Contract as the Remedy for Failure of Consideration

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The judgment of the Supreme Court in Barton v Morris explores the possible responses to the "clash" of unjust enrichment with effective contracts which has been this century's major innovation in high value contract litigation. Anxious to stress that "Unjust enrichment mends no-one's bargain", Lady Rose, with whom Lord Briggs and Lord Stephens agreed, found that the claimant had not established a contractual entitlement to payment for services it had rendered and from which the defendant had benefited. But on such facts, this finding gives rise to an apprehension of what Judge Pearce at first instance described as "an obvious apparent inequity", and there must, then, be some sympathy for Lord Burrows' finding that a term implied by law provided for "reasonable remuneration", or that an identical claim in unjust enrichment would do so. This, however, is unsatisfactory as it merely restates the clash. Lord Leggatt, dissenting, showed the way to avoid the clash. Building upon his judgment, it will be argued that if the contractual morality of bargaining is properly understood, an entitlement to payment would be found without recourse to "well-meaning sloppiness of thought", for that entitlement is stipulated by a term implied in fact subject to the "classic" tests of business efficacy on which the understanding of commercial contracting rests. The remedy for the perceived unjust factor of failure of consideration is proper understanding of consideration.

If, after the evidence is exhausted, it is found that both *p* and not-*p* are consistent with [the established facts], the presumptions laid down by the law decide in favour of one of the two alternatives.

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I. INTRODUCTION: THE CLASH OF CONTRACT AND UNJUST ENRICHMENT

In a line of cases traceable to *Roxborough and Others v Rothmans of Pall Mall Australia Ltd.*,[2] of which the leading English example is *Benedetti v Sawiris*,[3] "reasonable remuneration" has been

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[1] M. Polanyi, *Personal Knowledge*, corrected edn (Routledge and Kegan Paul, London, 1962), 278.

[2] [2001] HCA 68; (2001) 208 CLR 516.

[3] [2013] UKSC 50; [2014] AC 938.

awarded to "correct" an "unjust enrichment" even though the terms of an effective contract did not provide for payment. The "unjust factor" to which the award is a "response" is "failure of consideration".[4] Awards of this nature acutely express the clash with contract that has always lain potential within the modern development of unjust enrichment. The principal advocates of that development recognised this, and in the earlier stages of that development sought to maintain a sense of "subsidiarity" to a "subsisting contract": the existence of a "contractual regime" meant that "as a general rule, the law of restitution has no part to play in the matter",[5] with departures from that rule being "very rare",[6] so that "an undermining of contract by restitution is avoided, and restitution is made subservient to contract".[7] *Roxborough v Rothmans* and the cases following it have demonstrated the inherent inability of subsidiarity to prevent the clash with contract arising.[8]

Barton and Others v Morris and Another, in place of Gwyn-Jones (deceased),[9] handed down by the Supreme Court on 25 January 2023, is a most important attempt by the appeal courts to reassert the priority of contractual regimes. A majority of Lady Rose, with whom Lord Briggs and Lord Stephens agreed, held that the contract did not provide for payment for the services rendered, and that there could not "be a remedy in unjust enrichment … because a nil reward … was what the parties had agreed".[10] Lord Leggatt dissented because he thought the contract provided for payment. His comments on failure of consideration were therefore *obiter*, but constitute one of the most forthright judicial statements of contractual priority:

[4] This article, addressed to the law of contract, will not consider the unjust enrichment argument that failure of consideration is an inadequate terminology to express failure or absence of basis. Judicial mention of failure of consideration, failure of basis, etc will be regarded as equivalent.

[5] *Pan Ocean Shipping Co Ltd v Creditcorp Ltd, The Trident Beauty* [1994] 1 WLR 161 (HL), 164F (Lord Goff).

[6] P Birks, "Failure of Consideration and Its Place on the Map" (2002) 2 Oxford University Commonwealth Law Journal 1, 4.

[7] A Burrows, *The Law of Restitution* (Butterworths, London, 1993), 251; 2nd edn (Butterworths, London, 2002), 324.

[8] A Burrows, *The Law of Restitution*, 3rd edn (OUP, Oxford, 2011), 320-22.

[9] [2023] UKSC 3; [2023] AC 84.

[10] *Ibid*, [107].

"there is [a broad] reason why the existence of a contract precludes a claim based on the law of unjust enrichment. This is that there already exists a system of law for determining what rights and remedies contracting parties have in relation to the subject matter of their contract. It is called the law of contract".[11]

Lord Burrows also dissented because he found that the contract provided for payment, and so his comments on failure of consideration were also *obiter*. But those comments were at variance with the positions taken in the other judgments, for Lord Burrows found that "restitution for unjust enrichment was an alternative claim on the facts", and if he had not found for the claimant in contract he would have reached "the same result … in the law of unjust enrichment with the unjust factor being failure of basis".[12] To recognise that Lord Burrows' academic advocacy of failure of consideration as part of the law of unjust enrichment prior to his elevation to the Supreme Court informed his judgment is not, of course, itself a criticism of that judgment. This is particularly so because *Barton v Morris* is further affirmation that such advocacy has, in part at least, been a response to what indeed are failures in the law of contract.

In the belief that much of the impulse to the encroachment of unjust enrichment upon the proper domain of contract lies in a lack of understanding of and sympathy with the results of freedom and sanctity of contract,[13] the current author has argued that that encroachment inevitably will lead to doctrinal incoherence and practical mischief.[14] Claiming this does not, however, imply a denial that there are important cases in which a perception of injustice has arisen because the law of contract *has* dealt with those cases inadequately. *Barton v Morris* is an example. There *was* an entitlement to payment in *Barton v Morris*, and therefore Lord Burrows' holding that if contract

[11] *Ibid*, [191]-[192].
[12] *Ibid*, [240]-[241].
[13] D Campbell, "The Defence of Breach and the Policy of Performance" (2006) 22 University of Queensland Law Journal 271.
[14] Most recently in respect of the pronounced shortcomings of the attempt to respect "contractual regimes" in the important *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 267 CLR 560: D Campbell, "Bringing Down the Ceiling" (2023) 1 Contract and Commercial Law Review 22.

would not support payment then restitution should has its attractions. However, as on all other occasions involving effective contracts, providing an unjust enrichment remedy in *Barton v Morris* is insupportable, and it is submitted that Lord Leggatt's awarding of a remedy in contract is to be preferred. Lord Legatt's reasoning will be generalised in order to address the shortcomings of contract that have contributed to the turn to unjust enrichment. A proper understanding of the contractual morality institutionalised in the doctrine of consideration does much to remedy these shortcomings.[15]

II. The Possible Reasons for Payment in *Barton v Morris*

1. The Contractual Claim

In *Barton v Morris*, the claimant, Mr Philip Barton, introduced a prospective purchaser to Foxpace Ltd, which wished to sell a commercial property called Nash House. After the purchaser bought the property, Foxpace entered into liquidation, and the claim was brought over an issue of insolvency law against Mr Timothy Gwyn Jones, the sole director of Foxpace and the convenor of a deemed consent procedure distributing its assets. Having failed in the Chancery Division, Mr Barton succeeded in the Court of Appeal. Mr Gwyn Jones died after he had made what proved to be a successful application for leave to appeal to the Supreme Court, and the party named in the Supreme Court hearing of the case, Mr Nicholas Charles Morris, who will be called the defendant, was one of Mr Gwyn Jones' executors. In regard of the issues bearing on contract of interest here, the defendant's position was determined by the position of Foxpace. These issues were: (1) whether Mr Barton had a contractual claim under an "introduction agreement" with Foxpace that

[15] Though the US position is very different to the one argued for here, that argument has received some stimulus from the account of the Canadian and US laws in A Kull, "Consideration Which Happens to Fail" (2014) 51 Osgoode Hall Law Journal 783.

a commission of £1.2m would be paid; (2) whether, if the introduction agreement did not provide for a commission, there was an alternative unjust enrichment claim for "reasonable remuneration"; and (3), it not being denied that the introduction agreement remained effective, whether a claim in unjust enrichment might be maintained when there was no claim under the contract.

As it was based on an oral agreement, the contractual claim was, of course, likely to encounter difficulties of proof, and the Supreme Court noted[16] that the evidence on which interpretation of the introduction agreement rested had been described as "hotly contested",[17] with much of it being "unconvincing",[18] "unreliable",[19] etc. Though during the four day trial the claimant argued that there had been a reduction to writing,[20] this was inconsistent with his original argument in his statement of claim that the introduction agreement had been made orally, the defendant having denied the existence of any agreement at all.[21] In reaching his conclusion that there in fact was an introduction agreement,[22] HHJ Pearce, sitting as a High Court judge, undertook a painstaking consideration of the evidence, the account of which occupies 124 paragraphs of his judgment, in the course of which he addressed matters of general importance concerning the use of informal writings and evidence of oral negotiations in interpretation. These issues were taken up in the appeals, but only the great difficulty they occasioned for establishing the facts of the introduction agreement need be noted here.[23] As the matter reached the Supreme Court, the crucial point was the following.

[16] *Barton v Morris* (HL) (*supra* fn.9), [14].
[17] *Barton v Jones and Others* [2018] EWHC 2426 (Ch), [35].
[18] *Ibid*, [137], [141].
[19] *Ibid*, [134], [137], [142].
[20] *Ibid*, [14].
[21] *Ibid*, [16], [151].
[22] *Ibid*, [147], [152], [155], [157].
[23] Lord Burrows described the facts as "beautifully simple" (*Barton v Morris* (*supra* fn.9), [197]), "thereby locating beauty", Professor Briggs told us, "firmly in the eye of the beholder": A Briggs, "The Sound of Silence" [2023] LMCLQ 355.

