awarded him only €14.52m on the basis described at para 7 above. Mr Benedetti says that he is entitled to significantly more than €75.1m but that he is in any event entitled to that sum (as the sum awarded by the judge). Mr Sawiris relies upon the

fact that Mr Benedetti had already received €67m in support of the submission that, since that is more than the market value of €36.3m, he is not entitled to anything. In the alternative he submits that the maximum to which Mr Benedetti is entitled is €14.52m for the reasons given by the Court of Appeal.

47. In order to resolve these issues it is necessary to consider the findings of the judge as to the circumstances in which Mr Benedetti came to receive €67m, the circumstances in which Mr Sawiris offered to pay €75.1m and the relationship between them. Mr Benedetti continues to assert that he is entitled to more than €75.1m but I can see no possible basis for such a claim given the judge's findings of fact.

48. At para 226 et seq the judge described various steps taken by Mr Benedetti in order to protect his position if the Acquisition Agreement did not go ahead. In January 2005 Weather Investments SA ("Weather I") was incorporated by Investors in Private Equity ("IPE"). The shares were held by IPE and a subsidiary of IPE. In March 2005, at a time when one of the potential investors in Rain, Mr Ross, dropped out, Mr Sawiris asked Mr Benedetti to transfer the shares in Weather I to him. On 23 March 2005, Mr Benedetti was appointed a director of Weather I. On 24 March, IPE transferred 99% of the shares in Weather I to Mr Benedetti and the one remaining share to Mr Abdou, who worked for Mr Sawiris. On the next day, Mr Benedetti transferred his shares in Weather I to Mr Sawiris. As of then, the idea of a purchase by an IPE led consortium was effectively a dead letter.

49. On 24 March 2005, Mr Benedetti made two agreements without the prior approval of Mr Sawiris and without, at that stage, disclosing to him or Mr Abdou the fact that he would receive a substantial fee from the transaction. By the first agreement Mr Benedetti signed a Brokerage Agreement on behalf of Weather I ("the First Brokerage Agreement"), pursuant to which Weather I appointed International Technologies Management Ltd ("ITM"), an English company owned and controlled by Mr Benedetti, to provide "Brokerage Services" (as defined in the agreement) on behalf of Weather I in accordance with instructions from the company. In return for the provision of these services ITM was to receive 0.7% of the transaction value as defined in the agreement, which included the total amount paid to acquire Wind at its enterprise value including the amount necessary to refinance its debts. A striking feature of the arrangements was that Mr Benedetti was able to make the agreement on behalf of Weather I because he had just been appointed a director and he was able to procure the agreement of ITM, which was subsequently signed by a Mr Nounou on its behalf, because he controlled it. He did not send a copy of the First Brokerage Agreement to Mr Sawiris or Mr Abdou, and they were not made aware that Mr Benedetti was to receive a brokerage fee until much later. The judge described the creation of the agreement as essentially a piece of opportunism on the part of Mr Benedetti: see paras 334 and 565.

50. Mr Benedetti signed a second agreement on the same day, 24 March 2005 (the "Support Agreement"), on behalf of Weather I, which provided that Managest Media SA, a company in which Mr Benedetti had a 60% stake, would receive a flat fee of €3.4m plus expenses in return for the provision of support and logistic services to Weather I in connection with the acquisition, in accordance with instructions from Weather I. On 25 March, Mr Benedetti transferred the shares in Weather I to Mr Sawiris.

51. By early to mid April 2005, IPE were forced to pull out of the deal as they were not able to secure or find any other suitable investors. Mr Sawiris, together with his family and companies controlled by his business associates, was left as the only potential investor. By May 2005, when Weather Investments II SARL ("Weather II") was incorporated to replace Weather I, the structure of the acquisition had changed to include Weather Italy. Mr Benedetti had no beneficial interest in any of these entities, although, when the SPA was executed on 26 May, he signed the SPA on behalf of Weather Italy, of which he was a director at the time. Also on 26 May the First Brokerage Agreement and the Support Agreement were assigned by Weather I to Weather Italy. The structure of the new deal is set out in Annex 2, as at the first Closing on 11 August 2005. On or shortly after 11 August 2005 Mr Benedetti resigned as a director of Weather Italy.

52. It is important to note that at para 404 the judge found as follows. Mr Benedetti confirmed in his first witness statement that with the signing of the SPA on 26 May 2005 his role in the acquisition was, for all practical purposes, over. Although detailed work remained to be done by the lawyers and the banks in relation to the closing arrangements, these were matters of detail with which Mr Benedetti was not concerned. The judge added that the subsequent history of the transaction was therefore relevant only to two issues: the discussions which took place with Mr Abdou and Mr Sawiris about remuneration and the payment to Mr Benedetti of the €67m brokerage fee. I take the story of the €67m brokerage fee largely from paras 59-63 of the agreed Statement of Facts and Issues, which are based on paras 424-438 of the judge's judgment.

53. As of 27 July 2005, Mr Abdou was aware that a brokerage fee of about €87.76m, which had been listed in the costs of the transaction as being payable to ITM, would go to Mr Benedetti personally. He and Mr Nasr (CFO of Orascom) originally understood that the €87m figure was not intended as a payment to Mr Benedetti for his brokerage services but was to be used to discharge his liabilities to third parties. Mr Sawiris was very angry about the scale of the expenses of the transaction; so Mr Benedetti agreed with Mr Sawiris to reduce the payment from €87m to €67m, saying that that was the amount he needed at First Closing. The judge held (at para 432) that Mr Benedetti led Mr Abdou and Mr Sawiris to believe that the money was to be used to pay third parties who had assisted in the transaction. Mr Sawiris doubted this, but because he intended to reward Mr

Benedetti for his efforts and owed him money, he was content to allow the €67m to be paid with a view to sorting the position out later.

54. Mr Benedetti then arranged for a new agreement between ITM and Weather Italy to be prepared called "the Revised Brokerage Agreement". It was executed in late July or August but backdated to 26 May 2005, which was (as just stated) after Mr Benedetti's services had been concluded. It provided for a fee of €67m (0.55% of the transaction value) to be paid to ITM in respect of "brokerage services". The agreement was signed by Mr Benedetti on behalf of Weather Italy. Mr Abdou first saw the Revised Brokerage Agreement on or about 3 August 2005, before the fee was paid. The €67m fee was paid to ITM on about 12 August 2005, following the First Closing. The fee was paid as a transaction cost: in other words, it was paid by Weather Italy out of the money raised to finance the transaction. On 13 September 2005, following a meeting in Rome on 12 September 2005 attended by Mr Sawiris and Mr Benedetti, Mr Abdou sent an email to Mrs Shimi (an employee of Orascom) asking her to print off the Revised Brokerage Agreement which he sent as an attachment in readiness for Mr Sawiris's return from Rome, saying that Mr Sawiris was expecting it.

55. Mr Sawiris' knowledge of the payment of the €67m is relevant to Mr Benedetti's case that, as the judge held, he is entitled to at least €75.1m. It is also relevant to the cross-appeal (see below). The judge awarded this sum on the basis that he was entitled to have regard to negotiations between the parties as to the value to be placed on Mr Sawiris' services, even though the negotiations took place after the services were completed. He held, in particular, that Mr Sawiris offered to pay the figure of €75.1m and that that offer was evidence of the value which Mr Sawiris, as the paying party, placed on Mr Benedetti's services, albeit with the benefit of hindsight: see para 568.

56. The judge held that the reason for the admission of the parties' pre-service agreements as set out in cases such as *Way v Latilla* [1937] 3 All ER 759 is that they provide strong evidence of the value which they put on the services and that, subject to appropriate safeguards, post-acquisition dealings may do the same. In my opinion, that is not quite correct. It is true that what Lord Atkin called the bargainings of the parties may be of assistance in order to ascertain the market value of the services. They may also be of assistance in establishing whether there is a case for subjective devaluation. However, this is not of course a case of subjective devaluation but, if anything, of subjective revaluation. I have already expressed the view that there is no room in principle for increasing the market value to take account of subjective revaluation in a case of this kind. It follows that, in my opinion, the Court of Appeal were correct to hold that the judge was wrong in principle to award €75.1m.

57. In the light of the detailed submissions that were made, I will however consider the position on the facts. The question is whether the evidence establishes that Mr Sawiris subjectively valued Mr Benedetti's services at €75.1m or more. The judge expressed his conclusions concisely in paras 570-571 as follows:

> "570. The real issue is whether I should increase the fee payable to Mr Benedetti to take account of the €75m which Mr Sawiris offered to pay under the October agreement. Although Mr Benedetti clearly believes that he is entitled to more, it is difficult to ignore the fact that Mr Sawiris was prepared to pay him considerably more for his efforts than a strict application of market rates would produce. Mr Sawiris says in his witness statement that he regarded the €75m figure as generous but that is not inconsistent with it representing what he considered Mr Benedetti's services to be worth. These negotiations did not take place under the shadow of threatened litigation and can properly be considered in my view as a genuine attempt by Mr Sawiris to pay to Mr Benedetti a proper value for what he had achieved.
>
> 571. The best evidence of Mr Sawiris's thoughts on this matter is contained in the June and September e-mails from Mr Abdou quoted in paragraphs 187-189 above. They indicate both the importance which Mr Sawiris attached to Mr Benedetti's role and the reasons why his remuneration should be limited to the payment of a fee. I think that it would be wrong to ignore this evidence when considering the value to be attributed to Mr Benedetti's services. He is entitled, in my judgment, to the €75.1m in addition to the brokerage fee which he has already received."

58. There were three emails dated 11 June and 12 and 13 September 2005, all written by Mr Abdou. As the judge found at para 186, they were sent at a time after the signing of the SPA, when Mr Sawiris was seeking an agreement with Mr Benedetti about what he should receive for his role in the transaction. The judge set them out in paras 187-189:

> "187. In the first of these e-mails, Mr Abdou wrote:
>
> 'I had two discussions with Naguib regarding your deal. I will tell you exactly his response. First of all he very much appreciates all what you have done and he acknowledges that without you, there would be no deal. However, he feels he has been clear with you from the beginning that the deal was never meant to be this big and that when you two signed the agreement over one year ago, the deal has

totally changed. But even then, he told you and the agreement says, that he will not pay commissions etc. for a deal that merges or has OT as a party and rather the intent and spirit of the deal was that he would lend you your 1/3 of the Euro 50M target capital to be repaid with interest after exit so that you would not have to put in money yourself and that you would look to raise money for a deal that had his investment maximum at 200 to 300m euro. Today, Weather is no longer a passive investment for Naguib but rather a vehicle which he put in all his value that he owns (and a part of his family's wealth). He very much wants you involved in the BOD of the company and to be able to do other deals in the future. He sees the relationship between you two as strong and positive but he asks for you to be reasonable in what you ask. When I told him your request and the logic, he was quite upset as he did not expect you to ask for so much. While of course he sees that the original agreement needs to change, he does not agree with your request. In addition, while positive things happened to improve the deal, a few serious restrictions arose such as the need for Euro 500M cash (vs 200 to 300) and the limited financial partners and the somewhat restrictive IMI loan. The only reason he says this is to make the point that the deal today is totally different than the original and as such what he is prepared to offer you is l% of Weather for free and he can pay it to you in shares or give you a put option to take it in cash. If you choose cash, he wants to agree with you a timetable so that he can plan his cash sourcing.'

188. In the second e-mail, he said this:

'I talked to Naguib again. He wanted me to tell you that he feels 1% (which is Euro 75M today and may double if we succeed in Wind), is by far more than what you two had agreed to in the beginning when the deal was simple to lend you Euro 17M in cash to invest. As I mentioned before, he even crossed out all the sections related to OT and fees in the original deal because that was never his intention. He insists that he is being very generous with his offer and again wants to continue the relationship for a long time. He told me that if he really thought that you wanted hundreds of millions compensation, he would not even have done the deal at all. Alessandro, please look at the initial deal and the current offer. We are talking about Euro 75M versus Euro loan plus interest. Think strategically, long term. I am telling you as a friend that *Naguib truly believes this is a very generous offer and this is not an attempt to negotiate with you.*' (Emphasis added)

189. Finally, on 13 September Mr Abdou wrote:

> ‘Also, have you concluded the issue of the 1% of free shares in Weather? Let me advise you with something and I refer to is what I told you months ago about Naguib. I have talked to him many times on this point and I have succeeded (in my opinion) to get you the 1% free shares even though Naguib has never in his life given free shares to anyone and certainly not an amount of Euro 75M. He had offered this willingly to you because of what you have done and he has repeatedly thanked you for it. But I must tell you, he is quickly getting upset because he does not understand why you are not happy. The original deal was to loan you 1/3 of Euro 50M which was to be repaid. The original deal never included OTH (and in fact he crossed out the reference to paying a success fee on integrating OTH). The deal was to have other financial partners ... you know how that ended. *In any case, never was the amount paid to you supposed to even get close to 75M.* In addition, the fact that they are free and not a loan is a really big deal that you seem to be underestimating. I know Naguib and *I am telling you that he will not increase the offer ever and the longer things drag on, the higher the probability that this ends badly.* He wants to have a strong relationship with you in the future as he values you highly. However, he can not do anything that will put his family's interests at risk, either financially or otherwise.’” (Emphasis added)

59. The first of the three emails also contains a statement that Mr Sawiris had asked for a letter saying that Mr Benedetti had received the €67m. At para 437 the judge rejected a submission that that showed that Mr Sawiris knew that Mr Benedetti had received that sum personally. The judge held that it showed that Mr Sawiris had his suspicions on the point. He added that the second part of the email showed that the €75m was to be the total amount paid to Mr Benedetti for his work.

60. Those emails undoubtedly contain an offer to pay €75m, which was approximately the value of the 1% of the shares being referred to. Negotiations continued in 2005 and for much of 2006. They are described by the judge at paras 438-460. They included a meeting in Cairo in January 2006. By that time Mr Sawiris suspected that Mr Benedetti had taken the €67m for himself. He nevertheless offered €75m, which it appears was to be on top of the €67m, and Mr Benedetti agreed in principle to accept it. It was not suggested that there was a binding agreement to that effect.

61. On 3 February 2006, an interview that Mr Sawiris gave to “L’Espresso” about the transaction was published, including the following question and answer:

> "You paid 400m Euro in commissions including banks and the advisor Alessandro Benedetti. "L'Espresso" calculated that Benedetti received 90m, although he denied it. Doesn't that seem like a high price to pay?!
>
> When it came to discussing the fee, I went to a bank that wasn't involved in the operation. I paid 50 thousand Euro for them to give me an opinion on the fee structure because I had the same feeling. They told me it was alright. On the other hand Benedetti worked for me for two and a half years without asking for anything, he took costs at his own risk, so the bill at the end wasn't too much."

The judge noted at para 439 that, when asked in cross-examination based on the article, whether he believed that Mr Benedetti had received the fee, he said that he had always felt that Mr Benedetti was lying about the €67m and that he had received the fee. Mr Sawiris said in his witness statement that by the time of the Cairo meeting he suspected that that was the case. At para 450 the judge referred to a letter which confirmed the basic agreement made in Cairo.

62. Finally, as the judge explained at para 457, on 18 October 2006 Mr Abdou sent Mr Benedetti an email attaching two draft agreements. The first was a draft Supplemental Agreement to the Revised Brokerage Agreement dated 25 May 2005, to be signed by Mr Sawiris and Mr Benedetti, between Weather II and ITM which expressly acknowledged receipt of €67m by ITM and which provided that Weather II would pay a final fixed success fee of €75.1m to ITM. The second was a termination agreement formally bringing the Acquisition Agreement to an end. Mr Benedetti did not reply to the email. He said in his witness statement that he regarded the offer as insulting and proceeded to consult his lawyers.

63. It can readily be seen why the judge said at para 567 that it was clear from the evidence and from the terms of the draft Supplemental Agreement that by October 2006 Mr Sawiris was aware that Mr Benedetti had received the €67m and that the €75.1m success fee was to be an additional payment.

64. Thus, in the end and in spite of the apparent agreement, Mr Benedetti never accepted the offer of €75.1m. It is submitted by Mr Howard that the negotiations between the parties show that both parties took the view that Mr Benedetti's services were worth at least €75m and that Mr Sawiris personally valued his services in at least that amount. The judge accepted Mr Sawiris' evidence that he regarded the offer as generous, although he said that that was not inconsistent with the conclusion that it represented what he considered the services to be worth. One might think that it was consistent with a lower figure. The passages which I

have italicised in the above quotations seem to me to be saying that Mr Sawiris regarded the offer as very generous. They also suggest to me that, in spite of the protestations, and indeed the finding of the judge, these exchanges were indeed part of a negotiation.

