Putting the cart before the horse

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Imagine the scenario: a developer and builder enter into a joint venture to develop 14 flats in Hackney (purported to be London's most liveable borough). The completed flats are marketed through a local estate agency but only half the flats are sold.

Through a neighbour the developer is introduced to a person said to be an agent. They have a conversation by telephone where the agent agrees to look for a purchaser and says his fees are 2% plus VAT. Within minutes, the agent contacts a housing association who is interested in purchasing the flats.

A meeting at the site is arranged with the developer, his co-venture partner and the housing association, but the agent is absent. The housing association is interested and the following day agrees, subject to contract, to buy the remaining flats. The developer contacts the agent informing him of the sale. Thereafter the agent sends the developer an email stating that "as per our terms of business our fees are 2% plus VAT" and requesting the solicitor's details. He sends a copy of his written terms of business. The sale is completed and the agent claims commission of £42,000 plus VAT. The developer does not want to pay and says there is no contract.

The relevance of the urban factual matrix may not be readily apparent in an agricultural setting. But it is those facts which were the subject of a recent case in the Court of Appeal, *Wells v Devani*[1], and exposed a divergence of judicial opinion as to when a contract is completed and when terms may be implied. Given the tendency for oral agreements in rural businesses, it is case which will be significant as well as providing a salutary warning for the need to have written agreements. (The Court of Appeal, it should be said, also considered s.18, Estate Agents Act 1979 but this article is limited to the contractual issue only.)

First instance

It is sensible to start with the decision made at first instance by the trial judge in the County Court. Having heard the evidence, His Honour Judge Moloney QC found that, throughout the telephone conversation, Mr Devani considered to be proposing himself as an agent and not a buyer, and was looking to a commission from Mr Wells as the source of his profit.

Importantly, he said that Mr Devani had not informed Mr Wells before the making of the contract of the circumstances under which he would be entitled to remuneration. The judge, however "supplied the gaps in his findings" by implying a term to the effect that payment would be due on the introduction of a person who completed the purchase of the flats saying:

> "the law will imply the minimum term necessary to give business efficacy to the parties' intentions. In the context of estate agents' commissions, the term least onerous to the client, and the one which nobody would dispute if an officious bystander were to suggest it, is that payment is due to on the introduction of a buyer who actually completes the purchase."

The judge concluded that Mr Wells and Mr Devani had made a legally binding contract in the course of the telephone call.

Appeal

In the Court of Appeal, Lewison LJ disagreed: before the court can imply terms into a contract, there has to be a concluded contract into which terms can be implied. He said: "It is not legitimate, under the guise of implying terms, to make a contract for the parties", adding that the judge had put the cart before the horse. Or perhaps put in a different way, the judge had galloped off without saddle or reins and not paid heed to Lord Roskill in *Scancarriers A/S v Aotearoa International Ltd*[2]: "the first question must always be whether any legally binding contract has been made".

The principles as to interpretation of a contract on the one hand, and the implying of terms on the other, have been conflated in earlier cases. In *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*[3], Lord Neuberger said:

> "I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involved determining the scope and meaning of the contract. However, Lord Hoffman's analysis in [*Belize v Belize Telecom Ltd*[4]] could obscure the fact that construing the words used and implying additional words are different processes governed by different rules… In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until he has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term."

The general principles as to whether there is a binding contract may not be in doubt: there needs to be an intention to create legal relations; certainty of terms; and consideration, based on an evaluation of what was communicated by words or conduct judged on an objective basis.

Agreement of all terms

The crucial issue in this case was whether the parties had agreed upon all the terms which they regarded, or the law requires, as essential for the formation of legally binding relations. It does not follow, therefore, that all terms need to be agreed in order for a binding contract to have been made. In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH*[5], Lord Clarke said this:

> "Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

Likewise, in *MRI Trading AG v Erdenet Mining Corporation LLC*[6], a contract for the sale of goods which left terms relating to charges and a shipping schedule to be agreed was held **not** to be unenforceable for uncertainty. The court was willing to bridge the gap and imply a term requiring those terms to be reasonable in circumstances where the parties had agreed every other aspect of the contract.

The essential term missing in *Wells v Devani* was the express identification of the trigger event upon which the commission became payable. Lewison LJ considered that was essential (citing *Luxor (Eastbourne) Ltd v Cooper*[7]) which could not be decided by reference to the standard of reasonableness.