The price Foxpace initially obtained, subject to contract, was £6.5m plus VAT.[24] But the property was later found to be affected by HS2 construction, and the conveyance was completed at £6m plus VAT.[25] Though *some* provision for payment of a commission had been expressly orally agreed, Judge Pearce crucially found that the introduction agreement was "*silent* on the crucial issue as to the precise circumstances in which the fee was payable",[26] and so, as Lord Leggatt later put it, "The difficulty in this case derives from the fact that the parties' contract did not expressly state what was to happen [in the circumstances which] in fact occurred".[27] The claimant argued that the introduction agreement provided that commission of £1.2m would be paid *when the property was sold* to a party to which he had introduced Foxpace.[28] The defendant argued that the commission would be paid *only if the price was £6.5m*, and so would not be paid as the price was lower.[29] Judge Pearce's essential finding, quoted *verbatim* by Lady Rose in the Supreme Court,[30] was that:

"[The case] comes down to a simple question of fact. I accept that either [the claimant's or the defendant's] version of events is possible, and neither would be illogical. The [defendant's] argument that the [claimant's] version is improbable (because Foxpace would be paying a flat percentage regardless of the purchase price) cannot be dismissed out of hand as being commercially ridiculous because there is evidence that [a sale] was proving difficult … and Foxpace saw some urgency in completing the sale. On the other hand, the [claimant's] criticism of the [defendant's] argument, on the basis that it would make no sense for the [claimant] to enter into an agreement in which he only obtained any fee if the price exceeded £6.5 million, at which point the whole fee became payable, supposes that Mr Barton fully thought through the implications of what he was discussing … if Mr Barton was confident that [he had introduced] a willing purchaser at £6.5 million then … it is plausible that he simply did not anticipate anything coming to light prior to the exchange of contracts that might have caused [the purchaser] to renegotiate the price, such that the only sale price Mr Barton contemplated was £6.5 million".[31]

[24] *Ibid*, [40]. A payment of a further £50,000 which was at one point envisaged can be put aside: [42], [53].
[25] *Ibid*, [57]-[58].
[26] *Ibid*, [155] (emphasis added).
[27] *Barton v Morris* (HL) (*supra* fn.9), [124].
[28] *Barton v Jones* (Ch), (*supra* fn.17), [144].
[29] *Ibid*, [150]. The possible consequences of the price being higher than £6.5m are discussed in the text accompanying fn.74 below.
[30] *Barton v Morris* (HL) (*supra* fn.9), [15]-[16].
[31] *Barton v Jones* (Ch) (*supra* fn.17), [154].

As no figure other than £6.5m had been discussed, Judge Pearce told us that he was:

"satisfied that Mr Barton and [Foxpace] agreed the necessary terms of this contract, namely the circumstances in which Mr Barton would be paid the commission of £1.2 million [and] that … pursuant to [this contract] Foxpace was liable to pay Mr Barton the sum of £1.2 million in the event that Nash House was sold to a purchaser introduced by Mr Barton for the sum of £6.5 million. Since the property was sold for £6 million, the claim based on the contract fails".[32]

2. The Term Implied By Law

No-one can be entirely happy with the contractual outcome in *Barton v Morris*. Judge Pearce certainly wasn't. He told us that:

"An *obvious apparent iniquity* [which arises from] my findings of fact is that Mr Barton was contractually entitled to £1.2 million if the property was sold for £6,500,000 but nothing if it was sold for £6,499,999, in circumstances where Mr Barton had no control over the price at which the property was sold and where the value to Foxpace was hardly any different to that actually contemplated in the contract".[33]

Judge Pearce's response to this "apparent iniquity", affirmed by the Supreme Court, was to accept it as the cost of upholding the contractual regime. But three alternative responses could possibly be made: first, a term providing for payment were the sale price less than £6.5m could be implied by law; secondly, an action for reasonable remuneration could be grounded in unjust enrichment; and thirdly, it could be found that the correct interpretation of the parties' intentions yielded an entitlement to payment in contract. The first was briefly considered and rejected by Judge Pearce,[34] but endorsed by Asplin and Davis LJJ in the Court of Appeal,[35] and by Lord Burrows in the Supreme Court.[36] As Lord Burrows held that there was a remedy in unjust

[32] *Ibid*, [157], [161].
[33] *Ibid*, [196] (emphasis added). Elsewhere, reference was made to "the *undesirability* of allowing the fact that the parties reached a concluded contract to stand in the way of the court granting relief", and to "the *obvious unfairness* to Mr Barton of limiting his right to recover to the strict terms of the contract": *ibid*, [192] (emphases added).
[34] *Ibid*, [164].
[35] *Barton v Gwynn-Jones and Others* [2019] EWCA Civ 1999; [2020] 2 All ER (Comm) 652, [41], [75].
[36] *Barton v Morris* (SC) (*supra* fn.9), [241].

enrichment, he also subscribed to the second response. Lord Leggatt also found that there was an implied term, but in a different way which will be shown to amount to the third response. Let us consider these alternative responses.

The various classifications of implied terms are inconsistent or even contradictory to the point of vexation, and I will merely state[37] that my own usage, building upon Treitel,[38] seeks to distinguish between terms implied in fact and terms implied in law on the basis that the former are terms endogenous to the contract necessary to capture the intentions of the parties, and the latter are exogenous terms read into a contract, by statute or by a court, in order to yield an outcome believed to be substantively superior to the one yielded by the intentions of the parties. (There may be greater or smaller degrees of frankness about the overriding of these intentions.) This is to distinguish between implication which is guided by freedom and sanctity of contract and implication which is guided by welfarist intervention.[39]

If we provisionally accept Judge Pearce's finding that the introduction agreement's being "silent" about payment meant that "the claim based on the contract fails", then implying a term in law that provides for payment is irreconcilable with freedom and sanctity of contract, and Judge Pearce was of the view that it was "incumbent" on the claimant to provide a non-contractual justification for it.[40] Lord Burrows' opinion was that there was such a justification. We have seen

[37] Though distinguishing between terms implied by law and in fact underlies the argument of Lord Leggatt on which this article turns, so far as possible discussion of his conceptual analysis of the varieties of implied terms and of default rules (*Barton v Morris* (*supra* fn.9), [126]-[136], [140]) will be avoided. Any adequate such discussion, especially as it would have to link his views on "business efficacy" in implication to his views on "business common sense" in interpretation (*Minera Las Bambas Second Arbitration v Glencore Queensland Ltd* [2019] EWCA Civ 972; [2019] STC 1642, [20] (Leggatt LJ)) would require, and would merit, a separate article. The focus here is, not on construction, but on the morality of bargain and consideration which guides construction.

[38] GH Treitel, *Law of Contract*, 11th edn (Sweet and Maxwell, London, 2003), 201: "terms which were not expressly set out in the contract, but which the parties must have intended to include [and] terms imported by operation of law, although the parties may not have intended to include them".

[39] D Campbell, *Contractual Relations* (OUP, Oxford, 2022), 109-11, 136-42.

[40] *Barton v Jones* (Ch) (*supra* fn.17), [191].

that, had he not found for the claimant in contract, he would have found for it in unjust enrichment. The precise reason he would have found for the claimant in contract was that:

"Mr Barton is not entitled to contractual reasonable remuneration by way of interpretation or a term implied in fact … there was a term implied by law to that effect".[41]

Lord Burrows was, we shall now see, effectively arguing that the unjust enrichment claim was implied by law into the contract.

3. Unjust Enrichment

Though Judge Pearce spent considerable time finding that the claimant did not "bring himself within the principle of free acceptance",[42] his effort was, with respect, redundant because free acceptance has long lost its place in the argument for restitution.[43] Lord Burrows, one of whose early academic contributions had been a withering attack on the concept,[44] was the only member of the Supreme Court to discuss it, and his general statement that it "is not an unjust factor in English law" [45] may mark the *quietus* of free acceptance.[46]

This was, however, only preliminary to Lord Burrows maintaining that an unjust enrichment remedy was available because of failure of consideration:

"the unjust factor here is what has traditionally been called failure of consideration but is now often referred to as failure of condition or failure of basis … Mr Barton rendered the beneficial services to Foxpace on the basis, objectively shared with Foxpace, that he would be paid £1.2m for those services if Nash House was sold to Western for £6.5m. That basis failed (in Birks' words, the basis failed to materialise) when the sale to Western was for a price lower than £6.5m so that

[41] *Barton v Morris* (SC) (*supra* fn.9), [205].
[42] *Ibid*, [200].
[43] Davis and Males LJJ did not discuss free acceptance, and it was explicitly put to one side by Asplin LJ: *Barton v Gwynn-Jones* (CA) (*supra* fn.35) [38].
[44] A Burrows, "Free Acceptance and the Law of Restitution" in *Understanding the Law of Obligations* (Hart, Oxford, 1998), 72-98 (first published in 1988).
[45] *Barton v Morris* (SC) (*supra* fn.9), [230]. Asplin LJ's views were explicitly approved: *ibid*, [233].
[46] Six months after *Barton v Morris*, Lord Burrows, in, with respect, an equivocatory manner, allowed some possibility of success with a free acceptance argument in *AG of Trinidad and Tobago v Trinsalvage Enterprises Ltd* [2023] UKPC 26; [2023] 1 WLR 4045, [10], [19], [21].

