17 July 2013

PRESS SUMMARY

Benedetti (Appellant) v Sawiris and others (Respondents); Sawiris and others (Appellants) v Benedetti (Respondent) [2013] UKSC 50

On appeal from [2010] EWCA Civ 1427

JUSTICES: **Lord Neuberger (President), Lord Kerr, Lord Clarke, Lord Wilson, Lord Reed**

BACKGROUND TO THE APPEAL

This appeal concerns the manner in which a court should calculate the amount of money, if any, that a person who has been unjustly enriched by the receipt of services must pay to the provider of those services by way of restitution.

Alessandro Benedetti is an Italian citizen who lives in Switzerland. Naguib Sawiris is the CEO of Orascom Telecom Holding SAE ("Orascom"), a company incorporated in Egypt which operates a telecommunications business in the Middle East, Africa and South East Asia. He owns a company incorporated in the British Virgin Islands called Cylo Investments Ltd ("Cylo"). Mr Sawiris' brother and father established companies incorporated in the Cayman Islands called April Holding and OS Holding (collectively, "the Holding Companies"), which hold assets for the benefit of Mr Sawiris' wider family.

In 2002, Mr Benedetti became aware that Enel SpA, the largest energy company in Italy, was contemplating a sale of its subsidiary, Wind Telecomunicazioni SpA ("Wind"). In December 2002, Mr Benedetti sought to persuade Mr Sawiris to invest in the acquisition of Wind. Mr Benedetti and Mr Sawiris signed a contract in January 2004 ("the Acquisition Agreement") pursuant to which Wind would be acquired via a new company, Rain Investments SpA ("Rain"), the shares of which would be owned by Mr Sawiris and Mr Benedetti in a ratio of 2:1. The negotiations were to be handled by Mr Benedetti, with the support and advice of Mr Sawiris. Both parties were to use their best endeavours to obtain funding from third parties for the acquisition of Wind. Provision was made in the Acquisition Agreement for Mr Benedetti to receive remuneration for his services. Messrs Benedetti and Sawiris, however, were unable to secure sufficient funding from third parties for the acquisition of Wind to proceed as intended.

Mr Benedetti and various potential third party investors sought to acquire Wind via a newly incorporated company called Weather Investments SpA ("Weather I"). One of the potential third party investors lost interest in that deal and 99% of the shares in Weather I were transferred to Mr Sawiris on 25 March 2005, via Mr Benedetti. On the day before that transfer took place, Mr Benedetti, as a director of Weather I, opportunistically made agreements with his own companies without the knowledge of Mr Sawiris. One of those agreements ("the First Brokerage Agreement") was made with International Technologies Management Ltd ("ITM"). Pursuant to the First Brokerage Agreement, dated 24 March 2005, Weather I appointed ITM to provide brokerage services in return for a payment of around €87 million (0.7% of the ultimate cost of the acquisition of Wind).

It became necessary for the funds for the acquisition of Wind to be provided by Mr Sawiris, Cylo and the Holding Companies. A deal was signed, with the assistance of Mr Benedetti, on 26 May 2005. Enel and its holding company, Enel Holding BV, entered into a sale and purchase agreement ("the SPA") pursuant to which the majority of the shares in Wind were sold to Cylo and the Holding Companies (via a company called Weather Investments Srl ("Weather Italy"), of which Mr Benedetti was a director) for over €3 billion. The transaction was completed in two stages, on 11 August 2005 and 8 February 2006. Mr Benedetti did not have a beneficial interest in any company which acquired an interest in Wind. On the same day as the signing of the SPA, the rights and liabilities of Weather I, including its obligations to ITM under the First Brokerage Agreement, were transferred to Weather Italy. That was effected by Mr Benedetti, as a director of all three companies, without the knowledge of Mr Sawiris.

Mr Sawiris, after discovering the existence of the First Brokerage Agreement, believed that the €87 million brokerage fee to be paid to ITM was needed in order to discharge Mr Benedetti's liabilities to third parties who had assisted in the acquisition of Wind. Mr Sawiris suspected that the sum would be kept by Mr Benedetti personally and was unhappy about the size of the sum. Mr Sawiris asked for the brokerage fee to be reduced and, in June 2005, suggested a payment of €75.1 million. Mr Benedetti would not agree to that sum. In July 2005, however, an agreement between Weather Italy and ITM ("the Revised Brokerage Agreement"), backdated to 26 May 2005, provided that ITM would receive a brokerage fee of €67 million (i.e. 0.55% of the value of the transaction). That sum was paid to ITM on 12 August 2005.

Mr Benedetti brought numerous claims against Mr Sawiris, Cylo and the Holding Companies, including a claim for unjust enrichment (on the basis that the consideration for the services that he had provided had failed). All of Mr Benedetti's

claims were dismissed except the unjust enrichment claim, for which Mr Benedetti was awarded €75.1 million. Mr Sawiris, Cylo and the Holding Companies were held to be jointly and severally liable for that sum, which was calculated on the basis of the offer made by Mr Sawiris to Mr Benedetti in June 2005.

