Neutral Citation Number: [2016] EWCA Civ 1041

Case No: A1/2015/0607

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE TECHNOLOGY AND CONSTRUCTION COURT
HIS HONOUR JUDGE STEPHEN DAVIES
[2015] EWHC 58 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st November 2016

Before:

LORD JUSTICE JACKSON
and
LORD JUSTICE McCOMBE

- -

Between:

GRAHAM LESLIE	**Appellant** **Claimant**
- and -	
FARRAR CONSTRUCTION LIMITED	**Respondent** **Defendant**

- -
- -

Mr Nicholas Braslavsky QC and Mr Andrew Singer (instructed by **Baxter Caulfield Solicitors**) for the **Appellant**
Mr Simon Myerson QC and Mr Michael Ryan (instructed by **Levi Solicitors LLP**) for the **Respondent**

Hearing date: 19 October 2016

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Judgment Approved

Lord Justice Jackson:

1. This judgment is in six parts, namely:

Part 1 – Introduction

2. This is an appeal by the funder and developer of multiple development projects against a decision that he owes the contractor £139,428.16. The central issue in the appeal is whether the appellant is entitled to recover overpayments of building costs made on five completed projects. The judge held that he could not.

3. The claimant in the litigation and appellant in this court is Graham Leslie, to whom I shall refer as "Mr Leslie". The defendant in the litigation and respondent in this court is Farrar Construction Limited, to which I shall refer as "FCL". The principal shareholder and director of FCL is Neil Farrar, to whom I shall refer as "Mr Farrar".

4. After these introductory remarks I must now turn to the facts.

Part 2 – The facts

5. Mr Leslie is a businessman of substantial wealth, who decided in 2008 to build up a property portfolio. He entered into an oral agreement with Mr Farrar which contained the following terms: (i) suitable sites would be identified and agreed as suitable for development; (ii) Mr Leslie would acquire those sites; (iii) FCL would design and construct housing on the sites to an agreed scheme design and budget; (iv) Mr Leslie would pay FCL its "build costs" expended on the development; (v) on completion the open market value of the development would be agreed, the acquisition and build costs would be deducted, and the resultant profit share divided equally. That agreement has been referred to in the litigation as the "Framework Agreement".

6. Unfortunately, the parties never recorded the Framework Agreement in writing. Nor did they identify what they meant by the term "build costs", in particular which items of expenditure were included and which were excluded.

7. Matters proceeded smoothly for five years. The parties undertook and completed five developments which were known as Dandy Mill Court, Manor Drive, Rowan Tree Court, Woodlesford and Cornlands. Mr Leslie duly purchased those five sites. In each case, before work began, the parties agreed a costs budget. As works proceeded FCL submitted requests for interim payments. These were round sums not supported by any details or evidence of costs incurred. Mr Leslie made these payments because they were within budget and appeared reasonable. He trusted Mr Farrar.

8. As and when each project was completed, the parties agreed what sum was due to FCL in respect of the build costs and profit share. Mr Leslie did not require and Mr Farrar did not produce any form of schedule setting out all the build costs. They simply proceeded on the basis that the build costs were the same as the budget costs. Mr Leslie was content with this arrangement. In each case he ended up with a property which was substantially more valuable than the total amount which he had paid out for the purchase and development of the property.

9. The total sum which Mr Leslie paid to FCL in respect of build costs on those five sites was £2,705,000. The total sum which Mr Leslie paid to FCL as profit share was £874,375. Mr Farrar waived his entitlement to any profit share on Cornlands, as a wedding gift to Mr Leslie. The total profit which Mr Leslie made on the five completed developments was around £1.1 or £1.2 million, although the precise figures are in dispute.

10. Unfortunately, relations between Mr Leslie and Mr Farrar deteriorated in early 2013. Work was not proceeding smoothly on other development sites. Nor were those other ventures proving to be as profitable as the first five developments. In July 2013 Mr Leslie refused to continue funding the current developments. Thus the collaboration between Mr Leslie and Mr Farrar came to an end.

11. The task of sorting out the financial consequences was not straightforward. That was unsurprising, given the casual way in which Mr Leslie and Mr Farrar had been doing business together. Both parties believed that money was due to themselves. Against that background Mr Leslie commenced the present proceedings.

