HFW

COMMODITIES CASE UPDATE

April 2019

HFW COMMODITIES CASE UPDATE

April 2019

We are delighted to present the seventh Commodities Case Update, a publication which is produced quarterly. The update provides a summary of some of the key cases relevant to the commodities sector from the last few months.

With a market leading commodities team we have over 100 lawyers that provide a full service internationally. The group is led by a team of over 25 partners, who are based in all our offices around the world, including in the major trading hubs of London, Paris, Geneva, Dubai, Singapore, Hong Kong, and Sydney.

If you would be interested in receiving a bespoke training session and presentation about the cases referred to in this update or any other cases of interest, please contact your usual contact at HFW, or the authors of this update Andrew Williams and Damian Honey.

As well as being of general interest for those working in commodities, our intention is that for lawyers working in-house, a bespoke training session tailored to your specific needs will allow you to meet the change in CPD requirements introduced by the SRA. It will allow you to demonstrate that you have reflected on and identified your L&D needs and met these. Please do contact us if this would be of interest.

We hope that you find this update useful.

DAMIAN HONEY
Partner, London
T +44 (0)20 7264 8354
M +44 (0)7976 916412
E damian.honey@hfw.com

ANDREW WILLIAMS
Partner, London
T +44 (0)20 7264 8364
M +44 (0)7789 395151
E andrew.williams@hfw.com

1. Qingdao Huiquan Shipping Company v Shanghai Dong He Xin Industry Group Co Ltd [2018] EWHC 3009 (Comm)

Court Commercial Court (HFW's Nicholas Poynder acting on behalf of the claimant)

Date 25 September 2018

Summary

This judgment has confirmed that anti-suit injunctions will be granted on the grounds of "Angelic Grace" against foreign litigants who are not party to a contract containing an arbitration clause, but seek to rely on that contract in litigation.

Facts

A third party ("Emori") agreed to pay the Claimant ("Owners") a sum of money via the defendant authorised agent ("SDHX") by way of a settlement agreement. The settlement agreement contained an arbitration clause stating that any dispute arising out of or in connection with this agreement should be submitted to London Arbitration. SDHX was not party to the settlement agreement or arbitration clause.

Three years later SDHX sought repayment of the sum it had transferred to the Owners under the settlement agreement. SDHX commenced proceedings in the Qingdao Shinan District Court alleging there had been an oral agreement between it and the Owners giving it the substantially the same rights to those of Emori under the settlement agreement without the arbitration agreement. The Owners served an application to the English Commercial Court seeking an interim anti-suit injunction.

Existing case law has established the principle that a litigant who is not a party to a contract will not be able to base a claim on rights arising out of a contract without being bound by the forum clause contained within it. These circumstances raised the question whether SDHX was in fact relying on the contract when it formally based its claim on an oral agreement.

Findings

The judge decided that SDHX was bound by the arbitration clause because SDHX was, in substance, seeking to rely on the terms of and rights contained in the settlement agreement. Furthermore there was an allegation that the written agreement had been varied, thus there was reliance on the settlement agreement within the claim.

The judge considered whether the time period of over a year between SDHX's claim and the Owner's application for an anti-suit injunction was excessive. The Qingdao court had not yet considered the question of jurisdiction, furthermore the decision of the Qingdao court clarified that SDHX was relying upon the settlement agreement.

HFW Comment

This judgment is of interest because it suggests a third party litigant relying on a contract to which it is not party may be bound by an arbitration clause contained in that contract.

Parties seeking an anti-suit injunction need to consider the timing of an application. This judgment demonstrates that delaying an application in order to obtain clarification as to the basis of foreign proceedings may be a justifiable reason for delay however the chances of success will be higher if the application is made before the foreign court has considered the merits of the claim.

