

Estate Agents Commission

An Overview

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Introduction

- 1 This talk addresses the two principal issues upon which an estate agent must succeed in order to be entitled to commission against a client –
 - (1) the event stipulated in the contract must have occurred;
and
 - (2) generally, the agent must have been sufficiently connected with that event.
- 2 Recent cases suggest that the Courts continue to adopt a relatively benevolent approach to the client who denies liability to pay an agent's commission and further that the terms of an agent's contract will be interpreted strictly against him.

General Law

- 3 Since the outcome of many of the cases necessarily depends on the particular wording used in the agency agreement, it is often difficult to identify principles from them which are of general application. However, some standardisation has resulted from the Estate Agents (Provision of Information) Regulations 1991.
- 4 The following different forms of agents' agreements are found in the reported cases:
 - a. conventional selling agency: the agent may be one of several agents instructed by the vendor to sell the property. When a sale takes place, the question is then which agent (if any) has "introduced" the purchaser;

- b. sole agency: in such a contract the agent has the exclusive right to sell the property during the period of the agency, but not to the exclusion of the vendor;
 - c. sole selling agency: here the agent is entitled to commission (or damages for breach of the opportunity to earn commission) however the sale occurs during the period of the agency;
 - d. vendor/purchaser's agent: the estate agent might act either as agent for the vendor on the sale of a property, or as a purchaser's agent in seeking to find suitable property for a client.
- 5 Section 18 of the Estate Agents Act 1979 requires certain information to be provided by an estate agent to the client before any contract is entered into. Broadly, this information comprises:
- a. particulars of the circumstances in which the client will become liable to pay remuneration to the agent;
 - b. particulars of the amount of the agent's remuneration or how it will be calculated;
 - c. particulars of any payments the client may be liable to pay which do not form part of the agent's remuneration and in what circumstances they will be payable; and
 - d. the amount of any other such payments or how they will be calculated.
- 6 In addition, Regulation 5 and the Schedule of the Estate Agents (Provision of Information) Regulations 1991 prescribe certain information that an agent must include by way of explanation of terms that Parliament has deemed to be particularly confusing for consumers:
- a. "sole selling rights"

You will be liable to pay remuneration to us, in addition to any other costs or charges agreed, in each of the following circumstances–

if unconditional contracts for the sale of the property are exchanged in the period during which we have sole selling rights, even if the purchaser was not found by us but by another agent or by any other person, including yourself;

if unconditional contracts for the sale of the property are exchanged after the expiry of the period during which we have sole selling rights but to a purchaser who was introduced to you during that period or with whom we had negotiations about the property during that period.

b. “sole agency”

You will be liable to pay remuneration to us, in addition to any other costs or charges agreed, if at any time unconditional contracts for the sale of the property are exchanged –

with a purchaser introduced by us during the period of our sole agency or with whom we had negotiations about the property during that period; or with a purchaser introduced by another agent during that period.

c. “ready, willing and able purchaser”

A purchaser is a “ready, willing and able” purchaser if he is prepared and is able to exchange unconditional contracts for the purchase of your property. You will be liable to pay remuneration to us, in addition to any other costs or charges agreed, if such a purchaser is introduced by us in accordance with your instructions and this must be paid even if you subsequently withdraw and unconditional contracts for sale are not exchanged, irrespective of your reasons.

- 7 An estate agent will not be entitled to claim remuneration in respect of his services in seeking to find a purchaser or a property on behalf of the client in the event that no sale results. The event upon which commission is payable must have occurred under the contract or the contract must provide expressly

for any charges which the agent wishes to recover. In the absence of these, there will generally be no room for a *quantum meruit* claim: *MSM Consulting Ltd v Tanzania* [2009] EWHC 121 (QB).