Mr Barton was not entitled to, and was not paid, the promised £1.2m. It is this failure of basis that supplies the unjust factor".[47]

The failure expressly to provide for payment was, as Judge Pearce had found, a "silence", and:

"the silence in the contract meant that any default law should apply; and here there is the default law of unjust enrichment. Nor do I accept that there is any inconsistency here between the express terms of the contract and the law of unjust enrichment. On the assumption on which I have been working in going on to look at the law of unjust enrichment (i.e. that there was no term implied by law that reasonable remuneration was payable), the contract simply did not provide for what was to happen where the contract price was less than £6.5m: the contract (even if regarded as subsisting) has 'run out' and there is no good reason to stop unjust enrichment stepping in".[48]

Judge Pearce had raised with Counsel the possibility of, on the authority of *MacDonald Dickens and Macklin v Costello*,[49] contractually excluding recourse to unjust enrichment.[50] Lord Burrows accepted, and in his academic writing had long accepted,[51] this possibility, but this would be the exclusion of a default remedy that "*would be imposed* if there were no such exclusion".[52] The "silence" of the introduction agreement meant that the parties had not excluded a law of unjust enrichment which applies by default. It would be wrong, however, to read Lord Burrows as having claimed that unjust enrichment is a default *in* the law of contract. Considered as an unjust factor, the core of failure of consideration is not breach, a contractual concept, but the unjust enrichment concept of failure of basis, so that, as Birks put it in the foundational discussion "failure of contractual reciprocation is only a common species of failure of consideration, a genus which includes also the failure of non-contractual bases for the transfer of wealth".[53] As for Lord Burrows

[47] *Barton v Morris* (SC) (*supra* fn.9), [231], [233].
[48] *Ibid*, [239].
[49] [2011] EWCA Civ 930; [2012] QB 244.
[50] *Barton v Jones* (Ch) (*supra* fn. 17), [169].
[51] A Burrows, "Solving the Problem of Concurrent Liability" in *Understanding the Law of Obligations* (*supra* fn.44), 16, 21.
[52] *Barton v Morris* (SC) (*supra* fn.9), [237] (emphasis added). This line had been indicated in the Court of Appeal: *Barton v Gwynn-Jones* (CA) (*supra* fn.35), [32] (Asplin LJ), [62]-[63] (Males LJ), [74] (Davis LJ).
[53] P Birks, *An Introduction to the Law of Restitution*, pbk edn (Clarendon Press, Oxford, 1989), 234, 241. See further Burrows (*supra* fn.8), 320-21: "Birks was keen … to break the link between failure of consideration and contract … One should accept the wider meaning [Birks gave the concept]".

the general basis of the law of obligations is unjust enrichment, when the law of contract "runs out" one can and should turn to the law of this general basis. Though Lord Burrows claimed there was one, he by no means established a *contractual* justification of failure of consideration as an unjust factor. Lord Burrows imported an exogenous factor into the law of contract, and the first response to the apparent iniquity in *Barton v Morris* of implying an unjust enrichment term by law is not, in respect of freedom and sanctity of contract, any different to the second of allowing an action in unjust enrichment: it *must* clash with the contractual regime agreed by the parties.

Because Lord Burrows found "silence" to mean that the express terms of the introduction agreement did not exclude unjust enrichment, this clash appears not to be realised in his judgment. But this was not what Judge Pearce, Asplin LJ, or the Supreme Court majority found "silence" to mean. They found it to mean that there was no contractual provision for payment in the circumstances obtaining. As it cannot be denied that a valuable benefit had been conveyed, and that there had been a failure of the consideration for it, Lord Burrows had to override the introduction agreement which he agreed with the majority of those who heard *Barton v Morris* did not contain provision for payment either expressly or by a term implied in fact.

One initially sympathises with the implication of a term by law and with recourse to an underlying law of unjust enrichment as the first and second responses to the "apparent iniquity" because one initially acknowledges the iniquity, but they are both responses exogenous to and clashing with the law of contract. Is a third possible response to the "apparent iniquity" available from within the law of contract? Lord Leggatt's judgment advanced an answer to this question.

III. Lord Leggatt's Response To the "Apparent Iniquity"

1. Necessity in the Implication of Terms in Fact

The principal shortcoming of the majority judgment in *Barton v Morris* is that it regarded the complex matter of interpretation of the introduction agreement's "silence" as unproblematic in a most important way. Lady Rose argued that Judge Pearce's conclusion that "silence" meant the contract claim failed "depends on whether there [was] any reason not to draw 'the … usual inference' that the absence of any express term entitling Mr Barton to payment in the events which have happened means that there is no entitlement to any payment".[54] Finding no such reason, she equated "silence" with "absence":

> "[Judge Pearce] found that the obligation accepted by Foxpace was an obligation to pay Mr Barton a specified sum, £1.2 million, on the happening of a particular occurrence namely the sale of Nash House for at least £6.5 million to someone whom Mr Barton had introduced to them. That necessarily meant that there was no contractual obligation on Foxpace to pay anything in any other circumstances … the "silence" of the contract as to what obligations arise on the happening of the particular event means that no obligations arise [which] excludes … an implied contract".[55]

The "usual inference" is, of course, a reference to Lord Hoffmann's widely discussed views in *Attorney General of Belize v Belize Telecom Ltd*:

> "The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls".[56]

The usual consequence of an absence of express terms should indeed be an objective absence of agreed liability, no matter how much one of the parties subjectively desired to create that liability. But, with respect, the way Judge Pearce and Lady Rose interpreted the introduction

[54] *Barton v Morris* (SC) (*supra* fn.9), [19].
[55] *Ibid*, [18], [96].
[56] [2009] UKPC 10; [2009] 1 WLR 1988, [17].

agreement gave insufficient weight to the qualification "usual", for they moved too quickly to take "silence" to actually be eloquent of a specific position: the failure of the claimant to do the negotiating work necessary to turn his subjective wish to be paid into a term objectively signifying the defendant's agreement to pay. And when he seamlessly moved from observing that "It was most unfortunate that the parties did not reduce their agreement into proper legal form" to concluding that the claimant "had no entitlement to £1.2 million", Davies LJ similarly read vital content into a contract he found to be "simply silent as to what was to happen if the price … was less than £6.5 million".[57]

Insofar as this interpretation of "silence" constitutes a rejection of the welfarist implication of terms by law, it was a welcome assertion of freedom and sanctity of contract, even though it was this interpretation which generated the "apparent iniquity". It is not uncommon for the consequences of freedom and sanctity to be found distasteful in this way, this being the reason that a welfarist preparedness to imply terms by law has been a major theme of the modern law of contract. It is, one has to say, notoriously the case that Lord Hoffmann himself markedly displayed such a preparedness in *Belize Telecom*, and by doing so he would have seriously undermined the very desirable improvements to our understanding of the law of interpretation he had effected in that case and in *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)*,[58] had he not already done this by indefensibly reading in a term which the defendant had objectively failed to incorporate in *Investors* itself.[59] *Barton v Morris* was decided in the interpretive atmosphere towards implication created by Lord Hoffmann having himself jeopardised his achievement in *Investors* and *Belize Telecom*.

[57] *Barton v Gwyn-Jones* (CA) (*supra* fn.35), [68], [70].
[58] [1998] 1 WLR 896 (HL).
[59] Campbell (*supra* fn.39), 130-33.

Welfarism is, however, by no means the principal reason for the implication of terms. It is the principal reason for the implication of terms *by law*. But it is respect for the intentions of the parties that justifies the implication of terms *in fact* because such implication can be necessary to interpret those intentions correctly. "Silence" can denote the *absence* of a term following from an objective intention not to include it. But "silence" can also denote the *presence* of a term following from an objective intention not to make it express because its obviousness makes this otiose or even offensive. Properly dealing with the "apparent iniquity" in *Barton v Morris* requires implication on this basis. For *Barton v Morris* could have been devised to illustrate the inevitable incompleteness of contracts upon which Sir Frank Mackinnon remarked in a 1926 lecture:

> "if every commercial contract were fully and clearly written out, there would be no problems of law for the Commercial Court to decide … when the Court knows clearly the meaning of all parts of the contract it has solved all the problems it provides … if every contract were expressed with perfect clarity there could be no legal problems to solve".[60]

Though Lord Leggatt's own comments on the inevitable incompleteness of contracts, which he accounts for in the "colloquial" terms of "life [being] too short to negotiate contract terms designed to cover every contingency that may occur",[61] are of great interest, *Barton v Morris* does not turn on whether implication might have been necessary, which we will see even Lady Rose acknowledged could have been the case. It turns on the *nature of the process* of implication. In this connection, it is important to note that Sir Frank's lecture became of great importance as the source of MacKinnon LJs "officious bystander" test in *Shirlaw v Southern Foundries (1926) Ltd*,[62] and, if pointing to the very familiar may be allowed, this test and the "business efficacy" test as stated by Bowen LJ in *The Moorcock*[63] and by Scrutton LJ in *Reigate v Union Manufacturing Co*

[60] F Mackinnon, *Some Aspects of Commercial Law* (Humphrey Milford for OUP, London, 1926), 13, 17.
[61] *Barton v Morris* (SC) (*supra* fn.9), [127].
[62] [1939] 2 KB 206 (CA), 227.
[63] (1889) LR 14 PD 64 (CA), 68.