2. Sucden Middle-East v Yagci Denizcilik Ve Ticaret Limited Sirketi, "The Mv Muammer Yagci"

Court Commercial Court (Nick Fisher of HFW acting for the Appellant)

Date 2 November 2018

Summary
The English Commercial Court has held that cargo seized by a local customs authority at a discharge port, causing delay, was "government interference" and fell within the force majeure clause (Clause 28) of the Sugar Charter Party 1999.

Facts
The discharge of a cargo of sugar in Algeria was delayed for four and a half months after local authorities seized the cargo following the submission of false import documents by the cargo receivers. The charterers claimed this delay was an exception to laytime running under Clause 28. Owners disagreed. An arbitration tribunal found that the delay to discharge did not amount to "government interferences" within the meaning of clause 28 of the Sugar Charter Party 1999, which reads:

Clause 28 of the Sugar Charter Party 1999: "Strikes and Force Majeure"
"In the event that whilst at or off the loading place or discharging place the loading and/or discharging of the vessel is prevented or delayed by any of the following occurrences: strikes, riots, civil commotions, lockouts of men, accidents and/or breakdowns on railways, stoppages on railway and/or river and/or canal by ice or frost, mechanical breakdowns at mechanical loading plants, ***government interferences****, vessel being inoperative or rendered inoperative due to terms and conditions of employment of the Officers and Crew, time so lost shall not count as laytime on demurrage or detention…"*

Charterers were permitted to appeal on the grounds that the question of law was one of general public importance because it related to a standard form contract in wide commercial use. The question before the Commercial Court was: "*where a cargo is seized by the local customs authorities at the discharge port causing a delay to discharge, is the time so lost caused by 'government interferences' within the meaning of Clause 28 of the Sugar Charter Party 1999 form?*"

Findings
The Commercial Court found in favour of the appellant charterers. It held that the ordinary meaning of the phrase "government interferences" includes interventions of this specific form (seizure of cargo), being an action of a local customs authority or government, and so the delay constituted a force majeure event under the clause.

As this clause is concerned with laytime, a range of routine or ordinary tasks would be involved in that context, such as the submission of documents or inspections by surveyors to sample and analyse cargo are considered to be part of the *process* of discharging rather than an interference with it. Owners urged that Customs intervention leading to seizure of the cargo was part of this ordinary process. The Court disagreed and found the seizure to be a significant exercise of executive power and by no means an "ordinary" action. In the usual course of things, cargo is not seized and property rights are not invaded in that way. That remains the case even if seizure is experienced frequently, perhaps in one part of the world or another, or even when the seizure is predictable. Indeed, the judgment went so far as to state that seizure of this kind is a "strong example" of circumstances that would fall within the force majeure clause. Owners' contention that the cause of the delay was actually the submission of false documents was also dismissed; the Court found that the seizure caused the delay, even if the submission of false documents caused the seizure.

The Court stressed that it was of real importance that this decision on the meaning of the language did not in any way offend commercial common sense.

In allowing the appeal, the Court held that "the answer given to the question is only a narrow “yes”. It did not address all of the circumstances that may come within or fall outside clause 28.

HFW Comment
This case is an example of a rare recent successful claim for force majeure. It is also helpful to have a public court judgment on the interpretation of a commonly used form in sugar trading.

3. AML Global Ltd v Exxonmobil Petroleum & Chemical BVBA and anor [2018] EWHC 3321

Court Commercial Court

Date 22 November 2018

Summary

An aviation fuel supply agreement had recorded that the claimant would act as buyer. This was amended to reflect the parties' common intention that the claimant was to act as an intermediary between the defendant fuel suppliers and the buyer. Two earlier agreements had been on buyer's agent terms and there was no evidence that the parties intended to change their contractual relationship.

Facts

The claimant was an aviation fuel agent. It acted as an intermediary between fuel suppliers and aircraft operators, operating on a "buyer's agent" model. This meant that the claimant did not have to pay VAT on the fuel supplies. The claimant entered into two fuel supply agreements with the defendants in 2009 and 2010 on buyer's agent terms. In 2011, shortly before the expiry of the second agreement, the parties had a conference call to discuss changing their invoicing system in response to proposed changes by HMRC. The defendants then emailed a copy of a draft agreement to the claimant which was in the buyer's form, rather than the buyer's agent form. The claimants did not check the terms. The parties then met for lunch and agreed to renew the supply contract.

