UNDERGRADUATE LAWS

THINKING THE UNTHINKABLE

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TRANSCRIPT

Hello, it's Roger Halson here, and welcome to the first Contract Blog for '23/'24. I've entitled this blog, Thinking the Unthinkable, and we're going to discuss a recent case decided this year by the Supreme Court called ***Barton v Morris*** [2023] UKSC 3, and I'm going to discuss it in two ways. I'm going to discuss the narrow issue decided in that case, and explain how that fits into our contract law syllabus, but also use it to illustrate a broader theme about contract law, and particularly, the common law approach to contracts.

The title, Thinking the Unthinkable, comes from the fact that, a distinctive feature of the common law is that, it provides minimal doctrines of relief for parties from contracts, which retrospectively, they regret. This minimal relief comes in the form of maybe the doctrine of frustration, which as you know, will relieve parties from the consequences of a contract, but only in very narrow circumstances, which they failed to anticipate.

This narrow doctrine of relief, and the narrow doctrine of relief for mistakes, encourages the parties to think seriously and deeply before they enter a transaction. That is what I mean by Thinking the Unthinkable. The case of Barton and Morris, which came before the Supreme Court, thankfully, unlike many cases that do come before that court, had very simple facts.

The facts were that, in a contract between B and F, it was agreed that if B introduced to F a purchaser who bought from F a particular property for £6.5 million or more, F would pay B a commission of £1.2 million. That sum was the sum which B had himself wasted in trying unsuccessfully to purchase the property. The seller said, "*Look I know you've lost money trying to buy this property from me, but if you introduce a purchaser who goes on to buy the property for £6.5 million or more, I will pay you a fee, a commission of £1.2 million*".

Well, B found a purchaser, the purchaser was initially going to buy the property for £6.5 million, but this property was actually affected by the route proposed for HS2, the high speed rail link, and this reduced the value of the property somewhat, and the consequence was that the property was sold by F for £6 million, not £6.5 million. B claimed to be entitled to the payment of some commission.

The Supreme Court, by a three to two majority, said that B was not entitled to any payment at all. B had argued three grounds upon which he said he was entitled to payment, and two of those were contractual, the third related to the law of unjust enrichment or restitution, which is beyond our particular needs. We're going to focus upon the two contractual claims.

The first claim was the most easily dismissed, because B was said not to be entitled under the express terms of the contract to the payment of a commission, and this was because the contract was analysed to be a unilateral contract, a contract whereby, the owner of the

property agreed to pay a commission of £1.2 million, a promise, in exchange for an act, the act of introducing a purchaser, who was prepared to purchase the property, and who did purchase the property for £6.5 million or more.

That act was not complied with, and so there was no entitlement to the express commission. The more interesting argument of B was that, they were entitled to the payment of some commission under an implied term. They said, "*A term should be implied into the contract between B and F, whereby, a reasonable fee was to be paid to B, if the property was sold to someone B introduced for a sum of less than £6.5 million.*"

The Supreme Court held that no such term could be implied. The main basis of implication would have been implication, in fact, and the test upon which such terms are implied is usually called the Moorcock test, or the business efficacy test, when we ask, "*Is it necessary to imply such a term into a contract, in order to give it business efficacy*", by which we mean business effectiveness.

I hope you will be now making a link to a case you looked at when you studied unilateral contracts, the case of *Luxor v Cooper* (1941). Because the argument was put there in that case that, a term should be implied in that case with similar facts to this, whereby, a unilateral offer cannot be withdrawn once a party has begun performance of the unilateral condition.

In that case, the argument was that, someone had introduced a purchaser who was prepared to sell, but the seller did not go through and sell, so there'd only been partial performance, and the argument was, there was an implied term that the main promise could not be withdrawn, and it was said that the only grounds for implying such a term, was the business efficacy test.

Then, in that case, there was no requirement to imply such a term, because there could be a withdrawal, and the contract would still have business effectiveness. The focus there was upon the very large consideration that was being offered for a very small effort. It was still meaningful for the agent to go to the trouble of trying to find a buyer, even if the sale might ultimately be frustrated by the seller's disinclination to sell to that buyer.

Slightly different here, but the same test was applied, and it was said, "*There is simply no grounds to imply such a term to give business effectiveness to the contract.*" What we're left with, is a failure on the part of B to receive any commission, and an incentive to all contractors negotiating contracts like this to think the unthinkable, and to try to make express provision in their contract for all circumstances which they might anticipate.

Thank you very much.