

ENGLAND AND WALES / JUDGMENT

Benedetti v Sawiris & Ors

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Neutral Citation Number: [2010] EWCA Civ 1427 Case No: A3/2009/2123, 2132 & 2135 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE HIGH COURT OF JUSTICE (CHANCERY DIVISION) PATTEN J

[2009] EWHC 1330 (Ch) Royal Courts of Justice Strand, London, WC2A 2LL Date: 16/12/2010
Before : LADY JUSTICE ARDEN LORD JUSTICE RIMER and LORD JUSTICE ETHERTON

- ----- Between :

(1) ALESSANDRO BENEDETTI

(2) M FINANCE S. A. and

(1) NAGUIB ONSI NAGUIB SAWIRIS

(2) APRIL HOLDING

(3) OS HOLDING

(4) CYLO INVESTMENTS LIMITED

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- ----- Appellant/ Respondent (Not a party to the appeal) Appellants /
Respondents Mr Mark Howard QC & Mr Andrew Twigger (instructed by Herbert Smith LLP)
for the Appellant/Respondent Alessandro Benedetti Mr Laurence Rabinowitz QC, Mr
Richard Hill & Mr Gregory Denton-Cox (instructed by Kirkland & Ellis International LLP) for
the First and Fourth Appellants/Respondents Mr Adrian Beltrami QC (instructed by
Simmons & Simmons) for the Second and Third Appellants/Respondents Hearing dates : 15,
16, 19, 20 July 2010

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Judgment

Judgment Approved by the court for handing down. Benedetti v Sawiris & Ors. Lady Justice Arden:

1. This judgment deals with three appeals against the order of Patten LJ (sitting as a judge of the High Court) dated 21 July 2009 awarding Mr Benedetti the sum of €75.1m on a quantum meruit for his services as a facilitator in connection with the acquisition of an investment in an Italian telecommunications company, Wind Telecomunicazioni SpA (“Wind”) by the respondents. The respondents are Mr Naguib Sawiris (whom I shall call Mr Sawiris), Mr Sawiris’ company, Cylo Investments Ltd (“Cylo”) and two family trust companies set up by Mr Sawiris’ brother and father respectively, April Holding (“April”) and OS Holding (“OS”) (referred to collectively as “AH/OS”). Mr Benedetti contends that the amount awarded was determined on the wrong basis and should have been a greater sum, while Mr Sawiris and Cylo contend that the amount awarded was too much. AH/OS contend that whatever sum was awarded should not have been awarded against them, and in the alternative adopt Mr Sawiris’ case on the amount of the award.
2. The law of restitution provides remedies in particular situations where there has been some unjust enrichment of a party but there is no liability in contract or tort or for breach of trust (see generally *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 and *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349). One such remedy is the award by way of quantum meruit (which literally translated means “as much as he deserves”). A quantum meruit may be awarded where services have been rendered but there is no contract establishing the price to be paid for those services. If it is awarded, the court has to place a value on the services that have been provided.
3. This is a case where the parties had an agreement for other services, but no agreement for the services in issue. Their agreement was for the provision for services in connection with the acquisition of Wind by a different route from that ultimately adopted. This is not, therefore, a case where there was an agreement for services subject to the remuneration for the services being fixed later. The principal point of law raised by this appeal is the approach to be adopted in valuing services in the former set of circumstances. The contractual relationship between the parties had simply run out. Specifically, we are asked to decide whether the court should apply the (in this case, more generous) approach to remuneration in the earlier agreement to the exclusion of what the judge found to be the market value of such services. Furthermore, the appeals raise the question of what weight, if any, the court should give in its determination to an offer to pay an amount made by way of compromise by the one contracting party to the other after the delivery of services, which offer was not accepted.
4. Another major issue arises in relation to AH/OS, which participated in the acquisition at Mr Sawiris’ invitation. There is an issue as to whether AH/OS were enriched by Mr Benedetti’s services and whether they freely accepted them. They made no request for Mr Benedetti’s services. It would, at first sight at least, seem objectionable in principle if a person were liable to pay for services that he had no opportunity of refusing. Pollock CB famously once said: “One cleans another’s shoes. What can the other do but put them on?” (*Taylor v Laird*

(1865) 25 LJ Ex 329 at 332). On this part of the case, the court has to determine whether in these Judgment Approved by the court for handing down. Benedetti v Sawiris & Ors. circumstances AH/OS were nonetheless unjustly enriched, and if so, in what amount.

5. Before describing the judge's approach to these issues, I must set out the essential

background.

Background

6. Mr Benedetti is an experienced entrepreneur with an eye for a good business opportunity. He is knowledgeable about the telecommunications field, but he is not a banker or professional adviser. Mr Sawiris is a wealthy and successful investor from Egypt. He set up a company called Orascom Telecom Holding SAE ("Orascom") which has substantial investments in telecommunications businesses. He was a very busy man and he delegated to his employee, Mr Abdou, the day-to-day handling of negotiations on his behalf in connection with the acquisition of Wind.
7. The judgment dated 15 June 2009 of Patten J (as he then was) occupies 576 paragraphs and takes us through the transaction with meticulous care, but many matters that were in issue at the trial are now no longer relevant. The parties had made an agreement in writing ("the Acquisition Agreement") dated 31 January 2004 for the acquisition of Wind by what the judge held to be a different route. Mr Benedetti now accepts that there was no agreement between him and Mr Sawiris or any other person for the provision of the actual services for which the judge awarded him a quantum meruit. But Mr Benedetti contends that the Acquisition Agreement is still relevant to his claim in quantum meruit on the grounds that the methodology for fixing remuneration in it should be used as a template for determining the amount of his award. I will, therefore, need to describe the factual matrix and provisions of the Acquisition Agreement. That Agreement is the launch pad for the submissions on these appeals.
8. The background to the Acquisition Agreement was as follows. In 2002, Mr Benedetti became aware that Enel Spa ("Enel"), the largest energy company in Italy, might be willing to sell its wholly-owned subsidiary, Wind. The Acquisition Agreement described Wind as "the second largest operator in the Italian fixed line market, the third largest operator in the Italian mobile GSM market as well as a UMTS licence holder for 3rd Generation telecoms". Mr Benedetti started to put together a consortium of investors, including Mr Sawiris, who was introduced to him for this purpose.
9. After various meetings, Mr Benedetti and Mr Sawiris signed the Acquisition Agreement. As one might expect, this was not simply an agreement for the payment of fees to Mr Benedetti: it was an agreement for co-operation in the acquisition of a controlling stake in Wind. The vehicle for the acquisition was to be Rain Investments SpA ("Rain"), and the Acquisition Agreement dealt with the control and capitalisation of Rain. In particular, Mr Benedetti and

Mr Sawiris were each to form a company. In the event, the Acquisition Agreement was amended in manuscript to provide that the references to Mr Sawiris' company were to Mr Sawiris personally. Mr Sawiris' was to subscribe for two-thirds of the share capital of Rain, and Mr Benedetti's company would subscribe for the remaining one-third with a loan made by Mr Sawiris. Under clause 5, the two classes of shares would Judgment Approved by the court for handing down. Benedetti v Sawiris & Ors. participate rateably in distributions but have an equal number of voting rights, further issues of shares were to be made "at values to be agreed" and were not to dilute their rights save on a pari passu basis. In my judgment, this meant pari passu as between Mr Benedetti and Mr Sawiris so that neither of them was diluted to a greater extent than the other. Contrary to the submissions made on behalf of Mr Benedetti, this clause did not in my judgment give Mr Benedetti the right to block any issue of new shares or provide protection against dilution to an ineffective level, only a right to object to a share issue which had a discriminatory effect as between him and Mr Sawiris. As Mr Rabinowitz submits, the Acquisition Agreement contemplated that Mr Benedetti would be diluted by further investments by Mr Sawiris. The judge indicated that Mr Benedetti did not obtain a stranglehold over the issue of new shares because they were to be "at values to be agreed", since there must be an implicit obligation in clause 5 to agree a fair and reasonable value and so the court could in the last resort break any deadlock on the agreement of the value (see *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444). We were not taken to this authority; the point made on behalf of Mr Benedetti was that he was always to receive, and have, a one-third stake in Rain, but this point was rejected by the judge.

10. Each of their companies so formed was to have the right to appoint two directors and resolutions at board meetings were to require the positive vote of three directors. Mr Benedetti was to handle the negotiation of the acquisition of the controlling stake in Wind, subject to the support and advice of Mr Sawiris. He was to apply 60% of his time for this purpose and to be paid a monthly fee of €5,000 for his services. In addition, the board of Rain could not effect certain corporate transactions without the consent of Mr Sawiris and Mr Benedetti's company. Those acts included the issue of new shares.
11. The initial issued share capital of Rain was to be €200,000 which would be wholly provided by Mr Sawiris. This was to be repaid out of the first payments of dividend by Rain. Mr Sawiris was to have no further obligation to provide finance beyond €50m towards the actual acquisition. This was to be a contribution "into the capital of Rain", and thus presumably in the form of new shares. Mr Benedetti's company and Mr Sawiris were to use best endeavours to raise €1bn-€1.2bn for the acquisition. The intention was that Rain would sell non-controlling holdings of shares to investors and that the board of Rain, which would include Mr Benedetti, would manage Wind and receive management fees for doing so.

12. Clause 7.3.1 of the Acquisition Agreement, on which Mr Benedetti places considerable reliance, prevented Mr Sawiris from negotiating for the acquisition of Wind other than through Rain, after, as well as before, the termination of the Acquisition Agreement. This clause was expressly stated to be in recognition of Mr Benedetti's role in introducing and facilitating the transaction.
13. The Acquisition Agreement, therefore, plainly contemplated that Mr Benedetti would obtain an equity stake in the special purpose vehicle to be used to acquire Wind without initial cost to him. At this stage the parties contemplated that Mr Sawiris would invest only €50m of his own money.
14. Mr Benedetti contended at trial that Mr Sawiris had agreed that Mr Benedetti would be beneficially entitled to one-third of all the funding provided by Mr Sawiris, but Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. the judge held that this understanding was limited to the original €50m referred to in the Acquisition Agreement. The judge also rejected the idea that Mr Sawiris agreed to give Mr Benedetti one-third of whatever vehicle he used to acquire Wind. The judge did not make a finding as to when the understanding as to the one-third of €50m (€17m approximately) was reached.
15. Mr Mark Howard QC, for Mr Benedetti, described the original concept as a highly leveraged buy-out, by which I understand him to mean that the acquisition would be financed out of funds provided by the outside investors. He also explained that Mr Benedetti and Mr Sawiris were to receive a "carried interest", which I understand to mean that Mr Benedetti and Mr Sawiris were to receive an enhanced share of the profits of Wind if those profits exceeded the level agreed with the outside investors. The corporate structure envisaged by the Acquisition Agreement on completion of the acquisition of Wind would thus have looked like this: The Acquisition – as contemplated by the Acquisition Agreement Mr Sawiris Mr Benedetti's company Outside Investors providing virtually all of the funds needed to acquire Wind not covered by any bank borrowings Management Fees Generating Income for Rain
0-49% votes 66.6% 66.6% 33.3% Rain 51 –100% votes Subsidiary or Subsidiaries of Rain Wind
16. The Acquisition Agreement naturally reflected this scheme of acquisition. The particular method of acquiring Wind foreshadowed by the Acquisition Agreement was, however, dependent on Mr Benedetti finding other investors. In the event, however, Mr Benedetti was, despite his best endeavours, unable to secure other investors. By 2005, it became apparent that there would be no outside investors. By this stage Mr Sawiris had signed a commitment letter promising to provide up to €1.2bn. The acquisition structure had to be revised, and it was changed so that the outside investors were effectively replaced by Cylo and AH/OS. A company called Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. Weather Investments SA ("Weather 1") was set up for the purposes of the acquisition, but the acquisition was effected through a newly-formed company called Weather Investments II Srl ("Weather II"), and not Weather 1 or Rain.

17. The acquisition involved three stages. As to the first stage, the agreement with Enel (“the SPA”) was signed on 26 May 2005 and the first closing took place on 11 August 2005. The second stage then took place on 8 February 2006, when the second closing occurred. After this, the ultimate parent company of Wind was Weather Investments SrL (“Weather Italy”), a company incorporated in Italy, in which Weather II had a 71.1% shareholding, some Middle Eastern investors 2.8% and Enel 26.1%. The following chart, taken from the judge’s judgment, shows the shareholders in Weather Italy, and its principal subsidiaries, as at the second closing: The Acquisition – as implemented by the stage of second closing Middle Eastern Investors Weather II Enel 2.8% 71.1% 26.1% Weather Italy 100% 100% Weather Capital Wind Acquisition Holdings Finance S.p. A. 50.1% 100% Orascom (pledged to IMI) Wind Acquisition Finance S.p. A. 100% Wind
18. Weather II was in turn owned as to 31.4% by OS, as to 60.4% by April and as to 8.2% by Cylo. Mr Sawiris had no interest personally in Weather II, Weather Italy or Wind. AH/OS on the other hand owned nearly 92% of Weather II. The third stage in the acquisition occurred when the transaction was finally completed in December 2006 and Weather II acquired Enel’s shareholding in Weather Italy.
19. It is apparent that the structure actually used for acquiring Wind was very different from that contemplated by the Acquisition Agreement. It required Mr Sawiris to Judgment Approved by the court for handing down. Benedetti v Sawiris & Ors. fund or procure funding for effectively the whole of the purchase price. But he did not have to find this in cash. He brought in other investors, notably the companies operating the trusts set up by his brother and father (AH/OS). They had been shareholders in Orascom before the trusts were created. AH/OS and Cyclo together injected a 50.1% interest of Orascom which was charged in favour of a lender, Banca IMI (“IMI”), and thus to the extent of the value placed on this interest Mr Sawiris did not have to find cash. Orascom was an Egyptian company owned by Mr Sawiris’ family. It had mobile telecommunications operations or interests in the Middle East, Africa and Asia. Through Mr Benedetti’s good offices, he was able to obtain the agreement of Enel to a valuation of €5.05bn for the 50.1% interest in Orascom for the purposes of this transaction that was well in excess of their market value (judgment, paragraphs 10 and 26). This was achieved through an exercise code-named “Project Super Mufasa” by Mr Sawiris’ professional advisers. Overall, it is apparent that the cost of the transaction as completed, including a loan of €294m from Mr Sawiris’ family (judgment, paragraph 2) and the use of the Orascom interest, involved a far greater investment by him and his family than was originally envisaged. In the Acquisition Agreement he had placed a limit of €50m on the amount he was obliged to invest.
20. The judge paid tribute to Mr Benedetti’s achievement in bringing about the acquisition. Mr Benedetti built up good relations with the management of Enel, including with the CEO, Mr Conti. He had considerable responsibility for negotiating the price payable to Enel, and the judge found that Mr Benedetti’s achievements in this regard were highly valued by Mr Sawiris. In some respects, however, he thought that Mr Benedetti’s role had been

exaggerated, for example he did not consider that Mr Benedetti had the expertise necessary to devise a complex financial scheme of the kind which had to be put in place in connection with the refinancing of Wind's existing debt.