Part 3 – The present proceedings

12. By a claim form issued in the Technology and Construction Court at Manchester, Mr Leslie claimed repayment of all sums which he had overpaid FCL. FCL served a defence denying liability and a counterclaim. By its counterclaim FCL claimed additional sums due in respect of the individual sites and damages for repudiation.

13. The action came on for trial before HH Judge Stephen Davies, sitting as High Court judge in the Technology and Construction Court in Manchester during November and December 2014. The judge heard factual evidence from Mr Leslie, Mr Farrar and

other witnesses who had been involved in the projects. He heard expert evidence from accountants and quantity surveyors.

14. The parties raised 13 separate issues for the judge to decide. The judge duly did so in his reserved judgment dated 19th January 2015: see [2015] EWHC 58 (TCC).

15. Only one of the matters decided by the judge is a live issue before this court. In those circumstances I need only give a very brief summary of the judge's long and careful judgment.

16. The judge found that both Mr Leslie and Mr Farrar were honest witnesses, but their memories were poor. They both recollected events "through a partisan prism". Accordingly, the judge treated the oral evidence of both the main protagonists with caution.

17. The judge first had to decide which items of expenditure constituted "build costs" within the meaning of the Framework Agreement. He held that this phrase meant the direct cost of labour and materials together with site-specific preliminaries. It excluded Head Office overheads, non site-specific general business costs and capital expenditure on plant and machinery.

18. Because Mr Farrar had included impermissible items in the build costs which he charged, they were too high by 22%. That reduced the profit share of both parties. Therefore, the net loss to Mr Leslie was 11% of the sums that he paid for build costs.

19. The judge held that the Framework Agreement applied to all developments which the parties treated as falling within that agreement. On that basis he identified twelve separate developments which were subject to the Framework Agreement. They were the five completed developments and seven others which are not material for present purposes. The judge held that a further development at Moverley Way was not subject to the Framework Agreement.

20. The judge held that Mr Leslie's conduct in July 2013 constituted a repudiation of the Framework Agreement. He assessed and awarded damages in respect of that repudiation.

21. Let me now turn to the five completed developments. Mr Leslie paid £3,579,375 to FCL in respect of the build costs and profit share on those five projects. On the judge's analysis, and after adopting the definition of "build costs" set out above, that represented an overpayment of £297,550.

22. The question then arose as to whether Mr Leslie was entitled to recover that overpayment from FCL. He had pleaded this head of claim as follows in paragraph 8 of his amended particulars of claim:

> "In the premises therefore those sums fall to be repaid to the Claimant as being monies paid by mutual mistake i.e. on the basis that both parties wrongly believed that the monies were claimed and paid for work and material which were covered by the arrangement between the parties when they were not alternatively the Claimant paid in mistaken belief that the sums were properly payable and the

Defendant accepted payment which should not have been made and/or as monies paid for no consideration i.e. monies paid for work and materials from which the Claimant derived no benefit as the said work and materials were not for sites owned by him and the retention of the same would amount to unjust enrichment of the Defendant."

23. The judge rejected that claim for recovery of monies overpaid, essentially because the sums which FCL sought were within budget and Mr Leslie was content to pay them without any investigation. The relevant passages in the judgment are paragraphs 71, 72 and 266 to 267. Those paragraphs read as follows:

> "71. Whilst I have no doubt that Mr Leslie did trust Mr Farrar at the time, I am also satisfied that another equally important reason for Mr Leslie not seeking a breakdown was that he was not concerned so long as Farrar Construction was not claiming actual build costs in excess of the budget figure. Mr Farrar's evidence is that he did not seek payment in excess of the budget costs. That is what he said in his email of 1 March 12. It is also what he said in his evidence. It is also consistent with the contemporaneous documents.
> …
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> 72. In short, I am satisfied that so long as Mr Leslie was happy that Farrar Construction was standing by the budget figure, and the profits were good, he saw no need to require Farrar Construction to take the time and trouble to provide supporting back-up, especially since he would doubtless have needed to pay someone to audit the material anyway if he was to make any use of it.
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> …
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> 266. In relation to the completed developments, the position as I find it to be is as follows:
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> (1) Before work began the parties had agreed a cost budget.
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> (2) During the course of the works Farrar Construction submitted requests for interim payments, on the basis of round sums which were not supported by any interim valuation or otherwise broken down or substantiated.
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> (3) Mr Leslie was willing to make the interim payments requested, on the basis of a combination of factors, namely that: (a) they were within the budget; (b) they appeared reasonable; (c) he assumed that the request could be justified by reference to build costs already incurred or to be incurred specifically in relation to the Framework Agreement development(s) in respect of which they were requested (d) he trusted Mr Farrar and Farrar Construction not to request monies which it intended to use other than to fund build costs in relation to the Framework Agreement development(s).