When HMRC announced in 2013 that it was going to start charging suppliers, such as the defendants, on all supplies of fuel (even those utilising intermediaries), the claimants realised that the 2011 agreement was not on buyer's agent terms. The claimants brought a claim for rectification for common mistake. They argued that the defendants had used the buyer's form by mistake and that the agreement should have been in the same form as the previous two agreements. The defendants disagreed and counterclaimed for the VAT it should have charged on the fuel supply instead.

Findings

The Court found in favour of the claimants and dismissed the counterclaim. The 2011 agreement was not a new contract, but was agreed because the previous two contracts were about to expire. It was reasonable to assume that the parties were contracting on the same basis as before. The claimants were required to show (i) a common continuing intention for them to act as buyer's agent, (ii) there was an outward expression of accord, (iii) that intention continued at the time the 2011 agreement was executed, and (iv) the agreement did not reflect the common intention by mistake.

The standard of proof required was convincing proof, rather than balance of probabilities because the alleged common intention contradicted a written agreement. A common continuing intention was what an objective observer would have thought the intention to be. The conference call and lunch were evidence that the parties intended that the new agreement should be on buyer's agent terms. It was also financially beneficial for the parties to contract this way. The buyer's form used by the defendants was a mistake.

HFW Comment

If a party intends to deviate from a previous course of action it must demonstrate a clear intention. This judgment demonstrates that a court may find common intention by mistake where there is no evidence to contradict the common continuing intention.

4. Pluczenik Diamond Company v W Nagel [2018] EWCA Civ 2640

Court Court of Appeal

Date 28 November 2018

Summary

The English Court of Appeal has now considered and ruled on the meanings of "commodity exchanges" and "commodity market" for the purpose of The Commercial Agents (Council Directive) Regulations 1993 ("the Regulations").

Facts

Mr Nagel acted as a broker in the negotiation and purchase of rough diamonds from De Beers. Nagel worked for wholesale diamond purchaser Pluczenik Diamond Company ("Pluczenik") for a number of years before Pluczenik terminated the relationship. He claimed compensation under the Regulations and also under common law, for breach of contract.

A commercial agent is defined in Regulation 2(1) as: *"a self employed intermediary who has a continuing authority to negotiate the sale or purchase of goods on behalf of another person"* However, Regulation 2(2)(b) excludes from this definition *"commercial agents when they operate on commodity exchanges or in the commodity market"*.

At first instance, the Court awarded Nagel damages for breach of contract but held that his claim under the Regulations failed because it was caught by the exception in Regulation 2(2)(b). Pluczenik appealed. This summary will focus on Mr Nagel's cross-appeal, in which he argued that when De Beers sold boxes of rough diamonds to accredited purchasers at "sights" this was not a "commodity exchange" or a "commodity market".

Findings

The trial judge had concluded that "commodity" was not the same as "any tangible goods". The Court of Appeal agreed and noted that this was reinforced by the fact that French and German directives use terms that directly translate as "raw materials" in place of "commodities".

The Court of Appeal held that an “exchange" is a place where trading takes place among members of the exchange and subject to its rules. "*An essential feature of a commodity exchange is that the commodities (or rights to buy and sell commodities) which are traded on the exchange can be freely bought and sold among the participants*." An auction house, requiring bidders to satisfy specified criteria would not be regarded as an exchange in the commercial world. "Commodity market" encompasses any general trading in commodities that takes place in the open market.

De Beers held "sights" during which they sold rough diamonds to wholesalers. A party could not purchase diamonds from De Beers unless they were accredited as a "sightholder" and each sightholder was required to have an accredited broker. Therefore sights were a distribution outlet for a very particular producer of a very particular commodity, more typical of a wholesale shop than an exchange. The exception under Regulation 2(2)(b) did not apply here. The sale of boxes of unprocessed rough diamonds by De Beers at "sights" was not a commodity exchange or market because access to such market was not freely available.