21. The judge recognised that the transaction was both a very complex one and also a particularly successful one for Mr Sawiris and his family. The judge noted that "[I]t required considerable skill and effort to persuade Enel to do business with Mr Sawiris and to overcome the political and other hurdles involved in securing the closure of the deal." (judgment, paragraph 27). Mr Sawiris was an investor from an emerging market. Enel was one of Italy's largest quoted companies. The judge concluded that it would be unrealistic and wrong "to attach no real weight to the value of Mr Benedetti's skills" (judgment, paragraph 381). The judge recorded that, according to Mr Benedetti at least, Mr Sawiris had said that he was going to build two statues of Mr Benedetti in Cairo, and, in a subsequent television interview, he said that as a result of the premium he was able to buy Wind "for free". The judge held that the agreement on the price was by no means a certainty and that this needed to be reflected when he came to consider what it would be appropriate for Mr Benedetti to receive on a quantum meruit.
22. Although his instructions came principally from Mr Sawiris, Mr Benedetti also caused a company associated with him, International Technologies Management Ltd ("ITM"), to enter into agreements for brokerage services. The first such agreement was entered into in March or April 2005 with Weather 1, which Mr Benedetti caused to execute the agreement in his capacity as a director of that company. The second agreement ("the Revised Brokerage Agreement") was Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. entered into in July 2005 with Weather 1. The services which ITM agreed to provide were described as "Brokerage Services", and this expression was defined as meaning "the effecting of transactions of and/or relating to the purchase of and dealing in [the whole of the issued share capital of Wind] in the name of and for the account of Weather Italy as well as the [sic] assistance in the negotiation with prospective seller, raising of acquisition debt and further raising of financial debt for Wind". The Revised Brokerage Agreement provided for a success fee of 0.55%. The fee, which turned out to be €67m, was paid in August 2005. At the same time, a company in which Mr Benedetti had a 60% interest called Managest Media SA received a fee of €3.4m pursuant to an agreement originally with Weather 1 (but later with Weather Italy) for support and other expenses. Although Mr Lawrence Rabinowitz QC, for Mr Sawiris and Cylo, submitted in passing that this amount should also be taken into account in determining the amount to be paid by way of quantum meruit, that point was not pursued on this appeal, and, so far as I can see, it was not taken below. The Revised Brokerage Agreement and agreement between Weather 1 (later replaced by Weather Italy) and Managest were not executed until after receipt of the first email in June 2005 (set out below) indicating that Mr Sawiris was agreeing to pay Mr Benedetti only a much smaller fee than Mr Benedetti had expected for his services in connection with the acquisition of Wind.

23. Mr Benedetti raised the question of his fee in May 2005 (three months before the first closing). He had a number of conversations with Mr Abdou in which he sought a fee of between €200m and €300m. According to Mr Abdou, these calculations were not based on the Acquisition Agreement. There was also a series of emails between Mr Benedetti and Mr Abdou. Mr Howard submits that these show that Mr Benedetti was seeking an equity share on the lines of the Acquisition Agreement. Mr Benedetti obviously started the discussion but we do not have his initial communication to Mr Abdou, only the reply by email dated 11 June 2005 from Mr Abdou: "I had two discussions with Naguib [Mr Sawiris] regarding your deal. I will tell you exactly his response. First of all he very much appreciates all what you have done and he acknowledges that without you, there would be no deal. However, he feels he has been clear with you from the beginning that the deal was never meant to be this big and that when you two signed the agreement over one year ago, the deal has totally changed. But even then, he told you and the agreement says, that he will not pay commissions etc for a deal that merges or has OT [Orascom] as a party and rather the intent and spirit of the deal was that he would lend you your 1/3 of the Euro 50M target capital to be repaid with interest after exit so that you would not have to put in money yourself and that you would look to raise money for a deal that had his investment maximum at 200 to 300 million euro. Today, Weather is no longer a passive investment for Naguib but rather a vehicle which he put in all his value that he owns (and a part of his family's wealth). He very much wants you involved in the BOD [board of directors] of the company and to be able to do other deals in the future. He sees the relationship between you two as strong and Judgment Approved by the court for handing down. Benedetti v Sawiris & Ors. positive but he asks for you to be reasonable in what you ask. When I told him your request and the logic, he was quite upset as he did not expect you to ask for so much. While of course he sees that the original agreement needs to change, he does not agree with your request. In addition, while many positive things happened to improve the deal, a few serious restrictions arose such as the need for Euro 500M cash (vs 200 to 300) and the limited financial partners and the somewhat restrictive IMI loan. The only reason he says this is to make the point that the deal today is totally different than the original and as such what he is prepared to offer you is 1% of Weather for free and he can pay it to you in shares or give you a put option to take it in cash. If you choose cash, he wants to agree with you a timetable so that he can plan his cash sourcing. He would like you to come to Cairo to discuss this as he does not want any misunderstandings of bad feelings to cloud a very positive effort by everyone. If you can't come to Cairo, he can meet you when he comes next week."
24. Thus, an offer was made to Mr Benedetti of the issue of 1% of "Weather", an offer, which (on the basis that this was 1% of Weather Italy) was equivalent to €75.1m. According to Mr Abdou's evidence, accepted by the judge, Mr Abdou intended to refer to Weather Italy. Mr Benedetti, however, may have understood him to refer to Weather II. The point in this email that Mr Howard emphasises is that it refers to "the original agreement", that is the Acquisition Agreement, and that Mr Sawiris accepted that it needed to change, not that it had been abandoned. The thrust, however, of the email is that Mr Sawiris was not willing to

pay commissions for a deal that had Orascom as a party.

25. Mr Benedetti replied to this email the following day (using phonetic spellings): “Dear Hassan, This surprise me a lot. As you know very well, this aren’t commitions but just a small portion of the upside i have created from the binding offer we have done. In fact you know all so it is a waste of time repet all those points. you told me many times that naguib was more than ready to recognize my job and to share the upside created. your idea 1% + 1% + 1% was already a bad surprise for me. it is not a question to pay commitions it is a question to respect partnership, i have done all the necessary things to perform starting to get the bid bond, enel inside and so on!! The merget with OTH has been chosed to alow Naguib to take the control of Wind with no money!! Judgment Approved by the court for handing down. Benedetti v Sawiris & Ors. the deal is changed only in his favour, honestly my proposal to you was, in my view a last cut to close the subject in a very honest and more than reasonable way. This percentage is for somebody which indicate deal not make it fining the money and all the other things i have done” I’m really surprise. I tought the mail point that in our venture i was a partner not a shity middle man and i have act as a partner without asking protections or commitions...”
26. According to Mr Abdou, the reference in this email to 1% +1% +1% was to a suggestion that Mr Abdou had previously made to Mr Benedetti that Mr Benedetti might ask for 1% of Weather Italy for free, plus the right to purchase 1% at closing at the deal value, and an option to acquire a further 1% in the future (judgment, paragraph 415). Mr Benedetti did not accept this, but nothing turns on the proposal anyway. In the event, Mr Sawiris offered only 1% or its cash equivalent.
27. Mr Abdou responded the same day as follows: “I talked to Naguib again. He wanted me to tell you that he feels 1% (which is Euro 75M today and may double if we succeed in Wind), is by far more than what you two had agreed to in the beginning when the deal was simple to lend you Euro 17M in cash to invest. As I mentioned before, he even crossed out all the sections related to OT [Orascom] and fees in the original deal because that was never his intention. He insists that he is being very generous with his offer and again wants to continue the relationship for a long time. He told me that if he really thought that you wanted hundreds of millions compensation, he would not even have done the deal at all. Alessandro, please look at the initial deal and the current offer. We are talking about Euro 75M versus Euro loan plus interest. Think strategically, long term. I am telling you as a friend that Naguib truly believes this is a very generous offer and this is not an attempt to negotiate with you...”
28. Finally, on 13 September 2005, following the first closing, Mr Abdou emailed Mr Benedetti as follows: “Anyway, Naguib told me that he had asked you for a letter saying that you have received the fees of the Euro 67M for concluding the deal. Given that the contract is with International Technologies Management Ltd and given the recent negative articles in the Italian press on this point, even Judgment Approved by the court for handing down. Benedetti v Sawiris & Ors. though we and Enel have both responded, we will need to know

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

29. At a meeting in Cairo in January 2006 Mr Sawiris made a proposal to Mr Benedetti that he should accept 1% of Weather Italy and offered to waive his pre-emption rights over the 26.1% stake of Enel so that Mr Benedetti could acquire those shares (judgment, paragraph 448). There were a number of other emails and meetings. In October 2006, Mr Abdou sent Mr Benedetti two agreements, the first a supplemental agreement to the Revised Brokerage Agreement providing for Weather II (not Weather Italy) to pay Mr Benedetti the sum of €75.1m to a company controlled by Mr Benedetti (in addition to his receipt of the €67m fee), and the second a draft termination agreement, which brought all Mr Benedetti's rights under the Acquisition Agreement to an end.
30. In the event nothing was agreed and so Mr Benedetti began these proceedings.
31. There was an issue as to whether Mr Sawiris knew when he made the €75.1m offer that Mr Benedetti had also arranged for the payment of the €67m fee for his own benefit. Mr Abdou's evidence was that in July 2005 Mr Benedetti was claiming that the €67m fee had to be paid on completion of the acquisition of Wind so that he could arrange for third parties to be paid. The judge found that Mr Sawiris had suspected all along that the €67m fee had been paid to Mr Benedetti personally, not for onwards transmission to third parties. Furthermore, Mr Sawiris' advisers Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. produced a draft supplemental agreement produced shortly before proceedings were begun. As explained in paragraph 29 above, this provided for Mr Benedetti to receive the sum of €75.1m in addition to the €67m fee. The judge's approach to the claim for a quantum meruit

32. Mr Rabinowitz, who also appeared at the trial for Mr Sawiris and Cylo, argued at trial that Mr Sawiris and Mr Benedetti had abandoned the Acquisition Agreement and thus that it would provide no assistance to the court in determining the amount of any quantum meruit.
33. There was no contemporaneous evidence that Mr Benedetti was to have a one-third share apart from his interest in Rain under the Acquisition Agreement, and Mr Benedetti had not referred to any one-third interest on occasions when it might have been natural for him to do so. The judge consistently rejected the claim that Mr Benedetti was entitled to a one-third share over and beyond what had been agreed in the Acquisition Agreement. Mr Sawiris and Mr Benedetti had moved away from using Rain for the purpose of the type of acquisition contemplated at the time of the Acquisition Agreement.
34. The judge considered that, to reach the conclusion that the Acquisition Agreement had been abandoned or “consigned to history”, it would be necessary to be satisfied that clause 7.3.1 of the Acquisition Agreement had been rescinded or abandoned. The judge rejected the argument that the reference in the email of 11 June 2005 to Mr Sawiris accepting that “the original agreement needs to change” was significant. He concluded that the parties’ conduct in completing the acquisition by the method that was adopted was an “implicit acknowledgement that the Acquisition Agreement had ceased to be of any contractual effect” (judgment, paragraph 493).
35. The judge directed himself that the valuation of Mr Benedetti’s services had to be carried out as at the date when the services were rendered and that the valuation should, as a general rule, approximate to market value (judgment, paragraph 528). He continued: “...But regard must also be had to any prior negotiations or agreement between the parties which indicate that they put a particular value on the services in question. This may be the best evidence of what constitutes a reasonable remuneration for the services rendered and, as a matter of principle, there is some judicial support for the view that the price agreed should be the ceiling for any award... ”
36. On the reliance to be placed on the parties’ communications, the judge cited *Way v Latilla* [1937] 3 All ER 759, (judgment, paragraph 530), to which I shall refer below, and subsequent cases. The judge cited other cases, including *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925. In that case, Robert Goff J (at
- 805) held that, where a contract became unenforceable through frustration, “the contract consideration is always relevant as providing some evidence of what will be a reasonable sum to be awarded in respect of the plaintiff’s work”. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*.
37. The judge distinguished cases of the type in issue in *Way v Latilla* and *BP v Hunt*. He considered that there was a clear distinction between an ineffective agreement and one which the parties had effectively jettisoned: “534. But in a case where the evidence shows that the contract or agreement was abandoned as the basis of the parties’ dealings then the reasoning in *Way v Latilla* ceases to apply. If the correct view is that the parties ceased to

regard the original contract price as an appropriate value for the services then there is no justification for the court imposing it as a measure of value unless it can be justified by other evidence as the market value of the services at the time when they were performed. There is a clear difference between an ineffective agreement and one which the parties have effectively jettisoned.”

38. Indeed, the judge went on to hold that the Acquisition Agreement had to be disregarded for the purpose of assessing the amount of the award to Mr Benedetti for his services because the Acquisition Agreement had in his judgement been abandoned. He expressly explained that by abandonment he included the failure to update the agreement so as to include Weather II regardless of whether that also amounted to a rescission of the agreement (judgment, paragraph 550). In his judgment, the court could not place weight on the terms of the Acquisition Agreement. The parties had ceased to regard the remuneration in that agreement as an appropriate value of the services because the parties failed to update it when the structure underwent substantial change (judgment, paragraphs 534 and 550).
39. The judge accepted that, if appropriate, Mr Benedetti could be remunerated by the award of an equity stake. However, having heard expert evidence from bankers, the judge concluded that an equity stake was not the standard or usual form of remuneration in the market for the tasks which Mr Benedetti carried out (judgment, paragraph 561). The fact that the Acquisition Agreement provided that Mr Benedetti should have a limited share of the equity held at this point was of little value unless that Agreement could "serve as a template for the assessment of the remuneration due to Mr Benedetti" (judgment, paragraph 562). Moreover the judge pointed out that in any event under the Acquisition Agreement, Mr Benedetti was only entitled to one third of €200,000, which was less than the fee which Mr Sawiris accepted was payable.
40. The judge, therefore, fixed Mr Benedetti's remuneration by reference to the evidence as to the usual market rate and he accepted the evidence of Mr Sawiris' expert banker, Mr Sottile, for this purpose. However, he held that Mr Benedetti should be entitled to a fee at the top end of the scale, namely €36.3m (judgment, paragraph 563). There is no appeal from the judge's finding as to the usual market rate.
41. The judge then turned to the question whether the fee payable under the Revised Brokerage Agreement should be deducted from the award made by him. The judge observed Mr Benedetti's claim for a quantum meruit was based on the premise that he was entitled to be compensated for the value of the services he had performed Judgment Approved by the court for handing down. Benedetti v Sawiris & Ors. because it would be unjust for those who had received them to take them without payment. The judge went on to hold that, if the brokerage fee had in fact been paid as a cost of the transaction, he could see no reason in principle why Mr Benedetti should not be required to bring that into account in any determination of what was fair reward for the services he had performed, assuming that the payment related to the same services. There was no agreement with Mr Sawiris that Mr Benedetti should not be paid a brokerage fee in addition to his fee under the Acquisition

Agreement. He noted that, when the fees schedules were prepared and it became clear that ITM was to receive the brokerage fee, Mr Abdou and Mr Sawiris assumed that the money would be used to pay Mr Benedetti's costs and other liabilities to third parties.

42. Because Mr Benedetti was not entitled to be awarded by way of quantum meruit a sum for which he had already been remunerated by the brokerage fee, the judge held that he had to apportion the fee of €36.3m to work covered by the brokerage agreement and to other services. He did this on the basis of 60:40 so that Mr Benedetti was entitled to receive €14.52m in addition to the €67m brokerage fee.
43. The judge then turned to deal with a further argument advanced by counsel for Mr Benedetti (Mr Geoffrey Vos QC) that the judge was entitled to have regard to the subsequent negotiations between Mr Sawiris and Mr Benedetti in determining what value the parties in fact placed on the services which Mr Benedetti performed. The judge held that this meant that the issue about the €67m fee largely disappeared because it was clear from the evidence of the terms of the draft supplemental agreement prepared in October 2006 that by then Mr Abdou and Mr Sawiris were aware that Mr Benedetti had received the €67m fee and the fee being offered by Mr Sawiris, €75.1m, was an additional payment (judgment, paragraph 567).
44. The judge recognised the dangers of looking at negotiations between parties to a dispute, who might have various motives for making offers, but he went on (at paragraph 568) to hold as follows: “...But that said, I cannot see why in principle the court cannot receive post-transaction evidence of the parties’ dealings with each other if and so far as that evidence does show the value which the paying party (albeit with the benefit of hindsight) considered that the services were actually worth. The reason for the admission of the parties’ pre-service agreements as set out in cases such as *Way v Latilla* is that they provide strong evidence of the value which they put upon the services. Subject to the safeguards I have mentioned, the post-acquisition dealings may do the same.”
45. The judge rejected an argument that the offer in the course of these negotiations to waive pre-emption rights in respect of the 26.1% share of Weather Italy held by Enel justified the award of an additional payment to Mr Benedetti. He went on to hold, however, that Mr Benedetti should receive an award in the amount which Mr Sawiris was willing to pay to him in cash for his services: Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. “570. The real issue is whether I should increase the fee payable to Mr Benedetti to take account of the €75 million which Mr Sawiris offered to pay under the October agreement. Although Mr Benedetti clearly believes that he is entitled to more, it is difficult to ignore the fact that Mr Sawiris was prepared to pay him considerably more for his efforts than a strict application of market rates would produce. Mr Sawiris says in his witness statement that he regarded the €75 million figure as generous but that is not inconsistent with it representing what he considered Mr Benedetti’s services to be worth. These negotiations did not take place under the shadow of threatened litigation and can properly be considered in my view as a genuine attempt by Mr Sawiris to pay to Mr Benedetti a proper value for what he had achieved.

