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A Christmas contemplation on memories: how to prove an oral contract

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Introduction

Sometimes deciding the key issue in a case will boil down to the word of one witness over another. One person says an oral agreement was made in certain terms. The other person disputes those terms or denies that any agreement was made at all. How do the courts approach such cases? The recent decision of *Instrument Product Development Ltd* v *WD Engineering Solutions Ltd* [2022] EWHC 1994 provides a helpful guide.

Background

The parties' dispute concerned the design and manufacture of certain prototype props for Nespresso. Between December 2016 and February 2017, the claimant, "IPD", designed and made prototype props, with the defendant, "WDES", making some elements of them.

At the end of February and into early March 2017, discussions took place regarding a joint venture arrangement for the work for Nespresso, which was focused on its store in Cannes. This culminated in a telephone conversation on 6 March 2017 between Mr Paget of IPD and Mr Beale of WDES. The following day, on 7 March 2017, Mr Paget emailed Mr Beale setting out the terms of what had been agreed.

Subsequently, the parties discussed a further pilot at a store in America. This was followed by other requests, including for Nespresso's headquarters in Lausanne, and pilots in Mexico, Portugal and the UK. Another key event appears to have been a meeting with Nespresso in Lausanne in May 2017, which ultimately led to a much bigger order from it. By December 2017 it was the start of the end of the parties' relationship.

The main issue for the court was the scope of the original agreement, reached in early March (the 6 March telephone call and 7 March email). Did it cover all future supplies of the prototype props that IPD was designing or was it focused on work for the store in Cannes?

Interpretation of oral contracts

Mr Justice Richard Farnhill, giving the judgment of the court, looked at two lines of authority on the interpretation of oral contracts. The first relates to the relevance of post-contractual conduct, which was explained by Lord Hoffmann in *Carmichael* v *National Power plc* [1999] 1 WLR 2042, as follows:

> "*The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct, which would be inadmissible to construe a purely written contract (see Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd. [1970] A.C. 583) may be relevant on similar grounds, namely that it shows what the parties thought they had agreed. It may of course also be admissible*

> *for the same purposes as it would be if the contract had been in writing, namely to support an argument that the terms have been varied or enlarged or to found an estoppel.*"

How the parties acted after an alleged agreement was made can therefore be used as an interpretative tool to determine whether the parties made an agreement and what the terms of that agreement were. As Lord Hoffmann says, this is in stark contrast to written agreements, where such conduct is irrelevant. This analysis was expanded upon in *Thorner* v *Majors* [2009] UKHL 18 by Lord Neuberger:

> "*This* [the decision in Carmichael] *shows that (a) the interpretation of a purely written contract is a matter of law, and depends on a relatively objective contextual assessment, which almost always excludes evidence of the parties' subjective understanding of what they were agreeing, but (b) the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which the parties' subjective understanding of what they were agreeing is admissible.*"

The reason for the difference in the treatment of oral and written contracts is partly historical. Civil trials in England and Wales used to be heard before juries, who were often illiterate and could not interpret written contracts, whereas they could interpret oral ones.

The modern reasons are more pragmatic. First, if the contract is solely in writing, the parties rarely give witness evidence as to the terms of the contract, so it is cost-effective and practical to exclude evidence of their understanding as to its effect. On the other hand, if the contract was made orally, the parties will inevitably be giving witness evidence as to what was said and done at the relevant discussions or meetings, and it would be rather artificial to exclude evidence as to their contemporary understanding.

Second, and more importantly, the memory of witnesses is generally unreliable and self-serving. This is why it is thought better to exclude evidence of subjective understanding when the terms of the contract are in writing. In the case of oral contracts, by contrast, subjective evidence will be helpful to assist in the interpretation of the agreement. Evidence of subjective understanding must, however, be treated with care.

Much has been said by judges about the fallibility of a witness's memory in the reported cases, but none is more cited than the forceful speech given by Leggatt J, as he then was, in *Gestmin SGPS SA* v *Credit Suisse (UK) Limited* [2013] EWHC 3560. The case concerned alleged negligent investment advice related to the sale and purchase of shares, but much rested on the witness evidence in the case. Leggatt J was unimpressed by the witness evidence in the case and stated:

> "*While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
>
> *Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact,*

> *psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).*
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> *Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.*"

Leggatt J went on to point out how the process of civil litigation subjects the memories of witnesses to "*powerful biases*". There are obvious biases, such as those a witness may have to their employer who is a party to the dispute, but also more subtle ones, such as a desire to assist the party who called the witness, as well as a natural desire to make a good impression in a public forum.

