these obligations if they genuinely fail, subjectively, to appreciate that the impugned information is "confidential" or "private". This could have serious consequences for the protection of privacy in particular, given how historically contested, and conceptually fraught, the idea of privacy is.

CHRIS D. L. HUNT

EVALUATING ENRICHMENT

BENEDETTI v Sawiris [2013] UKSC 50, [2013] 3 W.L.R. 351 is the most significant decision in any common law jurisdiction on valuing enrichment for the purposes of the law of unjust enrichment.

Benedetti had facilitated a corporate investment by Sawiris in circumstances where there was no contract between them for the provision of the services. Benedetti sought *quantum meruit* founded on the defendant's unjust enrichment, since he had provided the services in the expectation that he would be remunerated under a contract which was not made, there consequently being a failure of consideration. Benedetti originally sought €3.7 billion. At each stage of the litigation he progressively recovered less. At trial he was awarded €75.1 million, this being the amount which Sawiris had offered him for the services, even though their market value was found to be €36.3 million. In the Court of Appeal he was awarded €14.52 million, this being 40% of the market value of the services, the claimant having already received remuneration for the rest. In the Supreme Court he was awarded nothing, since it was held that the €67 brokerage fee, which was found to have been paid to a company but personally received by Benedetti, constituted full payment for the services he had provided. This was sufficient to defeat the claim since, the claimant having been paid, the defendant was no longer unjustly enriched at the claimant's expense.

Since the claimant had appealed on the ground that the value of the services was higher than that awarded by the Court of Appeal, the Justices also considered how enrichment should be valued. The key issue was whether the award could be higher or lower than the market value of the services and whether the defendant's perception as to their value was relevant. The Justices adopted the same general approach, with one significant exception. The leading judgment was delivered by Lord Clarke, with whom Lords Kerr and Wilson agreed. Nonetheless the judgments of Lords Reed and Neuberger are significant in clarifying aspects of Lord Clarke's analysis or suggesting a different route for the future development of the law.

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All the Justices agreed that the starting point for the valuation exercise is to identify the objective market value of the services. Lord Reed usefully distinguished between the "ordinary market value" and the "objective value of the benefit". The former is the price which would have been agreed in the market in the absence of some unusual characteristic of the purchaser, whereas the latter is the value of the benefit to the reasonable person in the position of the defendant. Usually both values will be the same, and it will be sufficient to assess what it would have cost a reasonable person to acquire the goods or services elsewhere in the market. This will depend on the specific circumstances operating at a particular place and time. So, to use an example suggested by Lord Reed, in *Vanity Fair* Becky Sharp sells her horse in Brussels following the battle of Waterloo when the inhabitants fear that Napoleon is approaching. Consequently horses are exceptionally valuable, but the exorbitant price she obtained can still be considered to be the ordinary market value, objectively determined and assessed by the horse market in Brussels at that time.

The objective value of the benefit may be higher or lower than the ordinary market value by virtue of the defendant's position. This does not include characteristics such as the defendant having a generous or parsimonious personality, but will include, for example, the defendant's buying power which enables him to negotiate a low price, his credit rating and even, according to Lord Reed, the defendant's age, gender, occupation and state of health. For example, a famous film star who wishes to purchase a designer dress might obtain a significant discount because of the publicity arising from her wearing it on the red carpet. Consequently, the fact that she is famous is an aspect of her position which affects the objective value of the benefit. Lord Neuberger considered that the claimant's position might also be relevant, such as where he has particular expertise or experience, if this would have been reflected in the market.

Once the objective value of the benefit has been determined, the question then is whether the defendant's own personal preferences and idiosyncratic views as to the value are relevant to decrease or increase that value. It is at this point that there was a divergence of approach among the Justices. For Lord Clarke it is possible to reduce or eliminate, but not increase, the value of the enrichment by reference to the defendant's own valuation. He consequently recognised that an objective benefit can be subjectively devalued to protect the defendant's autonomy and to respect his spending priorities in circumstances where the benefit was not requested or accepted. Lord Clarke recognised that, whilst the burden of adducing evidence of the objective value is borne by the claimant, it shifts to the defendant to establish subjective devaluation. It is not sufficient for the defendant simply to say that he

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did not value the benefit at its market value; there will need to be "an objective manifestation of the defendant's subjective views" (at [23]).

