Safe as houses

Gwendoline Davies and Claire Acklam ask whether a recent Supreme Court decision places a new 'spin' on rules for formation of contracts and implying terms

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'It is important to remember that contracting parties' interests and understanding can differ and diverge.'

In *Wells v Devani* [2019] the Supreme Court has found that an oral contract was binding despite the parties' failure to agree a key term, and has hinted at a new discretion for implying terms into contracts.

Why is this case important?

The case addresses key issues of perennial importance for anyone concerned with commercial contracts: the formation of legally binding contracts, and the rules on whether and when contractual terms may be implied. It also confirms a key principle of estate agency common law.

In particular, the case is an authoritative example of the courts' reluctance to find there is no contract where the intention of the parties, objectively shown, suggests they intend to be contractually bound. It also potentially adds a new 'spin' to the rules on implying terms.

Following this case, parties may have greater scope for arguing that an incomplete or uncertain contract may nevertheless be binding. The case also seems to afford additional flexibility for the court when it comes to implying terms. While that may be helpful for commercial parties in certain circumstances, future litigation on the extent of the courts' discretion to imply terms seems likely.

What were the commercial context and legal issues?

The case concerned a property vendor (Mr Wells) and an estate agent (Mr Devani). Mr Wells and Mr Devani discussed the proposed sale of Mr Wells' property in a telephone conversation during which Mr Devani explained how commission would be calculated, but did not state when payment would be triggered. Mr Devani subsequently introduced Mr Wells to a purchaser, but when he sought to claim his commission on the sale, Mr Wells refused to pay, alleging there was no binding contract in place.

The legal issues were:

- was there a binding contract in place; and
- if so, should a term be implied as to timing for payment of commission?

The Court of Appeal had previously held that there was no binding contract in place. Specifically, the Court of Appeal found that the parties' agreement was not clear as to when commission would become payable and it therefore failed for uncertainty. The majority ruled that identifying the trigger event for payment of commission was of such importance to the formation of legally binding relations, that without it the bargain was incomplete. The Court of Appeal would not imply terms to make a contract binding where it would otherwise fail for uncertainty.

Mr Devani appealed to the Supreme Court.

What did the Supreme Court decide?

The Supreme Court focused on the fact that estate agency case law establishes

M&S v BNP Paribas [2015] UKSC 72
Wells v Devani [2019] UKSC 4

that, in the absence of any express agreement to the contrary, the trigger for an agent's entitlement to claim commission arises on completion of the sale at the latest. As a result, the parties' oral contract did not fail for uncertainty and was binding without there being any need to imply a term as to timing for payment of commission.

However the Supreme Court went on to say that, in this case, it would have had no hesitation in implying a term in any event.

Prior Supreme Court authority on implying terms, particularly in *M&S v BNP Paribas* [2015], established that in order for a term to be implied, it must be necessary to give business efficacy to the contract. That is a high bar which asks whether, without the term, the contract simply does not work.

In this case, however, the Supreme Court has potentially added a new 'gloss' to the test. Here, Lord Kitchen stated that even if (contrary to the above finding) the contract did not provide for payment of the commission on completion (paras 19 and 29, emphasis added):

> ... then a term to that effect must be implied to make the contract work and to give it practical and commercial coherence *[and i]n carrying out this exercise of implication the court would be reading into the contract that which its nature implicitly requires. Put another way, to leave Mr Wells without any obligation to pay Mr Devani would be completely inconsistent with the nature of their relationship.*

These comments can potentially be read as introducing an additional discretion for the court to imply a term where that is an obvious step which accords with a 'natural understanding' of the relationship and agreement between the parties.

What practical lessons can be learned?

Established law on implying terms does contain just enough flexibility as to allow the court to reach the decision that it has without the Supreme Court's potential additional discretion being inconsistent or amounting to a significant departure from it. Nine times out of ten, however, a case like this could well have the opposite outcome.

Keeping in mind the following practical points should help contract negotiators/drafters to ensure that their commercial contracts say what and all they should, thereby minimising the risk of a contract formation or implication of terms dispute later down the line:

- At the outset of most commercial arrangements, parties are enthusiastic and invariably believe that their aspirations and interests align. Even where that is true, and no matter how close and positive the relationship, it is important to remember that contracting parties' interests and understanding can differ and diverge.

- Commercial parties should also remember that legally binding contracts can be formed, as in this case, without any written documentation or other formality.

- Businesses should review their negotiating practices; be aware of the risks associated with informality; and educate their staff accordingly. The lack of any specific requirement for formality and/or documentation means that contracts can be formed orally and by conduct as well as in writing; and it is therefore important that parties should not discuss terms or act in any way that is inconsistent with their contractual intentions in case a contract comes into effect prematurely, inadvertently or on unsuitable terms.

- It is obviously preferable, where possible, for contracts to be in writing and drafted clearly, accurately and comprehensively to expressly contain, in unambiguous language, all necessary terms to reflect the parties' agreement.

- Where parties have entered into a lengthy and carefully drafted contract, particularly where they have been legally advised, it will be difficult to imply any term(s) as it will be doubtful whether any omission was the result of the parties' oversight or a deliberate decision.

- The Supreme Court's decision in *Wells* does, however, seem to offer new scope for parties to argue for terms to be implied on the basis of the obvious, natural understanding of the arrangement. ■