571. The best evidence of Mr Sawiris's thoughts on this matter is contained in the June and September emails from Mr Abdou quoted in paragraphs 187-189 above. They indicate both the importance which Mr Sawiris attached to Mr Benedetti's role and the reasons why his remuneration should be limited to the payment of a fee. I think that it would be wrong to ignore this evidence when considering the value to be attributed to Mr Benedetti's services. He is entitled, in my judgment, to the €75.1 million in addition to the brokerage fee which he has already received."
46. The judge then turned to the question whether AH/OS should be jointly and severally liable with Mr Sawiris and Cylo for this fee. The judge held that the relevant question was whether AH/OS had freely accepted Mr Benedetti's services and whether it would be unjust for those companies not to pay for them. The judge distinguished the decision of this court in *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2009] 1 WLR 1580 (referred to below as "the Wigan Athletic case"). He held that AH/OS were beneficiaries of Mr Benedetti's services (judgment, paragraph 573). Mr Benedetti accepted that AH/OS could not be liable to him on a quantum meruit unless they had freely accepted his services. But the judge concluded that, as AH/OS knew that Mr Benedetti was providing services and that he expected to be paid, and as they were not required to participate in the acquisition, they had a sufficient degree of freedom to make it unjust for them subsequently to decline to pay Mr Benedetti for what he had done (judgment, paragraph 575).
47. At a subsequent hearing on 21 July 2009 the judge determined the proportions in which the defendants were liable and the basis of their liability. The judge gave a supplemental judgment on that occasion. He held that the liability should be joint, rather than several, and he rejected an argument advanced on behalf of AH/OS that the parties' shares should be apportioned to take account of the fact that those parties had only come into the transaction at a late stage. He also dealt with interest and costs on that occasion. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*.
48. The judge accordingly awarded Mr Benedetti by way of quantum meruit the sum of €75.1m against the respondents jointly. Mr Benedetti was not bound to give credit for any part of the brokerage fee of €67m against this amount, so in aggregate he was entitled to receive €142.1m for his services in connection with the acquisition of Wind. ANALYSIS OF THE ISSUES RAISED ON THESE APPEALS
49. As I have already indicated, following a lengthy trial the judge made meticulous, detailed and comprehensive findings of fact. His extensive and outstanding judgment has been of great assistance to this court. Recognising the obvious difficulty of seeking to overturn any finding of primary fact, Mr Howard, despite the tenor of some parts of the skeleton arguments filed on Mr Benedetti's behalf, has largely eschewed any attempt to do so at the hearing of this appeal and instead focused in his able submissions on various inferences which the judge drew and his holdings on various matters of law. Issue 1: Should the court use the Acquisition Agreement as a template for determining the award by way of quantum meruit?

50. Mr Benedetti points to the paradox that, while the only concluded agreement between Mr Sawiris and him, namely the Acquisition Agreement, provided for him to receive an equity share in the target company, and treated him as an equity partner by prohibiting Mr Sawiris from proceeding with the acquisition of Wind without him, the judge awarded him by way of a quantum meruit for his services a finite sum of money as if he were an investment banker and adviser (which he was not). Mr Howard submits that the Acquisition Agreement is relevant to the amount of remuneration to be awarded to Mr Benedetti even though, in the events that happened, Mr Benedetti has no contractual claim. Mr Benedetti should be compensated on the basis that he should have received a loan to acquire one-third of Weather II.
51. The springboard for these submissions is the decision of the House of Lords in *Way v Latilla* [1937] 3 All ER 759. The plaintiff, Mr Way, was employed by Ariston Gold Mines Ltd, which had mining operations in what is now Ghana (and which I will refer to as such), as a consulting engineer and manager. While on a visit to England, he met Mr Latilla who asked him to look out for options to acquire concessions in Ghana which he (Mr Latilla) might acquire. In return, Mr Latilla agreed to give Mr Way a share in the venture. Mr Way returned to Ghana and certain concessions were acquired through his good offices. Mr Way and Mr Latilla agreed that the amount of Mr Way's reward would be determined on his next return to England. On his return, Mr Latilla promised Mr Way a substantial interest in his newly-formed Gold Coast Selection Trust Ltd. There was no agreement between the parties as to the amount of the interest Mr Way was to receive, but they were agreed on the type of remuneration, namely that he should receive some share of the concessions being acquired. Mr Way brought proceedings to recover his remuneration. The trial judge awarded him the sum of £30,000 on the basis that there was a contract between the parties. This court disagreed and held that no contract was made. Lord Atkin agreed that there was no concluded contract. Lord Atkin went on to hold that the court could not complete the contract for the parties but that Mr Way was entitled to be remunerated on the basis of a quantum meruit. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. The question was the amount of the award. This court had determined, on the basis of evidence from consulting mining engineers, that the proper award was a fee of £600 (per Lord Atkin at page 760C). Lord Atkin held that this ignored the real business position, and that the court should fix the award by reference to the approach to remuneration adopted by the parties. Having set out the decision of this court, he held at page 764: "My Lords, this decision appears to me to ignore the real business position. Services of this kind are no doubt usually the subject of an express contract as to remuneration, which may take the form of a fee, but may also take the form of a commission share of profits, or share of proceeds calculated at a percentage, or on some other basis. In the present case, there was no question of fee between the parties from beginning to end. On the contrary, the parties had discussed remuneration on the footing of what may loosely be called a "participation," and nothing else. The reference is analogous to the well known distinction between salary and commission. There are many employments the remuneration of which is, by trade

usage, invariably fixed on a commission basis. In such cases, if the amount of the commission has not been finally agreed, the quantum meruit would be fixed after taking into account what would be a reasonable commission, in the circumstances, and fixing a sum accordingly. This has been an everyday practice in the courts for years. But, if no trade usage assists the court as to the amount of the commission, it appears to me clear that the court may take into account the bargainings between the parties, not with a view to completing the bargain for them, but as evidence of the value which each of them puts upon the services. If the discussion had ranged between 3 per cent on the one side and 5 per cent on the other, all else being agreed, the court would not be likely to depart from somewhere about those figures, and would be wrong in ignoring them altogether and fixing remuneration on an entirely different basis, upon which, possibly, the services would never have been rendered at all. That, in fixing a salary basis, the court may pay regard to the previous conversation of the parties was decided by the Court of Exchequer in 1869, in *Scarisbrick v Parkinson*, where the terms of an agreement, invalid under the Statute of Frauds, were held to be admissible as evidence in a quantum meruit. This seems to me to be good law, and to give effect to a principle which has been adopted regularly by the courts not only in fixing remuneration for services but also in fixing prices, sums due for use and occupation, and, indeed, in all cases where the court has to determine what is a reasonable reward for the consideration given by the claimant. As I have said, the rule applied in fixing the amount of the remuneration necessarily applies to the basis on which the amount is to be fixed. I have therefore no hesitation in saying that the basis of remuneration by fee should, in this case, on the evidence of the Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. parties themselves, be rejected, and that Mr Way is entitled to a sum to be calculated on the basis of some reasonable participation.”

52. On that basis, the award was fixed at £5,000. Lord Wright agreed with Lord Atkin and gave a short concurring speech. Lord Wright considered that the court had to do its best to arrive at a figure which was fair and reasonable to both parties on all the facts of the case. He continued at page 766: “One aspect of the facts to be considered is found in the communings of the parties while the business was going on. Evidence of this nature is admissible to show what the parties had in mind, however indeterminately, with regard to the basis of remuneration. On those facts, the court may be able to infer, or attribute to the parties, an intention that a certain basis of payment should apply. This evidence seems to me to show quite clearly that the appellant was employed on the basis of receiving a remuneration depending on results. If he had been unsuccessful, he would have been entitled to no more than his expenses, but the respondent had led him to believe that, if the concessions he obtained were valuable, his remuneration would be on the basis of some proportion of their value.”
53. Neither Lord Atkin nor Lord Wright considered that the evidence of the consulting mining engineers, on which this court relied, assisted in determining Mr Way’s remuneration for the services he had supplied to Mr Latilla. Lord Thankerton, Lord Macmillan and Lord Maugham concurred. The speeches of Lord Atkin and Lord Wright are open to the

interpretation that they considered that there was an implied contract for reasonable remuneration between Mr Latilla and Mr Way (see the interesting discussion by Professor Ewan McKendrick in *Restitution, Past Present and Future - Essays in honour of Gareth Jones* (edited by Cornish, Nolan, O'Sullivan and Virgo) (1998, Hart) at pages 168 to 169). However, this interpretation was not adopted by counsel on this appeal, and on balance I take the view that the references to implied contract are driven by the then current analysis of quantum meruit as one of implied contract (for the history see the speech of Lord Nicholls in *Sempra Metals Ltd v IRC* [2008] 1 AC 561 at paragraph 111). The position among other scholars is summarised by Professor Andrew Burrows in *The Law of Restitution* (second edition) at page 374 thus: "[t]he House of Lords sought to justify this on the grounds of a second contract of employment between the parties, but [Professor] Birks and Goff and Jones criticise this as artificial and regard the decision as restitutionary, based on free acceptance." I would add in the margins at this point that the writings of scholars are of great importance in the development of the law of restitution, and we have been supplied by the parties with many extracts from leading works and journal articles (including material from others not named above), which I have found helpful as background in resolving some of the novel issues on this appeal. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*.

54. The above passages from the speeches of Lord Atkin and Lord Wright are authority for the proposition that, where there is no trade usage which assists as to the amount of remuneration to be awarded by way of quantum meruit, the court may take into account "the bargainings of the parties" (per Lord Atkin) or "the communings of the parties while the business was going on" (per Lord Wright). These matters can be taken into account as evidence of the value to be placed on the claimant's services. The court is specifically not concerned to ascertain what kind of agreement the parties would have come to, as would be the case if the court were making an award of damages on the "hypothetical bargain" basis established (for breach of a restrictive covenant) in *Wrotham Park Estate v Parkside Homes Ltd* [1974] 1 WLR
798. In a quantum meruit case, the court is concerned to work out a reasonable value for the services rendered.
55. Mr Howard accepts that Mr Benedetti made no attempt to have the Acquisition Agreement amended, but he submits that the judge was wrong to conclude that the Acquisition Agreement had been abandoned. It was only the mechanics of the transaction that had changed: Mr Benedetti's services were not re-defined. Mr Howard also relies on the reference to the "original agreement" in the email of 11 June 2005. Mr Howard relies on clause 5 of the Acquisition Agreement. He submits that while Mr Benedetti did not have a right to a one-third investment, he had a right of veto to prevent any further share issue without his consent. For the reasons given in paragraph 9 above, I do not consider that this gave him any effective and continuing veto over share issues made to acquire Wind. Mr Howard accepts that there was effectively a breach of clause 7.3.1 of the Acquisition

Agreement that Mr Benedetti elected not to enforce. But, on Mr Howard's submission, the question is not whether the Acquisition Agreement was abandoned but whether the parties intended the Acquisition Agreement to be the framework for their agreement on remuneration.

56. Mr Howard submits in the alternative that, if it is thought unfair that Mr Benedetti should receive any benefit from the injection of Orascom, he should be awarded one-third of Wind alone. Mr Howard relies on the dictum of Briggs J in *Vernon- Kell v Clinch* [2002] EWHC 3092 that the court should adopt a broad approach when determining the amount of an award by way of quantum meruit. Mr Howard does not accept that the court should seek to determine the amount of an award by way of quantum meruit by reference only to market value. Trade usage is only relevant where the parties do their deal on the basis of trade usage.
57. Mr Rabinowitz's response to these submissions is comprehensively to reject them. On Mr Rabinowitz's submission, therefore, the judge was right to find that the Acquisition Agreement had been abandoned. It had no relevance to determining the amount of the award by way of quantum meruit. Mr Rabinowitz contends that the judge found against Mr Benedetti with respect to any understanding that he would be entitled to a one-third share of the whole of Mr Sawiris' investment in Weather II. He submits that that must mean that the Acquisition Agreement cannot be used in awarding a sum by way of quantum meruit as Mr Benedetti contends. To say that the Acquisition Agreement provides a framework on which the court should fix the amount of an award by way of quantum meruit is to seek to resurrect the understanding which the judge rejected. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*.
58. Mr Rabinowitz also relies on the fact that the judge found that, at the time of the negotiation of the Acquisition Agreement and even after the Acquisition Agreement was signed, Mr Benedetti was pursuing the possibility of other investors making the acquisition of Wind and contemplated that this might occur without Mr Sawiris (judgment, paragraph 171).
59. Mr Rabinowitz submits that that shows how far the parties had moved away from the Acquisition Agreement. In addition, Mr Benedetti initialled the final agreement with Enel, which made no provision for him to have an equity stake in Weather II or Weather Italy.
60. Mr Rabinowitz submits that the Acquisition Agreement should not be taken into account and therefore that there should simply be an objective valuation of the benefit of Mr Benedetti's services. As the market value of the services has been established by evidence, there is no need to look anywhere else. With respect to the amount of the award, Mr Rabinowitz relies on the analogy drawn by Lord Scott in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at [41] as a reminder that the amount of the award will not necessarily be on the scale of the profit made by the respondents through the acquisition of Wind: "An analogy might be drawn with the case of a locked cabinet that is believed to contain valuable treasures but to which there is no key. The cabinet has a high intrinsic value and its owner is unwilling to destroy it in order to ascertain its contents."

Instead, a locksmith agrees to try to fashion a key. He does so successfully and the cabinet is unlocked. As had been hoped, it is found to contain valuable treasures. The locksmith had hoped to be awarded a share of their value but no agreement to that effect had been concluded and the owner proposes to reward him with no more than sincere gratitude. The owner has been enriched by his work and, many would think, unjustly enriched. For why should a craftsman work for nothing? However, surely the extent of the enrichment is no more than the value of the locksmith's services in fashioning the key. Everything else the owner of the cabinet already owned."

61. Mr Rabinowitz submits that the fact that Mr Sawiris offered 1% of Weather Italy in the exchange of emails set out above does not mean that he accepted the obligation to give Mr Benedetti an equity share. This was offered as a convenience so that Mr Sawiris would not have to raise cash. Thus, read as a whole, the emails set out above, on Mr Rabinowitz's submission, demonstrate that Mr Benedetti was not to be entitled to an equity participation.
62. Mr Beltrami, on behalf of AH/OS, adopts the arguments of Mr Sawiris and Cylo on this issue, and submits that in any event there is no basis for applying the Acquisition Agreement as a template for any award made against them. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. Conclusions on issue 1
63. For the reasons given, if there is an agreement between the parties as to the way in which a party was to be remunerated, but that agreement was incomplete or for some other reason unenforceable so that the court is required to determine the amount of that remuneration on a claim for a quantum meruit, the exercise which the court must carry out is that of determining the reasonable value of the services rendered. As part of that exercise it may take into account such matters as the parties' prior agreement (see per Robert Goff J in *BP v Hunt*, above paragraph 36), or other communications between them (see *Way v Latilla*, above paragraphs 51 to 54). The court will then give those matters such weight as in the circumstances it thinks fit (see *Way v Latilla*, above). However, a prior agreement will carry little, if any, weight if the parties have made it clear that it is no longer of any consequence in their dealings for any purpose or for that of determining the remuneration for services to be provided. That, as I see it, is why the judge had to decide whether the Acquisition Agreement in this case had been abandoned. *Way v Latilla* also refers to trade usage, but there was no relevant trade usage in this case.
64. Mr Howard's strongest point on abandonment as it seems to me is that the judge did not differentiate between the parties abandoning the Acquisition Agreement in the sense that they proceeded to conduct the same transaction but in some other way, and abandoning the Acquisition Agreement in the sense of regarding it as irrelevant to the way in which Mr Benedetti was to be remunerated. These are distinct possibilities, especially in circumstances where Mr Benedetti effectively continued to carry out services of the same type.

