

## **Usual Terms, Implied Terms and the Importance of Context in Contracts: A Case Note on *Devani v Wells* [2019] UKSC 4**

### **Case Facts**

Mr Wells had difficulty selling some newly built flats.<sup>1</sup> Through a mutual acquaintance, Mr Wells communicated via phone call with Mr Devani, an estate agent.<sup>2</sup> During the phone call, Mr Devani told Mr Wells that he was an estate agent and that his commission terms were 2% plus VAT, but failed to mention the exact event that would entitle him to payment.<sup>3</sup> Shortly after, Mr Devani found a buyer for the flats.<sup>4</sup> The sale was completed and Mr Devani sent an email requesting payment, but Mr Wells refused.<sup>5</sup> Mr Devani then issued proceedings in the Central London County Court.<sup>6</sup>

### **Relevant Issue**

Whether there was a binding contract between Mr Wells and Mr Devani.<sup>7</sup>

### **Procedural history**

Judge Moloney QC held that, despite a lack of express agreement regarding the exact event that would entitle Mr Devani to payment, a term could be implied to give business efficacy to the contract.<sup>8</sup> The implied term was that payment was due once the buyer (introduced by Mr Devani) completes their purchase of Mr Wells' properties.<sup>9</sup> Thus, Mr Wells was liable to pay Mr Devani his fees.<sup>10</sup>

The Court of Appeal held by a majority that there was no binding contract.<sup>11</sup> Firstly, courts cannot imply terms to make a contract for both parties.<sup>12</sup> Secondly, identifying a trigger event that gives rise to an estate agent's commission is essential to the formation of legally binding relations.<sup>13</sup> Thirdly, unless parties specify that event, the contract is incomplete; it is also wrong to add expressly agreed terms and implied terms together to turn it into a legally binding contract.<sup>14</sup>

### **Decision of the Supreme Court**

The Supreme Court unanimously held in favour of Mr Devani. Lord Kitchin agreed that there was no express agreement of the precise event leading to Mr Devani's payment.<sup>15</sup> However, he states that "courts are reluctant to find an agreement is too vague or uncertain to be enforced where it is found that the parties had the intention of being contractually bound and have acted on their agreement."<sup>16</sup> The Lord disagreed with Lewison LJ in the Court of Appeal that an event giving rise to the entitlement of commission is needed to render a contract complete: "a reasonable person would understand that the parties intended the commission to be payable on completion and from the proceeds of sale."<sup>17</sup> Hence, the commission was payable once the sale of the goods to the buyer (introduced by Mr Devani) is complete.<sup>18</sup>

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<sup>1</sup> *Devani v Wells* [2019] UKSC 4, para 2.

<sup>2</sup> *Ibid* at para 4.

<sup>3</sup> *Ibid* at paras 4 and 11.

<sup>4</sup> *Ibid* at para 7.

<sup>5</sup> *Ibid* at paras 7 and 9.

<sup>6</sup> *Ibid* at para 9.

<sup>7</sup> *Ibid* at para 17.

<sup>8</sup> *Ibid* at para 11.

<sup>9</sup> *Ibid*

<sup>10</sup> *Ibid* at para 12.

<sup>11</sup> *Ibid* at para 13.

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid* at para 19.

<sup>16</sup> *Ibid* at para 18.

<sup>17</sup> *Ibid* at para 26.

<sup>18</sup> *Ibid* at para 23.

Lord Kitchin also expressed that there was no need to imply a term into the contract.<sup>19</sup> However, if it was necessary to imply a term, the Court would not hesitate in holding that there was an implied term in the contract where payment would be due once the property had been purchased by the buyer that Mr Devani introduced was complete.<sup>20</sup> The Lord disagreed with the majority in the Court of Appeal that terms cannot be implied into an incomplete agreement; on the contrary, “it is possible to imply something that is so obvious that it goes without saying into anything”.<sup>21</sup> In line with established principles, a term can also be implied to give a contract business efficacy where it is shown that the parties have intended to be bound and to create legal relations.<sup>22</sup>

Lord Briggs also agreed with Lord Kitchin, emphasizing that he would “have been prepared to find that a sufficiently certain and complete contract had been concluded” merely from the context arising from the construction of the parties’ words and conduct without needing to imply a term into the agreement.<sup>23</sup>

### **Impact of the Case**

*Devani v Wells* upholds previous case authority that, subject to express terms stating otherwise, an estate agent is employed “on the usual terms” and will receive their commission for introducing prospective buyer after the completion of the sale.<sup>24</sup> It further shows that courts are not prevented from implying terms into an incomplete contract in order to give business efficacy to the agreement. It also reveals the importance of context when determining whether there was a complete contract between the parties.

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<sup>19</sup> *Ibid* at para 27.

<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid* at para 33.

<sup>22</sup> *Ibid*; also see para 28, where Lord Kitchin refers to *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at paras 23-24.

<sup>23</sup> *Ibid* at para 61.

<sup>24</sup> *Ibid* at paras 20-22.