(Ramsbottom) Ltd[64] comprise the "classic"[65] tests for the implication of terms in fact which are the principal response the common law of contract has made to incompleteness. The restatement of these tests in terms of "necessity" has played a most influential part in the recent law of implication (and interpretation), including the majority reasoning in *Barton v Morris*.[66]

The claimant did not argue before Judge Pearce that an implied term entitled him to payment of £1.2m., and Judge Pearce thought this "well understandable" "Given the judgment of the Supreme Court in *Marks and Spencer plc v BNP Paribas*".[67] This was, of course, to evoke the stress placed on "necessity" as a test for the implication of a term by Lord Neuberger, with whom Lords Sumption and Hodge agreed, when criticising what Lord Hoffmann had done in *Belize Telecom* in a tone of not tremendously well disguised disdain.[68] Lady Rose also took the view that the requirement of necessity militated against the claim in *Barton v Morris*.[69] It was a valuable part of Lord Neuberger's intention that the requirement of necessity should strongly work against judicial implication of terms by law, *a fortiori* when this is confused with implication in fact, but is it the case that necessity, as it runs through *The Moorcock*, *Reigate v Union Manufacturing*, and *Shirlaw v Southern Foundries*, would rule out the implication of a term in fact in *Barton v Morris*?

It is, with respect, indicative that something was going very wrong that Judge Pearce was resigned to the existence of the "apparent iniquity" despite having accepted that, if the matter had been expressly discussed,[70] it would have been "bizarre" for the claimant to have "knowingly" entered into the introduction agreement on the basis of his receiving nothing if the price was less

[64] [1918] 1 KB 592 (CA), 605.
[65] *Marks and Spencer plc v BNP Paribas Securities Services Trust Co. (Jersey) Ltd* [2015] UKSC 72; [2015] 3 WLR 1843, [16].
[66] *Barton v Morris* (SC) (*supra* fn.9), [21].
[67] *Barton v Jones* (Ch) (*supra* fn.17), [164]
[68] *M and S v BNP Paribas* (*supra* fn.65), [31].
[69] *Barton v Morris* (SC) (*supra* fn.9), [21]-[23].
[70] Evidence given by Foxpace's solicitor that this was the case which would have strengthened the defendant's argument was found "unconvincing": *Barton v Jones* (Ch) (*supra* fn.17), [116], [141].

than £6.5m.[71] There are a number of ways in which the point could be elaborated, the most telling of which are the following. Having made the introduction, the claimant had no input into, much less control over, the ensuing negotiations, but the arrangement Judge Pearce found to exist created, as he recognised, an incentive for Foxpace to agree a price of £6,499,999 in order to avoid paying £1.2m., therefore becoming £1,199,999 better off overall.[72] Males LJ stated the point in wider terms: "Foxpace would have been better off if the property was sold … for any price less than £6.5 million but in excess of £5.3 million".[73] Even more bizarre than this, Judge Pearce realised, but this telling point never received sufficient attention, that if Foxpace had secured a price *higher* than £6.5m, this also would have meant that, if the introduction agreement was as he found it to be, the defendant had no enforceable obligation to pay the claimant anything.[74]

The position of the claimant must be contrasted to that of the defendant. The defendant's incentive to agree a price lower that £6.5m arose because taking a lower price is entirely under the defendant's control. But recognising an entitlement to payment if there is a sale at a lower price does not create a situation under the claimant's control. If the price the defendant could obtain was £1.2m. or lower, then it would be irrational to sell; but the entire point is that the defendant does not have to do so, for sale at any price would be the defendant's choice, factoring in the need to pay the £1.2m. As Judge Pearce realised, the defendant "is of course protected from being under-compensated by its right simply to decline to sell to the purchaser introduced by the [claimant.] It could not be forced to sell Nash House to anyone unless it wished to do so".[75] Lady Rose therefore was, with respect, wrong to claim that to find that the introduction agreement provided for payment

[71] *Ibid*, [141].
[72] *Ibid*, [196]. There was "no … evidence" that Foxpace "deliberately" acted in this way: *ibid*, [188].
[73] *Barton v Gwyn-Jones* (CA) (*supra* fn.35), [57].
[74] *Barton v Jones* (Ch) (*supra* fn.17), [162]. Certain of the defendant's evidence would seem to allow that the £1.2m would be paid if the price was £6.5m or more: *ibid*, [108].
[75] *Ibid*, [129]).

would create "a one-way bet for Mr Barton" of no "benefit" to the defendant.[76] If the defendant derived no benefit from this bet, it would not sell.[77]

Males LJ was surely right to observe that "there is no room for a process of construction …the obvious effect of which would be to bring about a result … characterised as bizarre",[78] and the classic tests would not allow this.[79] The very point of an interpretation of the introduction agreement seeking "to give such business efficacy to the transaction as must have been intended … by both parties who are businessmen"[80] would be to preclude a lower or higher price giving rise to a bizarre result. The absence of an express term addressing either possibility was only to be expected because, had they been asked about this, both parties "would have replied" (if giving reliable evidence) that it was "too clear" "to trouble to say that"[81] those possibilities were out of the question. The strongest commitment to necessity in implication does not require denying this, and the parties would "testily suppress" the officious bystander's suggestion that "some express provision"[82] precluding a lower or higher price yielding a bizarre result was needed, for such provision for the obvious would connote an atmosphere of bad faith inimical to the productive conduct of negotiations.

[76] *Barton v Morris* (SC) (*supra* fn.9), [37].

[77] In the leading case of *Luxor v Cooper* [1941] AC 108 (HL), discussed in *Barton v Gwynn-Jones*(CA) (*supra* fn.35), [27]-[29] (Asplin LJ) and in *Barton v Morris* (SC) (*supra* fn.9), [52]-[55] (Lady Rose), [146] (Lord Leggatt), it was argued that there was an implied term *requiring* the defendant to complete a (commercially reasonable) purchase. This would have been a welfarist implication of a term by law at variance with the parties' agreement, in line with business practice, that the defendant had a discretion whether or not to make a purchase: *Luxor v Cooper*, *ibid*, 141. That no such term was found in *Luxor* does not bear on the facts of *Barton v Morris*.

The possibility of something like the implied term argued for in *Luxor* being found in commission agreements after *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661 is considered, and very largely rejected, in M Watson and S Rutnah, "Commercial Choices: Are *Braganza* Duties a Path to Payment Under Commission Agreements?" (2023) 6 Journal of International Banking and Finance Law 407.

[78] *Barton v Gwyn-Jones* (CA) (*supra* fn.35), [60].

[79] N Strauss, "Express Contract and Implied *Quantum Meruit*" (2023) 139 LQR 531, 535.

[80] *The Moorcock* (*supra* fn.63), 68.

[81] *Reigate v Union Manufacturing* (*supra* fn.64), 605.

[82] *Shirlaw v Southern Foundries* (*supra* fn.62), 227.

It is highly significant in this connection that Judge Pearce allowed that "It may be that" a term could have been implied in the case of a higher price,[83] which he rightly regarded as the more bizarre of the bizarre possibilities. And in her judgment which now constitutes the law denying the claimant a remedy, Lady Rose allowed that:

"in the present case it might well be necessary to imply into the agreement between Mr Barton and Foxpace a term that Foxpace would not, in effect, play a dirty trick by agreeing a reduced price with Western so as to avoid the liability to pay the £1.2m to Mr Barton".[84]

Lady Rose thought that, though *this* term was necessary, to do any more so as to ground liability when no "dirty trick" had been played but "the reduction in price to £6m was genuinely the result of the HS2 problem that arose and not of any desire to deprive Mr Barton of his commission",[85] would be to do more than to "imply the least onerous term needed to achieve" business efficacy,[86] which, citing *The Moorcock*,[87] she said "It has always been clear" has been the duty of the court.[88] But, with respect, this must mean that the terms of the introduction agreement could not be such that the defendant had *no* possible liability if the price was other than £6.5m; this is what allowing that some terms *could* be implied specifically denies. We must be more precise about what a term implied in fact on the basis of the classic tests should be.

The reason of general importance that Lady Rose gave for denying that the introduction agreement created bizarre possibilities is that:

"an agreement whereby someone contracts for a higher than normal payment on the fulfilment of a condition and is prepared to take the commensurate risk of getting nothing if the condition is not fulfilled is not a bizarre or uncommercial contract".[89]

[83] *Barton v Jones* (Ch) (*supra* fn.17), [163].

[84] *Barton v Morris* (SC) (*supra* fn.9), [31]. See also the consideration of a situation in which "the price had artificially or in bad faith been reduced" by Davis LJ: *Barton v Gwynn-Jones* (CA) (*supra* fn.35), [69].

[85] *Barton v Morris* (SC) (*supra* fn.9), [33].

[86] *Ibid*, [32].

[87] *Supra* fn.63, 67 (Lord Esher MR), 69 (Bowen LJ). Two years later, Lord Esher restated the point more clearly in *Hamlyn and Co v Wood and Co* [1891] 2 QB 488 (CA), 492.

[88] *Barton v Morris* (SC) (*supra* fn.9), [32].

[89] *Ibid*, [35].

Lady Rose sought to enlist the highest authority in support of her argument by citing[90] *Cutter v Powell*.[91] But, with respect, *Cutter v Powell* does quite the opposite to what Lady Rose believed. It is settled law that the parties may avail themselves of the valuable device of the entire obligation or entire contract, but in order to do so they must oust the default "severability" that lies behind the default rules which, in modern terms, require a breach of condition for a power to terminate to arise.[92] That a claim was brought in *Cutter v Powell* attests to it being even at the time, and more so to contemporary sensibilities, *prima facie* the case that the widow receiving nothing *was* bizarre, or some weaker near-synonym of bizarre, and that this had to be justified. Holding the claimant's incompletely performed obligation to be entire in part largely rested on it being found[93] that the potentially onerous incentivisation regime thereby created had been agreed on the basis of a higher than usual rate of remuneration.