- 8 Equally, in order to recover commission, the agent must show that the client's agreement to pay commission came before the commission-earning event took place. Otherwise there will only be past consideration for the client's promise to pay commission and accordingly there will be no valid agreement. Hence it is not enough for an agent to send unsolicited information to a client, even if the client goes on successfully to use that information: *Lady Manor Ltd v Fat Cat Café Bars Ltd* [2001] 2 EGLR 88.

What is the event which gives rise to a right to commission?

- 9 Typically the event specified in the relevant agency which gives rise to an entitlement to commission will be in one of three forms:
 - a. those contracts that make commission payable on completion, such as “*in the event that you introduce a person who purchases the property, we will pay you £x on completion of the sale.*” Any contract which refers to commission being paid out of the purchase money will also be treated as intending that the commission should only be paid on completion: *Beningfield v Kynaston* (1887) 3 TLR 279, and *Beale v Bond* (1901) 17 TLR 280.
 - b. those contracts that make commission payable on exchange of contracts. Contracts expressed in the form of “*find a purchaser*” or “*if the property is sold*” will also be treated as intending that the commission event will be the exchange of binding contracts between the parties: *Raymond v Wootton* (1931) 43 TLR 606, and *Jones v Lowe* [1945] KB 73.
 - c. those contracts that make commission payable on introduction of a person “ready, willing and able” to purchase the property.

- 10 Whether the event defined in the contract giving rise to the payment of commission is in the form of “exchange of contracts/find a purchaser” or “payment on completion”, then the general rule is that once there is a binding contract for sale, commission is payable. By “general rule” it is meant that Courts will normally interpret contracts including such clauses as intended to have this effect, in the absence of express wording to the contrary.
- 11 Accordingly, until there is a binding contract for sale the vendor is entitled to withdraw from the transaction without incurring liability to the agent for commission, even where the purchaser remains willing to purchase: *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108.
- 12 Conversely, once there is a binding contract the vendor will be liable to pay the agent’s commission, even if the vendor subsequently decides to break the contract and not proceed with the transaction: *Alpha Trading Ltd v Dunshaw-Patten Ltd* [1981] QB 290. However this rule only applies to breaches of the contract brought about by the fault of the vendor. If the failure of the transaction after exchange of contracts is not due to the vendor’s actions, then no commission will be payable, since the obligation to introduce a purchaser is to introduce one who is willing and able to complete: *Poole v Clarke & Co* [1945] 2 All ER 445.
- 13 Equally, if a contract is rescinded for innocent misrepresentation it will not be regarded as having been binding and therefore commission will not have been earned by the agent: *Peter Long & Partners v Burns* [1956] 1 WLR 413.
- 14 In *John D Wood & Co (Residential and Agricultural) Ltd v Craze* [2008] 1 EGLR 17 it was held on a strike out application that the rule that a contract is not regarded as enforceable where there is a misrepresentation, and that therefore the agent is not entitled to its commission against the vendor, applied equally to rescission of a contract for fraudulent misrepresentation by the vendor. Hence the agent is not entitled to its commission in such circumstances. However, the agent is not without remedy. It was also held in

the *John D Wood v Craze* case that there is an implied term in such an agency contract that the vendor will not make fraudulent misrepresentations so as to frustrate the sale. Accordingly, the agent is entitled to damages for the lost opportunity to earn commission in such circumstances. The Court distinguished this situation from the position in the *Luxor* case where it was held that it was not possible to imply into an estate agency contract a provision that a vendor would do nothing to prevent the satisfactory completion of the transaction once a willing purchaser had been introduced. In the *John D Wood* case the agents' efforts had been doomed to fail from the start (because of the fraudulent misrepresentation) and this cannot have been within the contemplation of the parties.

15 It should be noted that the event provided for in the 1991 Regulations (see above) for the payment of commission in both "sole agency" and "sole selling rights" cases is expressly the exchange of unconditional contracts for the sale of the property. Accordingly, although the issues above in relation to misrepresentation apply equally to contracts including this wording, commission will still be payable even if a purchaser who has exchanged contracts subsequently fails to complete.