65. I therefore look to see whether that distinction can be substantiated on the judge's findings and whether it can be said that while the Acquisition Agreement was not implemented the parties proceeded on the basis that the approach to remuneration in that Agreement would continue to bind. The matters on which Mr Benedetti relies are (1) clause 5 of the Acquisition Agreement; (2) clause 7.3.1 of the Acquisition Agreement and (3) the terms of the 12 June 2005 email. I have already dealt with clause 5 above.
66. As to the second of those points (clause 7.3.1), Mr Howard submits that the judge was wrong to say that this had been abandoned. Mr Howard's case is that this clause restricts Mr Sawiris from taking up the introduction himself and that this was consistent with Mr Benedetti being an equity partner rather than the provider of a service. But this clause was never asserted and the transaction did not go through Rain. I do not therefore accept that clause 7.3.1 assists the court in assessing the value of the services provided by Mr Benedetti at a later stage. Logically, Mr Benedetti had to have an equity stake under the original method to be used to acquire Wind since that involved being entitled to management fees paid to a management company with a controlling interest in Wind. This logic did not apply to an acquisition through Weather II.
67. The Acquisition Agreement contemplated a very different acquisition from that which took place. There was a sea change. Under the method of acquisition contemplated by the Acquisition Agreement, Mr Benedetti and Mr Sawiris were each to have a carried interest, which would be very profitable to them. But events Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. had moved on. There were practically no investors from outside Mr Sawiris' family. It was no longer a suitable case for a carried interest, and therefore the impetus for an equity stake for Mr Benedetti had diminished.
68. As to the email of 12 June 2005, I do not consider that Mr Benedetti obtains any assistance from the emails set out above read as a whole. There was no suggestion in the evidence that in the negotiations which led to the exchange of emails Mr Benedetti had invoked the Acquisition Agreement. As the judge held (judgment, paragraph 418), Mr Benedetti's email reply of 12 June 2005 was "not a response from someone who believed that Mr Sawiris was contractually committed to give him one-third of Weather II and was intent on reneging on their contract."
69. Accordingly, there is nothing in the judge's findings that supports any distinction between the Acquisition Agreement being abandoned as such and its having some afterlife as a template for fixing remuneration. It is quite possible that the judge treated the two possibilities as one because he considered that the new method of achieving the transaction was so fundamentally different from the earlier method that this afterlife was unrealistic, and that finding was certainly one that was open to him.
70. It is, moreover, simply unrealistic to suppose that the Acquisition Agreement provided a template for remuneration based on giving Mr Benedetti a stake determined by reference to assets which included a controlling interest in the Sawiris' existing empire. That was simply

injected into the transaction to make up part of the price provided by Mr Sawiris and his family and was not part of the acquisition. Mr Benedetti seeks by his alternative case to limit his claim to the Wind assets but that restriction emphasises the point which I am making that the transaction could not go forward on the basis of applying the approach in the Acquisition Agreement.

71. The judge was, therefore, in my judgment well justified in acting on the evidence as to market value and not using the Acquisition Agreement as a template. No-one has criticised his finding as to the market value of Mr Benedetti's services or the fact that he chose a figure at the top end of the scale in the evidence that he accepted. In all the circumstances of the case, he was entitled to award remuneration on the basis of market value on a liberal basis.
72. Mr Rabinowitz went so far as to argue that, if the court found that there was a market value or trade usage apart from communications between the parties, it could not take into account those communications in determining an award by way of quantum meruit. That point does not strictly arise on the way I have analysed Issue 1 on this appeal, but since the point was argued I would express my view that the submission is not correct. The communications between the parties may go to the level of remuneration or, as in *Way v Latilla*, to the type of remuneration or indeed to the fact that the parties agreed on remuneration which was in excess of market value. As I see it, *Way v Latilla* is authority for the proposition that in an appropriate case the court is not tied to market rates for the same or analogous services. In argument, I posed to Mr Rabinowitz the example of a plumber who charges 10% over the market rate. If a customer had agreed that rate in the past, the court, if awarding an amount by way of quantum meruit to the plumber against the Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. customer on a further occasion, would, in my judgment, take into account the parties' course of dealing in the past in preference to market rates. Mr Rabinowitz's response was that there would probably be an implied contract in those circumstances but (as in *Way v Latilla*) that would not necessarily be the case. I would, however, emphasise that my example goes no further than that, in such a case, the court must look to the outward manifestation of the parties' common intentions. It does not deal with the case where there is some subjective expression of one party's wishes in the matter which is not shared by the other party. That is a point which I will come to in more detail in the next Issue.
73. Finally I should make it clear that, while it does not arise in this case, there is in my judgment no objection in an appropriate case to making an order by way of quantum meruit that the award be satisfied by the transfer of shares or some other commodity. Nor of course is there any objection to making an award in a foreign currency (see generally *BP v Hunt*). That point was common ground in this case. Issue 2: Should the judge have taken Mr Sawiris' offer of €75.1m into account in placing a value on Mr Benedetti's services?

74. A further potential paradox in this case is that, although Mr Benedetti's principal case is that his remuneration should be determined by reference to the type and level of remuneration provided for in the Acquisition Agreement, the judge's award was by reference to an offer by Mr Sawiris to pay a sum for his services, an offer which Mr Benedetti never accepted. Mr Sawiris appeals against the judge's order in this regard.
75. It is to be noted that Lord Wright (unlike Lord Atkin) expressly limited his reference to "communings between the parties" to those which take place "while the business was going on". As to the admissibility of communications between the parties after the services have been provided, it appears that the parties started the trial in this case on the basis that such communications were not relevant, but that the position of Mr Benedetti changed late in the trial. The judge directed himself that such communications were admissible, but that caution had to be used in case they were influenced by the existence of a dispute between the parties: "[568] The position of both parties at the start of the trial was that evidence of the post-acquisition negotiations was not admissible on the question of the value to be attributed to Mr Benedetti's services. That remains the Defendants' position. There are, of course, obvious dangers in looking at negotiations between parties to a dispute particularly once the threat of litigation has been made. The would-be Defendant may choose to make a much more generous offer to the Claimant in order to settle the dispute than he would have agreed to pay when the services were actually performed. But that said, I cannot see why in principle the court cannot receive post-transaction evidence of the parties' dealings with each other if and so far as that evidence does show the value which the paying party (albeit with the benefit of hindsight) considered that the Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. services were actually worth. The reason for the admission of the parties' pre-service agreements as set out in cases such as *Way v Latilla* is that they provide strong evidence of the value which they put upon the services. Subject to the safeguards I have mentioned, the post-acquisition dealings may do the same."
76. Caution is, as the judge explains, necessary since a party may have different motives for making an offer, for instance, he may wish, or state that he wishes, to be generous and not care whether the offer represents market rate. Mr Abdou refers to Mr Sawiris' generosity in his email of 12 June 2005 (paragraph 27 above).
77. Mr Rabinowitz submits that the judge was wrong to hold that the post-completion negotiations between Mr Sawiris and Mr Benedetti were admissible for the purpose of determining the amount of an award by way of quantum meruit. The benchmark for any award by way of quantum meruit is the value to the defendant on an objective basis. The judge had already made a finding as to the market value of the services provided by Mr Benedetti, and he should not have departed from that. In any event, the judge should not have taken into account any post-completion negotiations in this case. When Mr Sawiris made his offer of €75.1m, he did not know that the €67m brokerage fee had been paid to Mr Benedetti personally. Moreover, the judge was wrong to hold that the emails were not under the threat of litigation.

78. Mr Howard submits that the court has to put the €75.1m offer into the pot in deciding the amount of an award by way of quantum meruit. He submits that part of what *Way v Latilla* decides is that the court should look at communications between the parties to see what value they place on the services. Thus the court may take into account matters specific to the defendant. Mr Howard also submits that there was no threat of litigation when this offer was made, and submits that in the course of giving evidence Mr Sawiris denied that there was a threat of litigation.
79. The arguments of Mr Sawiris and Cylo on this issue are adopted by AH/OS.
80. In my judgment, the starting point is to determine the date at which the court should value the services of Mr Benedetti. I agree with the judge that these services have to be valued as at the date when the services had been fully provided. Any other date might confer a windfall on a party. The relevant date on the face of it would be when the SPA was signed.
81. That does not mean that the court is not entitled to have regard to communications that take place after that date. When the court is valuing an asset or liability as at a particular date it is entitled to have regard to evidence after that date which throws light on that value (see *The Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v The Pontypridd Waterworks Co* [1903] AC 426). I therefore consider that the judge was entitled to look at the offer of €75.1m even though it was made after the valuation date. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*.
82. In my judgment, the question of the weight to be given to that offer should be answered in the following way. Mr Sawiris requested Mr Benedetti to perform services, and the benefit conferred by the services on Mr Sawiris was considerable (see above) and also non-reversible. The task for the court is to value that benefit (see per Robert Goff J in *BP v Hunt*, at pages 839-840). In the case of services, it may be difficult to perform the valuation exercise in any given case. In general, however, the correct measure of the value of a benefit is its market value. It would certainly be unfair in this instance to Mr Benedetti to take as a measure of the benefit merely the cost to him of providing the services; given that Mr Sawiris requested his services, such a measure would in my judgment be inappropriate. Neither party contends that there was an express or implied agreement that Mr Benedetti would be paid a reasonable sum, which would authorise the court to fix the amount on that basis if there was a disagreement. Market value is thus the obvious measure of value of the benefit in this case.
83. Mr Benedetti, however, submits that market value is an inadequate measure of the benefit, because the value to Mr Sawiris was very much higher, as is apparent from the fact that he made an offer of well in excess of market value.

84. I would accept that in some circumstances it is appropriate to take the value of the benefit to the particular defendant. But it would not be appropriate to do so in all circumstances. For example, it would not be appropriate to do so where the value to the defendant was less than market value. But the value to Mr Sawiris was clearly higher than market value: should the judge have taken the offer of €75.1m into account?
85. If the parties had reached an agreement about the amount to be paid for services, and for some reason that agreement was unenforceable, or that agreement formed part of a larger transaction, which was never completed, then, my judgment, it would be right for the court to take into account the parties' agreement. The reason for doing so would be that the parties' agreement as to price may assist in establishing the value, or (if that was the appropriate measure) the value of the service to the recipient. What *Way v Latilla* is saying is that that agreement does not have to be found in some enforceable agreement; it can be found more informally. But some significance attaches to the fact that the expressions used to refer to this sort of informal agreement are "bargainings" (per Lord Atkin) and "communings" (per Lord Wright). These are words that imply some engagement or rapport between the parties. But the figure of €75.1m was not in this case a figure that the parties were in any sense agreed on. Mr Benedetti ultimately did not accept it because the conditions on which he was prepared to accept it did not come to fruition. Nor did he accept the methodology in the offer made by Mr Sawiris as establishing a framework on which remuneration should be worked out. In those circumstances, it was, in my judgment, an error to take the €75.1m figure into account to the extent of substituting it for the market value of the services provided. It gave Mr Benedetti a windfall: it was something he had not agreed, but which was in excess of market value as found by the judge. It was also unjust to Mr Sawiris because it was never agreed. It would therefore impose on him something that had never been accepted. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*.
86. The figure of €75.1m originated in about June 2005. The only evidence that we have seen of its origins is that contained in the emails. It is said that the offer throws light on market value but there is nothing expressly said in the emails to suggest that the €75.1m figure could provide the court with any guide as to the market value of Mr Benedetti's services, and the judge accepted expert evidence that demonstrated that it did not reflect market value. Evidence as to later communications containing that figure merely repeat the offer and, apart from the fact that the parties were by October 2006 nearer the start of this litigation, there is nothing in that later evidence to shed light on the market value of Mr Benedetti's services as opposed to an offer that for whatever reason Mr Sawiris was prepared to make.

87. Mr Rabinowitz takes the further point that in any event the communications on which the judge relied had in fact been made under the threat of litigation and therefore little weight should have been attached to them. In the light of the conclusions that I have reached it is not necessary to determine to what extent the communications took place under the threat of litigation, but I agree with the judge that that factor could certainly affect the weight that could be attached to them as evidence of the market value.
88. Mr Howard goes so far as to argue that under *Way v Latilla* any communications between the parties, however vague, can provide a guide to the court when determining the amount of an award by way of quantum meruit. It follows from the above that I reject any such blanket submission. I bear in mind that Lord Wright used the words “however indeterminately” in the passage quoted in paragraph 52 above, but this was in the context of determining the parties’ common intentions and not in relation to subjective statements by a party which do not find favour with the other.
89. In all the circumstances, in my judgment the judge fell into error in taking the figure of €75.1m into account. Issue 3: Miscellaneous issues about the amount of the award by way of quantum meruit
- (a) Should any award have been made given the payment of the €67m brokerage fee?
90. Mr Rabinowitz submits the judge was wrong to make any award by way of quantum meruit in favour of Mr Benedetti, given the brokerage fee of €67m that had been paid. The judge’s award was excessive because Mr Benedetti had already been paid in excess of the market rate. The whole of this sum was paid to him as a cost of the transaction by the respondents in the belief that it was a payment to third parties.
91. Mr Howard does not accept that Mr Benedetti was disentitled to any remuneration because he had already received the fee of €67m (which Mr Howard concedes went to Mr Benedetti personally), and that this fee exceeded the market value of his services as found by the judge. The judge did not find that Mr Benedetti was dishonest. He held that the brokerage fee resulted from the IPE transaction, not the Acquisition Agreement, and that is important. Mr Sawiris knew about the €67m fee when he came to negotiate with Mr Benedetti in January 2006. As I have already explained in paragraph 31 above, there is an issue as to when Mr Sawiris first knew that Mr Benedetti had arranged for the payment to himself of the €67m fee. Mr Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. Rabinowitz submits that Mr Sawiris was not aware of this at the time of the June or September emails set out above. But the judge clearly found that Mr Sawiris had suspicions in January 2006. His evidence was that Mr Benedetti continued to deny receiving the fee and so he did not press it. Certainly, as Mr Howard submits, by the time of the draft supplemental agreement to the Revised Brokerage Agreement in 2006, Mr Sawiris was making an offer by way of compromise which would enable Mr Benedetti to have the sum of €75.1 million in addition to the fee which had already been paid.

92. Mr Beltrami adopts Mr Rabinowitz's submissions and submits that the judge should have found that any liability of AH/OS to Mr Benedetti had been discharged as they were largely responsible for the payment of €67m under the Revised Brokerage Agreement (in their capacity as 91% shareholders of Weather II, which was the ultimate holding company of the company which paid this fee).
93. On this appeal, Mr Sawiris does not say that Mr Benedetti was not entitled to retain the €67m fee. He says that it should be treated as a deduction from the amount awarded to Mr Benedetti. The judge made a deduction from the award of an amount reflecting the overlap between the services for which the brokerage fee was paid and the award. In my judgment, if Mr Benedetti has been wrongly paid the €67m fee to any greater extent, the paying company has or would have had remedies against him, which it can pursue. In my judgment, it is not right to short circuit the pursuit of those remedies and give Mr Sawiris all that could be obtained in proceedings brought for that purpose by treating the €67m as a deduction from an award. There is no basis for saying that the overlap was total. I agree with the judge's approach.
94. There were a number of points taken by Mr Sawiris in his notice of appeal and skeleton argument about the judge's apportionment of the services for which Mr Benedetti received the €67m fee and the services for which the quantum meruit was awarded but these were not pursued orally and I accordingly do not propose to deal with them.
95. It follows that I do not accept that, if AH/OS are unsuccessful in their appeal against the judge's order against them, they are relieved of liability because they indirectly made payments in discharge of the €67m fee.
- (b) Should Mr Benedetti have been awarded a 20% interest in Weather II?
96. As a subsidiary argument, Mr Howard submits that there was evidence that a promoter would have received an equity share of 20% and Mr Benedetti should be remunerated as a promoter because his actions enabled this investment to be unlocked and because of his rights against Mr Sawiris under clause 7.3.1 of the Acquisition Agreement (which I described in paragraph 12 above).
97. On Mr Howard's submission, the judge was wrong to say that unlike a promoter Mr Benedetti was not intended to have a continuing role in the management of Weather. Even the negotiations with IPE envisaged that Mr Benedetti would have an equity stake. The judge, however, found that Mr Benedetti did not assert that he Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. would have any ongoing management role in Wind (judgment, paragraph 560), and that was normally the case if an equity stake was to be given.
98. This alternative case was not put with great clarity. Mr Howard did not submit that the judge was clearly wrong to hold that Mr Benedetti was not a promoter. Nor did he challenge the judge's conclusion, having heard the expert evidence, that there was no generally recognised

role of “promoter” (judgment paragraph 560). Clause 7.3.1 of the Acquisition Agreement cannot, in my judgment, afford Mr Benedetti any success on this issue because it was not raised at the time of the acquisition of Wind. In all the circumstances, I reject Mr Benedetti's case on this issue.