65. Etherton LJ has given detailed reasons for the conclusion that, even if it were possible in an appropriate case to increase a restitutionary award above the usual market rate for the services rendered, such an award would not be justified in the present case. I agree and, save perhaps for the last sentence of para 156, I cannot improve on his reasons, which are set out in his paras 155 to 158 and can in essence be summarised as follows. The June emails were written before Mr Benedetti had received the €67m and the Revised Brokerage Agreement was not executed until July or August 2005 and was backdated to 26 May 2005. At the time of the September 2005 email Mr Sawiris was probably unaware that Mr Benedetti had received the money personally, although he had his suspicions. When the sum was paid on 12 August 2005 Mr Benedetti had asked for it to be paid to third parties. Accordingly the emails are no support for the conclusion that at that time Mr Sawiris would have been willing to pay Mr Benedetti both €67m and €75.1m (ie a total of €142.1m), or indeed more than €8.1m, which is the difference between the two figures. Etherton LJ added that if, as the judge thought, the emails are the best evidence of Mr Sawiris' state of mind, they are not inconsistent with an outcome whereby Mr Benedetti is entitled to retain the €67m pursuant to the Revised Brokerage Agreement (for which there has been no claim for repayment) and is awarded €14.52m on the basis described above.

66. By the time of the draft October 2006 agreement, litigation was plainly in prospect. Clause 5 of the draft expressly provided for a discharge of liabilities on both sides. As the judge recognised, it is dangerous to rely upon offers made in such circumstances. I would accept the submission made by Mr Rabinowitz that the finding of the judge in para 570 that the negotiations for the draft October agreement did not take place under the shadow of threatened litigation cannot be justified. Mr Benedetti himself said in a witness statement that in Cairo in January 2006 he said to Mr Sawiris that, if he did not agree with Mr Benedetti, they could go to court and see who was right. The judge recorded at para 447 Mr Sawiris' evidence at that time as being that the offer of €75m was "to finish the matter there and then". In Mr Benedetti's closing submissions before the change of tack to rely on the €75.1m point, it was submitted (in support of a submission that the negotiations should not be considered) that "those later bargainings [were] in the nature of some kind of settlement discussions".

67. In short Mr Sawiris' position varied considerably from time to time. There is little evidence of his true opinion as to the value of Mr Benedetti's services. If the point had been taken at the outset, the evidence might have been more coherent but, as I see it, the evidence falls far short of what would be required to establish

Mr Sawiris' subjective opinion of the value of Mr Benedetti's services. Accordingly, even if the principle of subjective revaluation were to be recognised, I would dismiss the appeal on both the Acquisition Agreement point and the €75.1m point.

What, if anything, is Mr Benedetti entitled to?

68. It follows from the above that, subject to the cross-appeal, I would uphold the decision of the Court of Appeal to award Mr Benedetti €14.52m. It is submitted, however, on behalf of Mr Sawiris that, given that the judge held that the market value of Mr Benedetti's services was €36.3m and that he has already received €67m, he has been fully compensated for any unjust enrichment. It is submitted that, if he is entitled to retain €14.52m as well as €67m he will have received €81.52m, which would be manifestly unjust.

69. The judge approached the matter in this way. In para 563 he identified the point being taken by Mr Rabinowitz, namely that credit must be given for the €67m brokerage fee paid to Mr Benedetti through ITM. In para 564 he identified two points made on behalf of Mr Benedetti in support of the conclusion that the award to Mr Benedetti should be in addition to the €67m received under the Revised Brokerage Agreement. The first point was that the agreement was made between different parties and the transaction cost was payable by all investors in Weather Italy. The second was that the agreement covered different services from those contained in the Acquisition Agreement. In particular the definition of "brokerage services" did not include bringing the investment opportunity to Mr Sawiris or obtaining the co-operation of the Italian Government or the management of Wind.

70. The judge's conclusions are contained in just two paras of his judgment, paras 565 and 566. In para 565, as I read it, the judge rejected the first point. He noted that the claim for unjust enrichment was based on the premise that Mr Benedetti was entitled to be compensated for the value of the services he performed because it would be unjust for those who have received them to take them without payment. If such compensation has in fact been provided as a cost of the transaction there was no reason in principle why Mr Benedetti should not be required to bring it into account in any determination of what is the fair reward for the services he performed, assuming of course that the payment relates to the same services. The judge added at the end of para 565:

> "It is difficult to see how that conclusion would be unjust. I accept that if it had been agreed between the parties that Mr Benedetti' s remuneration from the Defendants should not take into account the

> sums received under the brokerage agreement then the position would be different. But that is not this case. There was no agreement with Mr Sawiris that Mr Benedetti should be paid a brokerage fee in addition to what he received under the Acquisition Agreement. As explained earlier, the signing of the First Brokerage Agreement was essentially a piece of opportunism on the part of Mr Benedetti and, in so far as it had any historical justification, that lay in the arrangements between Mr Benedetti and IPE. When the fees schedules were prepared and it became clear that ITM was to receive the brokerage fee the original assumption on the part of Mr Abdou and Mr Sawiris was that the money would be used to pay Mr Benedetti's costs and other liabilities to third parties."

71. As it seems to me, the judge thus rejected the first point on the ground that Mr Benedetti had personally received the sum of €67m. Both Arden and Etherton LJJ disagreed with that approach. Arden LJ said at para 93 that if Mr Benedetti has been wrongly paid the €67m fee to any greater extent than the amount apportioned by the judge, the paying company has or would have had remedies against him, which it can pursue and that it would not be right to short circuit the pursuit of those remedies and give Mr Sawiris all that could be obtained in proceedings brought for that purpose by treating the €67m as a deduction from an award. Etherton LJ made a similar point at paras 161 and 162 where he observed that the Revised Brokerage Agreement was between different legal entities.

72. Mr Rabinowitz submits that those points are irrelevant. He submits that, quite apart from the dubious nature of the Brokerage Agreement and the Revised Brokerage Agreement, in these proceedings the focus is on the monies that Mr Benedetti received personally. He submits that in a claim for unjust enrichment the claimant must show that he rendered services which conferred a benefit for which he has not been paid and it follows that, if Mr Benedetti personally received payment for the totality of the services which conferred the benefit, he is not entitled to anything more. I would accept those submissions. The judge held that Mr Benedetti received the whole sum of €67m personally. The question is whether that sum was in respect of all the services in respect of which this action is brought.

73. As I see it, the judge recognised that that was the question. He said at para 566:

> "The definition of 'brokerage services' in the Revised Brokerage Agreement makes it clear that the €67m was paid in respect of the work carried out by Mr Benedetti in the negotiation of the purchase of Wind from Enel and the raising of the acquisition debt from the

> banks. Mr Benedetti is not entitled, in my judgment, to seek a quantum meruit for this work when he has already been paid for it. The sum of €36.3m which, on the evidence, would be the market rate for the services he performed ought therefore to be apportioned to take account of this. Being generous to Mr Benedetti, I think that a fair apportionment· would be to attribute 60% of the €36.3m fee to the work covered by the brokerage agreement and the remaining 40% to the services not obviously within the agreement. On this basis, Mr Benedetti would be entitled to receive €14.52m in addition to the €67m brokerage fee."

74. It seems to me that the quarrel that Mr Rabinowitz has with that paragraph is not with the first two sentences but with the last sentence. Here all the services were rendered before the 26 May 2005. The judge accepted the evidence of Mr Sottile (at para 552) that brokers or advisers in the position of Mr Benedetti were compensated for their services by transaction fees, (normally success fees), which varied between 0.1% and 0.3% of the transaction value for transactions of the size of the Wind acquisition and included all ancillary services. It was on that basis that the judge assessed the market value of Mr Benedetti's services, having taken the top of Mr Sottile's range, namely 0.3%.

75. The point was clearly made in the course of the argument by Lord Reed. He said (Day 3 pp 340-341) that he appreciated that there are factual situations where a clear distinction can be drawn between different services and the way in which they would be remunerated in the market, but in this case we were told that the services as a whole would be remunerated in the market by a unum quid fee calculated as a percentage commission of the value of the entire transaction. That amount would work out at a maximum of €36.3m. Lord Reed posed the question whether, if Mr Benedetti has actually received €67m, one cannot say in that situation that he cannot possibly have a claim in unjust enrichment, even if the agreement was a perfectly regular agreement. The alternative is that he will be remunerated, say, to the tune of €81 or 82m, as the Court of Appeal held, in the name of avoiding unjust enrichment. He suggested that that was to say the least a paradoxical result, if the correct starting point is that appropriate remuneration would have been €36.3m. Mr Rabinowitz naturally accepts that way of putting it. He submits that the market value of €36.3m was in respect of all the services and asks rhetorically how Mr Benedetti can possibly be entitled to more.

76. Mr Howard's answer (at Day 3 p 387) to those questions is based on the judge's apportionment. As he put it concisely, the €67m was paid in respect of services A but services B were also provided by Mr Benedetti and the unjust enrichment is Mr Sawiris' failure to pay for services B. Mr Howard submits that that is in effect what the judge held at para 566.

77. As I see it, the problem with the judge's apportionment is that the judge gives no reason for his conclusion and it seems to me to be inconsistent with his conclusions at para 561, where (as stated in para 44 above) the judge concluded that all the tasks carried out by Mr Benedetti fell within the agreed scope of a broker or adviser role. He reached that conclusion on the basis of the evidence of Mr Sottile referred to in para 74 above.

78. Mr Rabinowitz is very critical of the Revised Brokerage Agreement but it is important to note that it was made in July or August and backdated to 26 May 2005, by which time all Mr Benedetti's services had been completed. Moreover, taken at its face, its recitals show that it was intended to cover the remuneration for ITM's services (ie Mr Benedetti's services) in the past as well as the future. There were no services rendered in the future. By clause 7.2 the "Broker's fee" was described as "a success fee of 0.55% of the Transaction Value". Although the numbers are different, that was precisely the same approach as that advanced by Mr Sottile and accepted by the judge. In these circumstances, even taking the Revised Brokerage Agreement at face value, I cannot see any basis for the apportionment adopted by the judge. It appears to me to be clear that it covered the same services as the services in respect of which compensation is sought in this action.

79. In the course of the argument Lord Wilson drew attention to the third and fourth recitals to the draft agreement of October 2006, which were prepared on behalf of Mr Sawiris, at which time he was willing to settle on the basis that Mr Benedetti could keep the €67m and receive €75.1m in addition. The recitals in the draft agreement accepted that ITM performed a wider scope of services than the Brokerage Services referred to in the Revised Brokerage Agreement and recognised that Weather wished to supplement that agreement in order to compensate Mr Benedetti for those wider services. The suggestion is that these recitals are inconsistent with the conclusion that the services rendered under the Revised Brokerage Agreement were the same as those in respect of which payment is sought in this action. I would not accept that suggestion. The draft was no more than a draft settlement agreement under which Mr Sawiris was willing to pay over €142m to Mr Benedetti in order to bring this whole affair to an end.

80. The draft seems to me to be inconsistent with the basis upon which the services were assessed by Mr Sottile and the judge, namely that there should be a single fee to cover all the services performed by Mr Benedetti and that the market value of all those services was €36.3m. A conclusion which entitles Mr Benedetti to €81.52m does not seem to me to be just.

81. I would add that, as Mr Rabinowitz submits, and as appears above, the figure of €67m was agreed by way of reduction from €87.76m without reference to

the Revised Brokerage Agreement, which had not yet been created, or to the First Brokerage Agreement and at a time when Mr Benedetti was claiming that the money was going to third parties. Moreover the first Brokerage Agreement was, as the judge held at para 334, opportunistically created by Mr Benedetti in order to provide a justification for the payments he was intending to draw. In truth the figure of €67m was not arrived at by reference to his remuneration at all and there is no evidence that it was intended to compensate him for some but not all of the services he had provided. In these circumstances, it seems to me that the definition of "brokerage services" in the Revised Brokerage Agreement relied upon by the judge and the Court of Appeal is not a sound basis for the apportionment exercise carried out by the judge and upheld by the Court of Appeal.

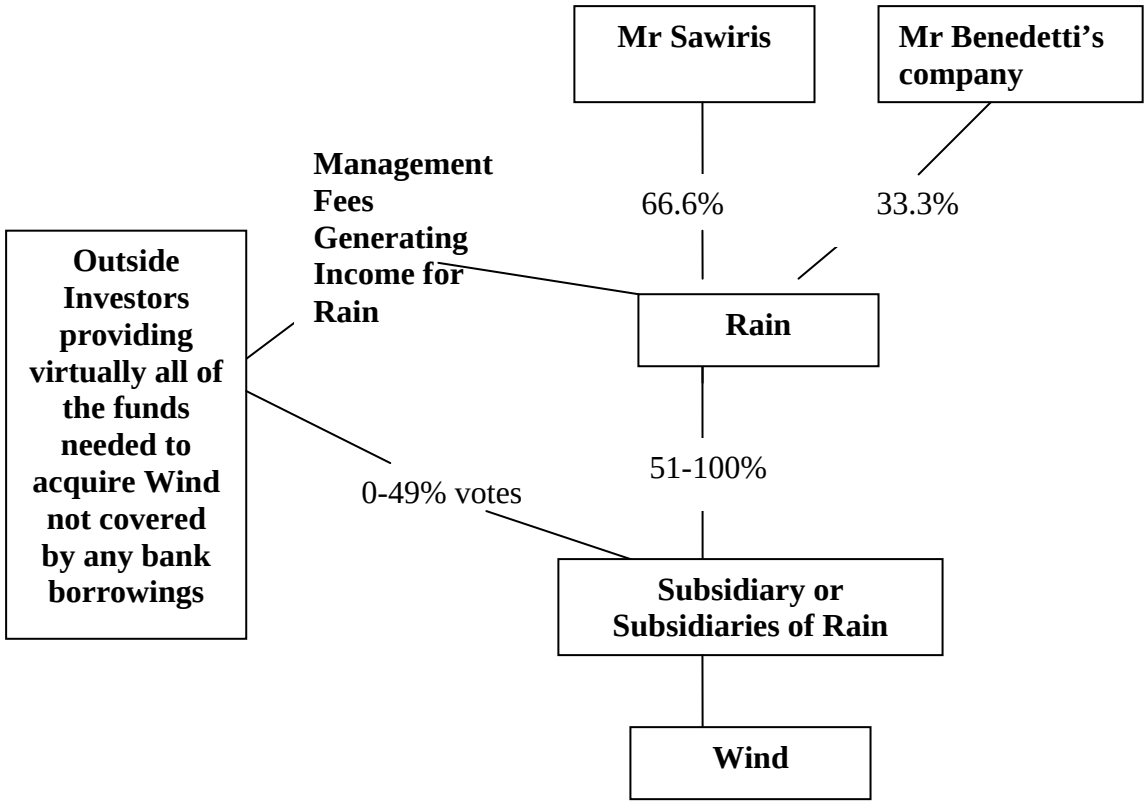
82. For all these reasons I have concluded that the whole of the €67m, which Mr Benedetti received personally, should be taken into account in deciding whether he is entitled to anything further for the services he rendered to Mr Sawiris. Since that figure is significantly greater than the market value of the services rendered, namely €36.3m, it follows that he is not entitled to any further payment. I would therefore allow the cross-appeal.