(4) Although I am satisfied that Mr Leslie did not, in fact, give the matter any real thought at the time, nor was there any discussion let alone agreement to this effect, I am also satisfied that if he had known that his assumption was wrong, and that Farrar Construction intended to use some or all the monies for other purposes, such as to fund other non Framework Agreement developments, or to fund Farrar Construction's general expenditure, including general head office overheads or purchases of items of plant and machinery which were not intended only for use in relation to the Framework Agreement development(s) in respect of which the monies were requested, he would have challenged that. The end result would either have been that he would have refused to make payments insofar as they were intended for those other purposes or, alternatively, he would have made it clear that he would not make any further or final payment in excess of the initial agreed budget without being provided with sufficient details to satisfy himself that it could be justified on the basis of build costs for the relevant Framework Agreement development(s) alone.

(5) So far as Mr Farrar as the controlling mind of Farrar Construction is concerned, I am also satisfied that initially he did not give the matter any thought, but that had he been asked he would have accepted that Farrar Construction was not entitled to request monies which it intended to use other than to fund build costs in relation to the Framework Agreement development(s), although I consider that if he had been asked the specific question he would probably have answered that he considered it legitimate to use some proportion of those monies to fund some proportion of its general expenditure. I am satisfied however that all that he did in reality was to ask for round sum payments on account on the basis of a belief that it was needed to put and keep Farrar Construction in sufficient funds to continue with the relevant development(s), without giving any thought to whether or not the monies would actually be used for that specific purpose. Later on, I am satisfied that he came to believe that the extent and depth of the relationship was such that he was effectively justified in using the monies for Farrar Construction's general business purposes, on the basis that it did not matter because he would always be able either to stick to the budget and still make a reasonable profit, or persuade Mr Leslie to make an increased contribution without having to produce full supporting details.

(6) Once each development had been completed, and the value of the completed development agreed, Mr Farrar was able to tell Mr Leslie that Farrar Construction would stick to its budget and, on the basis that this would produce a reasonable profit for both Farrar Construction and Mr Leslie, Mr Leslie was perfectly happy to agree to this. I am satisfied that Mr Leslie had no interest in requiring Farrar Construction to produce a detailed build cost substantiation in those circumstances, not least because he was being told by Mr Farrar on at least one if not more occasions that it had actually exceeded the budget, so that potentially going down that route would lead to Mr Leslie having to

pay more. I am also satisfied that in such circumstances Mr Leslie had no reason to give the question as to what the funds had been used for any more thought than he had done when making the interim payments. He was quite happy in those circumstances for Farrar Construction to produce a simple invoice with no supporting details and, in relation to Dandy Mill Court, to agree the £50,000 extra payment on the basis that he was being told Farrar Construction had gone over budget and to record his appreciation for the hard work put in by Farrar Construction to deliver a successful outcome.

(7) In relation to Cornlands the evidence from Farrar Construction is that £15,000 more than the budget costs was claimed, according to Mr Farrar's evidence under cross-examination to reflect the extra cost of constructing some garages, but there was no request for a detailed breakdown, I am satisfied because Mr Farrar had agreed to waive Farrar Construction's profit share on this development in any event.

(8) Even in relation to Woodlesford, where Mr Leslie came to believe that Farrar Construction had wrongfully paid itself a profit share without first completing or notifying him that this was what it was doing, there was no challenge to the build costs, and although Mr Leslie complained vociferously about Mr Farrar having, as he perceived it, paying himself the profit on Woodlesford out of monies intended to fund Minsthorpe, there has been no challenge in these proceedings to the profit payment in relation to Woodlesford.

267. What then is the legal position in such circumstances? In my judgment the position is as follows:

(1) At the time that he paid over the monies by way of interim payments Mr Leslie was operating under an assumption, which is that the monies were not intended for purposes other than to fund build costs specifically in relation to the Framework Agreement development(s) for which they were requested. He did not hold this as a conscious belief at the time he paid the monies, but it was nonetheless a belief in the sense that it was a tacit assumption, as described in Goff & Jones The Law of Unjust Enrichment (8th edition) at §9-35.