Lady Rose herself somewhat inconsistently stressed the importance of the higher rate of remuneration in *Cutter v Powell*.[94] This underlines that it is necessary to find similar facts evidencing such agreement in *Barton v Morris* in order to conclude, with Lady Rose, that *Cutter v Powell* "is what Mr Barton bargained for here".[95] It would appear that some such evidence, to the effect that £1.2m was a very large fee, which Lady Rose saw in the way the remuneration in

[90] *Barton v Morris* (SC) (*supra* fn.9), [35], [72].

[91] (1765) 6 Term Rep 320; 101 ER 573 (KB).

[92] *Boone v Eyre* (1777) 1 H Bl 273n.; 126 ER 160 (KB) (Lord Mansfield), brought to modern prominence in *HongKong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd, The HongKong Fir* [1962] 2 QB 26 (CA), 58 (Sellers LJ), 63 (Upjohn LJ), 67-68 (Diplock LJ). The rationale of the narrower doctrine of severability bearing on performance was set out by Blackburn J in *Appleby v Myers* (1867) LR 2 CP 651 (Ex Chamber), 661.

[93] Lord Leggatt not merely sought, as he was obliged to do and overall successfully did (*Barton v Morris* (SC) (supra fn.9), [181]), to distinguish *Cutter v Powell* from *Barton v Morris*, but he also sought to undermine its authority by arguing, *inter alia*, that the facts which were found about the rate of remuneration were wrong: *ibid*, [179]-[180]. The legal historical issues are, of course, more nuanced than can be satisfactorily addressed in a judgment: W Swain, 'Pleading of Claims in Unjust Enrichment" (2003) 11 Restitution Law Review 46, 52-53. But even if Lord Leggatt's scepticism was justified, it is, with respect, irrelevant to the *ratio* of the case on the facts of *Cutter v Powell* as found; and to it being settled that the entire obligation rule is now available on appropriate facts, even if *Cutter v Powell* did not then, and would much less now, be allowed to constitute such a set of facts.

[94] *Barton v Morris* (SC) (*supra* fn.9), [35]-[36].

[95] *Ibid*, [37].

Cutter v Powell had been seen, was given at trial,[96] but it is very difficult to place conclusive weight on this evidence, or indeed on the evidence to the contrary. It must be recalled that, after carefully weighing the "unreliable" evidence *in toto*, Judge Pearce concluded that both the claimant's and the defendant's view of the introduction agreement were "possible", and neither was "illogical". Lady Rose's view amounts to maintaining that the promisee clamant had to secure the incorporation of an express term stipulating payment in the circumstances which obtained in order to oust a general default of no entitlement to payment. This is quite the opposite of the *ratio* of *Cutter v Powell*, which concerned the promisor defendant's ouster of a default entitlement to payment.

Parties certainly can agree to enter into contracts in which payment is made subject to stronger conditions than the by default severable requirement of "performance", perhaps because it had been agreed that performance had to be entire, or because conditions additional to performance had to be satisfied. But this requires the ouster of the default entitlement to payment upon performance. It is only when one gives no or insufficient weight to the default that one can unproblematically maintain that "silence" effects this ouster. The preferred approach to identifying the correct default and the steps necessary to oust it was indicated by Lord Leggatt.

2. Payment and Failure of Consideration

In a sense which we shall explore, Lord Leggatt accepted Judge Pearce's finding about the "silence" of the introduction agreement, and yet he concluded that that agreement contractually, ie without implying a term by law or turning to unjust enrichment, created an entitlement to

[96] *Barton v Jones* (Ch) (*supra* fn.17), [132].

payment. The argument that such an entitlement was conditional on the sale taking place at £6.5m was:

"erroneous because it assumes that, in the absence of express agreement, Mr Barton had no right to be paid any remuneration for the services that he provided to Foxpace at their request. That is a wrong assumption. In accordance with settled law as well as normal commercial expectations, Mr Barton was entitled to a reasonable remuneration for the valuable service that he provided, unless expressly agreed otherwise. On the judge's findings there was no contrary agreement, as the express term agreed orally between the parties only specified the remuneration that would be payable in the event of a sale at a price of £6.5 million and said nothing about what was to happen in the event of a sale at a lower price. What was expressly agreed therefore did not negative Mr Barton's right upon such a sale to be paid what the service he provided was worth".[97]

Lord Leggatt maintained that *Barton v Morris* was governed by the default rule that "if no consideration for the services is fixed by the contract [the defendant should] pay a reasonable charge".[98] The specific obligation to pay a reasonable charge "reflects", Lord Leggatt further told us, "the ordinary expectation that those who, in a commercial context, provide valuable services to others do so for reward and not simply out of charity or benevolence; and by the same token someone who requests such services does so on the understanding that they are to be paid for".[99] Quantification of payment as reasonable remuneration raises a number of specific issues the necessarily lengthy discussion of which would detract from the argument advanced here about the general default rule of payment, and this form of quantification, which is inessential to the concept of a contract, will be put to one side in order to focus on "the understanding" that receipt of a benefit is "to be paid for", which *is* essential.

At the foundational level, the doctrine of consideration is stated in the purely procedural terms of reciprocal benefits and detriments, the substances of which the parties specify. *Barton v Morris* engages the doctrine of consideration at a slightly lower level of abstraction, for it involves

[97] *Barton v Morris* (SC) (*supra* fn.9), [111].
[98] *Ibid*, [137]. As did all who would have made an award, Lord Leggatt (*ibid*, [110], [118], [195]) accepted Judge Pearce's figure of £435,000: *Barton v Jones* (Ch) (*supra* fn.17), [214])
[99] *Barton v Morris* (SC) (*supra* fn.9), [138].

the benefit and detriment of a payment of money. In the general market economy money serves as the "universal medium of exchange" for all particular goods (in the economic sense), and so one party's consideration for almost all contracts takes the form of payment. After acknowledging the universal role of money, we can say that the doctrine of consideration provides a framework for economic exchange by making contractually enforceable the expectation that the acquisition of goods must be paid for.

The most curious feature of the doctrine of consideration is that it gives very little weight to an all but unparalleled regulatory success, focusing instead on *conundra* which are indeed themselves perplexing, but are trivial by comparison to this success.[100] The "one central and essential idea"[101] of consideration, the requirement of payment, is an "overwhelmingly … normal" idea.[102] As this normality is absolutely necessary for the general formation of prices, and therefore for rational economic calculation, it is essential to the market economy and liberal democracy. If we trace the modern doctrine of consideration to its 1875 formulation by Lush J in *Currie v Misa*,[103] we can say that, prior to the line of cases after *Roxborough v Rothmans*, there had been *no* cases in which it has even been challenged, much less found, either that an entitlement to payment could arise in a contractual situation in the absence of consideration, or that the furnishing of consideration as defined under an effective contract did not create an entitlement to payment. Regulatory theory tells us that the acme of achievement is reached when the regulated action is so in conformity with the regulation that the regulation apparently is never used because it is "self-applied".[104] The "one central and essential idea" of consideration enjoys this status.

[100] Campbell (*supra* fn.39), ch 5.
[101] JP Dawson, *Gifts and Promises* (Yale University Press, New Haven CT, 1980), 198.
[102] *Ibid*, 221.
[103] (1875) LR 10 Ex 153 (Court of Exchequer Chamber), 162. Coleridge CJ, dissenting, agreed with this definition: *ibid*, 169.
[104] HM Hart Jr and AM Sacks, *The Legal Process* (Foundation Press, Westbury NY, 1994), 120.

The doctrine of consideration is, of course, notorious for its failure to give satisfactory expression to this idea, and the case law of that doctrine may be basically explained as a set of attempts to manage that failure.[105] It is this idea that has been the impulse to the recognition of failure of consideration as an unjust factor when, for various reasons, it appears that a (valuable) benefit (enrichment) has been conferred for which payment should *prima facie* have been made, but the law of contract has (unjustly) failed to enforce it. At its core, failure of consideration is simply congruent with breach of contract. But if it is now clear that awarding an unjust enrichment remedy for a penumbra of reasons expanding beyond that core will lead to clashes between contract and unjust enrichment, this by no means amounts to a claim that all the reasons lack substance. The expansion of failure of consideration may be seen as in good part a response to shortcomings in contract which the development of unjust enrichment should be credited for drawing to fuller attention. One can criticise making an unjust enrichment remedy available in cases of effective contracts, but one should acknowledge the necessity this indicates of making improvements *in contract*. *Barton v Morris* is an important instance of both shortcoming and improvement, but before turning to this the issues may be clearly illustrated by discussion of a case which will be familiar to all readers of this article because it played such an important part in the early stages of the expansion of failure of consideration: *Planché v Colburn*.[106]

The claimant was an author who agreed, for a fee of £100, to write one of a series of children's books being brought out by the defendant publisher. Having lost faith in the series, the defendant cancelled it, and told the claimant that the book the claimant was writing was no longer wanted for the series. The claimant had, however, done substantial work by this time, though,

[105] Campbell (*supra* fn.39), chs 5, 10.
[106] (1831) 8 Bing 14; 131 ER 305 (KB).

following the notice of cancellation, none of the manuscript was ever delivered. He brought a breach of contract action which, on the best reading of the proceedings, was treated as an action for a *quantum meruit*, and was awarded £50. After the case had been rescued from obscurity by Goff and Jones,[107] Birks argued that "Where a party … terminates the contract … he is entitled to the reasonable value of any part performance of his own. That is the *Planché v Colburn* claim, an alternative to compensatory damages",[108] and that "a generalisation of the *Planché v Colburn* attitude would have a profound effect[, taking] the whole law in this field down the path already beaten by The Law Reform (Frustrated Contracts) Act 1943".[109]