CONCLUSION

83. In all the circumstances I would dismiss the appeal and allow the cross-appeal.

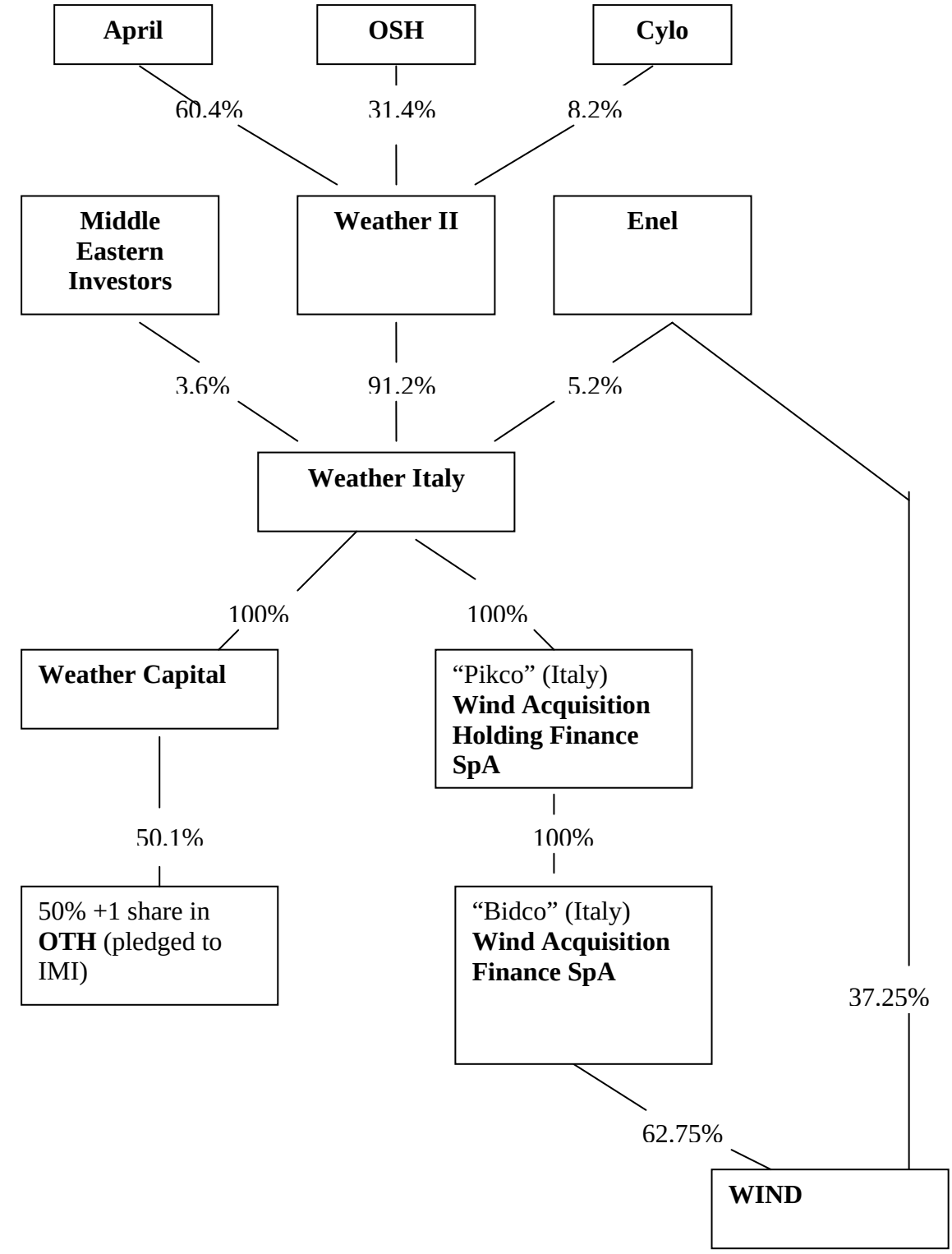
ANNEX 1

THE ACQUISITION – AS CONTEMPLATED BY THE ACQUISITION AGREEMENT



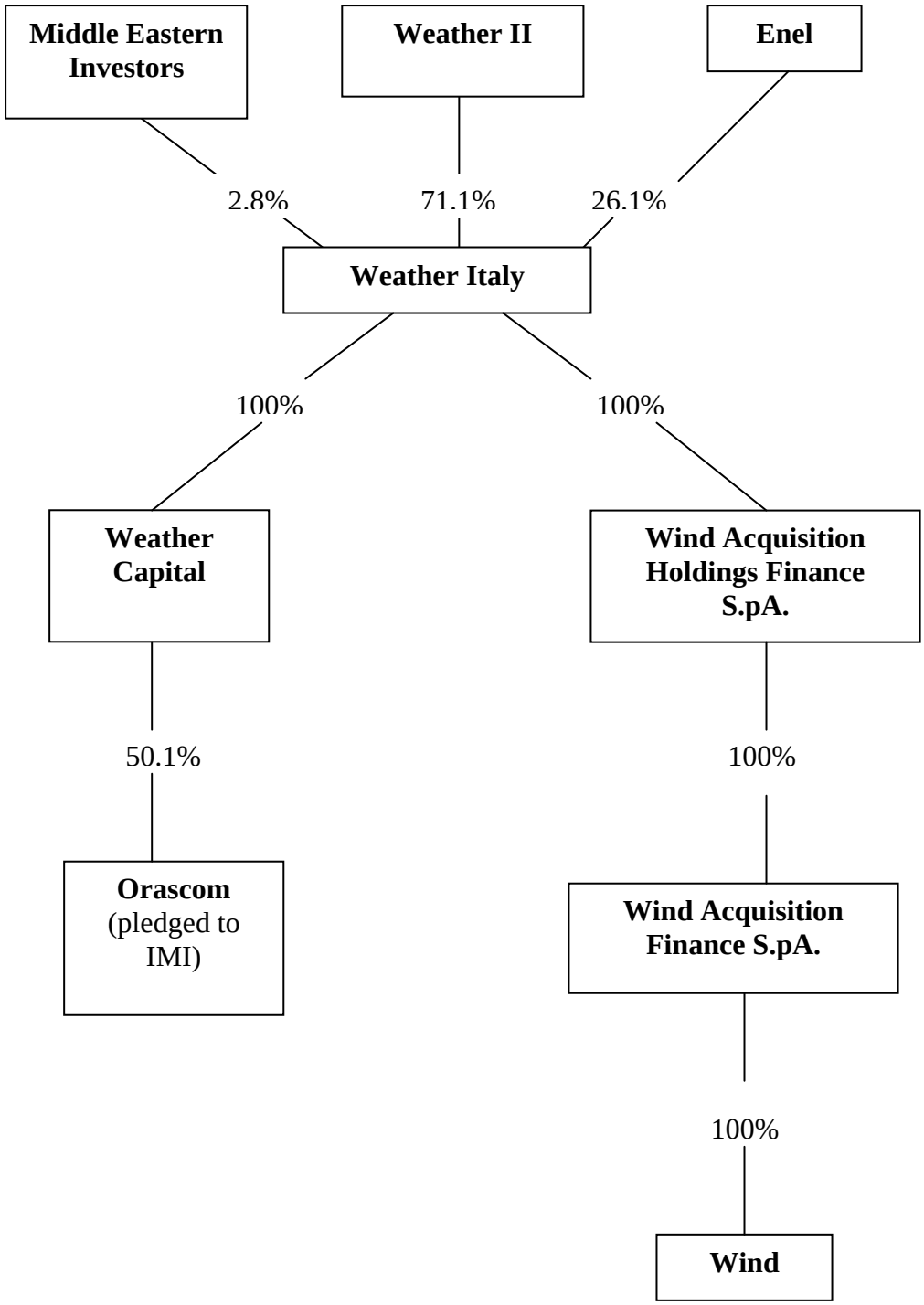
ANNEX 2

FIRST CLOSING on 11 August 2005



ANNEX 3

SECOND CLOSING on 8 February 2006



LORD REED

84. I too would dismiss Mr Benedetti's appeal and allow Mr Sawiris's cross-appeal, for largely the same reasons as Lord Clarke and Lord Neuberger, although I adopt a different approach to some extent to the subject of "subjective devaluation".

85. The case, as advanced on behalf of Mr Benedetti, is concerned with services provided and accepted in the expectation of reward under a contract which in the event was not concluded. A contract, referred to as the acquisition agreement, had been entered into at an early stage in the parties' dealings with one another, but it had envisaged a venture of an entirely different character from that subsequently entered into, and the only inference which could be drawn from the parties' conduct was that they had tacitly agreed to abandon that agreement. Mr Benedetti nevertheless provided his services to Mr Sawiris and his companies (which can for present purposes be elided with Mr Sawiris) in circumstances where it was understood that Mr Benedetti expected to receive some form of reward, but where there was no agreement, or even a loose understanding, as to the form which such a reward might take or as to its amount. It might perhaps have been possible in those circumstances to argue that there was a contract with an implied term that reasonable remuneration would be paid, and the court would then have determined what, in the whole circumstances, ought to be regarded as reasonable remuneration. The case has not however been brought on that basis. Instead, Mr Benedetti has brought a claim based on unjust enrichment: a claim of a fundamentally different character.

86. There is no doubt that Mr Sawiris was enriched by the provision of Mr Benedetti's services; that the enrichment was at the expense of Mr Benedetti, in the sense that he expended his labour to provide those services, and his labour was a marketable commodity; and that, in the absence of some reward for those services, the circumstances called for restitution by Mr Sawiris, since he accepted Mr Benedetti's services in the knowledge that Mr Benedetti expected to be rewarded for providing them. There was, on that footing, what is sometimes described as a failure of consideration (not using that term in its strict contractual sense): the services were provided on the basis that arrangements would be agreed for Mr Benedetti to be rewarded, but no such arrangements eventuated.

87. Mr Sawiris however relies on the fact that Mr Benedetti received €67m as remuneration under a contract referred to as the revised brokerage agreement. He

maintains that there is no scope for applying the concept of unjust enrichment, or at least that Mr Benedetti's receipt of the €67m has to be taken into account. Mr Benedetti on the other hand maintains that the revised brokerage agreement remunerated him for only part of the services which he provided. He therefore claims that he is entitled to a restitutionary award in respect of the remainder of his services.

88. It may be helpful at this stage to note that the revised brokerage agreement and its predecessor, known as the first brokerage agreement, were entered into after Mr Benedetti's services had been provided. He entered into the first brokerage agreement as a director of the company which was to be used by Mr Sawiris as the vehicle for the venture, and of which Mr Sawiris was about to become the sole shareholder. The other party to the agreement was Mr Benedetti's service company. Mr Benedetti then concealed the true nature of the agreement from Mr Sawiris, maintaining untruthfully that the €87m payable under the agreement was to be used to meet liabilities which he had incurred to third parties in connection with the venture. When Mr Sawiris expressed concern about the amount, Mr Benedetti drew up the revised brokerage agreement, under which the amount payable was reduced to €67m. That amount was then paid to his service company by Mr Sawiris's vehicle company.

89. There is also an issue as to the value to be placed on Mr Benedetti's services, so far as he may not already have been remunerated for them. The trial judge, Patten LJ, found that the market value of the whole of the services was €36.3m. Mr Benedetti however maintains that his services were valued by Mr Sawiris at a much higher figure. In response to Mr Benedetti's demands for payment for his services, Mr Sawiris offered him €75.1m. He did so initially at a time when he did not know that Mr Benedetti had personally received the €67m, and in circumstances in which there was an awareness of the possibility of legal proceedings. Mr Sawiris subsequently renewed the offer of €75.1m at a time when he knew that Mr Benedetti had personally received the €67m. In those circumstances, Mr Benedetti maintains that a restitutionary award ought to be at least €75.1m.

90. The questions raised by the case can be summarised as follows. First, does Mr Benedetti have any claim under the law of unjust enrichment at all, given that he received €67m under a contract for his remuneration? Secondly, on the assumption that Mr Sawiris was unjustly enriched notwithstanding Mr Benedetti's receipt of that contractual remuneration, by how much was he enriched where (1) the services rendered had a market value of €36.3m, (2) Mr Sawiris offered to pay €75.1m for the services after they had been rendered, at a time when Mr Benedetti was maintaining that the €67m payment covered liabilities incurred to third parties and Mr Sawiris did not know that that was untrue, and (3) Mr Sawiris continued to

offer €75.1m, in addition to the €67m already paid, after he knew that Mr Benedetti had received the €67m as remuneration?

The effect of the contractual remuneration

91. It seems to me that the logical starting point is to consider the effect of the contract under which the €67m was paid. If the contract made provision in respect of Mr Benedetti's remuneration for the whole of the services provided, to which Mr Benedetti agreed, then on the unchallenged assumption that the contract was valid, no question of unjust enrichment can in my view arise.

92. The trial judge, in the course of an impressive judgment dealing with a multiplicity of issues, construed the revised brokerage agreement as covering only 60% of the services provided by Mr Benedetti. On that basis, he considered that no remuneration had been paid for the remaining 40%, and that Mr Sawiris had to that extent been unjustly enriched. The market value of the services as a whole was found to be €36.3m. Rather than awarding 40% of that figure, which would be a sum of €14.52m, the judge held that Mr Benedetti was entitled to a further €75.1m, on the basis that that amount had been offered by Mr Sawiris at a time when he knew about Mr Benedetti's receipt of the €67m. The Court of Appeal on the other hand considered that no weight could be attached to the offer of €75.1m, for a variety of reasons which I shall discuss. Proceeding like the trial judge on the basis that the revised brokerage agreement covered only 60% of the services provided and that Mr Sawiris had been unjustly enriched in respect of the remaining 40%, the Court of Appeal concluded that he should be ordered to make restitution of 40% of the value of the entire services, which they took to be €36.3m. On that basis, it awarded Mr Benedetti €14.52m.

93. Lord Clarke and Lord Neuberger have explained the circumstances in which the first brokerage agreement was concluded. As the trial judge found, the agreement gave Mr Benedetti the security of a payment for his services which was not dependent on any agreement with Mr Sawiris: Mr Benedetti had taken advantage of his directorship of Mr Sawiris's vehicle company to secure the payment for himself. The revised brokerage agreement between the vehicle company then being used by Mr Sawiris and Mr Benedetti's service company merely reduced the amount to €67m, which was then paid.

94. I agree with Lord Clarke and Lord Neuberger that the implication of the judge's findings is that the purpose of the brokerage agreements was to ensure that Mr Benedetti received €67m for the services he had provided. No-one has questioned the validity of the agreements. Taken at face value and considered in

their factual context, agreements under which Mr Benedetti was to be remunerated for his services, which were entered into after the completion of the services between his service company and the vehicle company to be used for the venture, would naturally be expected to cover the entirety of the services, unless their terms clearly indicated otherwise. The terms of the agreements do not appear to me to point clearly away from that construction. I therefore agree with Lord Clarke that the trial judge erred in construing the revised brokerage agreement as relating to only 60% of the services provided. It appears to me to follow that no question of unjust enrichment arises. Mr Benedetti's appeal should be dismissed, and Mr Sawiris's cross-appeal should be allowed.

95. I also agree with Lord Clarke that, even if the contract related to only part of the services provided by Mr Benedetti, he would be unable on the evidence in this case to maintain a claim for restitution of the value of the remaining services. According to the evidence, services of the kind provided by Mr Benedetti are valued as a whole, rather than being broken down into distinct elements each with its own value. Indeed, even if it were assumed that the elements hypothetically excluded from the scope of the contract might have a value in themselves, there is no evidence as to what that value might be. In those circumstances, if the contractual remuneration exceeded the value of the services as a whole (as I would hold, in agreement with Lord Clarke and Lord Neuberger), then I cannot see how Mr Benedetti can establish a claim to a further payment on the basis of unjust enrichment.

The measure of restitution where a person has been unjustly enriched

96. As I have explained, there is no dispute in this case, subject to the questions arising from the payment under the revised brokerage agreement, that Mr Sawiris was enriched by the provision of Mr Benedetti's services, that the enrichment was at the expense of Mr Benedetti, and that the circumstances called for restitution by Mr Sawiris, since he accepted Mr Benedetti's services on the basis that they were not being provided gratuitously. The issue in dispute is the amount to be paid by way of restitution. That issue has to be considered at this stage on the hypothesis that there was no contract between the parties.

97. In *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 SCR 3 Bastarache J, giving the judgment of the Supreme Court of Canada, stated at para 32:

> "Restitution is a tool of corrective justice. When a transfer of value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer

> positions. In *Peel (Regional Municipality) v. Canada* [1992] 3 SCR 762, McLachlin J (as she then was) neatly encapsulated this normative framework: 'The concept of 'injustice' in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted' (p 804)."

98. That dictum might be related to Lord Wright's observation in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 64-65, in the context of unjust enrichment arising from the frustration of a contract after part of the contract price had been paid:

> "There was no intention to enrich [the defendant] in the events which happened … The payment was originally conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail."

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

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

100. *Prima facie*, the monetary value of the services can be fairly ascertained by determining what a reasonable person in the position of the defendant would have agreed to pay for them. That will depend on how much it would have cost a reasonable person in the position of the defendant to acquire the services elsewhere in the market (assuming that a relevant market exists, as will normally be the case). The payment by the defendant of the value of the services to a reasonable person

in his position will normally achieve a result which is just to both parties in a case of this kind, since the claimant will receive the amount for which he could have sold his services to another recipient in the same position, and the defendant will pay the amount which the services would have cost a reasonable person in his position to acquire from another supplier in the market. The basis of the valuation is thus consistent with the purpose of the valuation exercise.

101. A question arises as to what is meant by "the position of the defendant". The answer can be derived from the purpose of the valuation exercise. In order to arrive at an award which is just to both parties, it is necessary to take account of circumstances which would affect the value placed upon the services by a reasonable person receiving them. Those are also circumstances which would affect the cost to a reasonable person in that position of acquiring the same services in the market, and the amount which the claimant could have received if he had sold his services to another recipient in the same position. Such circumstances will include in particular the availability and cost of similar services provided by alternative suppliers (as in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34; [2008] AC 561), and prevailing rates and practices in the relevant market (as in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752). They will include any relevant characteristics of the defendant, such as, in the context of borrowing, its credit rating, or whether it belongs to the public or the private sector (as in *Sempra Metals*). They will include other personal characteristics, such as the defendant's age, gender, occupation or state of health, if they bear on the price at which such a person could obtain the services in question in the market. To give one example, a film star may not have to pay the ordinary price for a designer dress, as the fashion house may allow her a discount to reflect the fact that her wearing the dress will enhance its brand image. Her being a film star is thus an objective aspect of her position which affects the cost to her (or anyone else in her position) of obtaining such a dress, and therefore affects the value of the receipt of such a dress to a person in her position. The circumstances which are relevant to determining the value of the services to a reasonable person will not however include the personal preferences of the individual defendant, or any idiosyncratic views which the defendant may hold as to the value of the services, since the preferences or views of the particular recipient do not affect the services' value to a reasonable recipient.

102. There may of course be goods or services which are so tailored to the preferences of a particular recipient that the idea of a reasonable recipient (other than the actual recipient) becomes unrealistic: an example might be the costumes designed for the stage performances of some pop artists. Even in such cases, however, the value of the goods or services is not assigned by the recipient, but is likely to be ascertainable on the basis of objective evidence (which may, according to the circumstances, relate to such matters as the cost of obtaining the goods or

services from alternative suppliers, or the cost in the market of the materials and services involved and the profit margin which the evidence suggests would be reasonable in the circumstances).