(2) That assumption was incorrect, at least in relation to some of the interim payments, and particularly the later ones, because Farrar Construction did not positively intend to use those monies only for those specific purposes. However the extent to which Farrar Construction did intend to use these monies for those specific purposes, and the extent to which it did so, must have varied in relation to each specific request for payment in relation to each specific development, depending on Farrar Construction's circumstances at the time, which it is impossible to reconstruct.

(3) I am satisfied that it could be said, therefore, that Mr Leslie could be said to have paid at least some of the interim payments whilst under a

mistaken assumption. It is no longer necessary for Mr Leslie to have to show that it was a mistake of fact or any other mistake of a particular type: Goff & Jones §9-01. Nor, in my judgment, is it a mistake or a "misprediction" about the future, since the mistake was about the present intention which Farrar Construction had when it requested interim payments from Mr Leslie: Goff & Jones §9-08, referring to the distinction drawn by the Privy Council in Dextra Bank v Bank of Jamaica [2001] UKPC 50, at [29], to which Mr Myerson and Mr Ryan drew my attention.

(4) If the Framework Agreement had been operated as intended, at the end of the development Mr Leslie would clearly have been entitled to call for Farrar Construction to substantiate its build costs. If or to the extent that it failed to do so, either by relying on payments made in relation to other developments, or on build costs which were not on a true interpretation of the Framework Agreement recoverable, or otherwise, then I have no doubt that Mr Leslie would have been entitled, as a necessary incident of the Framework Agreement, to recover any overpayment, no doubt in practice by deduction from the profit share otherwise payable, or if necessary by action. However, the existence of a contractual remedy would not, of itself, preclude Mr Leslie from pursuing a coterminous remedy in unjust enrichment, where there would be no question of such remedy running in any way counter to the contractual allocation of risk: Goff & Jones §3-10 and following.

(5) However in fact what happened was that instead of operating the Framework Agreement as had been intended, the parties were happy to reach an agreement where both were content to agree that the build costs equated to the budget cost. In that way, there was no need for Farrar Construction to provide substantiation, or for Mr Leslie to have to consider it, and no need for a potential debate or dispute as to whether the actual build costs were less than or greater than the budget cost, and the parties could happily divide the agreed profit on that basis to mutual satisfaction. The effect of that, in my judgment, is that Mr Leslie assumed the risk of error and entered into a settlement to close off the transaction. This prevents a claimant from succeeding in an unjust enrichment claim: see Goff & Jones §9-27 to 30, and the dicta in the decisions in Maskell v Horner [1914] 3 KB 106, 118 and Woolwich v IRC [1993] AC 70, 165 cited by Mr Myerson and Mr Ryan, and noted in Goff & Jones at §10-57.

(6) A separate analysis, leading to the same result, is that there was no causative link between the mistake and the payment, because Mr Leslie chose to complete the development and divide the profit on the basis of the budget price on the basis of his conscious decision not to undertake the enquiry as to whether or not the actual build costs were less, and thus waived his right to enquire: see Goff & Jones §9-22 & 23, and Kelly v Solari (1841) 9 M&W 54 and Barclays Bank v Simms [1980] QB 677, cited by Mr Myerson and Mr Ryan, and noted by Goff & Jones.

(7) Alternatively, Farrar Construction would be entitled to rely upon the defence of estoppel, as to which Mr Myerson and Mr Ryan have referred me to Chitty on Contracts (31st edition) §29-182 and Avon County Council v Howlett [1983] 1 WLR 605. Having reached a clear agreement with Mr Leslie in relation to the build costs and profit share, with a clear implicit representation by Mr Leslie that he would not require it to undertake the process of ascertaining and substantiating its actual build costs for that particular development, or to repay any element of the budget in excess of substantiated actual build costs, Farrar Construction has acted to its detriment by agreeing that settlement, in circumstances where it appears that it may have been able to assert higher build costs than the budget. I am also prepared to accept that in general terms Farrar Construction undoubtedly expended monies on recruiting staff and improving its office facilities and purchasing plant and equipment on the basis that its build costs and profit entitlement had been agreed and paid. In the circumstances it is not now open to Mr Leslie to claim unjust enrichment on the basis of mistake."