Birks was aware that the *quantum meruit* involved quantification problems of a familiar and substantial kind, which he was prepared to accept as the cost of making the restitutionary remedy available,[110] and he perceived that, behind this, the "limited acceptance" he claimed was authorised by *Planché v Colburn* stretched the meaning of enrichment.[111] He did not come to terms with this, and it was another of Lord Burrows' academic contributions to be to the forefront of pointing out that maintaining that the delivery of a partially completed (or even a complete) manuscript which was unwanted,[112] or the performance of the unwanted "services"[113] involved, rested on "an unrealistic an overinclusive notion of benefit".[114] Lord Burrows accordingly expunged *Planché v Colburn* from the restitutionary canon.[115] But the case has nevertheless "been treated in countless authorities as stating a proper basis for restitution for work done at the request of the defendant",[116]

[107] R Goff and G Jones, *The Law of Restitution*, 1st edn (Sweet and Maxwell, London, 1966), 340-41.
[108] Birks (*supra* fn.53), 126.
[109] *Ibid*, 244.
[110] *Ibid*, 244-45.
[111] *Ibid*, 232, 243.
[112] *Ibid*, 232.
[113] *Ibid*, 127.
[114] Burrows (*supra* fn.7), 9.
[115] *Ibid*, 267 n.2.
[116] JW Carter, "Discharged Contracts: Claims for Restitution" (1997) 11 JCL 130, 141.

and the main reason for this is that it initially seemed that "an alternative to compensatory damages" was highly desirable. Should a claimant do work in reliance on the request of a defendant which repudiates and be left with nothing, or is it the case that "Under these circumstances the Plaintiff ought not to lose the fruit of his labour"?[117] If a *quantum meruit* was needed to prevent this loss, then so be it.

It was never clear from *Goff and Jones* or Birks' *Introduction* why a contractual award could not have been made *in Planché v Colburn*, and subsequent legal historical research has shown the basic issue to be much clearer than it once seemed after one appreciated that limits on the availability of damages which were quite obsolete by 1966 made the case "vastly different" to the "position today".[118] In contemporary terms, *Planché v Colburn* should have been decided on normal contractual principles depending on the interpretation of the contract. The defendant did offer to take the completed manuscript, and pay £100 for it, to publish in a series of books for adults. The claimant, "probably the most important British playwright of his generation", [119] did not want to have work written for a juvenile audience appear in such a series, or be put to the trouble of completely rewriting the book. Depending on whether the contract was for publication by the defendant or for publication by the defendant in a series for juveniles, the claimant should have been awarded the contractual sum of £100, or not have succeeded at all because it was he who breached.

Once this is all understood, one is presented with a choice. One can affirm the endogenous contractual outcome, whatever it should have been, or one can replace it with the unjust enrichment

[117] *Planché v Colburn* (*supra* fn.106), 306 (Tindall CJ).
[118] Carter (*supra* fn.116), 141.
[119] C Mitchell and C Mitchell, "*Planché v Colburn*" in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart, Oxford, 2006), 71.

outcome if one prefers an exogenous "objective valuation"[120] of "services". But the understanding is the necessary foundation of the choice, and in its earlier stages our then inadequate understanding of *Planché v Colburn* made it seem like something was very wrong with the contract.[121] The shortcomings of *Planché v Colburn* as a basis for unjust enrichment do not detract from this, and must lead us to seek to remedy the various shortcomings of the law of contract's handling of commercial affairs. The shortcoming of the law of contract which gave rise to *Barton v Morris* is its handling of the important commercial practice of making payment "conditional".

3. Payment and Conditionality

Accepting that the doctrine of consideration institutionalises the expectation that a benefit received should be paid for, it is entirely natural to think that payment is *essential* to a contract, and even to think that payment *constitutes* a buyer's consideration. But the limits of such natural thinking are particularly exposed in cases of conditional payment such *Barton v Morris*, where payment is a default which the parties can oust.

Payment may, of course, be said to always be conditional in the sense that the modern doctrine of consideration regards promises to perform primary obligations as mutually dependent. The core sense of total failure of consideration as a ground for the restitution of a valuable benefit transferred under a contract was a way of recognising this. But even this sense of total failure is now redundant as in their modern form the doctrines of breach and remedy do the necessary work in a more subtle and flexible manner than failure of consideration possibly could, as is amply

[120] Birks (*supra* fn.53), 126.

[121] Singled out from many other comments made in Birks' wake, including the present writer's own, because of the influence it then had, M Garner, "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 OJLS 42, 53-53 found that *Planché v Colburn* was a case in which "it was not possible to prophesy the plaintiff's expectation loss". But the facts of the case could not give rise to this difficulty.

demonstrated by the incoherence which has attended the gradual abandonment of the requirement that failure be total. In the circumstances which allow it, payment can contractually be partially or completely withheld, or adjusted by set-off, or recovered. The circumstance which by default allows complete withholding or recovery is breach of condition. We have seen that this default is ousted in an entire contract. But the discussion of the entire contract in *Barton v Morris* was a distraction because this was not at all the sense in which payment was conditional in that case.

It is not in dispute that the parties in *Barton v Morris* intended payment to be conditional upon the occurrence of an event other than the performance of the parties' primary obligations, for those obligations did not include guaranteeing that the event would take place. Had no sale to a purchaser introduced by the claimant taken place, no commission would have been payable. The consideration furnished by the claimant was, not the introduction of a buyer, much less the sale, but a promise to attempt to introduce a buyer to the defendant. The consideration furnished by the defendant was, not payment, but a promise to pay commission conditional upon the sale to an introduced buyer taking place.

But, of course, though payment need never have been made, it was the defendant's promise to pay if a sale to a purchaser introduced by the claimant took place that persuaded the claimant to agree the contract. Without this promise, the contract has no business efficacy, and the difficulty of precisely specifying the conditionality arising from the shortcomings of the introduction agreement must be put in this context. Goods would never be sold nor services ever supplied were the seller or supplier not persuaded to agree to sell or supply by the prospect of an expectation gain. Making that gain conditional can be described as an ouster of a default expectation of gain conditional upon performance itself, and Lord Leggatt found that the defendant failed to effect such an ouster in the circumstances which arose in *Barton v Morris*.

4. Payment and Contract

The default rule of payment which we have seen that Lord Leggatt found in *Barton v Morris* was identified by a review of a line of important estate agent commission cases culminating in the Supreme Court judgment in *Devani v Wells*.[122] The precise rule was that, though payment of such commission is conditional upon the sale of the property to an introduced purchaser, there conversely is an entitlement to commission upon this condition being satisfied.[123] If necessary, a term could and should be implied in fact to give effect to this default rule, and in these cases this rule had variously been described as "the common understanding of men",[124] "the ordinary understanding of mankind",[125] the "*prima facie* … intention of the parties",[126] and "the usual terms".[127]

Lord Leggatt decided *Barton v Morris* by placing what, following Farnsworth,[128] he called the "burden of expression" on the defendant as the party which wished to oust the default rule of payment of commission.[129] Such ouster must *actively* replace the default understanding, ie the objective understanding which usually obtains and which the parties would identify in response to the questioning of the officious bystander, with an "unusual", bespoke understanding. Lord Leggatt called the active process one of "Negativing the implied obligation".[130] The test of the

[122] [2019] UKSC 4; [2020] AC 129.
[123] *Barton v Morris* (SC) (*supra* fn.123), [156].
[124] *Dennis Reed Ltd v Goody* [1950] 2 KB 277 (CA), 284 and *Fowler v Bratt* [1950] 2 KB 96 (CA), 104.
[125] *Jacques v Lloyd D George and Partners Ltd* [1968] 1 WLR 625 (CA), 630B.
[126] *Midgeley Estates Ltd v Hand* [1952] 2 QB 432 (CA), 435.
[127] *Devani v Wells* (*supra* fn.122), [23]. Lord Leggatt illustrated the default rule by an analysis of the previously obscure *Edgar Firth (t/a Firth Gibbs and Partners) v Hylane Ltd* [1959] EWCA Civ J0211-3 (vLex), a 1959 estate agent case which reached the Court of Appeal but went unreported, though a digest "report" may be found at (1959) 173 EG 393; [1959] EGD 212, which the claimant raised before the Court of Appeal, making the vLex transcript available to the Court.
[128] EA Farnsworth, "Disputes over Omission in Contracts" (1968) 68 Columbia Law Review 860.
[129] *Barton v Morris* (SC) (*supra* fn.9), [135], [136], [157].
[130] *Ibid*, [161].

ouster is that the party which would, if it was looked at in isolation, be prejudiced by the ouster must objectively agree to it in the context of the overall contract. The "silence" of the *Barton v Morris* introduction agreement actually could not, then, leave two "possible" "version[s] of events" as Judge Pearce put it; indeed there could not be a silence.[131] Given Lord Leggatt's approach, the "silence" was eloquent of a failure to oust the default rule that payment should be made, or, more generally, that consideration should be furnished.

Lady Rose reached a similar conclusion to Lord Leggatt about a "common understanding" by her own review of estate agent cases,[132] but believed this did not avail the claimant. Her fundamental point was that the claimant was not an estate agent, and so, his expectation of payment not being that of an estate agent, he had no such expectation.[133] But, with respect, Lady Rose's conclusion does not capture the nature of the default rule at issue. It is not that the business custom of estate agents *specifically* creates a default rule of payment; it is that it does not oust the *general* commercial expectation that payment will be made, and it is against this background that we must decide what should happen in the circumstance of the sale taking place at less (or more) than £6.5m.[134] By allowing that the introduction agreement was made "in a commercial context in which people do not tend to act gratuitously", Lady Rose acknowledged a general expectation of payment to be the basic default. This default can be ousted, but it must *actively* be ousted. And in

[131] One cannot claim that silence as such is impossible because, of course, the same argument that gives rise to the recognition of default rules must also give rise to an acknowledgement that gap-filling may be defeated by extremely defective negotiations leaving a "contract" so incoherent that even a court wholly conscious of its gap-filling powers and duties may be stymied. The consequence of this literally radical failure is, however, that, unlike in *Barton v Morris*, no enforceable contract is identified.