103. The adoption of the objective approach to valuation which I have described, as the normal measure of a restitutionary award, is consistent with the relevant authorities. In particular, in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 840, Robert Goff J said, in relation to restitutionary awards for services, that "in making such an award, it is the market value of the services which is taken"; and in *British Steel Corporation v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, 511 the same judge held that the defendant should pay "a reasonable sum". In *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 AC 561, para 45 Lord Hope of Craighead stated that "questions of this kind are normally approached objectively by reference to what a reasonable person would pay for the benefit that is in question"; and Lord Nicholls of Birkenhead said in the same case (para 103) that the measure of a restitutionary award in respect of the use of money was "the market value of the benefit the defendant acquired". In *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752, para 41 Lord Scott of Foscote observed, in relation to his well-known example of the locksmith, that the extent of the unjust enrichment was "the value of the locksmith's services". In the case at hand, the developer's award was to be "assessed at the rate appropriate for an experienced developer" (para 42), that is to say at the rate ordinarily applicable in the market to a developer comparable to the claimant.

104. In relation to this approach, it may be helpful to say a word about the concept of "market value", which has been employed in some of the authorities (eg *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 840; *Sempra Metals*, para 103). It is an expression which can be used in more than one way, but the definition used by the Royal Institution of Chartered Surveyors captures the essence of the concept:

> "The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."

105. So understood, market value is specific to a given place at a given time. That point can be illustrated by the episode in *Vanity Fair* in which Becky Sharp sells her horses during the panic which grips the British community in Brussels after the battle of Waterloo, when rumours reach the city that Napoleon has defeated Wellington and that his army is approaching. The circumstances create a

market in which horses are exceptionally valuable, and Becky obtains a price which is far in excess of the ordinary value. It is, nevertheless, the value of the horses in the market in which they are sold.

106. That example illustrates the general point that market value depends critically on the identification of the relevant market, since there are different markets for many types of goods and services. That is reflected, for example, in the variability in the price of a haircut, or the cost of a meal in a restaurant, or the fees charged by solicitors, or the salaries of professional footballers, depending on the market in which they are operating.

107. The case of *Sempra Metals* provides another example. The defendant, as a public body, could purchase the benefit in question (the use of money) at a lower price than commercial enterprises. The benefit arising from the mistaken payment of tax before it was due was therefore valued on the basis of the public sector borrowing rate rather than ordinary market rates of interest. Equally, it is conceivable that money might be paid mistakenly to, and used by, a defendant with a poor credit rating who could borrow money only at rates above ordinary market levels. In such a case the benefit to that defendant, calculated as in *Sempra Metals* in terms of "the rate of interest … appropriate to the enrichee's circumstances" (per Lord Hope at para 46) or "the reasonable cost the defendant would have incurred in borrowing the amount in question" (per Lord Nicholls at para 103), would exceed that measured according to ordinary market rates of interest. It would still however be an objective value, which had nothing to do with the defendant's personal perception of the value of the money. Indeed, it would be a market value: the defendant in such a case would borrow in a different market from ordinary commercial borrowers, just as public sector borrowers constitute a distinct market. The higher rate of interest would reflect the risk of the defendant's inability to repay the money, and thus could be said to reflect the value transferred by the claimant, who would be bearing that risk.

108. There may be room for argument in particular circumstances as to whether the variation in the value of a benefit according to the position of the recipient is more aptly described as an aspect of market value or as a departure from it. The fact that the cost of an annuity may depend on the age, gender, state of health and personal habits of the annuitant would probably be regarded by most people as an aspect of market value: the annuity market differentiates between relatively young female non-smokers in good health and older male smokers in poor health. An economist might take the same view of the more favourable terms on which a film star may be able to buy a designer dress; but most people would probably say that the film star obtained the dress for less than its market value. I shall refer to "ordinary market value" to describe the amount which would be agreed in the market in the absence of some unusual characteristic of the particular purchaser.

109. It follows that some other vocabulary has to be found to describe the departure from ordinary market value which will be required where, as in the case of the film star, the value of the benefit to the reasonable person in the position of the defendant will be different from its ordinary market value. I shall refer to the objective value of the benefit, which will usually be its ordinary market value, but may in particular circumstances be either more or less than that amount.

"Subjective devaluation"

110. Counsel for Mr Benedetti argued that there was an established principle of "subjective devaluation", according to which the amount of a restitutionary award could be reduced below the objective value of the benefit in order to reflect the defendant's personal view of its value, and that by analogy a principle of "subjective revaluation" (or, perhaps more aptly, "subjective over-valuation") could justify on the same basis the making of an award in excess of the objective value.

111. It has to be emphasised that this is not an argument for the uncontentious proposition that the objective value of a benefit to the defendant may be less than its ordinary market value (as, for example, in *Sempra Metals*, or in my example of the film star), or may conceivably be greater than its ordinary market value (as might be said of the example from *Vanity Fair*, although that might also be regarded as an illustration of how the ordinary market value can vary according to the specific place and time; or as in my example of a mistaken payment made to a recipient who has a poor credit rating). The proposition being advanced is that the value of a benefit received by a defendant is not in principle arrived at objectively, but depends on the defendant's personal opinion of its value, or at least that an objective approach to valuation can be displaced by establishing that the defendant did not in fact value the benefit at its objective value.

112. The expression "subjective devaluation" has appeared occasionally in judgments where references have been made to the work of the late Peter Birks, who employed the expression in some of his writings in relation to the question whether the recipient of a benefit in kind had chosen to accept it and should therefore be taken to have been enriched (see eg *Introduction to the Law of Restitution* (1985, revised 1989), pp 109 and 413). As used by Birks, "subjective devaluation is an argument whose premiss is that where something has *not* been chosen by its recipient it cannot normally be said to have been of value to him" (*Introduction to the Law of Restitution* p 266; emphasis in original). Accordingly, "a defendant who has freely accepted the benefit cannot use that argument" (*ibid*).

113. Whether the recipient of a service can be taken to have assumed responsibility to pay for it is undoubtedly relevant to the question whether he is under a liability to make restitution of its monetary value on the basis of unjust enrichment (but it is important to add that it is not conclusive of that question: there are circumstances in which the receipt of a service may call for restitution of its monetary value even if the receipt was involuntary). Nothing I say about so-called "subjective devaluation" is intended to question that principle. As Pollock CB famously asked (albeit in the context of an analysis based on implied contract), "One cleans another's shoes; what can the other do but put them on?" (*Taylor v Laird* (1856) 25 LJ Ex 329, 332). I am however doubtful of the aptness of the expression "subjective devaluation" to describe that principle, since it seems to me that the reason for declining to make a restitutionary award based on ordinary market value in such a case is most aptly understood as being, not the defendant's idiosyncratic valuation of the service, but the importance of respecting his right to choose whether, and on what basis, to assume responsibility to pay for it. The issue is therefore not at bottom a matter of valuation; and, on one view, it is to be judged objectively. This point has been noted by a number of academic writers. For example, the Canadian academic Mitchell McInnes has written, "The important point is not the defendant's personal *valuation* of a benefit, but rather his personal *choice* to accept the risk of financial responsibility for it" ("Enrichment Revisited", in *Understanding Unjust Enrichment* (2004), eds Neyers, McInnes and Pitel, p 175 fn 44 (emphasis in original). See also Edelman and Bant, *Unjust Enrichment in Australia* (2006), pp 107-108, and Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (2012), chapter 6).

114. Birks himself recognised that the central issue underlying his concept of "subjective devaluation" was choice:

> "When the argument from the subjectivity of value (subjective devaluation) is available, it does not consist in an appeal to and proof of the tastes and priorities of the particular recipient but, on the contrary, only requires the recipient to show he made no choice to receive the benefit" ("In Defence of Free Acceptance", in *Essays on the Law of Restitution* (1991), ed Burrows, p 129).

It is of course the benefit by which the recipient has been unjustly enriched which has to be valued for the purpose of making a restitutionary award; but its valuation is conceptually distinct from the identification of the enrichment or the decision whether (or to what extent) it was unjust.

115. The recipient's freedom of choice is relevant not only to the all-or-nothing case where he either did or did not assume responsibility to pay for the service, but also, as Birks recognised (see eg "In Defence of Free Acceptance", *loc cit*, p 129),

to the case where the recipient assumed responsibility for payment, but only on a particular basis: for example, that the service was to be provided at half price as an introductory offer, or that the cost of the service would be a specific sum. In practice, most such cases are likely to fall within the scope of the law of contract, but some could fall within the scope of unjust enrichment (eg if a contract were void or unenforceable). The qualified nature of the recipient's acceptance of responsibility may then be relevant to limit any liability based on unjust enrichment. On the other hand, although I accept that a contract price in excess of the ordinary market value might be evidence of the objective value in particular circumstances, I have difficulty, like Lord Clarke and Lord Neuberger, in seeing how the recipient could be required, in the absence of a contract, to pay *more* than the objective value of the benefit on the basis of unjust enrichment.

116. Birks's use of the expression "subjective devaluation" to describe a principle concerned with issues relating to freedom of choice reflects his view that such issues should be addressed at the stage of determining whether the defendant has been enriched. On that approach, since enrichment involves a transfer of value, and the involuntary nature of the receipt of a benefit does not diminish the objective value transferred, the existence of enrichment must be denied, where necessary to protect the defendant's autonomy, by asserting that, subjectively, no (or only a limited) value was transferred.

117. Since the object of this principle is to protect the defendant's freedom to choose whether to assume responsibility to pay for a benefit in kind (and if so, on what basis), it seems to me that it might contribute to clarity of analysis if the principle were explicitly concerned with freedom of choice rather than "subjective devaluation". I would also comment that, although the expression "subjective devaluation" reflects Birks's treatment of the question whether and to what extent the defendant assumed financial responsibility for the benefit as part of the inquiry into whether there has been "enrichment", it is not self-evident that that is the most apt way of addressing the question: indeed, like some other academic authors (eg *Goff & Jones, The Law of Unjust Enrichment*, 8th ed (2011), eds Mitchell, Mitchell and Watterson, para 17-02), Birks in some of his writings also treats "free acceptance" as an "unjust factor" or ground of liability, so that the question whether the imposition of liability would be consistent with respect for the defendant's autonomy is taken into account at more than one stage of the analysis.

118. Another possible approach might be to treat enrichment as dependent upon the objectively beneficial nature of the receipt, and to consider at a later stage of the analysis, when determining whether it would be just to impose liability to make restitution (at all, or on a particular basis), the question whether the imposition of such a liability would be compatible with respect for the defendant's autonomy or freedom of choice. I note that the Canadian Supreme Court has taken a straightforward economic approach to the questions whether the defendant has

been enriched by the plaintiff and whether the plaintiff has suffered a corresponding deprivation, and has dealt with other considerations, including arguments concerning individual autonomy, at the stage of deciding whether the defendant's retention of the benefit is unjust: see for example *Kerr v Baranow* [2011] 1 SCR 269 at paras 37, 41 and 45. That approach appears at first sight to have the virtue of simplicity, in so far as it groups normative issues under an explicitly normative heading, and applies Occam's razor to Birks's repeated reliance on the concept of "free acceptance". It does not entail a descent into unstructured reasoning about injustice. I should add that, as Lord Nicholls indicated in *Sempra Metals* at para 119, the defence of change of position may also be relevant in some circumstances to the protection of the defendant's autonomy, especially if such a defence may be based on an anticipatory change of position, as the Privy Council accepted in *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, para 38.

119. Interesting and important as these issues as to the conceptual framework of unjust enrichment may be, they do not need to be decided in the present case, where there is no doubt that Mr Sawiris freely accepted Mr Benedetti's services on the basis that a reward would be provided. All that need be said is that, at whatever stage in the analysis the defendant's freedom of choice is best taken into account, I am inclined to think that it is preferable that it should be done explicitly rather than on the basis of so-called "subjective devaluation". I would also observe that this area of the law is at an early stage in its development, and that it remains to be seen whether we have yet found the most suitable analytical scheme.

"Subjective over-valuation"

120. Some academic writers (eg Burrows, *The Law of Restitution,* 3rd ed (2011), pp 60-61; Virgo, *The Principles of the Law of Restitution,* 2nd ed (2006), pp 88-89) have also used the expression "subjective revaluation" (or "over-valuation") in relation to the question how the benefit should be valued where services are provided in order to create an end-product which has no objective value. Examples sometimes discussed, which illustrate the nature of the issue, are those of a landowner who chooses to have a folly erected on his land, or a person who chooses to have his house decorated in execrable taste, adding nothing to its value. It is argued by Virgo (*ibid*) that, in such a case, a reasonable person would not regard the claimant's work as valuable, and that a restitutionary award is therefore based on the value subjectively attached to the work by the defendant.

121. As Burrows recognises (*ibid*), however, there is no need in relation to such examples to rely on a notion of "subjective over-valuation". The claimant benefited the defendant by providing his services. Those services had an objective value in the market: competitive quotations could have been obtained for the

erection of the folly or the decoration of the house. A restitutionary award would therefore be based on the market value of the services.

Subjectivity and value

122. There is in addition an inherent conceptual difficulty about the notion of subjective valuation. Value, in the economic sense which is relevant in the context of the valuation of services or other non-monetary benefits, is not established by individual attribution, but by exchanges between different individuals, usually in a market. It is the cumulative preferences of consumers which are important to the interaction of supply and demand that determines economic value, rather than the preferences of an individual party to a specific transaction. Even in situations where goods or services are tailored to the preferences of an individual party, their value is likely to depend on the supply and demand for the materials and services required, as is illustrated by the examples of the folly and the pop artist's costume. If on the other hand a person declares, for example, that coal is more valuable than diamonds, and intends to be understood as describing the relative monetary value of the two commodities, then one would be inclined to suppose that he has taken leave of his senses. He cannot make the monetary value of coal greater than that of diamonds by personal fiat. If a character in a science fiction film says that, on her planet, coal is more valuable than diamonds, one imagines a society where that might be true: where diamonds are plentiful and coal is scarce, where jewellery is made out of coal, and so forth: in other words a society in which market forces and consumer preferences could establish the relative value of coal and diamonds in the opposite sense to that operating in our own society. That is not to say that everyone has the same preferences. A woman who had no interest in fashion might not attach any more importance to a handbag from a fashion house than to one from a chain store, and might be unwilling to spend any more on the one than the other. But she would acknowledge that the former handbag was more valuable than the latter (and would doubtless claim its market value under her insurance policy if it were stolen), unless she was using the word "valuable" in a sense other than its economic one.

123. In the particular context of making a restitutionary award for unjust enrichment, there is a further reason why it is problematical for the valuation of a benefit to depend on the idiosyncrasies of the recipient. As I have explained, the purpose of restitution, where unjust enrichment has resulted from the receipt of services, is in my view to achieve a just result by restoring to the claimant the monetary value of the services which he has provided to the defendant. That aim will be compromised if the services are valued on a basis which depends on the idiosyncrasies of one party, rather than one which is even-handed as between them both.

The authorities

124. Three authorities were said to support the existence of a principle of "subjective devaluation" in the sense for which Mr Benedetti contended: that is to say, that a restitutionary award for unjust enrichment resulting from the receipt of a service should be based on the defendant's personal valuation of the service. On examination, none of them appears to me to provide support for it.

125. In the first case, *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775, Mance LJ referred at para 28 to Birks's discussion of "subjective devaluation" in the context of the question whether the defendant had been unjustly enriched by his receipt of a personalised number plate, as the result of a mistake. It was held that he had been, as he had chosen to retain the plate in circumstances in which he could easily have returned it but had refused to do so. The context, in other words, was a discussion of whether the recipient of a benefit as the consequence of a mistake had chosen to retain it and should therefore be taken to have been unjustly enriched (or, as it might be put, whether the imposition of liability for unjust enrichment would be consistent with respect for the recipient's autonomy): not whether a restitutionary award should be based upon the defendant's personal valuation of the benefit.

126. The second case, *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 AC 561, concerned restitution for unjust enrichment arising from the premature payment of tax as the result of a mistake. The majority of the House of Lords held that the Revenue had obtained a benefit, identified as being "the opportunity to turn the money to account" (per Lord Hope at para 33) during the period before the payment was due. The claimant sought to value that benefit according to commercial rates of interest. It was held however that the benefit should be valued according to the public sector borrowing rate.

127. That conclusion is consistent with the approach which I have described. The claimant had provided the Revenue with the benefit of the possession of the money for a period of time. The time value of money is assessed by applying a rate of interest. The appropriate rate of interest in the circumstances was one which was applicable to the public sector, since the circumstances involved the provision of money to an organisation in the public sector. A reasonable lender and borrower in the position of the claimant and the Revenue would have agreed on the public sector borrowing rate, since that was the rate at which alternative funds were available to the Revenue.

128. The case is thus an example of the way in which the position of the defendant can affect the objective value of the benefit which he receives. Just as Becky Sharp's horses had a higher value to a purchaser in Brussels during the panic than they would have had to a purchaser in ordinary circumstances, so the use of the taxpayer's money had a lower value to a public body than it would have had to a commercial enterprise.