24. The judge's final conclusion after netting off all sums owed by Mr Leslie to FCL and all sums owed by FCL to Mr Leslie on different developments was that Mr Leslie owed FCL £139,428.16. Accordingly, he gave judgment in FCL's favour for that sum.

25. Mr Leslie was aggrieved by the judge's decision. Accordingly he appealed to the Court of Appeal.

Part 4 – The appeal to the Court of Appeal

26. By an appellant's notice filed on 23rd February 2015, Mr Leslie appealed against one part of the judge's judgment. This was the decision that Mr Leslie could not recover the overpayments made in respect of the five completed developments. Accordingly, says Mr Leslie, the overall result of the litigation should be that FCL owes Mr Leslie £158,121.84 (rather than Mr Leslie owing FCL £139,428.16).

27. The notice of appeal contains five grounds which I would summarise as follows:

(1) The judge correctly allowed Mr Leslie to recover overpayments made on two uncompleted developments, namely Methley and Minsthorpe. He ought to have treated the completed developments in the same way. He should have treated all developments under the Framework Agreement as a whole.
(2) The judge ought to have allowed recovery of the overpayments on the five completed developments as monies paid under a mistake.
(3) The judge erred in finding waiver.
(4) The judge erred in finding that there was a valid defence of estoppel.
(5) There was a failure of consideration for the overpayments made by Mr Leslie.

28. The appeal was argued on 19th October 2016. Both Mr Nicholas Braslavsky QC for the appellant and Mr Simon Myerson QC for the respondent presented their submissions with clarity and economy. I am grateful to them and to their respective juniors, Mr Andrew Singer and Mr Michael Ryan, for their considerable assistance.
29. Before addressing the individual grounds of appeal, I must first review the law.

Part 5 – The law

30. If C, because of a mistake, pays money which is not due to D, he can recover that money unless one of the recognised defences applies. The courts have formulated, refined and applied that principle through a series of decisions over the last two centuries.

31. In *Kelly v Solari* (1841) 9 M & W 54 (exch.) an insurance company paid out £987 to the widow of the deceased in respect of three life insurance policies, overlooking the fact that one of the policies had lapsed. The insurers sought to recover the overpayment. They failed at trial, but the Court of Exchequer ordered a retrial. Lord Abinger CB stated the relevant principle as follows:

> "The safest rule however, is that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound."

32. Parke B stated:

> "I entirely agree in the opinion just pronounced by my Lord Chief Baron, that there ought to be a new trial. I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. ... If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

The other two members of the court agreed.

33. In *Barclays Bank Limited v W J Simms Son & Cook (Southern) Limited* [1980] 1 QB 677, a bank by mistake paid out on a cheque, overlooking the customer's instruction to stop payment. The recipient company went into receivership. The bank succeeded

in a claim to recover the payment. Goff J noted that none of the recognised defences to such a claim applied in that case. He explained that those recognised defences include that "the payer intends that the payee shall have the money at all events": see 695C.

34. In *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, the plaintiff building society paid tax due under certain regulations, whilst challenging the validity of those regulations. The plaintiff succeeded in its challenge to the validity of the regulations and subsequently succeeded in a claim to recover the tax paid out. The House of Lords held that special principles applied in tax cases, which are not relevant for present purposes. In relation to the general law, however, Lord Goff stated that where money was paid under a mistake of fact, it was generally recoverable. He then added this qualification:

> "(3) Where a sum has been paid which is not due, but it has not been paid under a mistake of fact or under compulsion as explained under (2) above, it is generally not recoverable. Such a payment has often been called a voluntary payment. In particular, a payment is regarded as a voluntary payment and so as irrecoverable in the following circumstances.
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> (a) The money has been paid under a mistake of law: see (1) above. See e.g., *Slater v. Burnley Corporation*, 59 L.T. 636 and *National Pari-Mutuel Association Ltd. v. The King*, 47 T.L.R. 110.
>
> (b) The payer has the opportunity of contesting his liability in proceedings, but instead gives way and pays: see e.g., *Henderson v. Folkestone Waterworks Co.* (1885) 1 T.L.R. 329, and *Sargood Brothers v. The Commonwealth*, 11 C.L.R. 258, especially at p. 301, *per* Isaacs J. So where money has been paid under pressure of actual or threatened legal proceedings for its recovery, the payer cannot say that for that reason the money has been paid under compulsion and is therefore recoverable by him. If he chooses to give way and pay, rather than obtain the decision of the court on the question whether the money is due, his payment is regarded as voluntary and so is not recoverable: see e.g., *William Whiteley Ltd. v. The King*, 101 L.T. 741.
>
> (c) The money has otherwise been paid in such circumstances that the payment was made to close the transaction. Such would obviously be so in the case of a binding compromise; but even where there is no consideration for the payment, it may have been made to close the transaction and so be irrecoverable. Such a payment has been treated as a gift: see *Maskell v. Horner* [1915] 3 K.B. 106, 118, *per* Lord Reading C.J."