The other major interference Leggatt J saw with the memories of witnesses was through the drafting of their witness statement by lawyers. He held that the effect of that process was to:

> "*… establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.*"

The conclusion the judge drew from this was rather dramatic:

> "*In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.*"

Whereas in criminal cases witness testimony will often take centre stage, in civil cases it is the documentary evidence that is key. Even so, Leggatt J's reluctance to put "*little, if any*" reliance on witnesses' recollections is certainly towards the extreme end of the spectrum of how judges view witness evidence in civil cases. Most appreciate that at least some conclusions on the credibility of a witness's evidence can be drawn through listening to a witness giving their evidence, including by observing their physical demeanour.

Compare, for example, Mr Justice Fraser's comments in *Dacy Building Services Ltd* v *IDM Properties LLP* [2018] EWHC 178, in which the judge had to determine whether the parties had made an oral contract in, of all places, a bus shelter in Camberwell:

> "*Watching a witness answer questions, and considering not only what they actually say, but how they say it, and also considering that evidence against contemporaneous documents, can give a tribunal a very good idea of what actually transpired on any particular occasion. Oral statements are not however the whole story.*"

Back to the present case, Farnhill J summed up his review of the authorities by laying down the following five principles that he considered were relevant to the interpretation of alleged oral contracts:

> "*i) In interpreting an oral contract, the parties' subjective understanding about what they were agreeing is relevant and admissible evidence.*
>
> *ii) What is critical is their understanding at or immediately after the point at which contract is entered into.*
>
> *iii) Later statements and actions are much less reliable indicators of what the parties understood to have been agreed. Just as memory is affected by the process of preparing for trial, it is affected by seeing how a transaction works out in practice.*
>
> *iv) Subsequent conduct and statements may be relevant to questions of variation and estoppel, just as they may be in the case of written agreements. In those cases, the analysis is principally, but not exclusively, an objective one. The focus is on what the parties said and did, more than on what the parties thought.*
>
> *v) To the extent that it exists, documentary evidence of what was said in meetings and conversations will almost inevitably be a more reliable guide than the witnesses' unaided recollections.*"

Application to the facts

The judge found that the email sent by IPD the day after the meeting in March 2017 was far more reliable evidence of what the parties had agreed than the recollections of the witnesses, which is consistent with his fifth principle set out above. The content of that email was consistent with IPD's version of events.

In addition, Farnhill J looked at the subsequent conduct of the parties, which again he judged to be more consistent with IPD's case than with WDES's. This, therefore, was a relatively clear-cut case on the facts and the judge proceeded to find in favour of IPD, as their story was the one that the contemporaneous documentary evidence predominantly supported.

Comment

The case confirms the primacy of documentary evidence even in the interpretation of oral contracts. The practical lesson to draw is of course the importance of making contemporaneous attendance notes after any business meeting, recording what, if any, agreements were made and on what terms.

Having said this, judges do still rely on their impression of witnesses giving oral evidence to some extent. There is some indication that Farnhill J relied on his observations of the witnesses giving evidence in the IPD case, and not solely on the documentary evidence. He described IPD's main witness as "*helpful*" and "*responsive*" and as someone who "*accepted when his recollection was unclear*". By contrast, WDES's main witness claimed to have no recollection at all of critical points, on which the judge commented:

> "*It was striking to me that the areas he said he could not recall were the areas that might reflect poorly on his conduct in this matter or WDES's case.*"

It therefore remains important that witnesses give evidence in a way that is helpful and responsive to the court, and there remains a role for lawyers to guide a witness in how best to present their evidence to achieve those goals.

For completeness, one point that wasn't raised in the IPD case is what happens when there is no contemporaneous documentary evidence on whether an oral agreement was made or on which terms. Such circumstances arose in the case of *Caldero Trading Limited* v *Beppler & Jacobson Limited* [2013] EWHC 2191, which turned on the parties' oral evidence on whether financing for the purchase and renovation of hotels had been provided by way of loan or capital.

The judge in that case found not only that there was no strong documentary evidence pointing one way or the other, but that each party's principal witness was not credible. He held that the "*overall commercial probabilities*" was therefore a factor of "*great importance*".

In other words, in the absence of contemporaneous documentary evidence, the court will determine which party is to be believed based on which version of events is more likely to have occurred between reasonable commercial parties. If one party says that an agreement was made in terms which seem inherently implausible, taking normal industry practice into account, a judge is much less likely to uphold that agreement.

Lest you need any further evidence that we can't trust our memories as much as we might believe, I will conclude with one more illustration of the fallibility of memory, which Farnhill J creatively used in his very first paragraph to set the tone for his judgment:

> "*In a noted study published in 1981, "Role of schemata in memory for places", the psychologists William Brewer and James Treyens reported on a simple but revealing experiment they had conducted. Each of the 87 study subjects was asked to wait briefly in an office before being led into another room. In that second room they were asked to write down a list of everything they had seen in the office. The overwhelming majority recalled seeing typical office furniture – a desk, chairs, shelves and so forth. That was unsurprising, since they had seen such items only seconds earlier. Thirty percent recalled seeing books and ten percent recalled seeing a filing cabinet. That was more unusual, because the office contained neither books nor a filing cabinet."*