HFW Comment

For commodities traders, this judgment offers a practical definition of the terms "commodity," "commodity exchange" and "commodity market" which should make for more straightforward interpretation of the exception under Regulation 2(2)(b). In reality, in most cases, the exception is likely to apply to commercial agents acting on behalf of a principal where commodities are traded.

5. WH Holding Limited, West Ham United Football Club Limited v E20 Stadium LLP [2018] EWCA Civ 2652

Court Court of Appeal

Date 30 November 2018

Summary
Commercial discussions about the settlement of a dispute fall outside the scope of litigation privilege.

Facts
A dispute arose between West Ham FC and E20, the landlord of the Olympic Stadium (West Ham's home ground) over the number of seats the club was entitled to use. Emails were sent internally between E20 board members and between E20 board members and stakeholders in relation to a commercial settlement of the dispute. West Ham wanted these emails to be disclosed whilst E20 claimed privilege over them.

Findings
The key issue at stake was whether litigation privilege extends to documents which are concerned with the settlement or avoidance of litigation where the documents do not seek advice or information for the purpose of litigation.

Whilst there was no question that E20 could fairly and properly say that litigation was in reasonable contemplation, there was a question as to whether the emails were prepared for the dominant purpose of conducting litigation. Documents prepared for the dominant purpose of formulating and proposing the settlement of litigation that is in reasonable contemplation are protected by litigation privilege, but it is not always the case that documents generated in connection with litigation are created for the sole or dominant purpose of the litigation. The judge gave an example of general management needing to dispose of a claim "because its continuation is harming fund-raising." Such documents would not fall within litigation privilege.

The judge discussed the *ENRC* case (as discussed in our previous update) in which it was agreed that "conducting litigation" encompassed avoiding or settling litigation, however this judgment did not extend the scope of documents covered by litigation privilege. The principle remains that communication must be made for the sole or dominant purpose of conducting the litigation.

In this case the emails sent between E20 board members and their stakeholders in relation to the commercial settlement of the dispute were not created for the sole or dominant purpose of the litigation. Therefore, the judge found that these documents did not fall within litigation privilege and E20 were required to disclose them.

HFW Summary
Clients should be aware of the need to exercise caution if documents are being created internally before or during litigation. Privilege will not generally protect documents unless they are created for the purpose of obtaining information or advice.

Where potential disputes arise, clients should seek advice as early as possible in relation to discussions relevant to settlement, commercial or otherwise.

6. Volcafe Ltd and others v Compania Sud Americana De Vapores SA [2018] UKSC 61

Court Supreme Court

Date 5 December 2018

Summary

If damage occurs to cargo during a voyage and the Hague Rules (the "Rules") apply, the starting point is that the carrier is responsible for damage to cargo that was shipped in good order. The carrier must rebut that presumption. If the carrier seeks to rely on inherent vice as a defence, it must show that it took all reasonable steps to protect the cargo from damage *and* that the inherent vice caused the damage.

Facts

Coffee beans were shipped from Columbia to Northern Europe in unventilated containers. Under the bills of lading, which incorporated the Rules, the carrier was responsible for stuffing the containers.

Coffee beans are a hygroscopic cargo: they naturally lose and absorb moisture. As containers move from warm to cold climates, moist air condenses on their metal walls and drips onto the cargo. This can be counteracted by lining containers with materials which trap moisture. Despite the containers being lined with Kraft paper (although it was not established how much paper was used), some of the coffee beans were found to have suffered condensation damage on outturn. Cargo owners claimed that the carrier was in breach of its obligation under Article III(2) of the Rules to properly care for and discharge the cargo. The carrier argued that it had met its obligations by lining the containers. It argued the case fell within an exception to its obligations, under Article IV(2)(m) of the Rules, because of an inherent vice of the cargo, in that it was unable to withstand ordinary levels of moisture.