[132] *Barton v Morris* (SC) (*supra* fn.9), [51]-[76]

[133] *Ibid*, [76].

[134] In the exhaustive discussion of agents' entitlement to remuneration in P Watts and FMB Reynolds, *Bowstead and Reynold on Agency*, 23rd edn (Sweet and Maxwell, London, 2024), paras 7.003-7.026, the detailed law on the "triggering" and the quantification (including by reference to "what is reasonable") of commission is all set in the general context that (para 7.004) "the mere employment of a professional person raises a presumption that it was intended that that person should be remunerated unless there are circumstances indicating the contrary".

Lord Leggatt's view the introduction agreement's "silence" about what should happen in the circumstances which arose meant that the defendant had not done enough to show that the ouster had been objectively agreed. It is submitted that Lord Leggatt's view is to be preferred, for the following reasons.

IV. The Impossibility of Silence and the Morality of Consideration

In his important lecture which has been mentioned, Sir Frank Mackinnon drew the lesson that the impossibility of a fully expressed contract placed a premium upon exercising skill in negotiation and drafting.[135] Such a response to the requirement that parties give their subjective intentions objective expression under pain of those intentions otherwise not being enforceable is of course sensible and wise; but it can go only so far. The issues we are addressing in general and in *Barton v Morris* in particular arise because, as Sir Frank himself insisted, a completely expressly specified contract is impossible, and that express provision has not been made therefore can never *itself* determine whether a subjectively intended term was or was not incorporated. How can we, as we must, keep intact the incentive to put subjective intentions into, as we have seen Davies LJ put it, "proper legal form", after recognising that a completely expressly specified contract is an illusory goal? The answer lies, as Lord Leggatt perceived, in the morality of contract.

In *Yam Seng Pte Ltd v International Trade Corporation Ltd*,[136] Leggatt J as he then was gave an account of the duties towards the other party which he argued constitute the law of contract. Those duties included "fidelity to the parties' bargain":

[135] Mackinnon (*supra* fn.60), 17.
[136] [2013] EWHC 111 (QB); [2013] 1 All ER (Comm) 1321.

"The central idea here is that contracts can never be complete in the sense of expressly providing for every event that may happen. To apply a contract to circumstances not specifically provided for, the language must accordingly be given a reasonable construction".[137]

Lord Leggatt expanded upon the role of default rules and implied terms in this process of construction in *Barton v Morris* by telling us that "A principal function of the law of contract is to provide a framework of rules" which make it possible for parties to reach agreement when the negotiation of a contract which will "cover every contingency" relevant to that agreement is impossible.[138] One way of putting this is to say that devices variously described as default rules, terms implied in fact, etc form the general framework of objective understandings into which the express terms relevant to the points in dispute must be inserted for the meaning of those express terms to be grasped.[139]

What is the nature of this framework? Accepting that it is impossible for contractual interpretation to start with a *tabula rasa*,[140] what are the contents of the *tabula inscripta*? Default rules, Lord Leggatt tells us, "are generally optimal when they reflect prevailing social norms and expectations and therefore create rights and obligations which reasonable parties would be likely to agree between themselves",[141] with the doctrine of consideration expressing, as we have seen Lord Leggat put it: "the ordinary expectation that those who, in a commercial context, provide valuable services to others do so for reward and not simply out of charity or benevolence; and by the same token someone who requests such services does so on the understanding that they are to be paid for".

[137] *Ibid*, [139].
[138] *Barton v Morris* (SC) (*supra* fn.9), [126]-[127].
[139] Campbell (*supra* fn.39), ch 3.
[140] The metaphor is specifically applied to *Barton v Morris* in Briggs (*supra* fn.23), 357.
[141] *Barton v Morris* (SC) (*supra* fn.9), [128].

The interpretation of the situation described by Judge Pearce as "silence" will be influenced by the understanding one has of competitive negotiation, which may be analysed in terms of Adams and Brownsword's seminal distinction between "market-individualism" and "consumer-welfarism".[142] To read silence as absence, as a failure of the claimant to do enough, is to take a market-individualist stance. This was given its most influential modern formulation by Lord Ackner (with whom all their Lordships concurred) in *Walford v Miles*:

> "the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations".[143]

To fill in the silence with a term implied by law or by recourse to an unjust enrichment remedy for failure of consideration is to take a consumer-welfarist stance, and one supposes the motivation for doing so will never be more graphically expressed than it was by Lord Denning in *British Movietonews Ltd v London and District Cinemas Ltd*:

> "the courts … will not allow the words in which [contracts] happen to be phrased to become tyrannical masters. The court qualifies the literal meaning of the words so as to bring them into accord with the true scope of the contract … The day is done when we can excuse an unforeseen injustice by saying to the sufferer 'It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself'".[144]

Neither of these alternatives should be chosen if the law of contract is to provide the framework for the market economy. The choice of the first would, however, seem unproblematically to follow from the recognition that economic action is motivated by self-interest. This apparent facility turns, however, on a fundamental misunderstanding of the way that self-interest is exercised in exchange, and the way this is institutionalised in the law of contract. For it is integral to market economics that in acts of exchange self-interest is channelled into

[142] JN Adams and R Brownsword, "The Ideologies of Contract" (1987) 7 LS 207.
[143] [1992] 2 AC 128 (HL), 139E.
[144] [1951] 1 KB 190 (CA), 201-202.

courses which show moral regard for the interests of others.[145] The point as it bears on the law of contract has never been made more clearly than it was by Adam Smith.

In perhaps the most influential passage in all of European social thought, in *The Wealth of Nations* Smith told us that:

> "In civilised society [man] stands at all times in need of the co-operation and assistance of great multitudes [and] has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour … and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages".[146]

Believing that such acts of economic self-interest are spontaneously co-ordinated as if by "an invisible hand",[147] Smith drew the policy prescription that has come down to us as "*laissez faire*".[148] Even the purest conception of *laissez faire*, however, places limits on the exercise of self-interest. When Smith himself spoke of self-interest, it was of self-interest exercised within a system of "justice": "Every man, *as long as he does not violate the laws of justice*, is left perfectly free to pursue his own interest in his own way".[149] One essential aspect of justice is ensuring that an economic actor will enjoy "the secure and peaceable possession of his own property".[150] An actor thereby prevented from "encroaching on … or seizing what is not their own"[151] which wishes to acquire another's property can do so only by obtaining the consent of the other to the property's transfer. *Laissez faire* therefore is not only, or even mainly, a question of preventing certain wholly

[145] Campbell (*supra* fn.39), chs 1-9.
[146] A Smith, *The Wealth of Nations* in *The Glasgow Edition of the Works and Correspondence*, vol 2 (Clarendon Press, Oxford, 1976), 26-27.
[147] *Ibid*, 456.
[148] D Stewart, "Account of the Life and Writings of Adam Smith LLD" in A Smith, *The Glasgow Edition of the Works and Correspondence*, vol 3 (Clarendon Press, Oxford, 1980), 322.
[149] Smith (*supra* fn.146), 687 (emphasis added).
[150] A Smith, *Lectures on Jurisprudence* in *The Glasgow Edition of the Works and Correspondence*, vol 5 (Clarendon Press, Oxford, 1978), 5.
[151] *Ibid*.

unproductive exercises of self-interest, but of the transformation of self-interest in the course of exchange. In exchange, the exercise of self-interest integrally involves an other-regarding, moral dimension: both parties must mutually recognise each other's ownership of property and power to choose whether to alienate their property, or not.

In the famous passage quoted above, the following words were omitted:

"He will be more likely to prevail if he can interest their self-love in his favour *and show them that it is for their own advantage to do for him what he requires of them. Whoever offers to another a bargain of any kind proposes to do this. Give me that which I want and you shall have this which you want is the meaning of every such offer;* and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of".[152]

The significance of the now included and emphasised words is that whilst they show that, though an economic actor does not wish to directly promote the welfare of the other but only to pursue her or his own self-interest – "give me that which I want" – they also show that the actor can obtain the transfer of that which "I want" only by reciprocally transferring to the other actor what it wants – "you shall have this which you want". Self-interested actors are motivated to consent to transfer only by the expectation of net benefit. An actor seeking to acquire goods from another therefore must secure the other's consent by "setting before him a sufficient temptation" to do so.[153] To adopt the term used by Smith in his *Lectures on Jurisprudence*, exchange is a matter of *persuading* the other to agree by offering a consideration:

"The offering of a shilling, which to us appears to have so plain and simple a meaning, is in reality offering an argument to *persuade* one to do so and so as it is for his interest".[154]

This means that exchange can never be the result of *one* actor's pursuit of advantage. The advantage must be mutual, for an exchange will place only if each party (ie both parties independently) believes it will benefit:

[152] Smith (*supra* fn.146), 26 (emphasis added).
[153] Smith (*supra* fn.150), 493.
[154] *Ibid*, 352 (emphasis added).