16 "Ready, willing and able" cases are different. The idea behind such clauses was to provide an antidote to the situation which arose in the *Luxor* case – viz. the agent finds a purchaser willing to purchase at the price required by the client, but the client decides not to proceed. Broadly, the cases have reached the position where a Court will probably not require an agent to prove a purchaser's willingness to purchase by reference only to the fact that the parties have entered into a binding contract of sale (which was Lord Denning's view: *McCallum v Hicks* [1950] 2 KB 271). Rather, it will be sufficient to show that a purchaser has made an unqualified offer to purchase the property: *Christie Owen & Davies v Rapacioli* [1974] 2 All ER 311. An unqualified offer means that it must not be "subject to contract" or "subject to survey" etc.: *Graham & Scott (Southgate) Ltd v Oxlade* [1950] 2 KB 257.

17 This position is express under the 1991 Regulations – i.e. that commission is payable where a person is introduced who “is prepared and is able to exchange unconditional contracts for the purchase of your property.” It will therefore be unnecessary for an agent in such circumstances to prove that contracts have in fact been exchanged (or following exchange that the purchaser continues to be willing to purchase). Instead, willingness to exchange unconditional contracts is sufficient.

Has the event factually taken place?

18 Two recent cases show some of the difficulties that can occur even once the relevant test has been identified as to what the estate agent must prove in order to be entitled to its commission.

19 In *Christie Owen & Davies Plc v Raobgle Trust Corporation* [2011] EWCA Civ 1151 an agent had sole selling rights for 6 months in respect of a convalescent home in Weston-Super-Mare. Under the agreement the agent was entitled to its commission if it introduced the purchaser to the vendor within the period of the contract, even if the purchase ultimately took place outside that period. “Purchaser” was defined as “anyone acting on behalf of the eventual purchaser.”

20 During the period of the agency, the agents introduced a Mr Kimitri to the property who went as far as to sign a memorandum of sale but who eventually ran into difficulties in funding the purchase and the negotiations ceased. The property was subsequently put into auction, and the agents informed Mr Kimitri of this. Although the property did not sell at auction, it was subsequently purchased by Mr Kimitri’s friend, Mr Pavlou. At trial there was substantial evidence that Mr Pavlou had in fact purchased the property intending to enter into partnership together with Mr Kimitri and a third party. It was therefore conceded on appeal (against the decision at first instance) that Mr Kimitri and Mr Pavlou had intended a partnership, but submitted that the

mere purchasing of the property was not sufficient to establish that there had in fact been a partnership in existence at that date. The Court of Appeal held that the fact that the purchase was ultimately taken in the name of one only of the three partners did not prevent the original introduction having been made to a “purchaser” within the meaning of the contract and it did not matter that at the time of the original introduction Mr Kimitri was not acting as a partner. The purchase of the property by one partner was as agent for the partnership and each of the other partners (including Mr Kimitri). Equally, the agent did not have to prove that there was a fully formed business partnership at the point at which the property was purchased. It was sufficient that the parties had this intention at that time and therefore the agent was entitled to its commission on the introduction.

- 21 The second case is *Estafnous v London & Leeds Business Centres Ltd* [2011] EWCA Civ 1157. There an estate agent became aware of a potential purchaser of a building which was held on a long lease by a company, Company A. Company A was a wholly owned subsidiary of Company B, and also held the benefit of the lease expressly on trust for Company B. The estate agent approached a Director of Company B and offered to introduce him to a purchaser of the building in consideration for £2million in commission. Prior to the introduction, but once an agreement in principle had been reached to sell the building to the intended purchaser for £19 million, Company B signed an agreement which stated the commission would be payable on “the introduction of the Intending Buyer...and upon the Intending Buyer...completing a purchase of the Property.”
- 22 The introduction was duly made, but the sale fell through. Around a year later negotiations recommenced and the sale was eventually effected but not in the form originally envisaged. Instead shares in a company which controlled Company B were sold to the purchaser (and thus giving the purchaser control over Company B, Company A and the building). Although there was no doubt that it was the purpose of the transaction to give the purchaser the control of the building, the Court of Appeal refused to imply into the agreement a term that commission would be payable on the transfer of shares in Company B, as

