When silence is not always golden.

Chris Louth (Managing Associate)

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English law will not always fill the gap of a contract especially where a contract is silent as to what obligations arise on the happening of a particular event.

This was recently confirmed by the Supreme Court in *Barton and others v Morris and another in place of Gwyn-Jones (deceased) [2023] UKSC 3*: https://www.supremecourt.uk/cases/docs/uksc-2020-0002-judgment.pdf.

Judgment was given on 25 January 2023.

The facts

An oral agreement was entered into between Mr Barton and Foxpace Limited ("Foxpace"). Foxpace agreed to pay Mr Barton a commission fee of £1.2m if he could introduce a purchaser for a property called Nash House who subsequently bought the property for £6.5m (the "Contract").

Mr Barton introduced a purchaser to Foxpace, Western UK (Acton) Limited ("Western") and a purchase price for Nash House was agreed for £6.55m. However, the purchase price was subsequently reduced to £6m due to Nash House being in an area earmarked for HS2 construction.

The Contract was entirely silent as to what would happen if Nash House was sold for less than £6.5m.

Mr Barton commenced proceedings against Foxpace for the reasonable value of his services. Mr Barton lost at first instance. This was overturned by the Court of Appeal who allowed Mr Barton's appeal and held that a reasonable fee was to be paid to him (in the sum of £435,000).

Foxpace appealed the Court of Appeal's decision and by a majority of the Supreme Court it was held that Mr Barton was not entitled to a fee.

Decision

Lady Rose who gave the leading majority Judgment examined three areas by which Mr Barton may have been able to successfully claim a fee. It was decided that none of the three areas assisted Mr Barton. These are briefly discussed below.

(i) Express term of the Contract

There was no express term of the Contract which permitted Mr Barton to be paid a fee if Nash House was sold for less than £6.5m. The Contract was a straightforward unilateral contract which did not expressly provide for any further obligations. In other words, Mr Barton was not obligated to find a purchaser but if he did and the purchase price was £6.5m or above then Foxpace was obligated to pay him a commission fee of £1.2m.

Accordingly, no express terms of the Contract assisted Mr Barton.

(ii) Implied term of the Contract

There are two ways in which a term can be implied: (a) as a matter of fact; and (b) as a matter of law.

As to (a), it was held that to suggest Foxpace was contractually bound to pay Mr Barton an unspecified sum if Western bought Nash House for less than £6.5m would contradict the express terms of the Contract. Lady Rose found this to go directly against what the parties had agreed.

Likewise, Lady Rose held that it was not necessary to imply a term that Mr Barton is entitled to a reasonable fee in order to give the contract business efficacy. However, Lady Rose did note that

the position might be different and a term would likely be implied in circumstances where Foxpace deliberately agreed a reduced price with Western so as to avoid a liability to pay Mr Barton the £1.2m (see [31]).

In relation to (b), it was held that although the Supply of Goods and Service Act 1982 implies a term that the party contracting with a supplier for services will pay a reasonable fee where consideration for the service is not determined by the contract, this did not apply in this case because consideration was in fact determined by the Contract.

Equally, Mr Barton could not rely on a series of cases in kind. He sought to rely on cases relating to estate agents however, these were distinguished and the Contract was found not to be the same as the contracts found in these line of cases.

(iii) Unjust enrichment

The law of unjust enrichment would not assist in these circumstances because to do so would circumvent the terms of the Contract and if Foxpace was obliged to pay any commission to Mr Barton when there has not been a sale for £6.5m that would be at odds with what was agreed between the parties. Lady Rose concluded: "*Unjust enrichment mends no-one's bargain*".

Comment

The English Courts will be reluctant to fill the gaps parties leave in their contracts and as a result, it might appear a fairly harsh result for Mr Barton. On the other hand, the Contract was entirely silent as to what would happen if the purchase price was below £6.5m. That was what the parties had expressly agreed and the risk of silence in a contract is uncertainty.

Clearly the English Courts at different levels had different opinions on whether a fee was due to Mr Barton and there were two dissenting Supreme Court Judgments in this case. There is a perception amongst practitioners that there are an increasing number of merits based Judges in both the High Court and Court of Appeal. The present case serves as a reminder that if a party insists on a position which might appear harsh but is nevertheless correct in law and founded on settled legal principles they may need to take the case to a more robust Court, even if that requires pursuing the matter to the Supreme Court.

Nevertheless, it is now clear that parties who contract only for one particular scenario may well be left out of pocket if what actually happens is something different and is not included in the contract.

This case also highlights the issues which can be encountered when oral contracts are made. Evidential difficulties will be faced when there is no written evidence of an agreement and the parties rely purely on memory recollection.

Chris Louth
Managing Associate

cl@humphrieskerstetter.com
+44 207 438 1121

Humphries Kerstetter LLP
St. Bartholomew House
92 Fleet Street
London EC4Y 1DH

Tel: +44 207 632 6900
www.humphrieskerstetter.com