McCombe LJ agreed with Lewison LJ. Dissenting, Arden LJ said that the absence of an agreement as to the trigger event did not mean there was no agreement binding in law. Her

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reasoning was that Scancarriers applied to unilateral contracts and was thus distinguishable because the parties' contract had started out as unilateral which had then become bilateral (comparing the agent relationship with a conditional option to renew a lease). Arden LJ cited *Restatement of the English Law of Contract*:[8]

> "there is an acceptance of the offer of a unilateral contract so that the offer cannot be revoked, once the offeree starts to perform the requested act".

Arden LJ considered that the trigger event for the payment of commission was when interpreting the contract – and as the judge at first instance found – the completion of purchase of the flats.

Lewison LJ identified two difficulties with Arden LJ's reasoning. First, it was not an argument put before the trial judge or, indeed, on appeal, and Mr Wells had been given no opportunity to respond to it. Secondly, there was no "act requested", so there was nothing to accept. Mr Devani's standard terms had not been sent until **after** the purchase had been agreed. The question to ask was what did the parties actually say to each other about the trigger event: the answer was nothing. Given that the circumstances giving rise to the entitlement to commission was of critical importance and that a variety of events could be specified, unless the parties themselves specify the event, the bargain is incomplete.

Plainly, whether a term is essential will depend on the nature of the contract and the particular factual circumstances. It is considered that this decision will have limited effect in so far as a landlord and tenant situation is concerned. The hallmarks of a tenancy are well established: the grant of exclusive possession for a term.[9] If one of those ingredients is missing, the arrangement will be a licence. If it is relevant, the landlord and tenant arrangement is in any event a bilateral contract.

The decision in *Wells v Devani* will have an impact, however, to those somewhat informal arrangements which are rarely written down and where terms may indeed be vague. And indeed, will be relevant to whether there is in fact a licence.

The moral of the story is to agree all the terms in writing before work is started. While that may be a counsel of perfection, parties should seek to agree as much as possible either in short form or heads of terms.

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1 [2016] EWCA Civ 1106
2 [1985] 2 Lloyd's Rep 419
3 [2016] UKSC 72; [2016] AC 742
4 [2009] UKPC 10; [2009] 1 WLR 1988
5 [2010] UKSC 14; [2010] 1 WLR 753
6 [2013] EWCA Civ 156
7 [1941] AC 108
8 Burrows (2016)
9 *Street v Mountford* [1985] 2 All ER 289

AGRICULTURAL TENANCIES

Mind the (registration) gap!

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The recent judgement of the High Court in *Stodday Land v Pye*[1] is a timely reminder of the traps awaiting solicitors serving notices under the Agricultural Holdings Act.

Mr Pye occupied 18 acres near Ashton-on-Stodday on an oral tenancy subject to the 1986 Act, and had done so since the 1950s. In 2006 Stodday Land Limited (Stodday) became the registered freehold proprietor of the holding. On 19th June 2013 Stodday sold part of the holding to a developer, Ripway Properties Ltd (Ripway). Ripway was registered as such on 16th July 2013. The period between 19th June and 16th July 2013 – the infamous 'registration gap' – was central to the case.

Two things happened in the registration gap. First, Ripway served a demand for rent in respect of their part of the holding (a mere 16p, in fact). Second, both Ripway and Stodday served notices under sch.3, Agricultural Holdings Act 1986 to terminate Mr Pye's tenancy.

Ripway served notice under Case B (land required for non-agricultural use), and Stodday served notice under Case D (failure to comply with notices).

Notices invalid

Mr Pye challenged the validity of both notices, not on the individual grounds, but on the more fundamental basis that Ripway's notice was not given by the legal owner of the reversionary estate. If that was true, then Stodday's notice was also invalid, since it did not relate to the whole of the holding.

At trial, HHJ Beech in the Preston County Court upheld both of Mr Pye's challenges. Stodday and Ripway appealed to the High Court.

Handing down judgement on 7th October 2016, Norris J found both notices to be invalid, and dismissed the appeal. He started from the position that: (a) any notice to quit must be valid at common law as well as under the 1986 Act; and (b) it was well-established that only the person in whom the reversionary estate is vested may give notice to bring a tenancy to an end. Stodday argued that the latter proposition did not apply to agricultural tenancies, or that it was no longer good law, on three bases:

The first argument was that s.96, AHA 1986 defines 'Landlord' as "any person for the time being entitled to receive the rents and profits of the land" unless the context otherwise requires. This was rejected, because 'the context' in these circumstances, includes the common law requirement that the reversion be vested in the person giving the notice; a view supported by the editors of *Hill & Redman*[2].

The second argument relied on s.141, Law of Property Act 1925, by which the benefit of every