- (c) Should the judge have taken into account the offer to waive pre-emption rights over Enel's 26% interest in Weather Italy?
99. As a further subsidiary argument, Mr Howard argues that the award by way of quantum meruit should also have taken account of the offer by Mr Sawiris to waive his pre-emption rights over the 26.1% shareholding in Weather Italy owned by Enel. He submits that the judge should have ascribed a value to Mr Sawiris' willingness to waive his right of pre-emption to enable Mr Benedetti to take up this right. On this basis, Mr Benedetti should be entitled to the €75.1m plus the potential profit on the 26.1% stake (based on the price at which Mr Sawiris had originally acquired his shares in Weather Italy). 100. In my judgment, this submission must fail on the facts. What happened was that Enel placed too high a price on the shares for Mr Benedetti to wish to exercise it. Thus no agreement with Enel was reached. Mr Benedetti's position in those circumstances was that the offer of €75.1m was not acceptable. No evidence was adduced to show that it was of any value. Moreover, when the judge gave his judgment he held that the offer to waive pre-emption rights was not part of the offer to pay Mr Benedetti for his services (judgment, paragraph 569).
101. Mr Howard seeks to meet these difficulties by submitting that the waiver is still relevant to the quantum meruit because Mr Sawiris clearly thought it had a value, for otherwise he would not have offered it. Mr Rabinowitz submits that this point was not open to Mr Benedetti on the pleadings. Irrespective of that point, in my judgment, the argument made on behalf of Mr Benedetti has to be rejected on the grounds that Mr Sawiris' perception as to a higher value of Mr Benedetti's services casts little, if any, light on the objective value of Mr Benedetti's services. Issue 4: Should AH/OS be liable on the award by way of quantum meruit for the services of Mr Benedetti?
102. A further paradox in this appeal concerns the parties liable to pay the award made by way of quantum meruit. Although Mr Benedetti submits that the award to him by way of quantum meruit should have taken account of the Acquisition Agreement made between him and Mr Sawiris and also the subsequent offer of €75.1m made by Mr Sawiris, the order which he obtained at trial was not only against Mr Sawiris (and his associated company, Cylo) but also against AH/OS. They were not parties, either to the Acquisition Agreement or the offer. In other words, the special feature Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. of this aspect of this restitutionary claim is that it is sought to be raised against persons who were not parties to the prior agreement between the parties who requested the services. This is not the usual bilateral situation, such as occurred in *Way v Latilla*, but a trilateral situation in which liability is sought to be attached not simply to the parties to the request for the services but also to those who received their benefit. They are, if no liability in restitution attaches, in the position of those whom economists call “free

riders”, like people who do not share in the costs of group litigation but receive the benefits of it through being members of the same group.

103. As I explained in paragraph 46 above, the judge was satisfied that AH/OS were liable on the basis that they had freely accepted Mr Benedetti’s services. Mr Beltrami challenges that holding.
104. Particular attention has been focused in argument on the decision of this court in the Wigan Athletic case, cited by the judge. This is a recent authority on restitution in the bilateral situation referred to above. In the Wigan Athletic case, the claimant chief constable of police (“the police”) brought a claim to recover the costs of providing police at matches at the grounds of the defendant (“the Club”). His claim pursuant to statute and in contract failed and he sought to establish liability in restitution. This court applied the four requirements for a restitutionary claim set out in the judgment of Lightman J in *Rowe v Vale of White Horse* [2003] 1 LLR 418 at paragraph 11: “..[T]here are four essential ingredients to a claim in restitution: (i) a benefit must have been gained by the defendant; (ii) the benefit must have been obtained at the claimant's expense; (iii) it must be legally unjust, that is to say there must exist a factor (referred to as an unjust factor) rendering it unjust, for the defendant to retain the benefit; (iv) there must be no defence available to extinguish or reduce the defendant's liability to make restitution.”
105. This court critically examined the first ingredient. The Chancellor held that there had to be either a request for the services or free acceptance of them or an incontrovertible benefit, and the other members of the Court agreed with him on this point. With regard to free acceptance, the majority, the Chancellor and Smith LJ, held that, as the Club had objected to the extra services and had no option to reject them without also rejecting those services that it did want, it could not be said to have freely accepted the extra services. It was not necessary for it to tell the provider of the services that it did not want the services and that it did not intend to pay for them. In addition, there was no evidence that it had in fact received a benefit by the provision of the additional services. Maurice Kay LJ disagreed on the facts as to whether a benefit had been provided, since, in his judgment, the Club could not have provided fixtures open to the public without the extra services in question. But, in the view of the majority, the Club had been faced with, as the Chancellor put it, “Hobson’s choice”: the additional services had been forced upon them if they wanted the basic services. The Club could not prevent the police from providing the services. This was so even though it could have declined to hold the matches in question. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*.
106. There is of course no reason why any acceptance had to take place before the benefit was provided. If there is the free acceptance of services to be provided for a particular price, there is no need for the court to form a view as to the value of the services. I propose to consider the issue of whether there was free acceptance by AH/OS in this case against the background of my conclusion on Issue 2, namely that the court should not have regard to the offer of €75.1m when determining the amount of the quantum meruit. The making of

that offer, however, remains part of the narrative. 107. I start by reviewing some of the judge's findings and evidence. As stated, there was no agreement between Mr Benedetti and AH/OS. They came on to the scene at a stage subsequent to the negotiation and execution of the Acquisition Agreement. Mr Benedetti's evidence that he had an agreement with Mr Sawiris demonstrated that his perception was that he should look to Mr Sawiris alone for payment for his services, and the judge refers to no relevant communication between Mr Benedetti and AH/OS: it has, however, to be said in fairness to Mr Benedetti that he did not know about the interposition of AH/OS until shortly before the SPA was signed. Mr Benedetti received the €67m fee in August 2005, and this was substantially paid by AH/OS, in their capacity as major shareholders in Weather II. Mr Sawiris made the €75.1m offer alone. The judge did not find that the offer was made by AH/OS as well. Nor did the judge find that Mr Sawiris was agent for or controlled either company (even though Mr Benedetti alleged at trial that AH/OS were controlled by Mr Sawiris). There was an issue about knowledge and, as I explained in paragraph 46 above, the judge found that AH/OS knew that Mr Benedetti was providing services and that he expected to be paid. Mr Sawiris was appointed an alternate director of OS but this was only for six days to enable him to sign certain documents.

108. Mr Sawiris was, however, prepared to accept in cross-examination that he would have regarded AH/OS as associated with him for the purposes of clause 7.3.1 of the Acquisition Agreement, which I have described in paragraph 12 above. The relevant exchanges were as follows: "Q. I will ask you this question: you understood when you signed this agreement, did you not, that April Holding was a person associated directly or indirectly with you and that remained the position until May 2005? A. Okay, I will – your worship, I will make it easier for counsel. He is asking whether this would fall – if April was the buyer of WIND, would they be in violation of that clause? The answer is yes. Q. The same applies if OS Holding was the buyer of WIND? A. Yes, if both of them, if they were buying the company behind Mr Benedetti's back and without his consent and without his knowledge, they would really be in breach of that clause, yes." Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*.
109. Mr Beltrami submits that the mere fact that AH/OS entered into the acquisition of Wind did not mean they were beneficiaries of Mr Benedetti's services for the purposes of any claim in quantum meruit or that they freely accepted Mr Benedetti's services. Mr Benedetti's evidence was that the only party with whom he had a relationship, and by whom he expected to be paid, was Mr Sawiris. He submits that the judge was wrong to find that AH/OS had accepted the services by virtue of their decision to enter into the Wind acquisition. The correct question was not whether they had freely decided to join the transaction but whether they had freely decided to accept Mr Benedetti's services. They were not in a position to freely accept or reject these, since they were provided not to them but to Mr Sawiris. Mr Beltrami submits that in the light of the *Wigan Athletic* case, the question is whether one can accept or reject the services without interfering with what one is otherwise doing. Moreover, the judge failed to consider whether AH/OS had been unjustly enriched at Mr Benedetti's expense and, if he had done so, he should have found that they had not been. Mr

Benedetti had thus created the impression that there was no liability. 110. Mr Beltrami submits that AH/OS had insufficient knowledge to support liability on the basis of free acceptance. The judge did not make a finding that AH/OS knew that Mr Sawiris had requested Mr Benedetti's services and expected to pay Mr Benedetti, but, as I see it, this would follow from the finding that the judge made about their knowledge of Mr Benedetti's role.

111. Mr Beltrami submits that, in paragraph 475 of his judgment, the judge rejected the idea that there had been any variation of the Acquisition Agreement. AH/OS were not parties to that or any other agreement with Mr Benedetti. In those circumstances there could not, he submits, be any liability on the part of AH/OS. He points out that Mr Benedetti does not contend that the Middle Eastern investors who took up 2.8 % of Weather II at the first closing are also liable to pay for his services. 112. If there had been a contract between Mr Benedetti and Mr Sawiris there would have been no question of suing AH/OS. Mr Beltrami submits that this situation is close to that in which there is no remedy in restitution because a benefit is conferred and the recipient reasonably believes that a third party is liable to pay for it. In any event, Mr Benedetti would not have stopped supplying the services if he had known that they objected to paying. There was, he submits, no unjust factor since Mr Benedetti was to be paid by Mr Sawiris.
113. Mr Howard's answer to these points focuses on the knowledge that AH/OS had. Mr Sawiris was the sole director of April; he was an agent to represent OS. Accordingly, on his submission, the judge rightly found that AH/OS had full knowledge of Mr Benedetti's services. Mr Howard submits that in the light of their close relationship to Mr Sawiris they should be treated as parties who requested the service. Because of the benefit that they obtained, and the request which should be thus imputed to them, there was no need for Mr Benedetti to show that AH/OS had freely accepted his services. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. 114. I now turn to my conclusions. I approach this issue from the judge's finding that Mr Benedetti's services were of considerable benefit to the shareholders in Weather II; and on the basis of my earlier conclusion that the judge's award as against Mr Sawiris and Cylo should be not be in the sum of €75.1m. Therefore I do not need to address here the submission (also made by Mr Beltrami) that Mr Sawiris' offer in that amount was not made on behalf of AH/OS. There has been no suggestion that Mr Sawiris was at any time an agent for AH/OS.
115. The position of AH/OS is quite different from that of Mr Sawiris. There was no previous contract between AH/OS and Mr Benedetti, still less an agreement fixing the amount of any remuneration for Mr Benedetti in connection with the acquisition of Wind. AH/OS were the innocent recipients of the services which Mr Benedetti provided at the request of Mr Sawiris. If there is a conflict between their interests and those of Mr Benedetti, the law ought in my judgment to protect them from having to pay for Mr Benedetti's services if they were unable to refuse them. Mr Benedetti provided them without taking the time to obtain the agreement of AH/OS to pay for them. 116. I have referred above to the famous dictum of

Pollock CB that: "One cleans another's shoes. What can the other do but put them on?" It is a somewhat mundane example but it provides the opportunity of illustrating where the law stands on the issue of bilateral and trilateral claims. The application of shoeshine confers no lasting benefit. Suppose that instead of leaving his shoes in a position where they can be cleaned by another, the owner of a pair of shoes had left them with a cobbler with instructions to reheel them (a service for which he would clearly be liable to pay) but the cobbler in error provided the unsolicited additional service of resoling them. It is difficult to see why in law the additional service should be paid for by the owner of the shoes, still less by a third party, for example, a person to whom the shoes had been sold or lent. This would be so even though the shoes might need to be resoled at some point. It might, however, be quite different, if the cobbler added new leather shoelaces, which (unless he had previously disposed of them) the owner of the shoes, on realising the cobbler's mistake, could take off and hand back to the cobbler or indeed sell to someone else. The shoelaces are a separate tangible benefit which can be returned to the mistaken cobbler.

117. To clear one matter out of the way, there was no necessity for Mr Benedetti to provide his services to AH/OS: the services he provided were not akin to those that might be provided by a medical practitioner, in the absence of other medical help, to someone who has suffered an injury and is in a coma. In the examples last given with the shoes, there could be no necessity sufficient to justify extra repairs to the shoes without the owner's consent.
118. Here, there was no request by AH/OS and none in my judgment can be implied. The parties have concentrated on the question whether there was free acceptance or incontrovertible benefit as a result of the provision by Mr Benedetti of his services. Free acceptance can be express or implicit. However, in the example of the person who gratuitously cleaned the shoes in Pollock CB's example or who gratuitously resoled the shoes in my example, it would not be enough to constitute free acceptance that the owner of the shoes put on the shoes and walked away. As the Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. Chancellor held in the *Wigan Athletic* case, there cannot be free acceptance of a benefit, even by conduct, unless the person had an opportunity to reject the benefit. That must mean that it is not enough merely to know that the services are being provided or to have the option of not engaging the activity that would mean that the benefit of other services was received. A person in general at least owes no obligation to take steps to desist from an activity on which he is currently engaged by reason only that it might lead him to benefit from the services being provided to him without his consent, express or implied.
119. AH/OS freely entered into the SPA with Enel leading to the acquisition of Wind, and the judge held that because they could have done so they must be taken to have freely accepted the benefit of Mr Benedetti's services. But if they had declined to enter into the SPA, they would have received no benefit from the acquisition either. In my judgment, it follows from the *Wigan Athletic* case that what is required to establish free acceptance is that they should have had the opportunity to proceed with the investment without receiving Mr Benedetti's services. I accept Mr Beltrami's submission on this, and consider that the judge was thus in

error in holding that free acceptance was constituted by their decision to proceed with the investment without rejecting Mr Benedetti's services. The option of rejecting his services and proceeding with the investment was not an option that was ever available to them, and accordingly, in my judgment, they cannot be said by virtue of having proceeded with the investment to have freely accepted the benefit of Mr Benedetti's services. There was no way in which AH/OS could satisfactorily disembarass themselves of Mr Benedetti's services.

120. However, even though, if there had been free acceptance, that would have fixed AH/OS with liability, its absence does not mean that there is no other basis for Mr Benedetti's claim. Mr Benedetti could still succeed if he could demonstrate an incontrovertible benefit to AH/OS as a result of his services. As I pointed out at the beginning of this discussion of this issue, however, the distinguishing feature of this case is that we are dealing with a trilateral situation. In this case, Mr Benedetti provided services to Mr Sawiris who was liable to pay for them. There is no evidence that he provided those services so that AH/OS could benefit from them. Likewise there is no evidence that Mr Benedetti ever expected AH/OS to pay for them. There is, as I see it, no incontrovertible benefit to them justifying the imposition of a liability to make payment because Mr Sawiris was in any event liable to pay for the services and AH/OS on the face of it had no such liability. 121. One might perhaps add this: if Mr Benedetti had given Mr Sawiris some confidential information in the course of performing his services, for example, information as to some other asset Enel wished to sell and which it might be possible to acquire on advantageous terms, would Mr Sawiris have been able to argue that the information was his and that he did not have to share it with AH/OS? In my judgment, that question would have been open to debate given that there is no evidence that Mr Sawiris treated AH/OS as beneficiaries of Mr Benedetti's services in the same way that he was. Moreover, while the acquisition of the shares was undoubtedly beneficial to them, the services, unlike the shoelaces in my example given above, cannot be considered as an item of value in their hands separately from the shares or as a matter which led to the saving in costs that they would otherwise have had to incur. In all the circumstances, there was no benefit which it would be Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. unjust for them to retain without payment. In my judgment, the benefit must have that added quality to give rise to a restitutionary remedy. 122. In the circumstances, I would find in favour of AH/OS on this issue. Issue 5: should the liability of the respondents be joint and several or only several in proportion to the size of their shareholdings in *Weather II*?
123. The judge held that the responsibility of the respondents was joint and several. In the light of my conclusion on Issue 4, and Mr Rabinowitz's acceptance that there should be no distinction between Mr Sawiris and Cylo, there is no need to consider Mr Rabinowitz' submission that the liability of the defendants in the action should not be joint but several, assessed by reference to the level of shareholdings in *Weather II*.