Findings

The Supreme Court overturned the Court of Appeal's decision. It held that where cargo is shipped in good order and damage is caused during shipment, the carrier has the burden of proving it had not been negligent.

It also distinguished between the existence of an excepted circumstance on the one hand (here, inherent vice) and its causative effect on the other. In order for a carrier to rely on the inherent vice defence, it must show that the inherent vice caused the damage. *"The mere fact that coffee beans are hygroscopic and emit moisture as the ambient temperature falls may constitute an inherent vice if the effects cannot be countered by reasonable care in the service contracted for, but not if they can and should be."*

The context of the contract is also important. To rely on the exception of inherent vice, the carrier will need to show that it took all reasonable measures to prevent damage, to the extent required by the contract, but the damage occurred nonetheless.

HFW Comment

For cargo interests, especially those shipping cargo in containers, this judgment identifies clearly who has the burden of proving the cause of, and liability for, damage during shipment in cases where the carrier has prepared and stuffed the containers. Where the Hague Rules apply, and cargo is shipped in good order, the carrier bears that burden.

This may lead to changes in written contracts: carriers may seek to reverse that burden of proof in their bills of lading, or exclude all liability in bailment. When shipping in containers, it would also be helpful for the parties to set out in the contract what is expected of the carrier to protect the cargo from damage.

7. Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd [2019] EWHC 476 (Comm)

Court Commercial Court

Date 28 February 2019

Summary

A default rate of interest of one-month LIBOR plus 12% stipulated in two advance payment and steel supply contracts was valid and enforceable. The high default rate of interest was not a penalty, nor was performance illegal under Indian law and the relevant clause was properly incorporated into the contracts.

Facts

In 2015, the parties had entered into two advance payment and steel supply agreements ("APSAs"), under which Cargill agreed to make advance payments in respect of contemplated future sales of steel and Uttam Galva was then obliged either (i) to sell steel of the requisite value to Cargill or (ii) to repay the sum paid in advance. The parties had been dealing with each other on similar terms for about 10 years. A total of US$61.8 million was drawn down and paid under the APSAs, but Uttam Galva failed to repay Cargill within the contractual time limit, either with steel or in cash. Cargill applied for and obtained summary judgment for repayment of US$61.8 million, with interest due at a rate to be determined. Cargill then applied for summary judgment on its claim for interest at the contractual "default compensation" rate, under Clause 8.12 of the APSAs. This was a rate of 1 month LIBOR plus 12 %, which, it argued, was the rate contractually agreed between the parties and which applied both pre-judgment and post-judgment. Uttam Galva argued that the "default compensation" provision was unenforceable (i) as a penalty, (ii) because it had not been incorporated into the APSAs, and (iii) because the rate was illegal under the applicable Indian law. Cargill submitted that Uttam had no real prospect of success in any of these three defences

Findings

The Court agreed with Cargill. It held the test for whether a contractual provision is a penalty is whether the disputed provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. Cargill had a legitimate interest in repayment of the advance in accordance with the contractual undertaking and the increase in the interest rate following default was commercially justified. Money advanced after default involves a greater credit risk. The default rate was not exorbitant or unconscionable by comparison with market standard rates for unsecured loans in India. Finally, it was not imposed as a deterrent, there was no evidence of oppression and the rate did not have to be a pre-estimate of the claimant's loss.

The provision for default interest was incorporated into the APSAs: (i) the parties had been dealing with each other on similar terms for 10 years; (ii) the APSAs had been negotiated between them; (iii) negotiations did not involve the imposition of standard terms by one party upon the other; (iv) the APSAs had been stamped and signed on every page by Uttam Galva to signify acceptance of the terms; (v) the "default compensation" provision was not onerous or unusual; and (vi) no undue pressure had been applied and Uttam Galva had had a proper opportunity to consider it.
Finally, payment of the "default compensation" would not be illegal under Indian law.

