Putting the horse before the cart: the Supreme Court's decision in Wells v Devani

In the briefing below, we consider the Supreme Court's recent decision on contractual interpretation and implication of terms in *Wells v Devani* [2019] UKSC 4, which provides a timely reminder of the way in which the courts will approach oral contracts and the need where possible to commit such contracts to writing.

**THE FACTS**

Mr. Devani was an estate agent and Mr. Wells had some flats to sell. The two were put in touch with each other and subsequently had a short telephone call in which Mr. Devani told Mr. Wells that he was an estate agent and that his commission terms would be 2% plus VAT, but no mention was made of the point at which any commission would become due (e.g. when a willing buyer was introduced, when the sale actually completed etc.).

Mr. Devani subsequently found a buyer for the flats and the sale completed. He then sought his 2% commission from Mr. Wells. Mr. Wells refused to pay it on the grounds that no binding contract had been concluded between the two of them: the terms of their agreement on the call were simply too uncertain to amount to such. In particular, for contracts of this nature, the identification of the specific trigger event giving rise to the entitlement to commission was of critical importance and therefore essential to the formation of a legally binding contract. The fact that no such trigger had been specified was fatal.

**THE FIRST INSTANCE DECISION**

The judge at first instance found that Mr. Wells and Mr. Devani had objectively intended to create legal relations during their telephone call. He also found that they had expressly agreed that Mr. Devani would act as Mr. Wells’ agent in relation to the sale of the flats and that a commission of 2% would be payable. They had not, however, reached any express agreement as to the precise event which would entitle Mr. Devani to his commission. In the absence of such express agreement, the law would imply the minimum term necessary into the contract to give business efficacy to their intentions (as per the test in the Supreme Court’s decision in *Marks & Spencer v BNP Paribas* [2015] UKSC 72). In that regard, the least onerous term for Mr. Wells, and one that would have been obvious to the reasonable bystander, was a term to the effect that the commission would be payable on the actual completion of the purchase of the flats (i.e. when the money actually changed hands), and not before. The judge therefore implied a term to that effect.

**THE COURT OF APPEAL’S DECISION**

So far, so straightforward. However, the Court of Appeal by a majority (Lewison LJ and McCombe LJ, Arden LJ dissenting) allowed Mr. Wells’ appeal on the issue of whether there was a binding contract between the parties. It agreed with Mr. Wells that no such contract existed on the basis that no trigger event for the
payment of the commission had been specified. While a court could of course legitimately imply terms into a contract, the existence of a concluded contract was a prerequisite to that exercise and here, given the uncertainty as to a critical term, that prerequisite did not exist. To imply a term into an otherwise incomplete or uncertain contract in order to render it complete or certain was to "put the cart before the horse".

THE SUPREME COURT’S DECISION

The Supreme Court (Lord Kitchin with a supporting judgment from Lord Briggs) effectively upheld the first instance judge’s decision but for different reasons:

- Mr. Wells and Mr. Devani had objectively intended on their call to create legal relations.

- The scope of the contract between them could then be determined by applying the standard test for interpretation of contracts: what would a reasonable person in the position of the parties at the time their contract was concluded have understood their words and conduct, taken together, to mean?

- When applying this test, not all the terms of the contract had to be expressed in words; terms could be made clear through the parties’ conduct, too. Indeed, in the case of an oral contract that would very frequently be the case.

- Here, it was objectively clear from a combination of the parties’ words and conduct on the relevant call that a contract had been created with the following terms: (i) Mr. Devani was appointed to act as Mr. Wells’ agent in relation to the sale of the flats; (ii) the rate of his commission would be 2%; and (iii) that commission would become payable when any sale actually completed and the purchase price was paid.

- There was therefore no need to imply a term in relation to the point at which any commission would become payable but, if such a need had existed, the Court would have had no hesitation in implying such a term on the basis that it was objectively necessary to give business efficacy to the contract.

- The Court furthermore had no objection in principle to implying a term into an agreement which would otherwise be uncertain or incomplete in order to render it sufficiently certain or complete to constitute a binding contract, should such a term be either objectively necessary or so obvious as to go without saying. It did not consider approaching matters in that way to be putting the cart before the horse.

IN CONCLUSION

In many ways this is a judgment that simply reaffirms the pre-existing legal position, and the tests for interpreting a contract and implying a term into a contract remain as they were. It does, however, provide a timely reminder that the best starting point for determining the parameters of contract will often be the standard test for contractual interpretation, rather than trying to get over the higher hurdle of persuading the court to imply a term. It is also a reminder that, when considering the scope of an oral contract in particular, it is important to consider the objective effect of both the parties’ words AND their conduct taken together. Ultimately, of course, the prudent course in order to avoid disputes such as this one will always be to commit such contracts to writing.

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