

The New Law Journal/2008 Volume 158/Issue 7329, July/Articles/Sole searching – 158
NLJ 995

New Law Journal

158 NLJ 995

11 July 2008

Sole searching

Features

Property

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*A recent Court of Appeal decision on **sole** agency agreements will come as a blow to estate agents, says Michael Wilkinson*

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In Brief

- In *Foxtons v Pelky-Bicknell* the Court of Appeal required that for an agent to be entitled to commission under a **sole** selling agreement, the sale of the property must come about as a result of the agent's introduction.

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Determining when an estate agent is entitled to commission has long concerned estate agents, their clients, their lawyers and the courts. Before *Foxtons v Pelky-Bicknell* [2008] EWCA Civ 419, [2008] All ER (D) 328 (Apr), the position appeared to be relatively well settled. For a general agency agreement, ie one which does not contemplate limiting the seller to using only one agent, a term would generally be implied into the contract requiring that the agent “effectively cause” sale: if the agent does not cause sale, they will not be entitled to their commission (see *Dashwood v Fleurets Limited* [2007] EWHC 1610 (QB), [2007] All ER (D) 67 (Jul)).

For **sole** agency agreements (SSAs), however, the law did not require the same high degree of causation: commission was payable wherever the agent “introduced” a person who then purchased the property, regardless of how that introduction was made (see Murdoch, *the law of Estate Agency*, 4th Edition, *Estates Gazette*, pp 129–130). It was generally thought an “introduction” would be made out where the agent merely sent sales particulars to a person who ultimately purchases: it was irrelevant who actually

caused the sale (see, eg *Your Move v Dunbar* [2001] CLY 112). This position, for estate agents, was significant. It spared them the costs and difficulties associated with proving “effective causation”. It also provided them with a degree of certainty and protection from unscrupulous vendors and purchasers who, while willing to cut the agent out of a deal, would falsely allege that others caused sale. Interestingly, *Foxtons* appears to be quiet as to whether an “introduction” ought to be interpreted in the same way in every SSA. The previous position also had its attractions in terms of logic. As Longmore LJ said in *County Homesearch Co (Thames & Chilterns) Limited v Cowham* [2008] EWCA Civ 26, [2008] ALL ER (D) 281 (Jan):

“...the main rationale for the implication of a term that the agent should at least be an effective cause of the transaction was the need for the client to avoid the risk of having to pay [multiple] sets of commission [where] persons selling their property...engaged more than one agent [whereas SSAs] contemplate...that there should be no other...agents. The rationale for implication [is] therefore absent.”

Despite the rationale of the previous position, the distinction was discarded, or at the least undermined, by the Court of Appeal in *Foxtons*. In this case, the court required, for an agent to be entitled to their commission, that the sale of the property must come about as a result of the agent's introduction. It held that an agent had to show “that they introduced the person concerned as the (eventual) purchaser...that they introduced the purchaser to the purchase, and not merely to the property”.

Lord Neuberger distinguished between a term requiring a property to be introduced to “a person who at some point in the future becomes a purchaser” and a term requiring a property to be introduced to “a person who becomes a purchaser as a result of [that] introduction”. In construing the meaning of “introduce” and “purchaser”, the court adopted the latter construction; although it did not actually imply a term requiring “effective cause”, by interpreting the word “introduce” to require that the sale be caused by that introduction, the court arrived at the same result.

Foxtons appears to be quiet as to whether an “introduction” ought to be interpreted in the same way in every SSA. Indeed, in the light of this omission, it is easily arguable that the meaning of “introduction” must be construed in the context of each individual agreement “in the light of commercial common sense and the facts known to both parties”.

Time Limits

In *Foxtons*, the court was clearly minded of consumer protection considerations, particularly the need to limit the amount of time a seller will remain liable to pay a commission after a SSA has been determined. Lord Neuberger referred to an Ombudsman decision in which an agent was disallowed commission after six months following the agreement's termination. His Lordship also considered the need to avoid the anomalous situation whereby a SSA is terminated and then two (or more) years later a seller nevertheless remains liable to pay the agent under that agreement, even though his property is put on the market with a new agent who causes its sale.

In *Foxtons* the agreement did not limit the amount of time during which commission could be recovered after the agreement had been terminated (to six months or at all). It did not, as is common among SSAs, provide, in addition to the terms prescribed by the Estate Agents (Provision of Information) Regulations 1991, any further clause defining when an introduction will be presumed to have been made. Although *Foxtons* appears to require the agent to cause sale for them to be entitled to commission under a SSA, the case is unlikely to be the last word on the subject. In the meantime, estate agents would be well advised to consider making express provision in their agreements limiting the time for recovering commission (to six months, for example) and also providing further definition to the meaning of "introduction". It is harder to imagine the court reaching the same conclusion in *Foxtons* had that agreement contained clauses limiting the time for recovering commission to six months and providing a clause expressly deeming when an introduction is made out.