

The Court of Appeal has recently held that gaps in contracts cannot be filled by implied terms where a contract would otherwise be unenforceable because the parties have failed to agree an essential term.

The issue in question in *Wells v Devani* [2016] EWCA Civ 1106 was whether a trigger event regarding the payment of commission to an estate agent could be implied into a contract.

Implied terms

On occasion, a court may imply a term into a contract to fill a gap in the contract's drafting if it is reasonable and necessary to do so in order to make the contract work, and provided that such implied term would reflect what the parties intended at the time they entered into the contract. In ascertaining the parties' intentions at the time they entered into the contract, the courts apply an objective test: what would a reasonable person have understood the parties' intentions to be, given the knowledge that was reasonably available to the parties at the time at which they entered the contract?

Background

Mr Wells had undertaken a development of flats in Hackney and was seeking to sell seven flats. A neighbour introduced Mr Wells to Mr Devani, an estate agent, and there was an exchange via telephone between the pair. Before anything was put in writing between the parties, Mr Devani had found a buyer who, subject to contract, had agreed to buy the seven flats.

Shortly afterwards, Mr Devani sent Mr Wells an email attaching his terms of business. The terms of business stated that a commission of 2% plus VAT would be payable to Mr Devani on the exchange of contracts with the purchaser. In due course, the purchase of the flats was completed, and Mr Devani claimed commission of £42,000 plus VAT. Mr Wells refused to pay it. At first instance, the court implied a term that commission was payable on completion of the sale of the flats.

Appeal

In considering whether the essential term regarding the trigger event for payment of commission had been agreed between the parties, the critical question which was considered by the Court of Appeal was whether, during the course of the telephone conversation between Mr Wells and Mr Devani, the parties had even reached a legally binding contract in the first place. The Court of Appeal found that the judge at first instance had been wrong to conclude that an oral contract had been made, and thus was wrong to imply a term that commission was payable. "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"¹ (emphasis added).

The Court of Appeal cited *Luxor (Eastbourne) Ltd. v Cooper*² which states that, "contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms...".³ In the current circumstances, Lewison LJ stated that, "commission agents' contracts are infinitely variable in nature and it does not seem...that a 'contract' of this type, that does not specify with sufficient clarity the event triggering entitlement to commission, is complete".⁴ The Court of Appeal was therefore of the view that "unless the parties themselves specify the event, their bargain is incomplete"⁵

¹ [2016] EWCA Civ 1106, paragraph 19

² [1941] AC 108

³ *Luxor (Eastbourne) Ltd. v Cooper* [1941] AC 108 at paragraph 119

⁴ [2016] EWCA Civ 1106, paragraph 81

⁵ [2016] EWCA Civ 1106, paragraph 24

and it is not for the court to “turn an incomplete bargain into a legally binding contract by adding expressly agreed terms and implied terms together.”⁶

Practice points

In order to guarantee that a contract is enforceable, parties should ensure that they agree all essential terms of the contract at the time at which they are entering the contract. A court will not imply terms into contracts where the court does not deem a legally binding contract to have been entered into in the first place.

Where there is a gap in a contract because an essential term is missing, the court will look to resolve the issue by interpreting the parties’ words and conduct but the court will not necessarily imply the missing term in question into the contract. Accordingly, this could result in a party missing out on payments or obligations which it is expecting to receive or to be performed by the other party, with no assurance that such payments or obligations would subsequently be implied by a court.

⁶ [2016] EWCA Civ 1106, paragraph 24