HFW Comment

Commodity contracts often use a "LIBOR +" mechanism to calculate default interest. This decision shows that the English Court will uphold contractual provisions stipulating a high default rate of interest provided they satisfy the requisite legal test - and that it will take into account very practical commercial factors when doing so. It also illustrates the factors that the Court will consider when deciding whether or not a term has been validly incorporated into the contract.

8. Smiths Interconnect Group Ltd v Quintel Technology Ltd [2018] 12 WLUK 435

Court Commercial Court

Date 20 December 2018

Summary

Summary judgment was awarded to the claimants on invoices for goods supplied where the defendant failed to show any realistic prospect of success. The goods supplied may have been of defective quality but this was provided for in a second agreement which replaced warranties as to quality contained in previous agreements.

Facts

The claimants applied for summary judgment on their claim for payment in respect of products supplied by the second claimant to the defendant. (The second claimant had assigned its relevant rights to the first claimant.)

The parties had agreed a manufacturing contract and a supply contract (the "original contracts"), to which the second claimant had served termination notices. The original contracts were due to terminate in September and December 2016 respectively. As part of the wind down arrangements, the parties had entered into another agreement in June 2016 (the "subsequent contract").

Relying on warranties in the original contracts, the defendant claimed that the products supplied after June 2016 had suffered a high rate of failure, giving rise to losses which the defendant was entitled to set off against the relevant invoices. The claimants relied on the subsequent contract, which contained a clause specifying that products sold from May 2016 would be sold on an "as is and where is" basis in return for a reduction in price.

Findings

The Commercial Court held that claimant was entitled to summary judgment for the sums outstanding on the invoices. It was clear that the subsequent agreement involved a material rearrangement of the bargain between the parties in exchange for a reduction in the price.

The defendant could not show any reasonable prospect of success in relation to his cross-claim. It was therefore unnecessary for the court to consider whether this claim could have been set off against the claimants' claim and the summary judgment was awarded to the claimants.

HFW Comment

Parties should bear in mind when making new contractual arrangements that they may lose rights available to them under the original agreement.

9. Kaefer Aislamientos SA v. AMS Drilling Mexico SA & Ors [2019] EWCA Civ 10

Court Court of Appeal

Date 17 January 2019

Summary

The English Court of Appeal has confirmed the 'good arguable case' test which is used to determine whether a court has jurisdiction and how the court will assess it in practice.

Facts

The claimant commenced proceedings in the English High Court for sums alleged to be due to it under a contract for the refurbishment of an oil rig. The contract contained an entire agreement clause and an English law and jurisdiction clause. Proceedings were issued against four defendants (D1-4). D3 and D4 were not named parties to the contract and the claimant had to show that they were undisclosed principals in order to demonstrate that they were subject to the jurisdiction clause in the contract and could therefore be sued in England under Article 25 of the Recast Brussels Regulation ('Article 25'). D3 and D4 challenged the jurisdiction of the English court.

There was no direct evidence supporting the claimant's argument, and at first instance, the Court found in favour of D3 and D4. It found that although there was a good arguable case that D3 was an undisclosed principal, it had "the better argument" that it was not. There was no good arguable case that D4 was an undisclosed principal.

The claimant appealed, arguing that the judge was wrong to add a "better argument" gloss to the "good arguable case" test, and had reached his conclusions on incomplete and contradictory evidence. The defendants argued that the judge was wrong to treat the entire agreement clause as a neutral factor when weighing up the arguments.

Findings

The Court of Appeal dismissed the claimant's appeal. The test for jurisdiction is the three-limbed test set out by the Supreme Court in *Goldman Sachs*[1]. To establish jurisdiction, a claimant must show:

i) A plausible evidential basis for the application of a relevant jurisdictional gateway.
ii) If there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so.
iii) If the limited evidence available at the interlocutory stage means that the court cannot not make a reliable assessment of who has the better argument, it should find that there is a good arguable case for the application of the gateway if there is a plausible, albeit contested, evidential basis for it.