35. *Kleinwort Benson Limited v Lincoln City Council* [1999] 2 AC 349 was something of a watershed. It established that monies paid under a mistake of law, as well as monies paid under a mistake of fact, were recoverable.

36. In *Dextra Bank & Trust Co Limited v Bank of Jamaica* [2002] 1 All ER (Comm) 193, the Privy Council explored what constituted a mistake of fact for restitutionary

purposes. An incorrect prediction of future events did not constitute such a mistake. The payer could not be relieved of a risk knowingly run.

37. In *Brennan v Bolt Burdon* [2005] QB 303, the claimant's claim form was struck out for late service. The parties then agreed to a settlement on the basis that each side bore its own costs. Subsequently there was a Court of Appeal decision in other litigation, the effect of which was that the claimant's claim form had been served in time. The claimant thereupon returned to the fray and successfully appealed against the order striking out her claim form. The defendant applied to stay the proceedings on the basis of the earlier settlement. Both the Master and the judge acceded to that application, holding that the compromise was vitiated because of a common mistake of law. The Court of Appeal allowed the defendant's appeal, holding that there had been a compromise of litigation on a give and take basis.

38. The essential point is that when parties settle litigation, each party foregoes the chances of achieving a better result and avoids the risk of suffering a worse result. They must accept the consequences of what they have agreed, even if the law subsequently changes to the advantage of one side or the other. The same principle, I would add, applies in the general run of situations where parties with opposing interests negotiate a financial agreement. The mere fact that it turns out that one party or the other has made a bad bargain does not vitiate the agreement.

39. The House of Lords considered these matters in *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49; [2007] 1 AC 558. DMG arranged its tax affairs on the basis of community law as it then stood. The Court of Justice of the European Community subsequently held that the tax regime constituted an unwarranted restriction on freedom of establishment. DMG succeeded in a claim for compensation against the Inland Revenue. Lord Hoffmann (with whom Lord Hope agreed) reviewed the general principles at [27]. He said:

> "Likewise, the circumstances in which a payment is made may show that the person who made the payment took the risk that, if the question was fully litigated, it might turn out that he did not owe the money. Payment under a compromise is an obvious example: see *Brennan v Bolt Burdon* [2005] QB 303. I would not regard the fact that the person making the payment had doubts about his liability as conclusive of the question of whether he took the risk, particularly if the existence of these doubts was unknown to the receiving party. It would be strange if a party whose lawyer had raised a doubt on the question but who decided nevertheless that he had better pay should be in a worse position than a party who had no doubts because he had never taken any advice, particularly if the receiving party had no idea that there was any difference in the circumstances in which the two payments had been made. It would be more rational if the question of whether a party should be treated as having taken the risk depended upon the objective circumstances surrounding the payment as they could reasonably have been known to both parties, including of course the extent to which the law was known to be in doubt."

40. I shall not attempt to paraphrase that line of authorities. Nevertheless, one important principle emerges: where C voluntarily makes a payment to D knowing that it may be more than he owes, but choosing not to ascertain the correct amount due, he cannot

ordinarily recover that overpayment. I say "ordinarily", because different considerations arise if there has been fraud or misrepresentation. There is no plea of fraud or misrepresentation in the present case.

41. Emboldened by this review of authority, I must now come to a decision on the present appeal.

Part 6 - Decision

42. The first issue is whether the judge was right to treat the five completed developments as closed transactions. Mr Braslavsky submits that he was not. He points to the fact that the judge ordered FCL to repay the sums overpaid on two uncompleted developments, namely Methley and Minsthorpe. Mr Braslavsky submits that the judge should have adopted the same approach to the five completed developments.

