

The sound of silence in contractual interpretation

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Barton v Morris decision

1. In the agency contracts there is often a condition that the agent must secure a minimum sale price on behalf of his principal in order to recover a commission. The Supreme Court considered whether there was an appropriate remedy when the sale price falls short in Barton & Others v Morris & Others [2023] UKSC 3 (25 January 2023).

The Facts

2. Foxpace Limited, the fourth respondent, owned a London property known as Nash House. Mr Barton was an agent who Foxpace had agreed to pay a £1.2 million commission if he introduced a purchaser who paid £6.5 million for Nash House.
3. Mr Barton did introduce a purchaser who did agree to pay £6.65 million for the property. However, after it was revealed that Nash House fell within a safeguarded HS2 construction area the sale price was reduced to £6 million plus VAT. There was no contractual provision for a final sale price under the agreed threshold. Foxpace contended that no sum was due; Mr Barton brought a claim for reasonable value of his services.

Lower Court Decisions

4. The trial judge determined that Mr Barton was entitled to nothing under the contract, a decision which Mr Barton appealed.
5. The Court of Appeal allowed the appeal holding that the silence of the contract as to what would happen if the sale was for less than £6.5 million meant that the contract did not rule out a claim in unjust enrichment.
6. They held, further, that Foxpace would be unjustly enriched if it took the benefit of the introduction without paying Mr Barton a reasonable fee. Foxpace through their director's personal representative, Mr Barton, appealed to the Supreme Court.

The Supreme Court

7. It was held that there were three ways in which Foxpace could be contractually required to pay Mr Barton:
 - a) **Express Term** The only express obligation in the contract was for Foxpace to pay Mr Barton £1.2 million if Nash House sold for a minimum price of £6.5 million to a purchaser whom Mr Barton had introduced. There was no express term agreed for a price under that threshold.
 - b) **Implied Term as a matter of fact** The Court held that implying a term that Foxpace is bound to pay Mr Barton an ambiguous sum if a purchaser buys Nash House for less than £6.5 million contradicts the express terms of the contract. Further, it is not necessary to imply into the contract a term of this nature to give the agreement business efficacy.
 - c) **A term implied by law** Section 15 of SOGA 1982 implies a term that the party contracting with the supplier for services will pay a reasonable charge where consideration for the service is not determined by the contract. It was held this did not apply in this case because consideration was specified in the contract. There was a further body of case law relied upon by Mr Barton relating to agency contracts whereupon a term is implied entitling an agent to a commission for introducing a buyer to the purchase of a property. The Court did not apply this principle as Mr Barton was not an estate agent and the fee was far greater than the reasonable fee for introduction as it was calculated in reference to previously aborted fees on unsuccessful sales.
8. Finally, it was determined that the claim for unjust enrichment must fail. The Court considered that any attempt to recover an award when the minimum price had not been delivered would be circumventing the express contract. It was not for the court to retroactively bolster Mr Barton's bad bargain.
9. There were dissenting judgments from two of the five Justices. Lord Leggatt and Lord Burrows both considered there was a term implied by law on reasonable remuneration for the supply of services where no sum is fixed by the contract. Lord Leggatt explained that the promise to pay Mr Barton £1.2m if a certain price was attained did not contradict the suggestion that a reasonable sum would be due if the price was less.

Impact of the Decision

10. The majority view was to assume that it was intentional for the contract to be silent on the agent's remuneration if he did not secure the minimum price. It was not for the Court to resolve or reinterpret a bad bargain.
11. The minority view was that the failure to prescribe for a specific outcome did not preclude the Court from reading in standard commercial considerations. Silence was not to be considered as deliberate especially where the express terms did not negate those that might be implied by law or fact.
12. Practitioners will note the importance of contractual detail. It is evident from the divided Justices in this case that there will always be scope for reasonable disagreement when interpreting vague commercial agreements especially those concerning agency remuneration. The best protection against such ambiguity will always be to contract with forethought and specification. Anything less is likely to prove expensive.

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