Goldman Sachs set out the test but did not expressly explain how it worked, what "plausible" means and how that relates to a "good arguable case," or how the three limbs interact with a previous decision[2] which construed the "good arguable case" test as including the relative concept of who had "much the better argument." The Court of Appeal addressed these issues in its judgment.

"A plausible evidential basis" would be one that showed the claimant had the better argument. The test was solely plausibility - it was unnecessary to show "much" the better argument. The claimant bore the burden of proof, but the standard was not the balance of probabilities. The test was context-specific and flexible and so long as form did not prevail over substance, it did not matter if it was wrapped up under the heading of "good arguable case". The Court had to try to overcome evidential

[1] Goldman Sachs International v Novo Banco SA [2018] UKSC 34
[2] Canada Trust Co v Stolzenberg (No.2) [1998] 1 W.L.R. 547, [1997] 10 WLUK 543

difficulties and to reach a conclusion if it could do so "reliably". Where the Court was unable to determine who had the better argument, the third limb provided a flexible test which combined "good arguable case" and plausibility of evidence but was not necessarily conditional on the relative merits.

Looking at how this test fits with Article 25, the Court of Appeal held that Article 25 required a "clear and precise" demonstration that the jurisdiction clause was the subject of consensus between the parties. The manner of proof was a matter for domestic law, subject to consistency with the objectives of the Regulation. There had to be a melding of the "good arguable case" test and the "clear and precise" requirement.

Separating out the "good arguable case" and "better of the argument" tests, as the judge had done at first instance, was the wrong approach. However, he had applied a test that was so close to the *Goldman Sachs* formulation as to be consistent with it. He had set out his findings carefully and had taken a pragmatic and sensible approach with no error of analysis. There was no basis for interfering with his decision.

Lastly, where a contract identifies the parties and contains an entire agreement clause, that is a strong indication that other agents did not intend to act as undisclosed principals. This was a relevant factor to be taken into account when assessing jurisdiction.

HFW Comment
This decision of the Court of Appeal provides helpful guidance about how to apply the *Goldman Sachs* test when trying to establish the jurisdiction of the English Courts. It is also important to note that it will be difficult to prove a party is an undisclosed principal where the relevant contract contains an entire agreement clause.

10. Wells v Devani [2019] UKSC 4

Court Supreme Court

Date 13 February 2019

Summary

The Supreme Court held that a binding agreement had been reached between parties despite an essential term being missing. They overturned the decision of the Court of Appeal, which had found that the agreement was incomplete because it failed to agree the circumstances in which commission would fall due.

Facts

An agreement had been reached between Mr Wells, a property developer, and Mr Devani, an estate agent. The developer was selling flats in Hackney and the trial judge found that the estate agent had informed the developer in a telephone call that his standard commission was 2% plus VAT. The triggering event for the commission was not discussed.

The trial judge held that in the absence of an express agreement as to the event which would trigger the estate agent's commission, the law would imply the minimum term necessary to give business efficacy to the parties' intentions. Whilst the Court of Appeal recognised that terms may be implied into a contract, it found that the agreement was incomplete because of the parties' failure to agree an essential term. It could not imply a term in order to transform an incomplete bargain into a legally binding contract.

Findings

The Supreme Court overturned the majority decision of the Court of Appeal, ruling that the only sensible interpretation of what the parties said to each other in the context of their conduct was that commission would be payable to the estate agent following the completion of the sale.

The question whether there was a binding contract required consideration of what was communicated between the parties by their words *and* their conduct and whether, objectively assessed, that led to the conclusion that they intended to create a legally binding relationship and that they had agreed all the terms that the law requires as essential for that purpose. The 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.