43. In my view, this first ground of appeal is an impermissible attack on the judge's findings of fact. The judge held that the parties agreed to deal with each development project as a separate matter, albeit in accordance with the provisions of the Framework Agreement. Accordingly, as each development was completed, they reached final agreement on the figures and, so to speak, closed their books on that particular project. There is no basis for this court to go behind that finding.

44. It is clear why the judge ordered the overpayments on Methley and Minsthorpe to be repaid. The employer normally makes interim payments for building works on the basis that there will be a reckoning at the end of the project, with a final balancing payment being made one way or the other. The judge, having found that the interim payments on Methley and Minsthorpe were too high, inevitably ordered FCL to repay the excess. Since Methley and Minsthorpe were both work in progress, the judge correctly treated them differently from the five completed developments.

45. I now turn to the second ground of appeal, which is really the crux of this case. Counsel on both sides directed most of their submissions to this issue.

46. It is first necessary to identify what "mistake" influenced Mr Leslie's conduct. I shall consider this at two separate stages, first at the stage of interim payments and secondly at the stage of final payments.

47. In relation to the interim payments stage, the judge's relevant findings of fact are set out in paragraphs 71, 72 and 266(1) to (4), which I have set out in Part 3 above.

48. It follows from these passages that:

    (i) Mr Leslie's main concern on each development was not to exceed the budget cost.
    (ii) Mr Leslie assumed that the interim payments all related to build costs for developments within the Framework Agreement. If he had known that assumption was wrong, he would have either (a) paid only the proper build costs (i.e. 78% of the sums requested) or alternatively (b) paid all of the sums requested but made it clear that he would not pay more in total than the budget figures.

49. In relation to the final payments, the judge's relevant findings of fact are set out at paragraphs 70, 71, 265(6) and 267(5) of the judgment, which I have set out in Part 3 above. It follows from these passages that:

    (i) Mr Leslie's main concern on all the developments was not to exceed the budget costs, subject to a couple of minor adjustments. That would ensure (and in the event did ensure) that Mr Leslie made a handsome profit.
    (ii) Since the final payments were in line with the budget costs, Mr Leslie was unconcerned about whether or not the sums which he was paying accurately represented the build costs.
    (iii) It was beneficial for both parties to avoid the costs and effort which would be involved in auditing and negotiating the actual amount of the build costs.

50. It is important to note at this point that Mr Leslie's pleadings did not allege fraud or misrepresentation. The overcharges levied by FCL resulted from the parties' differing understanding of what the phrase "build costs" meant in the context of the Framework Agreement. This matter remained unresolved until the judge's decision at trial. As Mr Braslavsky pointed out in argument, misunderstandings of this nature are hardly surprising, if a builder and a property developer choose to embark upon a series of multi-million pound projects on the basis of a brief oral agreement which no one troubles to reduce to writing.

51. Let me now turn to the legal consequences of what the parties did. In my view, when Mr Leslie made the final payments on each of the five completed developments, he was not acting on the basis of a mistake or under the influence of an erroneous assumption. He had taken a conscious decision to pay the sums requested without investigation, because that suited his purposes. The following dictum of Lord Abinger CB in *Kelly v Solari* is precisely applicable:

    > "There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound."

52. The present case falls into the category referred to by Goff J in *Barclays Bank v W J Sims* at 695. It is a case where the payer intended that the payee should have the money at all events. Lord Goff's statement of principle in *Woolwich Building Society v IRC* at 165 is also applicable. In each of the five completed developments Mr Leslie agreed a final payment in order to "close the transaction".

53. I would add that it is a feature of countless business negotiations every day of the week that people agree round figures or compromises because they really cannot be bothered to go into the details. In the present case if Mr Leslie had embarked upon a full audit of the build costs, with accountants to go through the figures and lawyers to advise on the meaning of "build costs", he would (as we now know) have increased his overall profit from about £1.15 million to about £1.45 million. Mr Leslie was a busy man with a wide range of business and property interests. He was making a profit on five completed developments in line with his expectations. He did not wish to devote further resources to grinding through the figures with professional assistance. There is nothing particularly surprising in that state of affairs.