129. The reasoning by which the majority of their Lordships arrived at their conclusion, so far as based on restitutionary remedies available at common law, was consistent with this approach. Lord Hope said that questions of this kind were normally approached objectively by reference to what a reasonable person would pay for the benefit (para 45), and explained the importance of focusing on the circumstances of the enrichee in order to determine the extent of the enrichment (para 49). Lord Nicholls stated that the relevant measure was "the market value of the benefit the defendant acquired", which was the reasonable cost the defendant would have incurred in borrowing the amount in question for the relevant period (para 103). This was described as an objective measure (paras 116, 117). The third member of the majority, Lord Walker of Gestingthorpe, favoured an approach based on the court's equitable jurisdiction to award interest.

130. Lord Nicholls added, obiter, that in other circumstances it might be unjust to order the recipient of a mistaken payment to pay interest: for example, where the recipient had made no use of the money and had repaid it when the mistake came to light, it might be most unfair to order him to pay interest (para 118). That is evidently correct: in such a case, the recipient had the opportunity to enrich himself through the use of the money, but did not choose to do so. Lord Nicholls continued (para 119):

> "Here, as elsewhere, the law of restitution is sufficiently flexible to achieve a just result. To avoid what would otherwise be an unjust outcome the court can, in an appropriate case, depart from the market value approach when assessing the time value of money or, indeed, when assessing the value of any other benefit gained by a defendant. What is ultimately important in restitution is whether, and to what extent, the particular defendant has been benefited: see *Burrows, The Law of Restitution,* 2nd ed (2002), p 18. A benefit is not always worth its market value to a particular defendant. When it is not it may be unjust to treat the defendant as having received a benefit possessing the value it has to others. In Professor Birks's language, a benefit received by a defendant may sometimes be subject to 'subjective devaluation': *An Introduction to the Law of Restitution* (1985), p 413. An application of this approach is to be found in the Court of Appeal decision in *Ministry of Defence v Ashman* [1993] 2 EGLR 102.Whether this is to be characterised as

> part of the 'change of position' defence available in restitution cases is not a matter I need pursue."

This reference to "subjective devaluation" was in turn referred to in the speeches of Lord Walker (at paras 184 and 187) and Lord Mance (at paras 232-233). Lord Walker preferred to adopt an approach to recovery in such cases based on equity, and Lord Mance correctly explained that Birks's concept of "subjective devaluation" was concerned with the existence of an unjust enrichment rather than the measure of restitution.

131. If, by "market value", Lord Nicholls means what I have called ordinary market value, then his observations are consistent with the approach I have described. Lord Nicholls did not in that passage endorse valuation based on the idiosyncrasies of the defendant, and I would not interpret the passage as bearing that implication, given first that the remainder of his speech followed an objective approach, secondly that such an approach would have conflicted with authorities of which Lord Nicholls will have been well aware, and thirdly his citation of the decision of the Court of Appeal in *Ministry of Defence v Ashman* (1993) 66 P & CR 195.

132. The case of *Ashman*, followed on similar facts in *Ministry of Defence v Thompson* (1993) 25 HLR 552, was concerned with the liability of a trespasser for her wrongdoing. The Ministry rented married quarters to the second defendant, who was serving in the RAF, at a concessionary rent. His wife, the first defendant, remained in the premises after they separated, despite a notice to quit, as the local authority would not re-house her until an eviction order had been made. Once the necessary proceedings had been taken she moved into local authority accommodation at a higher rent. The Ministry sought to recover mesne profits based on the open market rental value of the premises. An award made on that basis was overturned on appeal, and the court remitted to the court below to reassess the award on the basis that it should be based on the rent which the first defendant would have paid for local authority housing if it had been provided.

133. Hoffmann LJ, with whose judgment neither of the other members of the court expressed agreement, treated the claim as one for restitution. He referred in the course of his judgment to Birks's discussion of "subjective devaluation", which he treated as being relevant on the basis that the first defendant "had no choice but to stay in the premises". In other words, the "involuntary" nature of the first defendant's continued occupation of the premises, after she had ceased to be entitled to do so at the concessionary rent, supported the conclusion that she was not enriched by her wrongful occupation of the premises to the full extent of their value. If she had been free to choose whether to accept the benefit of continued occupation of the premises, she would not have done so, but would have moved

into local authority accommodation and paid the rent of such accommodation. The only enrichment arising from her occupation of the premises was therefore the amount of rent which she had avoided paying on that basis.

134. I would observe that if, as Hoffmann LJ considered, the first defendant had no choice but to occupy the premises, the application of Birks's approach would have led to the conclusion that she had not been unjustly enriched at all. The decision may perhaps be better rationalised, in terms of the law of restitution, as raising a question of change of position, as Lord Nicholls suggested in *Sempra Metals*. The central point was arguably not whether the first defendant chose the benefit of occupying the premises, but rather that her receipt of that benefit prevented her from receiving the equivalent benefit from the local authority at a lower cost. Her receipt of the benefit thus altered her position in such a way that she would be worse off if she were required to make restitution of the market value of the benefit than if she had never received it.

135. The important point for present purposes however is that the case is not an example of "subjective devaluation" in the sense in which that expression has been used in the present case. Hoffmann LJ's judgment provides no support for the idea that the valuation of a benefit can be based on the recipient's personal ideas about its value. On the contrary, Hoffmann LJ's approach to the valuation, on the basis of the rental of the alternative accommodation which might reasonably have been available to a person in the first defendant's position, was objective. He rejected a subjective approach to that issue, saying that, if the defendants had been occupying the premises at the open market rent before they separated, they could not claim that the premises had become less valuable to them because they could not find anywhere else to go; nor could they say that the premises were worth less to them than suitable accommodation they could realistically obtain. As Simon Brown LJ observed in relation to the case of *Ashman* in *Gondal v Dillon Newspapers Ltd* [2001] RLR 221, 228:

> "A restitutionary award, i.e. damages calculated according to the value of the benefit received by the occupier, is rightly decided … by an objective determination of what the wrongful occupation was worth to the trespasser."

136. These cases do not therefore appear to me to involve subjectivity: the valuation of the benefit in *Sempra Metals* or *Ashman* was not an attempt to discover the price which the individual defendant would in fact have been willing to pay, and therefore did not depend on the defendant's personal views. As was said in a Scottish appeal to the House of Lords, in a case where a person had erected a building on land in the mistaken belief that he was the proprietor, "it is not according to the fancy of the owner or the builder that the improvement upon

the estate is to be estimated" (*York Buildings Co v Mackenzie* (1797) 3 Paton 579, 584 per Lord Loughborough LC). The point illustrated by *Sempra Metals* is that there are differences between the circumstances of individuals which may affect the objective value to them of a given benefit in kind. The ratio of *Ashman* is less readily identified, and need not be decided now: views may differ as to whether the case is best understood as a further example of objective value being below the ordinary market value, or as relating to "enrichment", or as relating to a defence to the imposition of liability. It appears however to be concerned with the effect of constraints upon the choices made by a defendant in relation to the receipt of a benefit, and with the avoidance of imposing a liability which would leave the defendant worse off than if the benefit had not been received, rather than with a subjective approach to the valuation of benefits.

137. The present case is not one where any issue arises as to freedom of choice, since Mr Sawiris accepted Mr Benedetti's services freely, on the basis that Mr Benedetti would be rewarded, and without any cap on the reward. Nor is this a case in which it is said that the recipient of the benefit has particular characteristics which affected its objective value. The authorities cited do not appear to me to support a principle of "subjective devaluation" in the sense in which that expression is employed in the present case, namely the valuation of a benefit by which the recipient was unjustly enriched according to his personal opinion of its value.

138. In relation to para 26 of Lord Clarke's judgment, I should add, for the avoidance of doubt, that the ideas which I have discussed as possible alternatives to an analysis based on "subjective devaluation" do not appear to me to be less flexible or more liable to lead to windfalls for defendants. In particular, I entirely accept that there are circumstances in which a defendant may be unjustly enriched by the involuntary receipt of a benefit, and in which a restitutionary award may therefore be appropriate: see para 113. I also accept that a court can make a restitutionary award which is below the market value of the benefit conferred, in particular where that is necessary to respect the defendant's autonomy or freedom of choice: see para 115. An approach which explicitly respects freedom of choice, rather than adopting a concept of "subjective valuation", can be equally nuanced. Similarly, the adoption of an approach which addresses issues relating to autonomy at the stage of considering whether enrichment was unjust, rather than at the stage of considering whether there was enrichment at all, need not alter the outcome of cases. Finding the most suitable analytical framework to help the courts to reach principled decisions on particular facts and to articulate reasons for their decisions is nevertheless not unimportant.

The present case

139. In the present case, the amount which Mr Sawiris offered to pay Mr Benedetti for his services, after they had been provided, is significant only in so far as it provides evidence of the objective value of the services at the time they were provided (as in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752, para 44). The fact that the offer was made after the services had been provided does not render it irrelevant, although it is important to bear in mind that the services are to be valued as at the time when they were received (see, amongst other authorities, *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 802). Equally, the fact that the amount offered exceeded the amount which, according to other evidence, would be the ordinary market value of those services, does not make it irrelevant: as I have explained, it is possible that the objective value of services in particular circumstances may be more or less than their ordinary market value. These facts may however greatly affect the weight to be placed on the offer as an indication of objective value, in the absence of any identified circumstances which could account for the divergence from the value indicated by other evidence. As is familiar to practitioners in fields such as valuation for rating or rent reviews, the sums agreed in respect of comparable subjects, in comparable circumstances, can vary greatly, and outlying figures, even if relating to the very subjects to be valued, may have to be discarded if they cannot be reconciled with other evidence which is considered to be more reliable.

140. The significance of the sums offered by Mr Sawiris therefore depends upon whether they provide evidence of the objective value of Mr Benedetti's services at the time they were provided. In that regard, the fact that Mr Sawiris offered €75.1m for services which would ordinarily be valued at €36.3m plainly calls for an explanation. Was there something exceptional about the circumstances which rendered Mr Benedetti's services exceptionally valuable? The judge did not identify anything about the circumstances in which the services were provided which would indicate that they had a higher objective value in those circumstances than their ordinary market value. Or was Mr Sawiris's offer influenced by extraneous factors, such as the desire to settle Mr Benedetti's claim in the shadow of potential litigation? If so, the offer would not be reliable evidence of the objective value of the services at the time they were received. Or was Mr Sawiris simply being generous, as Mr Abdou said in the relevant emails, and as Mr Sawiris maintained in his witness statement? If so, the offer would again not be reliable evidence of the objective value of the services: generosity (or parsimony) may influence a person's attitude towards paying a given price, but it does not affect the objective value of what he has received. Or was Mr Sawiris influenced by the success of the venture in connection with which Mr Benedetti's services had been provided? If so, the offer would again not be reliable evidence of the objective value of the services, since that value has to be determined as at the time when the

services are received, and cannot be quantified with hindsight in the light of their success.

141. The fact that Mr Sawiris renewed his offer of €75.1m after he had discovered that Mr Benedetti had already received €67m under the revised brokerage agreement calls even more strongly for an explanation. Had his valuation of Mr Benedetti's services increased to €142.1m? Or can one infer from his successive offers, as counsel for Mr Benedetti argued, that his valuation of Mr Benedetti's services was even higher? Or should one infer from the surrounding circumstances that the increased offer was a further attempt to avoid litigation, there being evidence that the possibility of litigation had been discussed by that time? Or was it further evidence of his generosity?

142. These questions were not explored at the trial, where the parties sought to establish the objective value of Mr Benedetti's services by leading expert evidence. That evidence, as assessed by the judge, demonstrated that Mr Benedetti's services would ordinarily be remunerated by a fee of between 0.1% and 0.3% of the transaction value. Selecting the top end of that range, and applying the scale fee to the value of the transaction in question, the judge assessed the market value of the services at €36.3m. It was only in closing submissions that counsel for Mr Benedetti sought to place any reliance on the offers made by Mr Sawiris, having maintained throughout the trial that they were irrelevant. Even at that stage, it was suggested that they could be used mainly as a check on a valuation based on the expert evidence. In the absence however of any explanation of their being far in excess of the market value established by the expert evidence, other than Mr Sawiris's generosity (a factor which is not relevant to the measurement of the benefit, as I have explained), or his desire to avoid litigation (which would be equally irrelevant), and given the real possibility of their being influenced by extraneous considerations, they could not reasonably be regarded as reliable evidence of value.

The approach of the trial judge

143. In dealing with this evidence, the trial judge's starting point was that a "claim to a quantum meruit gives the court a wide discretion to award what it considers to be a fair and reasonable sum for the services" (para 58). That is not the correct approach. As I have explained, the court has to determine the objective value of the services at the time of receipt, that is to say the price which a reasonable person in the defendant's position would have paid for the services. That exercise may involve the exercise of judgment, but it does not involve the exercise of discretion (*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 578; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 385; *Sempra Metals* at para 46 per Lord Hope).

144. Although in principle evidence of negotiations between the parties might be relevant to that exercise, it is not clear that the judge treated the offers made by Mr Sawiris as evidence of the objective value of Mr Benedetti's services. He stated that "regard must also be had to any prior negotiations or agreement between the parties which indicate that they put a particular value on the services in question" (para 528), and that the evidence relating to the offers was admissible "if and so far as that evidence does show the value which the paying party (albeit with the benefit of hindsight) considered that the services were actually worth" (para 568). As I have explained, however, the object of the exercise is not to discover what the defendant thought the claimant's services were worth, either before or after they were provided, but what they were objectively worth at the time they were received. As I have explained, the offers might in principle have been significant if and in so far as they indicated the objective value of Mr Benedetti's services at the time those services were rendered. It was not however established that the offers had been made on that basis. In view of the absence of any explanation of the disparity between the offers and what the judge described as the market rate for the services Mr Benedetti performed, other than Mr Sawiris's generosity or his desire to avoid litigation, the judge could not reasonably have treated the final offer of a further €75.1m, in addition to the €67m already received, as determinative of the value of Mr Benedetti's services.

145. In the event, the judge appears to have awarded Mr Benedetti the €75.1m, in addition to the €67m already received, on the basis that it represented "what [Mr Sawiris] considered Mr Benedetti's services to be worth". As I have explained, however, that is not the proper measure of a restitutionary award. The offers could not be treated as overriding the evidence as to the market rate on the basis that Mr Sawiris's personal scale of values was the proper measure of a restitutionary award.

The approach of the Court of Appeal

146. In reaching that conclusion I am in agreement with the Court of Appeal. Arden and Etherton LJJ however differed in the reasoning by which they reached that conclusion, and Rimer LJ agreed with both judgments in relation to the valuation of the services. I am in agreement with the judgment of Etherton LJ, who adopted an objective approach to valuation.

147. I should explain why I do not entirely agree with the thoughtful analysis of Arden LJ. She appears in some parts of her judgment to have proceeded on the basis that an award in restitution should reflect the parties' common intention. On that basis, an unaccepted offer could not even in principle be relevant evidence of value. This appears to me to be incorrect in principle, and inconsistent with the significance attached in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL

55; [2008] 1 WLR 1752, para 44, to an unaccepted offer in settlement, made in the course of the proceedings, as an indication of the amount a quantum meruit might provide. I would not therefore agree with her comment (para 85) that it was an error on the part of the trial judge to take the figure of €75.1m into account because it was not agreed. Nor would I agree with the example she gives of a plumber who charges 10% over the market rate. In her view, if a customer had agreed to that rate in the past, the court, if awarding an amount by way of quantum meruit to the plumber against the customer on a further occasion, would take into account the parties' course of dealing in the past in preference to market rates. The point of the example, as stated by Arden LJ, is that "the court must look to the outward manifestation of the parties' common intentions" (para 72). It appears to me that that would be the proper approach if the award were being made on the basis of an implied contract, but not on the basis of unjust enrichment. I would add that it is important to bear in mind that although the term "quantum meruit" is used both in the context of contract and in the context of unjust enrichment, the basis on which a quantum meruit award is made differs according to which context is relevant.

148. The approach adopted in the passages I have mentioned, which treats the quantification of the benefit in a case of the present kind as resting on some common intention or understanding, has echoes of the old view that a restitutionary claim rests on an implied contract; and Arden LJ appears to have been influenced by Lord Atkin's speech in *Way v Latilla* [1937] 3 All ER 759, which proceeded on the footing that there was in that case an implied contractual term to pay reasonable remuneration. Lord Atkin stated that there "existed between the parties a contract of employment under which Mr Way was engaged to do work for Mr Latilla in circumstances which clearly indicated that the work was not to be gratuitous", and that Mr Way was therefore "entitled to a reasonable remuneration on the implied contract to pay him quantum meruit" (p 763). The present case is not however based on implied contract, and *Way v Latilla* therefore does not appear to me to be of assistance: the implied contract approach to restitutionary awards for unjust enrichment was decisively rejected in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669. On the other hand, Arden LJ was in my opinion on sounder ground in rejecting the relevance of the offer of €75.1m on the basis that there was nothing in the evidence relating to the offer to shed light on the market value of Mr Benedetti's services as opposed to an offer that for whatever reason Mr Sawiris was prepared to make (para 86).

149. Having rejected the relevance of the offer of €75.1m and taken the value of the services to be €36.3m, the Court of Appeal then awarded Mr Benedetti €14.52m on the basis that his contractual remuneration of €67m under the revised brokerage agreement related to only part of the services he had provided. As I have explained, I disagree with that understanding of the effect of the agreement.

