

# Protect your commission with concrete contracts



The courts have been busy sorting out complicated issues over commission payments

By Christopher Sykes

**Estate agents have not fared well in the courts over the last year or so where they have sued for their commission. An agent might feel that clients are avoiding payment of commission 'on a technicality'.**

In the most recent case of *Estafnous v LLBC Limited* (2009 EWHC 1308) the agent agreed a fee of £2,000,000 for introducing a buyer to purchase a large property in Central London. He even obtained a solicitor's undertaking to pay his fees on completion. The problem was that the nature of the deal changed and although the buyer was looking at acquiring the property, it eventually, instead, acquired the shares in the ultimate holding company of the property owner; so only acquired the property indirectly. Whilst the judge found that the agent had introduced the property to the purchaser, the commission agreement did not cover the eventuality of a purchase of the shares in a company rather than a property. The agent therefore lost his claim.

Looking at this case in the context of two other fairly recent cases, in *MSM Consulting Ltd v United Republic of Tanzania* (2009 EWHC 121) the agent claimed they had been instructed by the United Republic of Tanzania to find new premises for the Tanzanian High Commission. The agent carried out a lot of preliminary work, finding a suitable property, arranging viewings etc. Unfortunately he was unable to prove that there was a concluded agreement to pay commission. They were not entitled to be paid on a quantum meruit basis ("As much as is deserved." In contract law, the law infers a promise to pay a reasonable amount for labour and materials furnished, even in the absence of a specific legally enforceable agreement between the parties) as the Judge held that this was simply in expectation that they would at some stage be given a formal mandate. There was also an issue as to whether, even though the agent found the premises, they were the effective cause of the purchase.

*Foxtons v Pelkey Bignell* (2008 EWCA Civ 419) is well known; Foxtons were appointed sole agent for the sale of a residential property. A prospective buyer viewed the property through them but did not make any offer. The sole agency was terminated and

the property remarketed on a multi-agency basis. The prospective buyer then re-viewed the property and made a successful offer through another agent who received a commission. Foxtons sued the seller on the basis that they had introduced the purchaser. This scenario occurs much more often than one might expect. The Court of Appeal held that Foxtons were not entitled to a commission – the key point was that it was necessary to introduce the purchaser to the purchase and not merely to the property, ie to be instrumental in bringing the purchaser to the eventual transaction. Foxtons' terms of business were ambiguous and did not cover this situation. There are common themes. In all cases there was another agent entitled to commission and the courts do not like clients having to pay double commission. In all cases there was a problem with the contract or lack of one. In the *Estafnous*

case the terms did not cover the purchase of shares in a company, in *MSM Consulting* there was no contract at all, and in *Foxtons*, there was room for ambiguity.

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#### SO WHAT ARE THE LESSONS?

- Clearly there should be a written contract. Whilst this will not be an issue for most firms, it may be for smaller independents or those involved in ad hoc transactions where preliminary work is undertaken in the hope of obtaining a mandate. Estate agent's commission agreements do need to contain required information under the Estate Agents Act 1989.
- Any contract needs to be carefully drafted to make sure that it covers all circumstances under which commission should be payable. Whilst someone buying the shares in a company to acquire the property rather than the property itself may be infrequent, this does happen and it is worth defining what the agent needs to do to be entitled to commission.
- There is a better chance of a commission claim being successful if the terms of business are seen to be reasonable.

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