54. Anyone with experience of property development (and that certainly includes both Mr Leslie and Mr Farrar) would know that the actual build costs would not be the same as the budget costs. By proceeding on the basis of equating build costs with budget costs Mr Leslie was, self-evidently, running the risk of paying more than was strictly due. As the Privy Council noted in *Dextra Bank v Bank of Jamaica* (approving an observation of Professor Birks) a party should not be "relieved of a risk knowingly run".

55. The question of what risks a party knowingly runs came under consideration in *Deutsche Morgan Grenfell v IRC*. Paragraph 27 of Lord Hoffmann's speech (set out in Part 5 above) is directly in point. We must look at the objective circumstances in which Mr Leslie made the final payments in order to determine what risks he was taking. He was taking the risk of overpaying because he was satisfied with the overall profit he was making, the bottom line figure.

56. Let me now draw the threads together. In my view this is a classic case of C voluntarily making a payment to D, knowing that it may be more than he owes, but choosing not to ascertain the correct amount. He is not entitled to recover the overpayment.

57. Since I have reached the same conclusion as the judge on the main issue, I conclude that the appeal must fail. It is not therefore necessary to consider the alternative justifications for the judge's decision in paragraphs 267(6) and (7) of the judgment.

58. In case it is relevant, however, I agree with the judge that Mr Leslie waived his right to make any detailed inquiry into the actual build costs of each development. Whether this is a case of estoppel is a more difficult question and one which, in the circumstances, I do not need to decide.

59. Finally, there is the sixth ground of appeal. In his oral submissions Mr Braslavsky drew back somewhat from that ground. He merely stated, without enthusiasm and without citing any authority, that this was a case of partial failure of consideration. I do not agree. Mr Leslie has paid £3,579,375 to FCL in respect of five property developments, without requiring any detailed investigation of the figures. The fact that upon detailed investigation Mr Leslie's payment would have reduced from £3,579,375 to £3,281,825 does not mean that there has been a partial failure of consideration.

60. In the result therefore I would dismiss this appeal.

Lord Justice McCombe

61. I agree that the appeal should be dismissed and only add a few words of my own out of deference to the excellent arguments presented to us and to add a small additional observation.

62. For my part, when one considers paragraphs 71 and 72 and paragraphs 266 to 267 of the judgment, I can fully understand Mr Braslavsky's persuasive submission that elements of the latter paragraphs might suggest that they were inconsistent with the

earlier and with the judge's ultimate finding that each individual development was "closed off" by the agreement as to profit shares. However, in the end, it seems to me that the overriding fact found by the judge was that so long as the costs were within budget, Mr Leslie was content to draw a line under that transaction without asking for more. He had his own understanding of what "build costs" could properly include and Mr Farrar had another. Neither articulated his understanding and neither knew the effect of what they had objectively agreed until the judge told them what that was in his judgment. Mr Leslie could have asked for clarification of the figures, but it suited him not to do so.

63. In those circumstances, as my Lord says in paragraph 51 above, the situation appears to be covered by the dictum, which he quotes, from Lord Abinger CB in *Kelly v Solari* (supra).

64. I would add that I also agree with Jackson LJ that, so far as relevant, Mr Leslie waived his right to make detailed inquiry at the stage that he did, for the reasons given by the judge in paragraph 267(6) of his judgment.

65. I merely wish to add this. We are being invited to overturn a judge's conclusion on a finding of fact, made after a complex trial. It was a finding made in a very careful and comprehensive judgment on eleven issues. In such circumstances, I would not easily be persuaded that he was not entitled to make that ultimate finding of fact on the evidence which he had heard and which we have not. While, as I have said, I follow Mr Braslavsky's careful critique of the words used by the judge in paragraph 266 of his judgment, I do not think that one should be too slavish to narrow textual analysis of a judgment such as this, reserved and carefully thought out as it is. The salient fact that the judge found was that Mr Leslie was not concerned to seek a breakdown of build costs so long as there was no claim for such costs in excess of the budget figure and "the profits were good" (paragraph 72). That finding is not undermined by the later passages. As Lord Hoffmann said in *Piglowska v Piglowski* [1999] 2 FLR 763 at 784F, in cases where judgments are reserved or given *ex tempore*, "The exigencies of courtroom life are such that reasons for judgment will always be capable of having been better expressed". That is not to say that this judgment was not well expressed; it was. It is simply that the language used gave room for argument of the nature that has emerged on this appeal.

66. For these reasons, and in full agreement with the judgment of Jackson LJ, I too would dismiss this appeal.