Although it might be considered to follow logically from the recognition of subjective devaluation that subjective over-valuation should also be recognised, none of the Justices recognised this principle, although Lord Clarke reserved the possibility of recognising it in exceptional circumstances, but without identifying what they might be. Subjective over-valuation was not considered to be necessary to protect the defendant's freedom to choose the benefit, it being sufficient that the defendant restored to the claimant no more than the objective value of the benefit, for then the enrichment would no longer be unjust.

Lord Reed went further and considered that there was no role for any form of subjective valuation; value is to be determined objectively only. Although he acknowledged that it was important to respect the defendant's right to choose to pay for a benefit which had not been requested, he considered that this related to whether the enrichment was unjust rather than its identification and valuation. This is dangerous, however, because, despite Lord Reed's assertion that this would "not entail a descent into unstructured reasoning about injustice", (at [118]), such normative reasoning could easily become unprincipled and unclear.

The difference between the approaches of Lords Clarke and Reed is not great, particularly because of the expanded role for objective valuation with regard to the defendant's position. This is illustrated by *Sempra Metals Ltd v IRC* [2007] UKHL 34, [2008] A.C. 561 where the Government was required to pay for the use of tax paid prematurely. This was valued by reference to the interest which the Government would have had to pay to borrow an equivalent amount of money. Since the Government as a public body could borrow at interest rates lower than the commercial market rate, this was the measure of the enrichment. All the Justices in *Benedetti* recognised that this involved objective valuation, having regard to the defendant's position as a public body able to borrow at a lower rate. Logically, as Lord Reed recognised, if the defendant had a poor credit rating and so could only borrow at a rate above the market rate, the objective value of the enrichment would increase. It follows that *objective* devaluation and over-valuation have been recognised. Whether the defendant's circumstances should be characterised as affecting objective or subjective valuation will be a matter of judgment since, as Lord Clarke recognised, the line between them is narrow. Essentially the difference will depend on whether the defendant's circumstance would have been taken into account by the market in determining the value of the enrichment. If it would, it is relevant to the objective value. This

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matters because it affects the burden of proof; the claimant proves objective valuation and the defendant proves subjective devaluation.

A further difference between the approaches of Lords Clarke and Reed turns on whether the defendant's autonomy should be considered at the enrichment or the unjust stage of the inquiry. Lord Neuberger acknowledged that in most cases the choice will only affect procedural analysis rather than outcome. For example, if a kitchen fitter mistakenly enters the defendant's house, rips out his kitchen and installs a new one, when he should have installed it in a neighbour's house, the defendant should not be required to pay for the kitchen, because he should be free to choose whether he wants a new kitchen. Such a result could be achieved by concluding that the defendant's enrichment was not unjust, but this changes the accepted understanding of the unjust factors as being claimant-focused. The defendant's circumstances are usually taken into account through the defence of change of position, but the defendant cannot be considered to have changed his position in this situation. Surely it is preferable to say that the defendant has simply not been enriched. Whilst he had clearly received something of objective value, he should be allowed to say that he did not value it. If the defendant was contemplating purchasing a new kitchen but would only have done so at a significant discount in the sales, it is appropriate to take this into account in reducing the objective value.

The legacy of *Benedetti* is that, whilst there remains a continuing role for subjective devaluation, its ambit has been significantly reduced because of the wider interpretation of objective value, but there is no place for subjective over-valuation when valuing an enrichment.

GRAHAM VIRGO

FAMILY DIVISION, 0; CHANCERY DIVISION, 1: PIERCING THE CORPORATE VEIL IN THE SUPREME COURT (AGAIN)

SUPREME Court decisions are like buses. Following a decades-long wait for the House of Lords to clarify Lord Keith's dictum in *Woolfson v Strathclyde Regional Council* 1978 S.C. (H.L.) 90 that the corporate veil can only be "pierced" at common law "where special circumstances exist indicating that [a company] is a mere façade concealing the true facts", the Supreme Court has now considered this jurisdiction twice in quick succession (its first decision being *VTB Capital plc v Nutritek International Corporation* [2013] UKSC 5; noted [2013] C.L.J. 280).

Prest v Petrodel Resources Ltd. [2013] UKSC 34 concerned an application by Mrs Prest against her husband for ancillary relief under

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