124. Mr Beltrami also submits that any liability imposed on AH/OS should be several (not joint and several as the judge held). Mr Beltrami also argued that the liability of AH/OS should be less than that of Mr Sawiris and Cylo as they came into the transaction at a later stage but there was no material to enable the court to consider what difference that made.
125. Again, in the light of my conclusion on Issue 4, it is not necessary for me to deal with the points which Mr Beltrami raises on this Issue. Issue 6: Costs and interest
126. Mr Benedetti appeals against the judge's subsequent orders in respect of interest and costs.
127. As to costs, Mr Benedetti contends that the judge was wrong to require Mr Benedetti to pay the defendants' costs (on the standard basis) and should have ordered the respondents to pay costs (with a reduction to reflect his lack of success on certain issues). This contention entails an examination of the totality of the trial but it is throughout premised on the award of €75.1m which the judge made in his favour, and Mr Benedetti being the successful party. On the conclusions that I have reached thus far, the question of challenging the judge's order on this premise no longer arises. Thus Mr Benedetti's appeal against the judge's order on the basis of that premise must fail. There is unsurprisingly no application by Mr Sawiris or AH/OS for a variation in the judge's order as to costs, which accordingly stands.
128. Since drafting this judgment, I have had the benefit of reading the judgments of Etherton and Rimer LJ, who have expressed different reasons for upholding the judge on the issue of costs. As to the difference between them, I would respectfully agree with Rimer LJ that the challenge to the judge's decision on costs must also fail on its merits for the reasons which he gives in paragraphs 184 and 185 of his judgment and for the additional reason that, even if the judge was wrong to rely on the offer made in October 2006, there was already an offer of that amount in June 2005 which Mr Benedetti was able to accept. Although this offer, if taken in cash, was made subject to agreeing a timetable for payment, there is no indication that the postponement of payment would necessarily have been beyond August 2005, or, if Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. beyond that date, that Mr Sawiris would not have agreed to pay interest at an appropriate rate. That offer was still available in January 2006 (judgment, paragraphs 448 to 450). Six months was adequate time for Mr Benedetti to accept this offer. (No distinction has been drawn on this appeal to the fact that sometimes the offers are said to be for €75 million and sometimes for €75.1 million.) In addition, it may be borne in mind that by the time the judge dealt with costs, he had already concluded that there should be no statutory interest prior to 15 June 2009. For the reasons given below, in my judgment, he was entitled to take this view. Accordingly when the judge states in paragraph 21 of the supplemental judgment on costs "Mr Benedetti was offered and could have accepted in 2006 exactly what he has now been awarded in the action", his statement was in the light of his order accurate and Mr Benedetti ought reasonably to have been aware that if he began proceedings he would not be entitled to statutory interest as of right from 12 August 2005.

129. As to interest, the judge in exercise of his discretion under s 35A of the Senior Courts Act 1981 awarded Mr Benedetti interest (at 1% above Euribor) from the date of the delivery of his main judgment (15 June 2009). Rimer and Etherton LJ consider that the judge was wrong in principle in this and that he ought to have ordered interest from 12 August 2005, but in my judgment the judge was entitled to come to the conclusion that he did. The starting point in my judgment is that the judge made a crucial finding in paragraph 11 of his supplemental judgment when he dealt with interest that it was clear that Mr Benedetti: “would not have accepted the €75.1 million at any time up to judgment had the offer been repeated. The delay in receiving that money is entirely of his own making.” The approach to the exercise of the discretion to award interest implicit in the judge’s holding on this point was followed by Teare J in *Sawiris v Marwan* [2010] EWHC 89 (Comm). 130. I would summarise the principles applying to the exercise of the discretion to award interest pursuant to s 35A of the Senior Courts Act 1981 as follows.
- (1) The court should normally award interest pursuant to s 35A of the Senior Courts Act 1981 to a successful claimant as from the date on which his cause of action arose in order to compensate him for having been kept out of his money (see per May LJ in *The Popi M* [1984] 2 Lloyd’s Rep 555 at 561, which is set out by Etherton LJ at paragraph [164] below). This is the core principle. The defendant will have had the benefit of the use of the money in the meantime. The court does not have to enquire whether the defendant actually used the money for any commercial purpose: it may assume that he did.
 - (2) The jurisdiction to award interest should not be used to penalise the party for his conduct of proceedings: the discretion in relation to costs is available for that purpose. As Rimer LJ points out in paragraph 176 below, the same would apply in relation to the conduct of negotiations.
 - (3) The court has a discretion not to award interest pursuant to s 35A of the Senior Courts Act 1981 where a party has delayed in issuing Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. proceedings (see, for example, per Robert Goff J in *BP v Hunt* [1979] 1 WLR 783 at page 848, and per Langley J in *Kuwait Airways Corporation v Kuwait Insurance Company SAK* [2000] Lloyd’s Rep IR 678, cited by Etherton LJ in paragraph [164] below).
 - (4) In my judgment, the discretion to withhold interest is also exercisable where a party has refused to accept an offer of not less than the amount which he has succeeded in recovering in the proceedings. It is the same principle as that of delay in issuing proceedings. The award of interest does not then compensate him for loss caused by the defendant but potentially gives him a windfall. I have not found authority for this proposition, apart from the decision of Teare J cited above, which followed that of the judge on this point. For the reasons given, I consider that it follows in principle. Although not on all fours, it may be observed that, at common law, in an action on a promissory note carrying interest, interest was not recoverable once an offer of payment was made: see *Dent v Dunn* (1812) 3 Campbell

296 170 ER 1388 where Lord Ellenborough held: Interest, properly speaking, “I think interest ought to stop from the offer to pay. is a compensation agreed to be paid for the use of money forborne by the lender at the borrower's request. It is more frequently recovered in the shape of damages for money improperly retained by the debtor contrary to the request of the creditor. But in neither of these ways can interest continue to run after an offer to pay the principal, upon a reasonable condition, which the party to receive it refuses, or is not in a situation to fulfil.”

- (5) If the court considers that there has been a delay or refusal of this kind, it may consider that the justice of the case is sufficiently met by withholding interest for part only of the period: this might in some cases be appropriate if the offer in question was available for part only of the period.
 - (6) In respectful disagreement with Rimer LJ, I do not consider that the successful claimant's refusal of an offer which meets his claim should be disregarded simply because the claimant wished to pursue another claim which did not succeed. For this purpose, it does not seem to me that the court needs to consider whether he was acting properly or in good faith or not. If he was erroneous in proceeding with the other claim, he should not be treated as entitled to do so on the basis that he will nonetheless not be subject to the withholding of interest from the defendant on the claim which does succeed. Although the defendant has had the use of that money, in principle, where there is acceptable offer, it is the claimant who should bear the risk and cost of failure. He has taken a deliberate decision not to accept an offer which would satisfy the claim which he can establish in law. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*.
131. As the withholding of interest in this case was a discretionary exercise of judgment, Mr Benedetti has to show that the judge materially misdirected himself or that his order was perverse. While Mr Benedetti does not dispute the rate awarded, Mr Howard submits on his behalf that the correct date for commencement should be the date when his services were substantially complete, i.e. 12 August 2005, as that is the date when his cause of action in restitution arose. The judge no doubt made his decision on interest against the background of the whole of the facts of the case. In my judgment, given that the judge made a finding that Mr Benedetti would not have accepted the sum of €75.1m at any stage down to judgment, there was no misdirection in law by the judge and the judge was well within the bounds of his discretion in ordering that interest should only run from the date of his judgment determining the amount of the award. Mr Benedetti was kept out of his award by his own intransigence and refusal to take a reasonable line in settling his claim, and not by virtue of the wrongful conduct of Mr Sawiris and Cylo. In those circumstances the judge was entitled to take that the view that he was not entitled to compensation for being kept out of his money. It was not a question of the court wrongly penalising Mr Benedetti for a matter which should more properly have been dealt with in costs, but of the court looking to see what caused the delay in his receipt of the sum to which he was entitled. It is clear that, as at June 2005, Mr Sawiris was ready, willing and able to pay Mr Benedetti for his services the

sum of €75.1m in cash.

132. The basis of the award is now materially different, but in the light of the judge's finding about the continuous rejection of the sum of €75.1m, I do not consider that the fact that the award has been materially reduced represents a change in circumstance which should lead to the setting aside of the exercise by the judge of his discretion as to interest. 133. I would dismiss the appeal on interest and costs. As Rimer and Etherton LJ would allow the appeal on interest but they are not agreed as to the period for which statutory interest should be ordered on the substituted sum of €14.52m awarded by way of quantum meruit, in place of the judge's order on interest, there will have to be further submissions on that point.

Disposition

134. My answers to the Issues identified above are: Issue 1: the Acquisition Agreement does not provide any useful guidance in the determination of the award by way of quantum meruit in favour of Mr Benedetti. Issue 2: the offer of €75.1m made by Mr Sawiris in respect of those services is not evidence of the market value of those services and should not be given weight in determining the amount of the award by way of quantum meruit. Issue 3: The judge was correct to deduct only a proportion of the €67m brokerage fee paid to Mr Benedetti when determining that award. Mr Benedetti has failed to show that he should be remunerated Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. as a promoter or that Mr Sawiris' offer to waive his pre-emption rights over the Enel shareholding ought to have been taken into account. Issue 4: AH/OS are not liable on the quantum meruit. Issue 5: Mr Benedetti's challenge to the judge's order as to costs fails. Issue 6: The judge was entitled to award interest under s 35A of the Senior Courts Act 1981 only from the date of his judgment determining the amount of the award by way of quantum meruit. 135. I would therefore dismiss Mr Benedetti's appeals, and allow the appeals of the respondents in part, accordingly. Lord Justice Etherton (delivering the second judgment at the invitation of Lord Justice Rimer): 136. In the course of his oral submissions Mr Rabinowitz described Patten J's judgment delivered on 15 June 2009 on the substantive issues of liability ("the judgment") as a remarkable judgment in terms of the number of issues that had to be addressed and the way in which the Judge dealt with them. I fully endorse that tribute in respect of the judgment, which runs to 576 paragraphs and was delivered after a trial lasting some 31 days. The factual and legal issues to which these proceedings have given rise are numerous and complex. Both the judgment and the Judge's subsequent judgment dated 21 July 2009 on costs and interest ("the second judgment") are models of factual and legal exposition and clarity. That description is not in any way undermined by what I say below, in upholding certain aspects of the appeals of Mr Benedetti and Mr Sawiris. 137. I agree with the conclusions of Arden LJ in paragraph [134] of her judgment as to Issues 1 to 4, and also, in relation to Issue 5 that the Judge's costs order should not be disturbed. I respectfully do not agree with her conclusion on Issue 6, and consider that the Judge ought to have awarded interest on the amount ordered to be paid to Mr Benedetti. 138. In addition to the questions of interest and costs, I consider below certain aspects of Mr Benedetti's quantum meruit

claim both because we are differing from the Judge on that central issue and because of the importance of the legal principles which are engaged. Quantum meruit

139. The steps in the Judge's reasoning on this issue may be summarised as follows.

- (1) Mr Benedetti is entitled to receive reasonable remuneration for the services which he performed: [527]. (2) The Court has a wide discretion to award what it considers to be a fair and reasonable sum for those services: [58]. (3) As a general rule, in a quantum meruit claim, services should approximate to market value at the date they were rendered: [528]. (4) Regard must also be had, however, to any prior Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. negotiations or agreement between the parties which indicate that they put a particular value on the services in question, for that may be the best evidence of what constitutes reasonable remuneration for the services rendered: [528]. (5) The Acquisition Agreement is of no relevance, however, because its terms were inapplicable to the transaction that was eventually executed and it was effectively abandoned: [534] [562]. (6) Mr Benedetti was never a principal [541]. All the tasks which he carried out fell within the scope of the role of a broker/adviser: [561]. (7) Broker/advisers are typically not granted equity incentives; they are compensated for their services by transaction fees (normally success fees), which vary between 0.1% and 0.3% of the transaction value for transactions of the size of the Wind acquisition, and include all ancillary services: [552]. (8) Those percentages would produce €12 million to €36.3 million in the present case: [562]. Mr Benedetti should, on any view, be entitled to the top end of that scale, €36.3 million: [563]. This would, on the evidence, be the market rate for the services he performed: [566]. (9) Mr Benedetti is required to bring into account, in any determination of what is the fair reward for the services he has provided, any payment received for the same services under the Revised Brokerage Agreement, even though that was made between different parties: [565] [566]. (10) Being generous to Mr Benedetti, a fair apportionment would be to attribute 60% of the €36.3 million fee to the work covered by the Revised Brokerage Agreement and the remaining 40% to services not obviously within that Agreement. On that basis Mr Benedetti would be entitled to receive €14.52 million (40% of €36.3 million) in addition to the €67 million brokerage fee paid pursuant to the Revised Brokerage Agreement: [566]. (11) That assumes that Mr Benedetti is restricted to a quantum meruit based on the €36.3 million market rate for his work. (10) The Court can, however, have regard to post-transaction evidence of the parties' dealings with each other if and so far as that evidence shows the value which the paying party considered that the services were actually worth: [568]. (12) Contrary to Mr Benedetti's contention, he should not receive any additional payment to take account of Mr Sawiris' willingness to waive his pre-emption rights in respect of the 26.1% Enel stake in Weather Italy. Enel wanted too high a price to make that of value to Mr Benedetti, and the proposal came to nothing: [569]. (13) On the other hand, it would be right to have regard to Mr Sawiris' willingness and offer to pay Mr Benedetti a success fee of €75.1 million, in addition to the €67 million brokerage fee. That willingness and offer are apparent from the draft Supplemental Agreement to the Brokerage Agreement dated 5 October 2006 ("the draft October 2006 Agreement"), by which time Mr Benedetti had personally received

the €67 million. The negotiations for the €75.1 million did not take place under the shadow of threatened litigation and can properly be considered as a genuine attempt by Mr Sawiris to pay Mr Benedetti a proper value for that he had achieved: [570]. The emails from Mr Abdou of 11 and 12 June and 13 September 2005 quoted in paragraphs [187] to [189] of the judgment show the importance which Mr Sawiris attached to Mr Benedetti's role and the reasons why his remuneration should be limited to the payment of a fee. It would be wrong to ignore that evidence when considering the value to be attributed to Mr. Benedetti's services. Having regard to it, Mr Benedetti is entitled to the €75.1 million in addition to the brokerage fee which he had already received: [571]. 140. It would be impossible to fault the careful and detailed analysis of the Judge if the legal issue was, as he posed it, to determine in the wide discretion of the Court what Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors.* would, as between the parties, be a fair and reasonable sum to be paid by Mr Sawiris to Mr Benedetti for the services rendered by Mr Benedetti: see steps (1), (2), and (4) in the Judge's reasoning. That, however, is not a proper characterisation of the legal issue. Judicial decisions and academic commentary in recent times have clarified that a quantum meruit claim is a restitutionary claim for unjust enrichment. The amount recoverable by the claimant is the objective value of the benefit at the time of receipt, namely the price which a reasonable person in the defendant's position would have had to pay for the services. It is to be contrasted with an express or implied contractual term to pay a reasonable amount for services provided pursuant to the contract. In such a case, the court can have regard to all the circumstances to determine what would be a reasonable amount as contemplated by the parties to the contract.

141. The common law cause of action for a quantum meruit, like other restitutionary claims, was formerly perceived to rest on the theory of an implied contract. That theory was rejected implicitly in *Lipkin Gorman v Karpnale Ltd* [1991] AC 548 and expressly in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 1 WLR 938. In *BP Exploration Co (Libya) Ltd v Hunt (No*
- 2) [1979] 1 WLR 783 Robert Goff J expressly characterised a quantum meruit claim for services as a claim, founded on the principle of unjust enrichment, which is concerned with restitution in respect of the benefit obtained by the defendant. The historical development and demise of the implied contract theory were described in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] HLUK 34, [2008] 1 AC 561 by Lord Nicholls at paragraphs [105] and [107] and Lord Walker at paragraph [174]. 142. In assessing an award of restitution in such a case, it is the defendant's benefit which must be identified and valued. Concentration is on the defendant's benefit rather than the expense, loss or other personal aspect of the claimant's condition: BP at pp. 839-840. In *Sempra* Lord Hope said that, for restitution, it is the gain that needs to be measured, not the loss of the claimant; that the claimant's remedy is the reversal of the defendant's gain; and that the process is one of subtraction, not compensation: [28] [33]. That gain is to be measured objectively, that is to say, what a reasonable person would pay for the benefit in question; and so, where there is a market, by reference to market rates: BP at p. 840; *Sempra* at [45] [103], [116].