The Supreme Court found it would be naturally understood that payment would become due on completion and made from the proceeds of sale. Devani and Wells agreed that if Devani found a purchaser for the flats, he would be paid his commission. It was therefore unnecessary to imply a term into the agreement. However, if it had been, there would be no hesitation in holding that it was an implied term of the agreement that payment would fall due on completion of the purchase of the property by a person introduced by Devani. The obligation to make payment of commission on completion was required to give the agreement business efficacy and would not go beyond what was necessary for that purpose.

HFW Comment

This decision demonstrates the English courts' unwillingness to find that an agreement is unenforceable because it is too vague or uncertain where it is obvious the parties intended to be contractually bound and acted on their agreement. However, the best approach is to avoid uncertainty by expressly agreeing all necessary terms of a contract in writing.

Alistair Feeney

Partner, London
T +44 (0)20 7264 8424
M +44 (0)7989 437397
E alistair.feeney@hfw.com

Damian Honey

Partner, London
T +44 (0)20 7264 8354
M +44 (0)7976 916412
E damian.honey@hfw.com

Brian Perrott

Partner, London
T +44 (0)20 7264 8184
M +44 (0)7876 764032
E brian.perrott@hfw.com

Katie Pritchard

Partner, London
T +44 (0)20 7264 8213
M +44 (0)7768 873053
E katie.pritchard@hfw.com

Judith Prior

Partner, London
T +44 (0)20 7264 8531
M +44 (0)7785 700229
E judith.prior@hfw.com

Timothy Clemens-Jones

Partner, Paris
T +33 (0)1 44 94 31 60
M +33 (0)6 80 10 32 54
E timothy.clemens-jones@hfw.com

Sarah Hunt

Partner, Geneva
T +41 (0)22 322 4816
M +41 (0)79 281 5875
E sarah.hunt@hfw.com

Georges Racine

Partner, Geneva
T +41 (0)22 322 4812
M +41 (0)78 644 4819
E georges.racine@hfw.com

Philip Prowse

Partner, London
T +44 (0)20 7264
M +44 (0)7979 708314
E philip.prowse@hfw.com

Sarah Taylor

Partner, London
T +44 (0)20 7264 8102
M +44 (0)7909 917705
E sarah.taylor@hfw.com

Adam Topping

Partner, London
T +44 (0)20 7264 8087
M +44 (0)7768 553882
E adam.topping@hfw.com

Andrew Williams

Partner, London
T +44 (0)20 7264 8364
M +44 (0)7789 395151
E andrew.williams@hfw.com

Vincent Bénézech

Partner, Paris
T +33 (0)1 44 94 40 50
M +33 (0)6 80 10 32 54
E vincent.benezech@hfw.com

Olivier Bazin

Partner, Geneva
T +41 (0)22 322 4814
M +41 (0)79 582 66 48
E olivier.bazin@hfw.com

Michael Buisset

Partner, Geneva
T +41 (0)22 322 4801
M +41 (0)79 138 3043
E michael.buisset@hfw.com

Richard Strub

Partner, Dubai
T +971 4 423 0554
M +971 (0)50 625 1284
E richard.strub@hfw.com

Paul Aston
Partner, Singapore
T +65 6411 5338
M +65 9790 5835
E paul.aston@hfw.com

Christopher Swart
Partner, Singapore
T +65 6411 5315
M +65 9092 1883
E christopher.swart@hfw.com

Peter Murphy
Partner, Hong Kong
T +852 3983 7700
M +852 9359 4696
E peter.murphy@hfw.com

Stephen Thompson
Partner, Sydney
T +61 (0)2 9320 4646
M +61 (0)404 494 030
E stephen.thompson@hfw.com

Adam Richardson
Partner, Singapore
T +65 6411 5327
M +65 9686 0528
E adam.richardson@hfw.com

Guy Hardaker
Partner, Hong Kong
T +852 3983 7644
M +852 5411 7489
E guy.hardaker@hfw.com

George Lamplough
Partner, Hong Kong
T +852 3983 7776
M +852 9194 6581
E george.lamplough@hfw.com

Americas | Europe | Middle East | Asia Pacific