Estate agents' fees: curing incomplete contracts by implying terms.

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THE *WELLS v. DEVANI* DECISION.

1. A court cannot begin to *imply* terms into a contract, until the contract itself has been formed. The court will not imply a term to turn an incomplete bargain into a legally binding contract: Wells v Devani [2016] EWCA Civ 1106. The facts as found by the Judge caused more stark divisions in analysis than one would expect.

3PB'S ANALYSIS.

2. **The Facts.** The dispute concerned the terms of a commission agreement by which a developer, Mr Wells, agreed to pay an estate agent, Mr Devani, for introducing purchasers of flats in a development of 14 flats in Hackney, London.

3. By the beginning of 2008, when Mr Devani was introduced to Mr Wells, seven of the flats remained unsold. The terms of the commission agreement were entirely oral, reached in a telephone conversation on 29th January 2008. A critical point in the case was whether that conversation had resulted in a legally-binding contract.

4. Mr Devani subsequently introduced a purchaser, Newlon Housing Association, who by 5th February 2008 agreed, subject to contract, to buy the remaining flats.

5. **The First Instance Decision.** At first instance, HHJ Moloney QC found: (i) that during the telephone call, Mr Devani told Mr Wells that his standard terms for fees were 2% plus VAT; but (ii) that the parties had not discussed what event would trigger payment of the fee.

6. The Judge found that the telephone call had produced a legally-binding contract. The fact that a trigger for the fees had not been agreed did not mean there was "*insufficient agreement on terms, or certainty about terms*". The Judge was able to "*imply the minimum term necessary to give business efficacy to the parties' intentions*". Payment would be due on the introduction of a person who actually completed the purchase: [16].

7. Having determined that there was a contract, HHJ Moloney QC thereafter concluded that Mr Devani had breached section 18 of the Estate Agents Act 1979 (**"Section 18"**), which obliges an agent to provide prescribed information before a contract is entered into. Section 18 provides that where there is a failure to comply with it, the contract shall not be enforceable except pursuant to an order of the Court. The judge permitted the enforcement of the contract, but reduced the fee by a third to reflect prejudice suffered by Mr Wells.

8. **The Appeal** raised two points:

   8.1. First, had the judge's approach to the implication of terms been permissible?

   8.2. Secondly, had he properly exercised his discretion under Section 18 by reducing the fee by one third?

9. **The contract point.** The members of the Court of Appeal critically disagreed on the inferences to be drawn from the judge's factual findings. For the majority (Lewison and McCombe LLJ) the trial judge had made a clear finding of fact that nothing was said about the trigger event (at [38],[81]). What followed from that?

10. In allowing the appeal, Lewison LJ reasoned that the court can only imply terms into a concluded contract:

    "*…It is of course the case that the court may imply terms into a concluded contract. But that assumes that there is a concluded contract into which terms can be implied. It is not legitimate, under the guise of implying terms, to make a contract for the parties.*" [19]

11. Further, the Supreme Court has disavowed the suggestion[1] that contractual *interpretation* and *implication* are part of an indivisible process. What the judge had done was to imply a term, which was not the same as interpreting an agreement: [31]-[33]. To determine the express terms of an oral contract, the court has to ask: what words were spoken? [38]

12. Was the trigger clause one that "*the law requires as essential for the formation of legally binding relations*"?

[1] The suggestion was made my Lord Hoffman in AG of Belize v. Belize Telecom Ltd [2009] 1 WLR 1988 (PC), and disavowed in Marks and Spencer plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742.

Yes. The trigger event was an essential pre-requisite. Moreover, because here were all manner of different circumstances in which an entitlement to commission could arise, in the absence of agreement on when the trigger event occurred, it was not the sort of incompleteness that could be cured by an implied term based on reasonableness or any other default rule: [21],[24],[37].[2]

13. **The contract point: the minority view.** Arden LJ disagreed. In her view the judge had found an agreement that Mr Devani should be entitled to commission "*if he found a purchaser*": [90],[93]. That was a sufficiently complete agreement, so there was no need to imply any further term, and the Court's function was to interpret its meaning: [97]. Mr Devani had found a purchaser, and his fee had become due, at the latest when Newlon completed the purchase: [97],[109]-[110].

14. Arden LJ considered the limits of Lewison LJ's proposition (in para. 10 above) about implying terms, and concluded:

    14.1. (Agreeing with the majority) it is illegitimate, under the guise of implying terms, to make a contract for the parties: [102].

    14.2. But the authority relied on for that proposition[3] concerned *unilateral* contracts. Where a party makes a unilateral offer (so that no contract is concluded until the offeree *chooses* to accept), the court cannot imply terms which *impose legal obligations*, in order to bring a contract into existence: [103]-[106].

    14.3. That principle had no application here. Mr Wells' offer to Mr Devani had started out as a unilateral offer, but had become a bilateral contract once Mr Devani had started to perform it.

IMPACT OF THE DECISION

15. The general proposition that the Court will not "create" a contract, is far from novel. However, this case serves as a reminder of the fine line that sometimes exists between the implication of terms and the interpretation of contracts. However, whilst one has sympathy for Mr Devani, the analysis of Lewison LJ and McCombe LJ is compelling.

16. Of further interest is the Court's guidance on the approach to be adopted to s18 Estates Agents Act 1979. The Court highlighted:- (a) the need to treat prejudice and culpability in the round, rather than sequentially; (b) the particular importance of compliance where, as here, performance was achieved in quick time; (c) the types of prejudice likely to be suffered by the client, including uncertainty, and (if another agent is retained on a sole agency basis) the risk of exposure to a double commission – having regard also to factors such as lapse of time and limitation; (d) the relevance of the quality of the job done by the agent.

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[2] McCombe LJ agreed with that analysis. He noted that the facts as found showed that the parties "*did not agree as to the circumstances in which [Mr Devani] would be entitled to that commission.*" [81]

[3] Scancarriers A/S v Aotearoa International Ltd [1985] 2 Lloyd's Rep 419 (HL).