143. There is an academic debate as to whether, generally or in certain circumstances, the jurisprudential basis for the cause of action for a quantum meruit is so called “free acceptance” or failure of consideration. That does not matter in the case of Mr Benedetti’s claim against Mr Sawiris since it is accepted by Mr Sawiris that, however so characterised, Mr Benedetti was entitled to payment for his services on a quantum meruit (subject to sums already received pursuant to the Revised Brokerage Agreement), and that characterisation does not affect the nature of any restitutionary relief to which Mr Benedetti is entitled.
144. There is also debate, which is more relevant to the present issue, about whether any personal characteristics of the defendant can affect identification of the benefit and its valuation. There is judicial authority to support the proposition that, even if the defendant has been objectively benefited, that is to say the benefit has an ordinary or usual market value, the defendant will be permitted to claim that his or Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. her personal characteristics mean that there has been no benefit conferred or the benefit is less than the ordinary market value – so called “subjective devaluation”: *Sempra* [46], [48], [49], [103], [118], [119], [128], [184]; comp. *Ministry of Defence v Ashman* [1993] 2 EGLR 102 (Hoffmann LJ).
145. While the application of the principle of subjective devaluation involves taking into account the actual characteristics of the defendant and circumstances to show that the actual benefit in a particular case is less than the ordinary market value, there is no authority for the reverse proposition that such personal characteristics and circumstances may confer on the defendant a benefit of greater value than the ordinary market value. In any event, even in the case of subjective valuation, whether lowering the valuation below or increasing it above the ordinary market value to the reasonable person, what is relevant is not the degree of personal emotional joy or misery of the defendant for what the claimant has done, or the defendant’s generous or parsimonious personality. What is relevant is the existence of conditions increasing or decreasing the objective value of the benefit to any reasonable person in the same (unusual) position as the defendant.
146. On the Judge’s findings, there was an ordinary market value for the services provided by Mr Benedetti for Mr Sawiris. As I have said, the Judge found that all those services of Mr Benedetti fell within the scope of the role of a broker/adviser. Although Mr Howard vigorously attacked the Judge’s rejection of Mr Benedetti’s case that he was a promoter or something similar, the Judge was entitled to reach the conclusion which he did on the proper characterisation of the role of Mr Benedetti and his services. The Judge also found that typically payment for such services varied between 0.1% and 0.3% of the transaction value for transactions of the size of the Wind transaction. The Judge was similarly entitled to reach that finding, and indeed there is no appeal against those market rates.
147. In those circumstances, there was no legal scope for the Judge to increase Mr Benedetti’s restitutionary remedy above the €36.3 million at the top end of the market range. The Judge did not identify any particular characteristics of Mr Sawiris or any particular circumstances that resulted in the benefit conferred on him, as it would on other persons with similar characteristics in similar circumstances, having a greater objective value than the ordinary market value found by the Judge. The fact that Mr Sawiris was

prepared, after the services had been provided, to offer more, indeed very much more, than that value is therefore irrelevant. That, in short, is the consequence of the subtractive nature of the restitutionary remedy which, as I have said, is to be contrasted with a contractual provision for the payment of reasonable remuneration.

148. The Judge's analysis, resulting in an increase of the value of the benefit represented by Mr Benedetti's services from €36.3 million to €75.1 million, rested heavily on the Judge's interpretation and application of Lord Atkin's speech in *Way v Latilla* [1973] 3 All ER 759: see especially at [568]. I do not agree that *Way* generally, or Lord Atkin's speech in particular, assists in the present case. First, *Way* was decided at a time when the implied contract theory of restitution was still prevalent, and before the rapid evolution in the analysis and application of restitutionary principles in more recent times. Secondly, Lord Atkin held that, while there was no concluded contract as to remuneration in that case, there "existed between the parties a contract of employment under which Mr Way was engaged to Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors.* do work for Mr Latilla in circumstances which clearly indicated that the work was not to be gratuitous" and that Mr Way was "therefore ... entitled to a reasonable remuneration on the implied contract to pay him quantum meruit": p. 763. This was therefore a classic case of a contractual term to pay reasonable remuneration. Thirdly, there was no market rate fixed by (in Lord Atkin's words) trade usage. It was in those circumstances that Lord Atkin considered it would be appropriate for the court to take into account "the bargainings between the parties" as evidence of the value of the services: pp 764-765.
149. Lord Wright's speech in *Way* is consistent with that analysis. He said that there was an implied promise by the respondent to pay on a quantum meruit, "that is to pay what the services were worth": p. 765. There being no trade usage, it followed that the question of the amount to which the appellant was entitled was left at large, and the court had to do the best it could "to arrive at a figure which seems to it fair and reasonable to both parties", and that "the communing of the parties" while the business was going on were admissible to enable the court to "infer " or "attribute" to the parties "an intention that a certain basis of payment should apply": p. 766. On the evidence, Lord Wright concluded that "the appellant was employed on the basis of receiving a remuneration depending on results".
150. There were no other reasoned speeches in *Way*. That case was therefore decided on the footing that the Court was interpreting a contractual provision for the payment of a reasonable remuneration, that is to say what the parties to the contract would, in the light of all the evidence, have considered to be fair and reasonable as between them.
151. The Judge also referred to *Sarisbrick v Parkinson* (1896) 20 LT 175 and *B. P.* I respectfully consider that neither of these cases justify the approach taken by the Judge. Indeed, it would appear from his observations in paragraph [534] of his judgment that he did not think they were analogous since they concerned contractual terms which would have been legally enforceable but for some formal defect or supervening event. Moreover, in *Scarisbrick* there was evidence that the remuneration for the plaintiff's services specified in the contract,

which was ineffective only because it was not in writing, was the same as the ordinary market value of such services: see the judgment of Cleasby B at page 177 referring to the plaintiff's oral evidence to that effect. 152. In BP Robert Goff J said that, in the case of a transaction of such an unusual nature as a farm-in agreement for the development of an oil concession, which was under consideration in that case and had been frustrated, the contract provided the most useful evidence of a fair remuneration for the services rendered: see p. 822F. He went on to observe, however, that the agreement under consideration was not very different from other farm-in agreements used in the oil industry, and that the contractual consideration in all probability represented a market view of the fair consideration for services of that kind: p. 822G. Further, I have already mentioned in paragraph [141] above Robert Goff J's subsequent analysis in the same case where he emphasised the difference between the remedy in a claim for damages for a legal wrong and a claim for an award of restitution; that in the latter case the law is concerned with restitution of the defendant's benefit; and that where the claim is for a quantum meruit, it is the market value of the services which is taken: pp. 839G to 840D. Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. 153. In the most recent case in which the issue has been considered at the highest judicial level, *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, 1 WLR 1752, the claimant was held to be entitled to a quantum meruit for services in obtaining planning permission for the development of property owned by the first defendant. The claimant acted pursuant to an oral, but unenforceable, agreement with the first defendant, which the claimant was encouraged to believe the first defendant would honour, for the purchase and redevelopment of the property by the claimant, with terms as to the sharing of profit from the redevelopment. Lord Scott, giving the leading speech, with which three of the other members of the Appellate Committee agreed, said that Mr Cobbe was entitled to the common law remedy of a quantum meruit, and that he should receive a fee "at the rate appropriate for an experienced developer", and that fee would "represent the extent of the unjust enrichment for which the defendant company should be held accountable to [the claimant]": [42]. It is clear that Lord Scott was fixing the restitutionary award at the ordinary market value for the type of services provided by persons similar to the claimant, irrespective of the particular terms of the unenforceable contract.

154. For all those reasons, the willingness of Mr Sawiris to pay Mr Benedetti more than the market rate of €36.3 million is irrelevant. In any event, even if it were possible in an appropriate case to increase a restitutionary award for a quantum meruit above the usual market rate for the services rendered, I respectfully do not accept that the evidence would have justified the increase to €75.1 million in the present case. As I have said, the Judge was prepared to do so in the light of the draft October 2006 Agreement and the emails from Mr Abdou in June and September 2005 quoted in paragraphs [187] to [189] of the judgment.
155. The Judge said in paragraph [571] of the judgment that those emails were "[t]he best evidence of Mr Sawiris' thoughts on this matter" [i.e the proper value for what Mr Benedetti had achieved]. The June 2005 emails were, however, written before Mr Benedetti had received the €67 million pursuant to the Revised Brokerage Agreement. The Revised

Brokerage Agreement was not executed until July or August 2005 and was backdated to 26 May 2005. The Judge's own conclusion was that, at the time of the September 2005 email, Mr Sawiris was probably unaware that the €67 million had been paid to Mr Benedetti personally. That sum was paid on 12 August 2005, and Mr Benedetti had asked for it in order to pay third parties. In fact, it was not used for that purpose but was taken by Mr Benedetti for himself. The Judge said in paragraph [437] of the judgment that he was not convinced that, as at the middle of September 2005, Mr Sawiris and Mr Abdou knew by then that the €67 million had gone to Mr Benedetti personally, although they had their suspicions. Further, the Judge also said in paragraph [437] of the judgment that the second part of the September 2005 email "certainly suggests that the sum of €75 million was intended to be the total amount paid to Mr Benedetti for his work." Accordingly, those emails are no support for the proposition that, at that time, Mr Sawiris was or would have been willing to pay Mr Benedetti, in addition to the €67 million Mr Benedetti received under the Revised Brokerage Agreement, a further €75.1 million or indeed anything at all or at any event anything more than €8.1 million (being the difference between the €75.1 million and the €67 million). If they are, as the Judge thought, the best evidence of Mr Sawiris' thoughts on the matter, they are not inconsistent with an outcome under which Mr Benedetti is awarded €14.52 million based on ordinary market rates, and he retains the €67 million Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. million received by him pursuant to the Revised Brokerage Agreement, for which there has been no claim for re-payment in whole or part.

156. So far as concerns the draft October 2006 Agreement, which provided for the payment to Mr Benedetti of €75.1 million in addition to the €67 million received by him under the Revised Brokerage Agreement, the Judge himself recognised that there are obvious dangers in looking at negotiations between parties to a dispute once the threat of litigation has been made: [568]. They may be influenced by all manner of considerations related to the desire to avoid litigation, other than the substantive merits of the rival claims. Reflecting that need for caution, the Judge said in paragraph [570] of his judgment that the negotiations for the draft October 2006 Agreement "did not take place under the shadow of threatened litigation and can properly be considered ... as a genuine attempt by Mr Sawiris to pay to Mr Benedetti a proper value for what he had achieved."
157. For the reasons I have given, on the Judge's own findings of fact, the proposals on behalf of Mr Sawiris in the June and September 2005 emails were not the same as those in the draft October 2006 Agreement since they were for payment of €75.1 million in total. So far as concerns subsequent discussions and negotiations, the Judge himself found, or at any event it was Mr Benedetti's own case (put to Mr Sawiris in cross examination) that the threat of litigation existed by the end of January 2006. The Judge said, at paragraph [570], that at a meeting between Mr Benedetti and Mr Sawiris on 30 January 2006: "[t]here was then talk of sorting everything out in court". Mr Howard submitted that the Judge was not there making a finding of fact, but he was merely setting out Mr Benedetti's version of the facts. I am not confident that submission is correct, but it makes no difference since Mr Howard accepts that it was Mr Benedetti's own case that there was talk of litigation at that meeting in January

2006. That was many months before the draft October 2006 Agreement. Mr Howard also drew our attention to a passage in the transcript of Mr Sawiris' cross-examination in which Mr Sawiris said he could not recall such talk; but, again, it was either a finding of fact which the Judge was entitled to reach or it was Mr Benedetti's own case. Accordingly, those facts would appear fatally to undermine the Judge's confidence in the reliability of the draft October 2006 Agreement as evidence of "a proper value" for Mr Benedetti's services uninfluenced by the threat or fear of litigation.

158. Mr Benedetti submits that the reasonable remuneration or fee for his services should include some financial recognition of Mr Sawiris' willingness to waive, for Mr Benedetti's benefit, Mr Sawiris' right to acquire Enel's 26.1% shareholding in Weather Italy. The idea was that Mr Benedetti might be able to make money if Enel was prepared to sell its shareholding at an advantageous price. In the event, Enel wanted a high price and so the opportunity came to nothing. Mr Benedetti's case is that, nevertheless, the parties anticipated Mr Benedetti might make a profit from Mr Sawiris' waiver of his right of pre-emption. No evidence was placed, on behalf of Mr Benedetti, before the Judge as to the value to be attributed to the waiver, and Mr Howard's submission was that there should either be a further hearing before the Judge (now in the Court of Appeal) to determine the amount of the anticipated profit it was subjectively anticipated Mr Benedetti would make or the Court should simply adopt a broad brush approach in awarding Mr Benedetti an additional sum. With respect to Mr Howard, this line of argument seems to me hopeless. Quite Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. simply, the Judge came to the only possible conclusion, namely that there was no value at all in the waiver of Mr Sawiris' right of pre-emption because the hope of Mr Benedetti that he might make some money in purchasing Entel's shareholding was based on the false assumption that Enel would be prepared to sell at a low price: [569].
159. For his part, Mr Sawiris claims that nothing at all should be awarded to Mr Benedetti in respect of his services because, pursuant to the Revised Brokerage Agreement, Mr Benedetti has already received €67 million for work the market value of which was €36.3 million. The Judge's analysis was, as I have said, that 60% of those services (with a market value of €21.78 million) fell within the Revised Brokerage Agreement, and so Mr Benedetti was, on any footing, entitled to receive €14.52 million (being the market value of the 40% balance) in addition to the €67 million paid pursuant to Revised Brokerage Agreement. Three criticisms of that analysis are advanced on behalf of Mr Sawiris in the skeleton arguments, some of which were elaborated by Mr Rabinowitz in oral submissions. First, it is submitted that, on the proper interpretation of the Brokerage Agreement, all the services provided by Mr Benedetti to Mr Sawiris fell within its scope and, in particular, within its definition of "Brokerage Services". Secondly, even if that was not the case, no reliance should have been placed by the Judge on the wording of the Revised Brokerage Agreement to enable Mr Benedetti to claim subsequently that he is entitled to further fees in respect of services outside its scope since the Agreement was in effect his own document, on which he acted on both sides. Thirdly, as the Judge valued the total market value of all Mr Benedetti's services

at substantially less than the €67 million received by Mr Benedetti under the Revised Brokerage Agreement, Mr Benedetti cannot now be entitled to anything further, whatever the precise definition of “Brokerage Services” in that Agreement.