The Court of Appeal held that the Holding Companies had not been unjustly enriched by any services received from Mr Benedetti, and further held that Mr Sawiris and Cylo were jointly and severally liable to Mr Benedetti for only of €14.52 million. That sum was based on the conclusion that the market value of the services provided by Mr Benedetti to Mr Sawiris was €36.3 million and Mr Benedetti had already been paid for 60% of those services. The Court of Appeal took the view that the Acquisition Agreement and Mr Sawiris's offer of €75.1 million in June 2005 were irrelevant to the calculation of the sum due to Mr Benedetti. In his appeal to the Supreme Court, Mr Benedetti argues that the sum to be awarded to him should be based on the terms of the Acquisition Agreement or, alternatively, on the offer made by Mr Sawiris in June 2005. Mr Sawiris and Cylo cross-appealed, arguing that Mr Benedetti was not entitled to anything because they had already fully paid Mr Benedetti for his services. Mr Benedetti initially asked the Supreme Court to rule that the Holding Companies were jointly and severally liable with Mr Sawiris and Cylo, but he abandoned that part of his appeal before the hearing.

JUDGMENT

The Supreme Court unanimously dismisses Mr Benedetti's appeal and allows Mr Sawiris' cross-appeal. Lord Clarke gives the leading judgment.

REASONS FOR THE JUDGMENT

Where a restitutionary award is made on the basis of unjust enrichment, it is to be calculated as the value of the benefit received by the defendant at the expense of the claimant **[10-14]**. Where the benefit takes the form of services, that will normally be the market value of the services performed **[15-16, 100-103, 180]**. The market value may depend on the personal characteristics of the defendant, such as his buying power in the relevant market **[17, 101, 184]**. Lord Clarke (with whom Lords Kerr and Wilson agree) suggests that the sum to be awarded to a claimant can be reduced on the basis that the defendant subjectively valued the services that he received at less than the market value (subjective devaluation) **[18, 187]**. Lord Reed suggests that that is not permissible **[113, 123, 137]**, and Lord Neuberger prefers not to express a concluded view on the issu**e [188, 192]**. That difference of opinion is likely to be significant in very few cases, and it is unnecessary to resolve the debate for the purposes of this case **[25-26, 119, 188-189]**. It is not, however, possible (save perhaps in exceptional circumstances) to increase the amount awarded to a claimant on the basis that he valued the services at more than the market price (subjective revaluation) **[29, 30, 34, 115, 198]**.

The Acquisition Agreement is not relevant to the calculation of what, if any, sum Mr Sawiris and Cylo have to pay to Mr Benedetti. The parties abandoned the Acquisition Agreement after it proved difficult to find third party investors. It is not, therefore, appropriate to have regard to that contract in determining the sum, if any, to which Mr Benedetti is entitled for the services that he performed **[41, 42, 85]**.

The trial judge found that Mr Bendetti performed the role of a broker or adviser and, on that basis, the market value of the services that he provided was €36.3 million. There is no basis for challenging those findings. However, the Court of Appeal was right to conclude that the judge fell into error in awarding Mr Benedetti more than the market value of his services based on Mr Sawiris' offer in June 2005. That offer is not relevant to the calculation of what, if any, sum Mr Sawiris and Cylo have to pay to Mr Benedetti because subjective revaluation is not permissible, save perhaps in exceptional circumstances. In any event, the offer of €75.1 million made by Mr Sawiris in June 2005 did not represent his genuine view of the value of Mr Benedetti's services; the offer was considered by Mr Sawiris to be "generous" and was made under the shadow of threatened litigation. There is no reliable evidence of Mr Sawiris's genuine opinion as to the value of Mr Benedetti's services **[44, 56, 66, 173]**.

The Court of Appeal was wrong to award Mr Benedetti €14.52 million. The market value of his services was €36.3 million and, as the trial judge found, he has already received €67 million (via ITM). The trial judge gave no reasons for saying that the payment of €67 million related only to 60% of Mr Benedetti's services, and it was inconsistent with some of his other conclusions, such as the fact that all of Mr Benedetti's services fell within the scope of his role as a broker/adviser and that his services would normally be paid for by way of a single payment representing a percentage of the value of the transaction. Furthermore, all of Mr Benedetti's services had been provided before the date on which the Revised Brokerage Agreement was signed. That agreement was expressed to cover services performed by Mr Benedetti in the past as well as in the future, but there were no further services to be performed by him at that date. The payment of €67 million, therefore, covered all of the services provided by Mr Benedetti **[72-78, 94-95]**. Lord Neuberger agrees that the cross-appeal should be allowed but takes the view that the payment of €67 million to ITM was not attributable to the Revised Brokerage Agreement at all **[211]**.

References in square brackets are to paragraphs in the judgment

<u>NOTE</u> This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html