Conclusion

150. I would therefore dismiss Mr Benedetti's appeal against the decision of the Court of Appeal, and allow Mr Sawiris's cross-appeal.

LORD NEUBERGER

The background

Introductory

151. Two questions require to be determined. The first, which is raised by Mr Benedetti's appeal, is what sum he should be awarded for the services which he carried out for Mr Sawiris and his companies (which, for present purposes, can be elided with Mr Sawiris) in connection with the acquisition of Wind Telecomunicazioni SpA ("Wind"). The second issue, which is raised by Mr Sawiris's cross-appeal, and only arises if the appeal is dismissed, is whether Mr Benedetti's entitlement to that sum should be treated as satisfied, because a company which he owns and controls has already received €67m.

152. Each issue raises a point of principle, but is complicated by the very unusual facts of this case. Those facts are set out in the judgment of Lord Clarke in paras 3-8 and 35-66, and, while it is unnecessary to repeat them in any detail, I shall begin by identifying what seem to me to be the salient features in connection with the issues raised in this appeal and cross-appeal.

A brief summary of the relevant facts

153. In 2002, Mr Benedetti became aware that Wind might be for sale, and he contacted Mr Sawiris, who he believed might be interested in buying it. Following discussions, they entered into an "acquisition agreement" on 31 January 2004, which envisaged that Wind would be acquired pursuant to the following scheme ("the scheme") which can be summarised, on a somewhat simplified basis, as follows: (i) Mr Sawiris would subscribe for two-thirds of the €200,000 initial share capital in a new company; (ii) Mr Benedetti would subscribe for the remaining one-third (with a loan from Mr Sawiris); (iii) Mr Sawiris would contribute €50m to this new company; (iv) Mr Benedetti would try to find other, third party, investors who would put up most of the money (around €1.2bn) required for the purchase of

Wind; but (v) the structure of the new shareholdings in Wind would give Mr Sawiris, through the new company, *de facto* control of Wind.

154. It was part of Mr Benedetti's case at trial that there was an understanding (referred to by the Judge as "the alleged understanding") that Mr Sawiris (and other investors) would pay him 1% brokerage in respect of the acquisition of the shares in Wind. The Judge rejected the existence of such an understanding (but I mention it as it has some relevance to the cross-appeal).

155. Two promising investors were found by Mr Benedetti, a Mr Ross, who had a large amount of capital at his disposal, and a company called Investors in Private Equity ("IPE"), which represented potential investors (including, at least in some respects, Mr Ross), and with whom Mr Benedetti entered into a so-called "collaboration agreement" in February 2004. As negotiations with them proceeded, a company called Weather Investments SA ("Weather Investments") was formed in January 2005, with a view to putting the scheme into effect. All hundred shares in that company were initially held by a subsidiary of IPE, on behalf of Mr Ross (the reasons do not matter). Mr Ross appeared to have lost interest in the scheme around mid-March 2005, so Mr Sawiris required the shares in Weather Investments to be transferred to him. On 24 March 2005, IPE transferred 99 of the shares to Mr Benedetti and the remaining share to Mr Abdou, Mr Sawiris's assistant. The following day, 25 March 2005, Mr Benedetti transferred the 99 shares to Mr Sawiris.

156. Two days before, on 23 March 2005, Mr Benedetti became a director of Weather Investments. On the following day, 24 March 2005, the day before he transferred all the shares in Weather Investments to Mr Sawiris, Mr Benedetti, without Mr Sawiris's knowledge, entered into two contracts, on behalf of Weather Investments, each for the benefit of companies wholly or largely owned and controlled by Mr Benedetti. One of these contracts has been referred to as "the first brokerage agreement", under which International Technologies Management Ltd ("ITM"), a company owned and controlled by Mr Benedetti, was appointed to provide Weather Investments with "brokerage services" for a 0.7% fee.

157. By mid-April 2005, IPE dropped out (and the collaboration agreement accordingly fell away), because it became clear that any potential investors it had represented had lost interest. Despite Mr Benedetti's best efforts, no other third party investors could be found, and so it became clear that the scheme could not be progressed. Mr Sawiris, together with his family and some associates, were left as the only potential investors in Wind, and he decided to proceed nonetheless. Negotiations accordingly took place over the next few weeks, in which Mr Benedetti was actively involved. As a result of those negotiations, terms were

agreed for the acquisition of Wind, culminating in a sale and purchase agreement on 26 May 2005.

158. Pursuant to the sale and purchase agreement, the great majority of the shares in Wind were acquired by companies ultimately controlled by Mr Sawiris, his family and business associates. This was accomplished in two stages, which were completed on 11 August 2005 ("first closing") and 8 February 2006 ("second closing"). The cost of over €3bn was mostly funded by bank loans, but it also included the introduction of the controlling interest of a company known as Orascom. After second closing, the ownership structure involved (i) (albeit through 100% owned subsidiaries) a company called Weather Investments Srl ("Weather Italy") (of which Mr Benedetti was initially a director) owning all the shares in Wind, (ii) companies controlled by Mr Sawiris and his family owning a substantial proportion of the shares in Weather Italy, and (iii) Mr Benedetti having no interest, either directly or indirectly, in Wind or Weather Italy.

159. On the same day as the sale and purchase agreement was entered into, the rights and obligations of Weather Investments (which had ceased to have any part to play in this matter) under the first brokerage agreement were assigned to Weather Italy. This was done by Mr Benedetti, as a director of both companies, without the knowledge of Mr Sawiris.

160. The accounts drawn up for first closing recorded around €87m being payable to ITM, which Mr Sawiris knew was owned by Mr Benedetti. However, Mr Sawiris was led by Mr Benedetti to believe that this sum was attributable to Mr Benedetti's expenses and was due to third parties in connection with the negotiating of the sale and purchase agreement. Mr Sawiris was unhappy about the amount, and Mr Benedetti agreed to reduce it to €67m. Mr Benedetti then prepared a "revised brokerage agreement" between Weather Italy and ITM, which provided for a 0.55%, rather than a 0.7%, fee, and back-dated it to 26 May 2005. This agreement was seen by Mr Abdou before first closing, and, on 12 August 2005, €67m was paid to ITM as part of the cost of first closing. Around that time, Mr Benedetti resigned as a director of Weather Italy.

161. Before first closing, discussions were already taking place about Mr Benedetti's remuneration. During June 2005, Mr Sawiris offered him €75.1m, in cash or Weather Italy shares, to which Mr Benedetti responded by saying, in effect, that it was far too little. In January 2006, the two men met to discuss the issue. At that time, Mr Sawiris suspected, but did not know, that Mr Benedetti had, through ITM, received the €67m under the revised brokerage agreement for his own use. However, he adhered to his offer, to which Mr Benedetti agreed in principle, but only if a proposal that he acquire some shares in Weather Italy at a good price was realised. That proposal came to nothing, and negotiations

continued desultorily. In October 2006, Mr Abdou sent a draft agreement to Mr Benedetti proposing a fee of €75.1m, and acknowledging that Mr Benedetti had received €67m. Mr Benedetti did not reply, and, shortly after, he began the present proceedings, which led to a hearing before Patten J.

The decisions of the courts below and the issues before the Supreme Court

162. That hearing lasted over thirty days, as Patten J heard much factual and expert evidence and had to resolve many issues, most of which are no longer live. In his full and careful judgment, [2009] EWHC 1330 (Ch), Patten LJ (as he had become), concluded that:

(a) The acquisition agreement was abandoned some time in April 2005, once the parties accepted that virtually no third party interest could be found, and that Mr Sawiris was effectively on his own so far as paying to acquire Wind was concerned;

(b) Mr Benedetti's contention that he should be paid for his services on the basis of an express contract, a contract supported by equity, fiduciary duty, or estoppel should be rejected;

(c) Nonetheless, as Mr Sawiris accepted, he was liable to pay Mr Benedetti a *quantum meruit* for his services, as otherwise Mr Sawiris would be unjustly enriched;

(d) There was a market for the sort of services provided by Mr Benedetti, and, in that market, he would have been paid €36.3m (the top end of the figures provided by the expert called by Mr Sawiris, but far less than the figure suggested by the expert called by Mr Benedetti);

(e) In view of the €67m paid to Mr Benedetti's company, ITM, under the revised brokerage agreement, the €36.3m should be reduced by 60% to €14.52m, as the revised brokerage agreement covered at least 60% of the work referable to the *quantum meruit*;

(f) However, as Mr Sawiris had been prepared to pay Mr Benedetti €75.1m, and had maintained that position after he knew that ITM had received the €67m, the correct figure to award Mr Benedetti as a *quantum meruit* was €75.1m.

163. The Court of Appeal, [2010] EWCA Civ 1427, in effect upheld conclusions (a) to (e), but reversed the Judge's conclusion (f). More specifically, the Court of Appeal:

(a) Rejected Mr Benedetti's contention that he should have received more than the €75.1m on the basis that the acquisition agreement supported a larger award;
(b) Upheld Mr Sawiris's contention that the Judge should not have awarded more than the market value of Mr Benedetti's services by way of a *quantum meruit*; and
(c) Rejected Mr Sawiris's contention that the whole of the €36.3m *quantum meruit* award had effectively been satisfied by ITM's receipt of the €67m.

Accordingly, the Court of Appeal overturned the Judge's award of €75.1m in favour of Mr Benedetti, and replaced it with an award of €14.52m (being 40% of the €36.3m *quantum meruit* award).

164. Mr Benedetti now appeals against the Court of Appeal's conclusions (a) and (b), and Mr Sawiris appeals against the Court of Appeal's conclusion (c).

165. On the Court of Appeal's conclusion (a), there is little to add to what Lord Clarke says in paras 40-41 above. As is now accepted by Mr Benedetti, the Judge was right to conclude that the acquisition agreement had been abandoned by the parties, once it became clear that no independent third party investors could be found and the scheme could not proceed, so that Mr Sawiris would have to proceed effectively on his own (albeit with members of his family and business associates) if he wished to acquire control of Wind. For the same reason, the terms of the acquisition agreement are of no assistance to Mr Benedetti's *quantum meruit* claim, because those terms reflected both the nature and the product of his services being different in nature from that which in fact eventuated. Even if they could, in principle, be of assistance to him in that claim, I find it hard to see how that assistance could be turned to quantitative account.

166. However, the issues raised by the Court of Appeal's conclusions (b) and (c) merit more consideration, not least because, according to the arguments developed in this Court and in the courts below, they concern an area of law, unjust enrichment, which has been impressively developed in legal academic circles over the past fifty years, but has not received much attention in the United Kingdom courts.

The first issue: the sum to which Mr Benedetti is entitled

The unusual factual position

167. The problem thrown up by the appeal in the present case arises from a strikingly wide discrepancy between (i) the figure found by the Judge, on the basis of the expert evidence, to be the market value of the services provided by Mr Benedetti ("the Services"), namely €36.3m, and (ii) the sum Mr Sawiris, an experienced and successful businessman, was prepared to pay Mr Benedetti for the Services, namely at least €75.1m. The discrepancy is all the more striking once two other factors are appreciated. In relation to point (i), the Judge's figure of €36.3m was at the top end of the expert evidence. That is because the dispute between the two experts was about the characterisation of the Services, and, once the Judge had accepted Mr Sawiris's expert's characterisation, €36.3m was the highest figure he could have adopted on the evidence. And in relation to point (ii), Mr Sawiris's final offer of €75.1m (a) took into account the fact that Mr Benedetti had, through ITM, pursuant to the revised brokerage agreement, already received €67m, and (b) was rejected by Mr Benedetti as being not enough (at least, unless he received some shares in Weather Italy, effectively at a discount).

168. At any rate, in the absence of any other evidence or any 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 that amount is, or at least is good evidence of, the market value of that type of benefit. Apart from complying with commercial common sense, this approach seems to have been assumed to be correct almost four hundred years ago in *Lampleigh v Brathwait* (1616) Hob 105, to have found favour with Kelly CB in *Scarisbrick v Parkinson* (1869) 20 LT 175, and to be in accord with what was said by Lord Atkin and Lord Wright in *Way v Latilla* [1937] 3 All ER 759, 764 and 766 respectively. The approach is also inherent in the well-established practice of invoking comparable transactions in the field of rating and other property valuation disputes. In such cases, arm's length lettings or sales of properties similar to the hereditament in dispute are routinely accepted, at least *prima facie*, as good evidence of the market value of the property the subject of the transaction. A letting or sale at arm's length of the hereditament to be valued must, albeit again only *prima facie*, be very good evidence of that hereditament's value.

169. In the present case, it is true that the €75.1m (i) was offered only after the Services had been provided, and (ii) was not accepted by Mr Benedetti, so there was no actual agreement. However, those points are not that telling. As for point (i), Mr Benedetti was only to be paid if the transaction succeeded, and the figure was proposed shortly after the sale and purchase agreement was signed, and before

first closing. So far as point (ii) is concerned, the fact that Mr Benedetti wanted more suggests that €75.1m is, if anything, a low, rather than a high, figure.

170. Nonetheless, the Judge assessed the market value of the Services as being much lower than the sum which Mr Sawiris was prepared to pay for them. While it may appear to be a surprising decision on the bare facts just recited, an appellate court should be wary of overturning decisions of trial judges on fact and on inference from fact. Patten LJ's decision on this point, like most findings after a trial with factual and expert evidence, was inevitably, and correctly, heavily influenced by the way in which the parties presented their respective cases, in terms of both the evidence and the argument.

171. It is no doubt for that reason that there was (quite rightly) no real attack in this Court on the Judge's finding that the market value of the Services was €36.3m. Both sides called expert evidence on the issue at trial, and the Judge's analysis of the effect of that evidence, and his reasons for preferring that tendered by the expert called by Mr Sawiris, were full, careful and rational. Although Mr Benedetti is now heavily relying on Mr Sawiris's offer of €75.1m, he placed no weight on that offer at trial (except at a very late stage, when he placed some, if pretty slight, weight on it), not least because he was seeking much more. Indeed, initially Mr Benedetti contended that Mr Sawiris's offer of €75.1m was inadmissible as evidence of value. When it was admitted into evidence, "neither side wished to contend that this was a proper basis for assessing the *quantum meruit* claimed", as the Judge put it. However, as he immediately went on to explain, counsel for Mr Benedetti "has now" (which I understand to mean in his closing speech, after the evidence had been given) "changed his position on that and suggests that the court can look at it but mainly in order to use it as a check on its assessment of quantum."

172. The Judge considered the offer of €75.1m, and rejected it as being helpful as an indication of market value. There is some background support for that conclusion, quite apart from the general points that can be made, namely (i) that in every field, there are "rogue" comparables, ie arm's length agreements (or offers) which are simply out of line with the rest of the market for no necessarily discernible reason, and (ii) the very fact that the €75.1m was never agreed can be said to cast doubt on it as a reliable guide to value: although the parties got very near to reaching a binding agreement, they did not do so; accordingly, not merely Mr Benedetti, but also Mr Sawiris, were entitled to have second thoughts about it.

173. The fact that Mr Sawiris did not reduce his offer when he discovered that Mr Benedetti had obtained €67m, and misled him about it, either suggests that his original offer was much too low or that he was being very generous to Mr Benedetti. It was open to the Judge to opt for the latter alternative, especially as Mr

Sawiris said in evidence that he considered his offer to be generous, and the Judge accepted that as true. Additionally, despite the Judge saying otherwise, it seems likely that the offer of €75.1m was made under the threat of litigation (as was apparently accepted by the Judge elsewhere in his judgment).

174. In principle, then, the offer of €75.1m was a potentially relevant fact for the Judge to take into account when determining what sum to award Mr Benedetti, but it was a piece of evidence which the Judge was entitled to reject as unhelpful. In the end, if the correct figure to be awarded as a matter of law in the light of the Judge's assessment of the evidence, was indeed the €36.3m which the Court of Appeal awarded, the fact that Mr Benedetti turned down a much higher offer before issuing proceedings is his misfortune.

The issue to be determined

175. The Judge held that Mr Benedetti had a claim in unjust enrichment and that was accepted by the Court of Appeal. The circumstances in which such a claim can arise are multifarious, but they can all be said to involve the conferment of a benefit on a defendant at the expense of a claimant in circumstances where it would be unjust for the defendant not to pay the claimant. Examples of the circumstances in which such a claim can be made include where the benefit has been conferred by or under a mistake, duress, undue influence, incapacity or compulsion. (I express these examples in the most general of terms: in many such cases, the enrichment may not be unjust and so no claim arises). The present claim is in another category, namely, to use a well-established if not wholly apt expression, where there has been a failure of consideration. This arises where there was a contract, but, in whole or in part, it was ineffective (eg due to illegality, frustration or unenforceability), or it ceased to apply for some reason.

176. It is, and always has been, accepted by Mr Sawiris that (subject to his argument on the cross-appeal) Mr Benedetti has a valid claim in unjust enrichment in respect of the Services. This is because (i) by providing the Services, Mr Benedetti conferred a benefit on Mr Sawiris, (ii) the provision of the Services was at the "expense" of Mr Benedetti, (iii) because the scheme fell away, this was a case where the consideration failed, (iv) it would be unjust if Mr Benedetti was not paid for the benefit, and (v) save as a result of the receipt of the €67m (which is relevant to the cross-appeal), Mr Sawiris has no defence to the claim. The appeal is thus concerned with how the sum to be paid to rectify the injustice of the enrichment is to be assessed.