160. Attractively as these arguments were presented, I do not accept any of them. As to the first of them, the Judge held that the Revised Brokerage Agreement covered the work carried out by Mr Benedetti in the negotiation of the purchase of Wind from Enel and the raising of the acquisition debt from the banks: [566]. He clearly accepted Mr Benedetti’s argument that the definition of “Brokerage Services” did not include bringing the investment opportunity to Mr Sawiris or obtaining the co- operation of the Italian government and the management of Wind: [564]. That finding cannot properly be criticised; and nor can the Judge’s conclusion, on a mixed question of fact and law, that the proper apportionment was to attribute 60% of the €36.3 million market fee to the work covered by the Revised Brokerage Agreement and 40% to Mr Benedetti’s services not obviously within it.
161. As to the second of the arguments, the Revised Brokerage Agreement was plainly made between different legal entities. There is no proper legal basis for ignoring its terms merely because, as a director, Mr Benedetti had an involvement in both entities. It has not been asserted, and no evidence has been relied on to suggest, that Mr Benedetti was responsible for artfully or artificially crafting its wording so as to facilitate some future personal claim by himself for remuneration.
162. The third argument ignores the fact that Mr Benedetti was not one of the parties to the Revised Brokerage Agreement. The Judge’s reasoning, with which I entirely agree, was that Mr Benedetti should not receive a quantum meruit award for services for which payment had already been made; payment had already been Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. made in discharge of the contractual rights of International Technologies Management Limited (“ITM”) under the Revised Brokerage Agreement for some (60%) of those services; and Mr Benedetti was therefore personally entitled by way of a quantum meruit to payment in respect of the balance (40%) of his services. The fact that Mr Benedetti, taking advantage of ITM’s contractual rights under the Revised Brokerage Agreement, received well in excess of the market value for the services within the Revised Brokerage Agreement is irrelevant. Interest
163. The Judge declined to make any order in favour of Mr Benedetti, for interest pursuant to section 35A of the Senior Courts Act 1981. He declined to do so because Mr Benedetti made it clear at all times before and after the commencement of the litigation that he was not prepared to accept the €75.1 million. In the Judge’s words: “The delay in receiving that money is entirely of his own making”: [11] of the second judgment.
164. The Court has a discretion under section 35A whether or not to make an award of interest and for what period. There is authority that an award of statutory interest may properly be refused where the claimant has unjustifiably delayed bringing the proceedings: see the discussion by Langley J in *Kuwait Airways Corporation v Kuwait Insurance Company SAK*

[2000] Lloyd's Rep IR 678. No authority was cited to us of any instance in which the Court has refused statutory interest on an award in favour of the claimant because the claimant refused an earlier offer. In my judgment it is wrong in principle to do so, and most particularly where the claim is for restitution of the defendant's unjust enrichment. I agree with the following observation of May LJ in *The Popi M* [1984] 2 Lloyd's Rep 555, at 561: "There is no question but that the award of interest is a matter of discretion. However, the fundamental basis for exercising that discretion is to compensate a party for being kept out of the money which the Court has adjudged he should have been paid: the award or refusal to award interest should not be used as a means of penalising a party, for instance for the way in which negotiations or litigation have been conducted on his behalf." 165. Interest is compensation for the time value of money, and is generally a necessary component of an award in favour of the claimant in order to do complete justice for loss, damage or harm suffered by the claimant or a benefit wrongly obtained or retained by the defendant. It is therefore generally a strong thing to deprive a successful claimant of an award of interest. That is particularly so where, as in the present case, the claim is for restitution in respect of the defendant's unjust enrichment, since interest in such a case is necessary to extract from the defendant the full benefit of the unjust enrichment enjoyed by the defendant over time. It is one thing exceptionally to deprive a claimant of statutory interest where the institution of the proceedings has been unjustifiably delayed; it is another to deprive a claimant of interest where the proceedings have been commenced timeously and have resulted in an award in favour of the claimant. An order in respect of the costs of the proceedings may fairly and reasonably take into account the claimant's Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. Costs conduct in relation to negotiations and offers to compromise. In my judgment, the exercise of the discretionary power to award statutory interest should not do so. 166. In the present case, there are also particular circumstances for not penalising Mr Benedetti by depriving him of statutory interest. His claim is for restitution in respect of Mr Sawiris' unjust enrichment arising from the non-payment of the full value of Mr Benedetti's services. Mr Sawiris continued to enjoy that benefit up to and after the commencement of the proceedings, and only an order for interest will give full restitution for the continuing enjoyment of that benefit. There is no evidence of any hardship or commercial unfairness that would be suffered by Mr Sawiris to pay such interest. Further, the €75.1 million was not payable under the draft October 2006 Agreement until 31 December 2007, but Mr Benedetti was entitled to payment from the date the cause of action for a quantum meruit arose. As Mr Howard submitted, that date was 12 August 2005 at the latest, when the €67 million brokerage fee and the €4.08 million expenses were paid and was after Mr Benedetti had broadly speaking finished providing his services. Furthermore, the proceedings were instituted before 31 December 2007, by which time the offer to pay the €75.1 million had been withdrawn.

167. For those reasons, I would allow Mr Benedetti's appeal in respect of statutory interest to the extent of making an order for statutory interest on an award of €14.52 million from 12 August 2005.

168. Mr Benedetti appeals against the Judge's order that Mr Benedetti pay all the Defendants' costs. The Judge made his order for two reasons: having regard to the relative levels of success on the issues in the action, and in view of the fact that Mr Benedetti succeeded in recovering no more than he would have received had he signed the October 2006 draft Agreement: [20] and [21] of the second judgment.
169. Mr Benedetti says that the Judge's critical errors of principle were his failure to take due account of the fact that Mr Benedetti was the successful party in the litigation, and his unduly taking into account Mr Benedetti's refusal to accept the terms of the draft October 2006 Agreement.
170. Although the issue of costs was, of course, peculiarly within the discretion of the Judge, the second of his reasons, which he described in paragraph [21] of the second judgment as the "more fundamental reason", has been cogently criticised by Mr Howard. As I have said, Mr Benedetti was entitled to payment on a quantum meruit from 12 August 2005. Under the draft October 2006 Agreement, however, payment was not due until 31 December 2007. Moreover, by that time, the offer embodied in the draft October 2006 Agreement had been withdrawn, and the only offer was for a net sum of €4.02 million. Even that offer was effectively withdrawn on service of Mr Sawiris' Defence. At that point, Mr Benedetti had no option but to continue the proceedings until judgment. The fact that, as found by the Judge, Mr Benedetti would never have accepted the €75.1 million, even if the offer had remained open at all times, is irrelevant.
171. For those reasons, I respectfully consider that the Judge erred in principle in relation to the second of his reasons. On the other hand, the first reason given by Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. the Judge, that is the Judge's assessment of the relative success on the issues in the action, has not been successfully challenged on appeal. Mr Howard sought to do so, but I am not persuaded that the Judge made any error of principle. The Judge's conclusion on that aspect has been reinforced by the success (to a significant degree) of the cross-appeal. In all the circumstances, I do not consider that the Judge's order in respect of costs should be disturbed. Lord Justice Rimer:
172. I have had the advantage of reading in draft the judgments of Arden and Etherton L. JJ. I agree with Arden LJ, for the reasons she gives, both that the Acquisition Agreement provides no useful guidance to the assessment of the quantum meruit award to which Mr Benedetti is entitled and that AH/OS are not liable to contribute to that award. I also agree with Arden and Etherton LJ, for the reasons they give, that the judge fell into error in fixing the quantum meruit award at €75.1m and that he should have limited the award to €14.52m. That was the figure the judge arrived at after (i) finding that the market value of the services Mr Benedetti had rendered was €36.3m, and (ii) adjusting it to take into account the apportionment also received by him under the revised brokerage agreement.
173. As to whether Mr Benedetti is entitled to interest on his €14.52m under section 35A of the Senior Courts Act 1981, he can only be entitled to ask this court to consider awarding him such interest if he can first succeed in his challenge to the judge's refusal to allow him such

interest on the greater award of €75.1m. The judge's refusal was the result of an exercise of discretion and this court ought therefore only to consider taking a different view on interest if first satisfied that the judge made an error of principle in arriving at his decision. This issue is an important one in terms of the money involved.

174. The judge did not suggest that Mr Benedetti had delayed in the bringing or subsequent prosecution of his claim, although any such delay might have justified a refusal to award interest in respect of part of the overall period. The judge's only reason for the refusal to award interest was that Mr Benedetti had the opportunity before the proceedings had started to accept the offer of €75.1m contained in the draft supplemental brokerage agreement but had refused to do so and had subsequently made clear his continuing refusal. Therefore, held the judge, it was his own refusal that had kept him out of the money and there was no good reason now to compensate him with interest for being so kept out. 175. It is correct that in October 2006 there was an offer under clause 3.2 of that draft agreement to pay Mr Benedetti €75.1m on 31 December 2007, which he did not accept. He instead commenced his claim in August 2007 for a vastly more valuable quantum meruit in the shape of a shareholding in Weather II. The offer of €75.1m was reduced in November 2007 to one of about €4m, which he also did not accept; and by the time of the service of the Defence of Mr Sawiris and Cylo in the proceedings, nothing was on offer. No Part 36 or other renewed offer was ever made. The reason that Mr Benedetti did not accept either of the offers that were made was because he could not have done so without giving up his more valuable claim. He pursued the proceedings for the purpose of making that claim good. In the Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. result he failed to do so and succeeded only in obtaining an award of a mere (all is relative) €75.1m, an award which the defendants denied was due. 176. I would respectfully agree with Arden LJ that (1) the core principle is that the court should normally award interest pursuant to section 35A as from the date of the accrual of the cause of action; (2) the reason for doing so is to compensate the claimant for being kept out of his money; (3) the jurisdiction is a discretionary one, such that the court may decline to award interest for all or part of the relevant period if the claimant has unjustifiably delayed the bringing or prosecution of his claim; and (4) the discretion to award (or therefore to withhold) interest should not be used to penalise the claimant for his conduct of the proceedings -- or I would add of any negotiations (see the passage from May LJ's judgment in *The Popi* cited by Etherton LJ). The court's discretion with regard to costs is available to that end. 177. I would also accept that the refusal by the claimant of an offer of all that he is ultimately held entitled to in the proceedings may in appropriate circumstances be a factor relevant to an exercise of the discretion against the award of interest, the rationale being that it would have been the claimant's refusal of the offer that has kept him out of his money. That said, I would expect such circumstances to be rare and I do not propose to speculate as to the type of case in which the refusal of an offer would or might be a determining factor. I would therefore have respectful reservations as to Etherton LJ's view that it would be wrong in principle for the court to take into account the refusal of an offer. I am also not convinced of the correctness

of his observation that a claim for restitution for unjust enrichment should be regarded as a special category of case in which only an award of interest will give full restitution. 178. In agreement with Etherton LJ, I have however come to the view that the judge did fall into error with regard to interest, for two reasons. The first is that Mr Benedetti had completed the rendering of his services by 12 August 2005. It was then that he was entitled to be paid. The judge found that the payment to which he was entitled for those services was €75.1m. That sum was offered to him in October 2006 on terms that it would be paid on or before 31 December 2007. The offer was withdrawn in November 2007, it was never renewed and it did not include any compensation for the fact that Mr Benedetti would have to wait until 31 December 2007 for the money to which he was entitled in August 2005. The offer upon which the judge relied was, therefore, not strictly an equivalent of that to which Mr Benedetti proved he was entitled.

179. My second, and primary, reason is that, on the facts of this case, I would anyway not accept that Mr Benedetti should be penalised for turning that offer down in order to pursue his greater claim: and it is that, I consider, that underlies the judge's reasoning for refusing an award of interest. It appears to amount to judging the wisdom of Mr Benedetti's conduct in pursuing his greater claim with the benefit of the knowledge of its outcome and to penalise him for not having foreseen that outcome when the offer of €75.1m was made. The judge did not find that Mr Benedetti's pursuit of his claim was improper – for example, as one in which he had no genuine belief and which he was pursuing for the purpose of pressurising the defendants into making an increased offer – or that he knew all along that his maximum claim was for €75.1m. If he had done so, I could well understand a conclusion that Mr Benedetti could and should fairly be regarded as the agent Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. responsible for the delay in recovering the €75.1m. But he did not. He of course rejected the greater claim. But he did not, I understand, find it to have been brought or prosecuted other than in good faith. That claim could not, however, have been brought if the €75.1m offer had been accepted. Moreover, from November 2007 down to judgment Mr Benedetti could not even have recovered the €75.1m except by pursuing his claim. Put simply, I do not accept that the refusal of an offer of X in order to pursue a bona fide claim for 3X should, when the claim for 3X fails and an award of X is made, ordinarily – or at any rate automatically -- be regarded as a scenario in which the claimant can fairly be regarded as having so acted as to deprive himself of a claim to statutory interest on X.
180. For these reasons I consider that the judge was in error in refusing an award of section 35A interest. Like Etherton LJ, I would permit Mr Benedetti to appeal in relation to interest and allow his appeal. Etherton LJ would award him statutory interest on an award of €14.52m from 12 August 2005. I take the view, however, that the parties ought to be entitled to make representations as to whether such interest should be awarded. That is because the facts are now different from those the judge was considering. This court has to consider that question against the fact that Mr Benedetti refused an offer of €75.1m and has recovered just €14.52m. We have had no argument in relation to that.

181. Mr Benedetti also challenges the judge's costs order by which – despite securing an award of €75.1m in the face of the defendants' resistance – he was ordered to pay their costs. There is of course no challenge to this order by the defendants. This court can, therefore, only re-visit the judge's costs order if Mr Benedetti is entitled to succeed in his challenge, although any such re-visit would then have to be made in light of Mr Benedetti's reduced fortune in the litigation as a result of the outcome of the defendants' appeals.
182. Once again, the question of costs was pre-eminently a discretionary matter for the judge and this court should only interfere with his decision if he fell into an error of principle. The judge's reasoning for his costs order was as follows: (1) whilst Mr Benedetti had achieved a monetary award in his favour, that had not been his primary claim, which was for a shareholding in Weather II; (2) the fair and proportionate determination of the costs order therefore required a consideration of how that end result had been achieved; (3) the adoption of an 'issue-based' approach to the question of costs would lead to the conclusion that Mr Benedetti 'should pay most, if not all, of the Defendants' costs'; but (4) there was a 'more fundamental reason' why Mr Benedetti should not recover any costs, namely that he had succeeded in recovering no more than if he had accepted the October 2006 offer, when he was offered exactly what he had recovered in the claim: 'The costs of the litigation were wholly avoidable and Mr Benedetti's conduct prior to the action is a factor which I am required to take into account in determining what costs order to make.'
183. Like Etherton LJ, I too was impressed by Mr Howard's cogent attack on the judge's 'more fundamental reason' for ordering Mr Benedetti to pay the defendants' costs of the claim. True it is, an offer was made in October 2006 of €75.1m, payable on 31 December 2007, which he could have accepted, although his entitlement was Judgment Approved by the court for handing down. *Benedetti v Sawiris & Ors*. to payment as from 12 August 2005. That offer was, however, reduced in November 2007 to about €4m and then (by the time of the Defence) to nil, after which Mr Benedetti could only recover anything by pursuing his claim to judgment, as he did, an exercise occupying 31 days of trial time. No money was paid into court and no Part 36 offer was made. By the judgment he achieved a substantial award, the amount of which had been in dispute at the trial and of course the defendants then mounted their own appeals against such award. The defendants had not protected themselves as to costs in the conventional way by making an appropriate Part 36 offer or a payment into court. There is, it seems to me, therefore much to be said for the view that Mr Benedetti should fairly be regarded as the successful party in the claim, one which, following the withdrawal of the offers, he had no choice but to pursue to judgment. That would lead to a consideration of whether he ought to enjoy the benefit of 'the general rule' as to costs referred to in CPR Part 44.3(2), or whether in all the circumstances of the case some different, and if so what, order was called for. 184. In the event, however, I am not persuaded that these considerations take Mr Benedetti very far. The judge's reasons in his second judgment show, as one would expect, that he was fully sensitive to the principles he should apply in deciding the costs issues. He did not overlook that the outcome of the action was that Mr Benedetti recovered an award of €75.1m which the defendants had resisted. But the

judge rightly assessed that it did not follow from Mr Benedetti's success in that respect that he should recover his costs. At the end of a 31-day trial the judge was in the best possible position to assess where the costs of the claim should fall and he made it plain in paragraphs 19 and 20 of his second judgment (i) that the €75.1m claim was only advanced in Mr Benedetti's closing submissions 'very much as a last resort'; (ii) that Mr Benedetti had failed on the major issues at the trial; and (iii) that he had only 'succeeded on some ... discrete factual issues [which were] minor issues, none of which really affected the outcome of the case.' Those considerations led the judge to conclude that an issue-based approach to costs should result in Mr Benedetti paying 'most, if not all, of the Defendants' costs.' He then turned to what he regarded as a 'more fundamental reason' why Mr Benedetti should not recover any costs, namely that he had turned down a pre-claim offer of a sum exactly matching what he eventually recovered. He regarded Mr Benedetti's refusal in that respect as being a matter of conduct on his part to which he was required to have regard (see Part 44.3(4)). The outcome was that he ordered Mr Benedetti to pay the defendants' costs. 185. I recognise that the 'more fundamental reason' might perhaps be viewed as having by itself steered the judge to making the order that he did. I would, however, regard that as a rather too literal reading of his reasoning. Mr Benedetti's refusal of the pre-claim offer was, the judge said, 'a factor' of which he was required to take account in determining what costs order to make; and I would not accept that by that point in his reasoning he had ceased to regard as relevant the factors in points (i) to (iii) to which I have referred in my previous paragraph. I consider that, upon a fair reading of his costs judgment, it was the combination of all these factors that led him to make the costs order that he did; and I consider that it was an order he was properly entitled to make within the broad discretion that he had. I have therefore not been persuaded that he misdirected himself in making it. I would refuse to Judgment Approved by the court for handing down. Benedetti v Sawiris & Ors. disturb it. Whilst, therefore, I would give permission to Mr Benedetti to appeal on costs, I would dismiss his appeal.

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