"The very intention of commerce is to exchange your own commodities for others which you think will be more convenient for you. When two men trade between themselves it is undoubtedly for the advantage of both. The one … exchanges a certain [commodity] for another commodity that will be more useful to him. The other agrees to the bargain on the same account, and in this manner mutual commerce is advantageous to both".[155]

The law of contract regulates exchange by requiring an enforceable contract to be a bargain: an *agreement* of transfers of reciprocal *considerations*. Looking at the issues, as it were, negatively, ostensible contracts not supported by any or sufficient consideration should not be enforced. Looking at the issues positively, the interpretation of the detailed terms of enforceable contracts should start from the bargain as the legal institutionalisation of the morality of exchange. To the recognition of the impossibility of contractual interpretation starting from a *tabula rasa* must be added that on the default *tabula inscripta* is written: bargain. The contractual framework should not be silent about this; its function is to be eloquent about it.

No one can maintain that the introduction agreement was competently negotiated. It wasn't. Its negotiation is a cautionary tale.[156] But on the facts of *Barton v Morris* found by Judge Pearce and accepted in the appeals, one cannot unproblematically conclude from this that it was the claimant which failed to make its case. Though the significance of *Barton v Morris* is its affirmation of the priority of contract, Lady Rose was only partially justified in saying that "Unjust enrichment mends no-one's bargain"[157] because it was not the claimant's bargain, in the sense she meant, that needed mending.[158] Though she directly adopted Judge Pearce's finding that "either

[155] *Ibid*, 511.

[156] That the parties had so incompetently expressed their intentions as to invite the hazards of litigation in which the claimant persuaded five out of the nine who heard his case but lost immediately attracted adverse comment from practitioners: S Allan and C Ward, "All-or-nothing Wager?" (24 March 2023) 173(8018) NLJ 9, 10 and Strauss (*supra* fn.79), 531. But it is very significant that Allan and Ward (*ibid*, 9, 10) see this as "a paradigm of how things ought not to be done" by "commission agents" who are "not to be encouraged", whilst, in stark contrast, Strauss (*ibid*, 531, 535) describes an "unfortunate" claimant losing his case because of the Supreme Court majority "unnecessarily" endorsing an outcome recognised to be "bizarre and unfair".

[157] *Barton v Morris* (SC) (supra fn.9), [109].

[158] PS Davies, "Implied Terms and Commission Agreements" [2023] CLJ 385, 387.

[the claimant's or the defendant's] version of events is possible, and neither would be illogical", she unproblematically assumed that the burden of providing for what would happen of the sale price was less (or more) than £6.5m. in the circumstances of the case fell on the claimant. This assumption is not entailed in Judge Pearce's finding of "silence".

Lady Rose was surely right to, as we have seen she did, agree with Lord Hoffmann that "the most usual inference" to be drawn from the absence of an express term providing for something to happen "is that nothing is to happen". But this does not sanction interpreting an express provision about what would happen if the price was £6.5m as an implied provision, *exclusio alterius*, that nothing would happen if the price was less or more than that. Life, we have seen Lord Leggat tell us, "is too short to negotiate contract terms designed to cover every contingency that might occur", but the position left by Lady Rose would seem to be to require just such a contract be negotiated by those in the position of claimant.[159] It is contrary to the entire existence and purpose of default rules, implied terms, etc as determined by the classic tests to require a party to do this in order to make its "ordinary expectation" of payment proof against all contingencies, and indeed Lady Rose acknowledged this in respect of a hypothetical "dirty trick".

When interpreting the contested terms of a contract, to recognise the *tabula inscripta* of bargain is, of course, to place the burden of expression, not on the promisee wishing to be paid, but on the promisor wishing to oust the default of payment. But if, as the morality of contract law requires, we start from this *tabula inscripta*, and not from the *tabula rasa* of a market-individualist misunderstanding of that morality, then this is how we *should* allocate the risks of the inevitable incompleteness of contracts. Lord Leggatt therefore was profoundly right to resolve the "apparent

[159] B Pomfret, ""Where Does *Barton v Morris* Leave the Law of Unjust Enrichment in Relation to Payment for Services Provided Under a Contract?" (2023) 7 Journal of International Banking and Finance Law 463, 466.

iniquity" in *Barton v Morris* by, first, regarding payment as a default rule which "averts the injustice of disregarding the basic norm of commerce and contract law that a party who requests and enjoys the benefit of a valuable commercial service must pay for it",[160] and, secondly, by finding that the defendant did not successfully oust this default by "Negativing the implied obligation". Lord Leggatt has done a great deal to make the general issues clearer because he has closely pursued what, as Bowen LJ told us in *The Moorcock*, was "the object of giving efficacy to the transaction", which was "preventing such a failure of consideration as cannot have been within the contemplation of either side [and] not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure".[161] What, in sum, "the law desires to effect by the implication [of terms]" precisely is not some result of untrammelled self-interest but the result of competitive negotiation exercised through the morality of the contractual bargain, which is the only basis on which it can form the basis of a stable, general economy.

IV. Conclusion: The Remedy for "Well-meaning Sloppiness of Thought"

The modern law of restitution was described by its founders as "a unified treatment of all claims founded on the principle of unjust enrichment".[162] To a certain extent, one's opinion of that law will be determined by how far one thinks it has managed, by establishing such unity, to escape the longstanding criticism that restitution amounted only to a "well-meaning sloppiness of thought" motivated by 'a no doubt praiseworthy desire … to do what [was] thought to be right in each

[160] *Barton v Morris* (SC) (supra fn.9), [195].
[161] *Supra* fn.63, 68.
[162] Goff and Jones (*supra* fn.107), 5.

case'.[163] In the current writer's opinion, it has not done so at all, and bringing unjust enrichment to bear on effective contracts through the expansion of failure of consideration has produced unacceptable clashes which acutely evidence the unwisdom of the development of the law of unjust enrichment. Nevertheless, that development has a justification which it is essential to acknowledge. It is not wrong to describe the "sloppiness of thought" as "well-meaning" because a feeling that there has been an enrichment in some way unjust has rightly arisen from the contractual outcomes of certain cases.

That *Barton v Morris* in a sense demonstrates that "Unjust enrichment mends no-one's bargain" is most welcome, but that sense has to be made clear. The principal contradiction in the application of unjust enrichment to contractual situations is that "just" and "unjust" *should* be endogenously defined by the terms of the contract. This means that those terms should not be supplanted by unjust enrichment reasoning exogenous to contract. But it also means that "just" and "unjust" *must* be clearly defined by the terms of the contract. It is only then that the contractual outcome is justified as the result of a bargain which should not be mended. The "apparent iniquity" which arose in *Barton v Jones* is perfect example of a lack of sufficient clarity about the bargain. This does not justify turning to unjust enrichment, but it makes one sympathetic to the "well-meaning" feeling that one should do so. The proper solution to failure of consideration is, however, to establish contractual clarity about the consideration constituting the bargain, explaining and justifying transfers "in terms of contract … without the need for the supposed principle of unjust enrichment".[164]

[163] *Holt v Markham* [1923] 1 KB 504 (CA), 513.

[164] P Jaffey, "The Unjust Enrichment Fallacy and Private Law" (2013) 26 Canadian Journal of Law and Jurisprudence 115, 136.

We *must* be clear about the law of contract's starting position. The nature of a bargain entails that if a benefit is conveyed, by default it *should* be paid for. This default can be ousted, but this requires the party seeking the ouster to ensure the incorporation of contractual terms of sufficient clarity for it to be objectively concluded that the ouster was agreed. Up to a point, this might be discussed in terms of failure of consideration. Cases such as *Barton v Morris* are not, however, so much cases of failure of consideration as of the failure of the law of contract's doctrinal, and therefore judicial and practical, handling of payment. It is perfectly "possible", as Judge Pearce told us, that a contractual regime in which Mr Barton renders a service but isn't paid could have been agreed. Lord Leggatt's judgment has valuably clarified the law in this area by showing that, with respect, Judge Pearce nevertheless was wrong to claim that there was a "silence" about this. The "one central and essential idea" of consideration makes it "overwhelmingly … usual" that payment will be made, and by default a term giving effect to this should be implied if necessary. Non-payment therefore must be seen to require active work of negotiation, which places the "burden of expression" on the party intent on "negativing" the default. The feeling of injustice behind unjust enrichment is not denied, but Lord Leggatt's approach does much to quell this feeling without imposing an exogenous morality defeating the contractual regime. That approach is rather is the more adequate articulation of the morality endogenous to the law of contract.

In this vale of tears, a contractual dispute taken to judgment will be decided in a way which one of the parties does not like. This inevitable dissatisfaction, which must give way to an acknowledgement of the overwhelming legitimacy of the morality of freedom and sanctity of contract, must be distinguished from the colourable feeling of injustice that will arise if the contractual reason for the judgment is unclear; the feeling, and therefore the "praiseworthy desire … to do right", arises because in an important sense the enrichment *is* unjust, but not in the sense

of unjust enrichment. Clarification of the contractual issues does not yield bliss, but it should remove the desire to do right because it removes the injustice. If a judgment enforces a contract which clearly satisfies the requirement of being a bargain, this eliminates any justifiable feeling of injustice because it justifies the contractual regime. Articulating the morality of the bargain has been a most welcome theme of Lord Leggatt's contractual judgments since *Yam Seng*, and its articulation in *Barton v Morris* is, it is submitted, of great importance, and will further reverse the encroachment of unjust enrichment upon contractual regimes. By stimulating the clarification of contract needed to do this, the development of unjust enrichment has, however, served the function of the canary in the coalmine, and so has not been altogether a disaster.[165]

[165] R Stevens, "The Unjust Enrichment Disaster" (2018) 134 LQR 574.