177. That sum has been described throughout this case as being a *quantum meruit*. It is, I think, arguable that this is a mischaracterisation. It is true that the

original contractual arrangement, which identified Mr Benedetti's consideration, fell away. It is also true that the new arrangement which developed did not involve any such identification. However, it seems to me that the new arrangement probably gave rise to a contract, arising from the parties' words and conduct in April and May 2005. That contract did not specify Mr Benedetti's remuneration, but it must be at least arguable that there would be implied into the contract a term that he should be paid a reasonable sum. I say no more about this possible point of distinction, as (i) the point was not argued, (ii) the point may be wrong, (iii) even if it is right, the point may involve an issue of terminology rather than principle, and (iv) even if there is an issue of principle, I am confident it makes no difference to the outcome of this appeal, given the conclusion I have reached.

178. The term *quantum meruit*, expressed as it is in the old language of the forms of action, might fairly be said to "conceal … as much as it reveals about the nature of a claim" – to quote from *Goff & Jones* on *The Law of Unjust Enrichment*, 8th ed (2011), para 1-29. In this appeal, the *quantum meruit* refers to the value of the services rendered by Mr Benedetti, in circumstances where there was no contract which expressly provided how the price he was to be paid for the Services was to be quantified. In awarding a *quantum meruit* for a benefit, the court is essentially deciding how much is deserved for the conferment of that benefit (and, as Arden LJ pointed out in the Court of Appeal, the literal translation of *quantum meruit* is "as much as he deserves" – [2010] EWCA Civ 1427, para 2).

179. The appeal therefore turns on whether the *quantum meruit* which Mr Benedetti claims for the Services which he performed for Mr Sawiris is (i) the open market value of the Services as assessed, now unchallengeably, by the Judge, €36.3m, or (ii) the higher sum which Mr Sawiris was prepared to pay for the Services, namely (at least) €75.1m. The former figure can be characterised as the "objective" value in the sense that it does not depend on the particular view or assessment of either party. I am prepared to assume that the latter figure can be characterised as the "subjective" value, in the sense of being what the Services were assessed by Mr Sawiris to be worth to him. It is true that, on the Judge's findings, the offer of €75.1m was substantially over the market value and was seen by Mr Sawiris himself as being "generous". However, it was offered by a very experienced and very successful businessman, with access to the best advice. It can therefore, at least arguably, be explained on the basis that it represented what the Services were worth to Mr Sawiris (or, as Mr Benedetti would say, the minimum amount that they were worth to Mr Sawiris, as the figure represents an unaccepted offer).

The prima facie position

180. Where, as is agreed to be the position here, a claimant is entitled to a *quantum meruit* based on the fact that he has enriched the defendant by the provision of benefits, which have an assessable market value, it seems to me pretty clear that the sum *prima facie* to be awarded is the market value of those benefits. That conclusion is consistent with commercial common sense, the authorities, and the leading academic works on the topic of unjust enrichment.

181. It is hard to identify a rational alternative basis to market value, in the absence of a good reason to the contrary on the particular facts of a particular case. It seems to me that, even to those who might favour a generally subjective approach to the assessment of *quantum meruit* in unjust enrichment cases, there must be a presumption that the value of a particular benefit to the defendant is its market value. The nearest one can get to the value of a good or service, at least in a capitalist system (which can be said to equate price with value, which has echoes of Oscar Wilde's cynic), is its market value, and I agree with Lord Reed's description of that expression in paras 104-108. If a different valuation, in this case a subjective valuation, is said to be appropriate in a particular case, the onus must be on the person seeking to justify the different valuation to establish that it exists and differs from the market value as a matter of fact, and that that different valuation is justified as representing the *quantum meruit* in that particular case.

182. In his judgment in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 822 and 839-841, Robert Goff J said in terms that any *quantum meruit* is to be assessed by reference to market value. More recently, Lord Scott in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, paras 41-42, rejected the suggestion that a *quantum meruit* was to be assessed by reference to the increase in the value of the defendant's property thanks to the claimant's services, and held the claimant entitled to what those services would cost in the market. Further, although the issue involved can be said to be slightly different, namely payment under a mistake, the approach of Lord Hope and Lord Nicholls, in the House of Lords decision in *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, paras 45-47 and 113-116 respectively, seems to me, as it did to Etherton LJ at [2010] EWCA Civ 1427, para 144, to indicate that market value is the *prima facie* basis of valuation in this area of law. Also like Etherton LJ four paragraphs later in his judgment, I do not regard the reasoning of the House in *Way v Latilla* [1973] 3 All ER 759 as inconsistent with this conclusion, as it was found that there was no open market value assessable for, or to use Lord Atkin's words, no "trade usage" as to, the services which were in issue in that case.

183. The academic support for a *prima facie* objective valuation includes Professor Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012)

section 34, *Goff & Jones op cit*, para 6-69, Virgo *The Principles of the Law of Restitution*, 2nd ed pp 98 and 103, and Birks, *Unjust Enrichment*, (2nd ed, (2005), pp 52-63.

184. There may be penumbra round this otherwise clear *prima facie* principle, but I consider that they will normally involve arguments about the precise basis upon which market value is to be assessed in a particular case. Thus, there could be cases where the defendant would, for some reason or another, be able to negotiate an unusually low price for the benefits in the open market – eg he could be a particularly active and prestigious client, so the provider of the benefits would hope for repeat business; or the service-provider's reputation and goodwill would be enhanced by it being known that he had acted for that client. In my view, in such a case, the very fact that the particular defendant would be able to negotiate a lower price in the open market provides the answer: if it was shown that the market would have appreciated that factor and would have been likely to take it into account, then the market value should reflect it. (Lord Reed gives some instructive and colourful examples in paras 101, 102, 105 and 106). One should not ignore objective characteristics of one or both of the parties, which would be known to, and taken into account by, the market, when assessing market value, at least in the instant context. The claimant as a provider of the benefits, would, by the same token, be able to seek more, on a market value basis, if he had a particular expertise or experience, provided that he could show that that was a factor which would have been appreciated by the market and could have been expected to be reflected in the market for the particular benefits in question.

Subjective devaluation

185. Having identified the *prima facie* position, the next stage in the argument involves addressing the proposition that the *quantum meruit* should be reduced in a case where the defendant establishes that, for one reason or another, the benefits provided by the plaintiff were worth less to him than the open market value; in other words, where the subjective value of the benefits to the defendant in the particular case is less than the objective, market, value. This proposition, known as subjective devaluation, is treated by most academic writers as being correct – see eg per Burrows *op cit*, section 34.2, *Goff & Jones op cit*, paras 4-06 to 4-11 and 6-69, Virgo's *Principles op cit*, p 98, and Birks, *op cit*, pp 52-63. However, others, notably Edelman and Bant in *Unjust Enrichment in Australia* (2006, p. 108), appear to challenge the whole notion of subjective devaluation, primarily on the basis that the enquiry into whether the defendant desired the receipt of the benefit should be objective, referring to Deane J's description of the issue as one of "constructive acceptance" of a benefit by a defendant: see *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256-257 and *Foran v Wight* (1989) 168 CLR 385, 438.

186. There is some judicial support for subjective devaluation in *Ministry of Defence v Ashman* (1993) 25 HLR 513, 519-520, a case concerned with damages for trespass, where Hoffmann LJ (whose reasoning was adopted by a subsequent Court of Appeal in which he sat in *Ministry of Defence v Thompson* (1993) 25 HLR 552, in a passage cited by Lord Clarke at para 24) specifically referred to subjective devaluation with approval. He explained that "a benefit may not be worth as much to the particular defendant as to someone else. In particular … to a defendant who has not been free to reject it". To describe a former tenant who remains in occupation of the premises as a trespasser in this way may, I think, be questionable in this context: the former landlord has not voluntarily conferred any benefit on him. I share Lord Reed's view expressed at para 136 that this is not the occasion to consider that question further. The speeches of Lord Hope and Lord Nicholls in *Sempra Metals* [2008] AC 561, paras 49 and 118-119 respectively, at first sight provide some support for subjective devaluation in an unjust enrichment case, although that case was concerned with payment of money by mistake. However, as Lord Clarke says at para 22, Lord Reed's analysis at paras 126-131 convincingly establishes that the analysis, and indeed the conclusion reached, in those speeches are both consistent with a market valuation approach, in line with what he says in paras 101-106 (and with what I say in para 184).

187. In my view, it may well be that, in some cases of unjust enrichment, subjective devaluation could be invoked by a defendant to justify the award of a smaller sum than that which would be *prima facie* payable, namely a sum based on the market value of the benefits conferred on him. Lord Clarke discusses the question in paras 18-26, and Lord Reed does so in paras 110-118. Lord Clarke adopts a so-called subjective devaluation approach, which involves a two-stage process, at the second stage of which the defendant may deny that the benefit conferred on him was worth as much as its market value, and leaves it to the court to decide on the facts whether he can justify such a subjective devaluation, and if so to what figure. Lord Reed, on the other hand, tends to favour a so-called choice of benefit approach, which concentrates on whether the defendant was in some way responsible for the conferment of the benefit, and deals with the question of value as part of a holistic question of enrichment.

188. Given that it is unnecessary to do so, I would prefer to express no concluded view as to which approach is correct. I can see attractions and problems in each of the two approaches, and it appears that there are even differing views as to what each approach entails or should entail. Broadly speaking, the subjective devaluation approach has the attraction of making the defendant pay for the benefit in so far as it has improved his position, but it may involve a greater risk of letting the defendant name his price. The choice of benefit approach has the merit of greater simplicity in some cases, but it may be more likely to lead to a defendant receiving what many might regard as a windfall at the expense of the claimant, in

circumstances where the defendant would (or, on some views, should) have been prepared to pay for the benefit.

189. I suspect that in the great majority of cases where unjust enrichment is raised these two approaches will lead to the same result. Indeed, the difference between the two approaches may turn out to be one of procedural analysis rather than outcome, particularly given what Lord Clarke says at para 26 and Lord Reed says at para 138. Whether that is right or wrong, where, as in this case, there is no doubt that the benefit was conferred at the defendant's request, or with his prior consent, it is hard to see how the two approaches would lead to different results. In particular, on either approach, I do not consider that subjective devaluation would be open to a defendant in a case such as the present, where, in the context of an arm's length commercial relationship, he voluntarily accepted the benefits, and said nothing to the claimant, before the benefits were conferred, or even while the benefits were being conferred, to suggest that they would be worth less than their market value to him, or that he expected to pay less than market value. This was a case of a claimant conferring a benefit on a defendant who was not merely free to reject it, but who positively encouraged the claimant to provide it, and who did so without ever suggesting that he would not pay the market value, or that the benefit would have limited value to him.

190. Assuming subjective devaluation is available in some cases, it would, in my view, require a very unusual case indeed before a defendant could rely on subjective devaluation where (i) the services were provided at the defendant's request or by agreement between the parties, (ii) either the request or agreement failed in some way to have legal effect, or it had no effective basis for quantifying the remuneration to be paid to the claimant, (iii) the defendant never gave the claimant to understand that the services had a lower than market value to him, or that he was not prepared to pay market value for them, and (iv) the claimant never gave the defendant to understand that he expected to be paid less than the market value. I am not prepared to say that subjective devaluation could never be relied on in such circumstances, but, as presently advised, I find it impossible to conceive of a case which includes these features where it could.

191. Equally, where the defendant can return the benefit, it seems hard to justify a departure from market value, if he chooses not to return it – as in *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775. On the other hand, in some other circumstances, most obviously the classic case of an unreturnable benefit being conferred on a defendant without his prior or contemporaneous consent or knowledge, there is obvious force in the argument that, once he has paid the claimant a sum equal to what the benefit is worth to him, the enrichment he has gained thanks to the claimant cannot be unjust. Equally, in some cases, it may often be unreasonable for a claimant to claim a market-based payment, when he has taken the risk of providing benefits to a defendant without the protection of a

contract specifying how his remuneration is to be quantified, or where there have been prior discussions and the defendant has indicated that he would not be prepared to pay as much as the market price for the benefit.

192. It would seem wrong, at least in many such cases, for the claimant to be better off as a result of the law coming to his rescue, as it were, by permitting him to invoke unjust enrichment, than he would have been if he had had the benefit of a legally enforceable contractual claim for a quantified sum. However, I would expressly leave open how far the personal tastes, or even the eccentricities and idiosyncrasies, of a defendant can be taken into account when assessing the subjective value – a point which would be of some potential relevance in this case if subjective valuation had been a maintainable argument – see para 179 above. As a general proposition, I would have thought that the more personal, and in particular the more objectively dependent on personal taste, a particular benefit is, the more powerful the case for giving great weight to the defendant's particular priorities and preferences. I should add that, not least for this reason, I agree with Lord Clarke and Lord Reed that the expression "subjective devaluation" may not be a happy one.

Subjective revaluation

193. Of course, Mr Benedetti is not seeking to rely on subjective devaluation in this case. However, it is a step in his argument. Having concluded that (i) the *prima facie* basis of assessing a *quantum meruit* payment in an unjust enrichment case is by reference to the market value of the benefits, and (ii) in some cases, it may be open to the defendant to reduce the sum otherwise payable by relying on subjective devaluation, the final question is whether it is open to the claimant in this case to rely on subjective revaluation. In other words, is it open to a claimant, as Mr Benedetti contends it is, to recover more than the market value of the benefits where the value of the benefit to the defendant is greater than the market value of the benefits?

194. There is a seductive simplicity in the contention that, if a defendant can take advantage of subjective devaluation, then a claimant should be able to take advantage of a subjective revaluation. That is a contention which receives a degree of support from some academic writers. Thus, Virgo acknowledges that subjective revaluation could be said to follow "logically and for reasons of consistency" from subjective devaluation in his *Principles op cit* p 64. However, in his *Restatement, op cit* p 158, Professor Burrows says that "[t]he correct view is probably that, without a valid contract, the claimant should not be entitled to an overvaluation". The same view appears to be taken in *Goff & Jones op cit,* para 4-11 (and see paras 6.63-6.74), although the arguability of the contrary view is acknowledged.

195. In my view, while, once again, this is not the occasion to lay down firm rules, I find it difficult to think of circumstances where subjective revaluation would be available to a claimant in an unjust enrichment claim to increase the *quantum meruit* above the open market value of the benefits he has conferred on the defendant. Even assuming that subjective devaluation is available to a defendant in some cases, it does not follow that subjective revaluation should be available to a claimant, and, if it is, it appears to me that it would be more difficult to establish than subjective devaluation. A closer analysis of the two situations indicates that part of the argument which supports subjective devaluation actually helps negative, rather than support, the case for subjective revaluation.

196. Where a benefit is conferred on a defendant by a claimant, it would, at least in the absence of special circumstances, be hard to describe the defendant's consequent enrichment as "unjust" if he pays the claimant the market value of the benefit. Viewing the matter from the other perspective, if the defendant could have gone into the market and purchased the benefit for the sum which he has to pay the claimant, it is hard to see what injustice there could be to the claimant if he cannot claim any more, whichever of the two approaches briefly summarised in para 187 above one adopts.

197. In many cases where the benefit has a special, higher, value to the defendant, it will by no means be clear that, if the parties had agreed a contractual quantification of the claimant's remuneration, that factor would have been taken into account. That is particularly true given that one is considering cases where the reason the benefits would have a special value to the defendant would not be known to the market or would not be reflected in the market value – see para 184 above.

198. It would, at least in general, be surprising if a claimant could obtain more by pursuing an unjust enrichment claim, which can be said to involve the law coming to his rescue because, for one reason or another, he does not have the benefit of a contractual claim, than he would have been likely to receive if he had had the benefit of a legally enforceable contractual claim. This argument, which appears to help to undermine subjective revaluation, is the mirror image of an argument which seems to me to help to justify subjective devaluation – see para 192 above.

199. A possible exception to the rule that a claimant cannot claim subjective revaluation may be where the defendant has led the claimant to believe that he will be prepared to pay more for the benefits than the market value, and the claimant reasonably and foreseeably relies on that indication. However, the claimant's case in such circumstances may, on analysis, be said to involve an overlay of estoppel on top of, or even a contractual claim in lieu of, his claim in unjust enrichment.

200. Even if subjective revaluation is available in some unjust enrichment claims, it seems to me clear that it should not be available in a case such as this, where (i) the Services were provided voluntarily by the claimant with the agreement, or at the request, of the defendant, (ii) the request or the agreement failed in some way to have legal effect, or it had no effective basis for quantifying the remuneration to be paid to the claimant, (iii) prior to the Services being provided, the defendant never gave the claimant to understand that the Services had a higher than market value to him, or that he was prepared to pay more than the market value for them, and (iv) prior to the Services being provided, the claimant never gave the defendant to understand that he expected to be paid more than the market value.

Conclusion on the first issue

201. Accordingly, in agreement with Lord Clarke, Lord Reed and the Court of Appeal, I conclude that the sum to which Mr Benedetti is entitled by way of *quantum meruit*, based on unjust enrichment, is €36.3m, rather than the €75.1m determined by the Judge. I would accordingly dismiss Mr Benedetti's appeal. That means that the cross-appeal must be addressed.

The second issue: the extent to which the quantum meruit should be reduced

The nature of the issue

202. Mr Sawiris's case on the cross-appeal is simple. It is that (i) Mr Benedetti is entitled to a *quantum meruit* of €36.3m for the Services which he provided for Mr Sawiris; (ii) following first closing, he was paid far more than that, namely €67m; (iii) accordingly, even before he began these proceedings, he had received more than he was entitled to; and (iv) therefore his claim should have been dismissed.

203. That argument was rejected by the Judge on grounds which the Court of Appeal held were open to him. The Judge's reasoning may be summarised in the following propositions: (i) the €67m was paid to ITM, Mr Benedetti's company, for "brokerage services" under the revised brokerage agreement; (ii) the scope of those brokerage services under that agreement, as a matter of construction, only covered (what on a view generous to Mr Benedetti was) 60% of the Services (ie the total Services which he provided); accordingly (iii) the €67m included a payment in respect of 60% of the Services; so that (iv) the *quantum mer*uit of €36.3m should be reduced by 60%; resulting in (v) an award of €14.52m, if the €75.1m were left out of account.

204. Mr Benedetti's case is primarily that any attempt on the part of Mr Sawiris to attack the Judge's analysis and conclusion is bound to fail because, properly analysed, it is an appeal against a finding of fact, and, indeed, a finding of fact which the Court of Appeal upheld. I would accept that the Judge's findings of primary fact should be interfered with only in exceptional circumstances, on the very well established ground that such issues are best left to the trial judge, especially when his conclusions have been upheld by the Court of Appeal. I would also accept that many of the Judge's inferences from primary fact should not be interfered with for very similar reasons. Thus, if he was right in his conclusion that the revised brokerage agreement should be accepted at face value and that it covered some, but not all, of the Services which Mr Benedetti provided to Mr Sawiris in terms of introducing Mr Sawiris to the possibility of acquiring Wind and negotiating the sale and purchase agreement, then we should not interfere with the conclusion that it covered 60% of the Services. The very fact that this assessment had to be no more than a rough and ready assessment is a good reason for leaving it to the trial judge: having considered, read and heard oral and documentary expert and factual evidence over more than thirty days, he was in a far better position to make such an assessment than an appellate court.

205. However, that is not the basis on which Mr Sawiris attacks the Judge's conclusion. He puts his case in two ways. First, he contends that the Judge should have concluded that the terms of the revised brokerage agreement were irrelevant because the payment of €67m was not really attributable to that agreement. Alternatively, he says that, if, as the Judge found, the revised brokerage agreement did apply, then, properly construed, it covered all aspects of the Services which Mr Benedetti provided to Mr Sawiris. I shall consider those two arguments in turn.

Was the €67m attributable to the revised brokerage agreement?

206. Mr Sawiris's basic submission under this head is that (i) the €67m which Mr Benedetti was paid had, in reality, nothing to do with any Services he supposedly provided under the first brokerage agreement or the revised brokerage agreement, but (ii) it was a payment which Mr Benedetti engineered for his own benefit as a result of being involved in the acquisition of Wind, and to which he was not entitled, so in these circumstances (iii) Mr Sawiris is entitled to have it taken into account on the determination of how much is to be paid to Mr Benedetti for the Services, and, accordingly, (iv) as the payment exceeds the *quantum meruit* to which Mr Benedetti would otherwise be entitled to be paid, he should receive nothing.

207. In this connection, it is necessary to look at the findings which Patten LJ made about the first and revised brokerage agreements and the payment of the

€67m in a little more detail. At [2009] EWHC 1330 (Ch), para 334, the Judge described the creation of the first brokerage agreement in this way:

> "On 24 March [2005] Mr Benedetti responded to the prospect of Mr Ross's and IPE's departure from the transaction by using the opportunity presented by his appointment as director of Weather [Investments] and the transfer of shares to procure two agreements for his own benefit without the prior approval of Mr Sawiris and without disclosing to him or Mr Abdou the fact that he would receive a substantial fee from the transaction. … [T]he payment of a brokerage fee in addition to the shares received under the acquisition agreement was not a term of that agreement or part of the alleged Understanding and … the first brokerage agreement … gave Mr Benedetti the security of a payment out of the transaction that was not dependent on any agreement with Mr Sawiris about the terms of his remuneration or on IPE remaining involved in the transaction so as to give him a return under the … collaboration agreement."

208. The assignment of the rights and liabilities of Weather Investments under the first brokerage agreement to Weather Italy was effected, without the knowledge of Mr Sawiris or Mr Abdou, by Mr Benedetti two months later, on 26 May 2005, the day on which the sale and purchase agreement was executed. Accordingly, Mr Sawiris and Mr Abdou were unaware of the existence of a potential contractual claim by Mr Benedetti or his companies until after 26 May 2005.

209. The first time Mr Sawiris or Mr Abdou had any sort of notice of such a claim was at the end of July 2005, when Mr Abdou received details of all the fees to be paid in anticipation of first closing. This included €87m payable to ITM, which was reduced to €67m as Mr Sawiris thought it was too high. There was a dispute at trial as to the purpose to which Mr Benedetti led Mr Abdou and Mr Sawiris to understand that this money would be put. The Judge reached this conclusion at [2009] EWHC 1330 (Ch), paras 432-433:

> "It seems clear … that Mr Abdou …originally understood that the €87m figure was not intended as a payment to Mr Benedetti for his brokerage services but was to be used to discharge his liabilities to third parties. … [Mr Benedetti led] Mr Abdou and Mr Sawiris to believe that the money was to be used to pay third parties who had assisted in the transaction. But … when Mr Benedetti was asked to identify precisely who was going to receive the money he did not answer. ...

> Mr Sawiris said that this caused him to have doubts about the story that the money was needed to pay third party advisers but that as he intended to reward Mr Benedetti for his efforts and owed him money, he was content to let the €67m be paid and to sort it out later. … Mr Benedetti says that he therefore agreed to reduce the payment from 0.7% (€87m) to 0.55% (€67m). He then arranged for the revised brokerage agreement to be prepared which was identical in terms to the first brokerage agreement except for the fee. [T]his Agreement was executed in July or August but backdated to 26 May."

210. Information as to what then happened to the €67m is very limited. At [2009] EWHC 1330 (Ch), para 434, the Judge said that "Mr Benedetti was cross-examined about [the €67m] and accepted that part of the money was spent on items such as antique candlesticks which were used to furnish his office". He continued by saying that, although "this has a certain resonance with other recent events, there is, as [Mr Benedetti's counsel] pointed out, no counterclaim for the recovery of these sums on the grounds that they were in some way misappropriated and the issue of expenses is not, I think, ultimately relevant to what I have to decide."

211. In the light of the Judge's conclusions in the passages I have set out above, it seems to me that the argument advanced on behalf of Mr Sawiris on this issue is correct. In summary, the position appears to me to be as follows. (i) The €67m was received by Mr Benedetti, or at least a company wholly owned by him, either for nothing or for the very benefits which he had conferred on Mr Sawiris, namely the Services; (ii) I do not consider that anything which passed between Mr Sawiris and Mr Benedetti calls that conclusion into question; (iii) if the €67m was received for nothing, then, particularly as it was obtained as a result of Mr Benedetti's involvement with the very transaction for which he provided the Services and for which he claims *quantum meruit*, it must be set off against that *quantum meruit*; (iv) if, on the other hand, the sum was received for the Services, then *a fortiori* it must be set off against the *quantum meruit*; (v) whether (iii) or (iv) is correct, as the *quantum meruit* to which he was entitled, according to the Judge's analysis (as adjusted by the Court of Appeal), was less than the sum of €67m, his claim must be dismissed.

212. It is appropriate to examine those conclusions in a little more detail.

213. The Judge's analysis of the circumstances in which the first brokerage agreement was executed, as quoted in para 207 above, is important not merely because it shows that Mr Benedetti concealed the creation of that agreement from Mr Sawiris. It is also important because it shows that the purpose of the agreement

was to enable Mr Benedetti to obtain "the security of a payment out of the transaction" and a payment which "was not dependent on any agreement with Mr Sawiris about the terms of his remuneration" or on any other contingency.

214. It seems to me very hard to argue against the proposition that this means that the purpose of the first brokerage agreement was to ensure that Mr Benedetti got at least something for the Services he had agreed to provide. There is nothing in the findings of the Judge to suggest that he was envisaging that he would be paid for something different. It is true that the Judge was saying that Mr Benedetti was seeking to insulate himself against the loss of other possible sources of income, resulting from IPE and Mr Ross pulling out, or under the alleged understanding, but that cannot assist Mr Benedetti. IPE and Mr Ross did pull out, and he therefore had no claim to anything in that connection, and, as the Judge found, the alleged understanding never existed.

215. If the purpose of the first brokerage agreement was not to provide a basis for ensuring that Mr Benedetti was paid something for the Services when a transaction in relation to Wind eventuated, it seems to me that it can only have been a sham document prepared for the purpose of extracting money from the transaction, because, if the "brokerage services" therein referred to were not the Services for which Mr Benedetti should receive a *quantum meruit*, there seem to have been no other Services to which they could refer.

216. The next stage is the assignment on 26 May 2005, which was also effected by Mr Benedetti without Mr Sawiris or Mr Abdou's knowledge. Other than confirming the secret nature of the whole brokerage arrangement, that takes matters no further.

217. One then gets to late July and early August 2005, when the existence of a possible contractual claim came to light, and the purpose of what was originally the €87m was discussed. It seems to me that Mr Benedetti misled Mr Sawiris as to the purpose of the €87m (which was reduced to €67m in those very discussions). He said that it was to pay third parties, but in my view that cannot be accepted, in the light of the following points, which have particular force, given that the onus must be on Mr Benedetti to establish that the €67m was paid out to third parties: (i) the absence of any reliable evidence from Mr Benedetti as to the identity of the alleged third parties; (ii) the absence of any evidence of any specific payment having been made to any third parties; (iii) the purpose of the agreement as described by the Judge in the passage quoted at para 207 above; (iv) Mr Benedetti's rejected contention that there was the alleged understanding, which would have entitled him, not third parties, to brokerage; and (v) the Judge's admittedly laconic finding as to what happened to the €67m, as quoted in para 210 above. Even if (which appears unlikely) any significant proportion of the €67m

went to third parties, I find it impossible to accept, on the evidence at trial and on the Judge's findings, that Mr Benedetti did not retain the lion's share – ie much more than half, and, crucially, more than the €36.3m to which he was entitled by way of *quantum meruit*.

218. I do not consider that the fact that Mr Sawiris may have had doubts as to whether the €67m was going to third parties can possibly assist Mr Benedetti on this issue. It has not been suggested that the €67m was intended to be a gift to Mr Benedetti. In so far as it was not going to third parties as Mr Benedetti had said, it seems to me that the €67m was probably viewed by Mr Sawiris as a payment on account for the Services (and hence he was prepared to "sort it out later"). If that is the right analysis, then one is led straight back to the point raised by the appeal, namely that the correct measure for the *quantum meruit* is objective market value, not some species of subjectively revalued value.

219. Apart from the actual payment of the €67m, the only other relevant fact was the execution of the revised brokerage agreement. Neither of these events takes the matter much further, save that the fact that Mr Benedetti found it relatively easy to agree to such a significant reduction in the sum payable under the revised brokerage agreement provides mild support for the notion that it was to be retained by him rather than being payable to third parties.

220. The Judge decided that the payment of the €67m under the revised brokerage agreement was, in the light of the definition of "brokerage services" in that agreement, partly, but only partly, in respect of the Services supplied by Mr Benedetti. The Court of Appeal agreed with the Judge or at least considered that the Judge was entitled to reach that conclusion. But, as I see it, that approach was wrong because it treated the revised brokerage agreement as representing the basis upon which Mr Sawiris agreed that ITM should be paid €67m. However, in the first place, the Judge had already reached his conclusions described and discussed in paras 213-214 above, which amounted to finding that, giving it the explanation that is the most creditable from Mr Benedetti's point of view, the revised brokerage agreement, reflecting the first brokerage agreement, was to protect his claim for a *quantum meruit*. Secondly, although the revised brokerage agreement was a document which, on its face, did justify the payment, the truth is that, as explained and discussed in paras 209 and 213 above, the payment was only authorised and agreed by Mr Sawiris after he had been told by Mr Benedetti that it was to reimburse third parties, whereas Mr Benedetti kept at least most of it, and probably all of it. Thirdly, over and above these two points, I agree with what Lord Clarke says in paras 74-77, namely that, despite the Court of Appeal's approval, it was, on analysis, inappropriate and arbitrary to apportion the remuneration in the way that the Judge did.

221. In the Court of Appeal, Arden LJ relied on the fact that there was no counterclaim for the €67m. But I do not see that as a problem. The fact that Mr Sawiris did not allege that Mr Benedetti had been paid too much does not preclude him from contending that Mr Benedetti had, at its lowest, been paid enough to satisfy his *quantum meruit* claim.

222. Another point touched on by Arden LJ was that the brokerage agreements were between ITM and Weather Italy, whereas the Services were negotiated, and were treated as being provided, as between Mr Benedetti and Mr Sawiris. I accept that a court must be very wary of treating companies as if they were the individuals who own or control them – see *Salomon v A Salomon and Co Ltd* [1897] AC 22 and *Prest v Prest* [2013] UKSC 34, [2013] 3 WLR 1. However, properly analysed, it seems to me that Mr Benedetti and (in so far as he was aware of the involvement, or even existence, of ITM) Mr Sawiris were treating Mr Benedetti's right to compensation from Mr Sawiris as satisfied by the obligation of Weather Italy, a company owned and controlled to a significant extent by Mr Sawiris, to ITM, a company owned and controlled by Mr Benedetti. That would appear to follow from the Judge's explanation of Mr Benedetti's thinking behind the execution of the first brokerage agreement (see para 207 above), and Mr Sawiris's approach to the payment of the €67m (see para 209 above), as well as being inherent in the 60% reduction to the €36.3m *quantum meruit* made by the Judge and approved by the Court of Appeal.

223. Etherton LJ also made the point that the fact that Mr Benedetti had executed the first brokerage agreement, the revised brokerage agreement (and the assignment of the first brokerage agreement) for both parties did not invalidate those agreements. While I agree with that as far as it goes, it does not go very far in answering the points which can, for the reasons given above, be validly made by Mr Sawiris in support of his cross-appeal.

The interpretation of the revised brokerage agreement

224. The alternative argument raised by Mr Sawiris is that, even on the Judge's approach, the payment of the €67m was a payment in respect of all the Services which Mr Benedetti had provided. That argument turns on whether the definition of "Brokerage Services" in the revised brokerage agreement extended to all the Services provided to Mr Sawiris by Mr Benedetti.

225. The expression "Brokerage Services" is defined as meaning "the effecting of transactions of and/or relating to the purchase of and dealing in Securities in the name and for the account of [Weather Italy] as well as the assistance in the

negotiation with the prospective seller, raising of acquisition debt and further raising of financial debt for Wind".

226. It is said on behalf of Mr Sawiris that the Judge did not make it quite clear in his judgment which aspect or aspects of the Services provided by Mr Benedetti was or were not included in that definition. However, I think Etherton LJ was right at [2010] EWCA Civ 1427, para 160, to say that the Judge "clearly accepted Mr Benedetti's argument that the definition … did not include bringing the investment opportunity to Mr Sawiris or obtaining the co-operation of the Italian government and the management of Wind". The question is whether Etherton LJ was right to add this was a "finding [which] cannot properly be criticised".

227. I accept that, on a literal, relatively narrow, approach to the definition of "brokerage services", it would not include introducing Mr Sawiris to the possibility of purchasing Wind, which can fairly be said to be an action which occurred before the activities covered by the definition. However, the revised brokerage agreement must, like any document, be construed contextually, and there obviously is an argument that the definition can and should be interpreted relatively widely to extend to all the Services which Mr Benedetti provided, in the light of the purpose which he had in mind when executing the first brokerage agreement – see para 207 above.

228. However, the conclusion I have reached on Mr Sawiris's first argument to support his cross-appeal renders it unnecessary to consider this alternative argument, and I do not think that it is right to decide it. First, the extent of the definition under scrutiny is not a point of any general importance. Secondly, given the somewhat artificial circumstances in which the first brokerage agreement was executed, it is not easy to identify the factual matrix. Thirdly, there could be difficult questions to be resolved – eg (i) is everything in Mr Benedetti's mind at the time of execution admissible, as he signed on behalf of both parties, and (ii) must the meaning of the terms in the revised brokerage agreement be the same as in the first brokerage agreement. Fourthly, the issue was not the subject of much argument before us.

Conclusion

229. Accordingly I have reached the conclusion that, in agreement with Lord Clarke and for much the same reasons, I would dismiss Mr Benedetti's appeal, and allow Mr Sawiris's cross-appeal. It therefore follows that Mr Benedetti's claim is dismissed.