opposed to the simple sale of the property. The Court held that a term could only be implied if a reasonable addressee would understand the agreement to mean that. Here the parties had not addressed their minds to the possibility of a sale by the transfer of shares and therefore the agent was not entitled to the commission.

- 23 This case is particularly important in the light of the increased use of offshore companies to hold property in the UK due to the associated tax advantages. Agents will need to be careful to draft any agreements appropriately if they are to obtain a right to commission in such circumstances.

Is the agent sufficiently connected with the stipulated event - effective cause?

- 24 Assuming the agent can prove that the relevant event has taken place then the focus turns to whether or not the agent is sufficiently connected with that event to be entitled to commission. It is now clear following the decision in *Foxtons Ltd v Pelkey Bicknell* [2008] EWCA Civ 419, [2008] 2 EGLR 23 that the general rule is that an agent will need to show that he is the or an effective cause of the event giving rise to commission. The Court of Appeal in that case identified two sources for this obligation.

- 25 One source is an implied term. The principal reasoning behind this is to minimise the risk of a vendor of property having to pay two commissions, it being assumed that it would be in the contemplation of a reasonable offeree that this should not occur. Equally, it is assumed that where professional fees are not being claimed, but rather commission based on the value of the property, the parties would have intended that the value should have been achieved as a result of the agent's involvement. Where the term is implied, the burden is on the agent seeking commission to establish that he was the effective cause: *Chasen Ryeder & Co v Hedges* [1993] 1 EGLR 47.

26 It is interesting to compare the Court's willingness to imply such a term for the benefit of the vendor, to the refusal to imply a term for the benefit of the agent in a case such as *Estafnous* (above).

27 The second basis for the obligation, and the one which Lord Neuberger relied upon on the facts of the case before the Court, is the express terms of the contract. *Foxtons v Bicknell* was in fact a sole agency case where the wording in the agreement had been taken directly from the relevant wording in the 1991 Regulations (as is common). Lord Neuberger agreed with commentators (at paragraph 34 of his judgment) that in an agreement which incorporates wording based upon the 1991 Regulations, there is no room for an implied "effective cause" requirement. This is because the relevant wording in relation to sole agency is that commission will be payable where contracts are exchanged with a purchaser "with whom we had negotiations about the property during the period." The argument is that since the parties, by incorporating such a term, have expressly provided for commission in a situation which does not depend upon the agent showing that he caused the sale, there is no room for an implied term. This reasoning was applied to wording based upon the 1991 Regulations in the case of *Fleurets Ltd v Dashwood* [2007] EWHC 1610.

28 However, Lord Neuberger focussed on the word "purchaser" in the contract. In his view this must be read in this context as meaning "a person who becomes a purchaser as a result of our introduction" rather than "a person who at some point in time in the future becomes a purchaser." Hence the causative element is read into the meaning of purchaser as a matter of the express wording of the contract. This is also said to follow from the word "introduce" which is used in the sense of "being led into" the purchase rather than "brought to the notice of" the purchaser. It is interesting to note that in coming to this conclusion, Lord Neuberger relied, at paragraph 25 of his judgment, on the consumer protection background to the 1991 Regulations and the perceived goal to avoid a vendor being liable to two estate agents in respect of the same transaction. Although it was not argued in the case that the contract should not be enforceable under section 18 of the Estate Agents

Act 1979 for failure to provide proper particulars of the circumstances in which the client would be liable, it is conceivable that one of the reasons for the court interpreting “purchaser” in the way it did was the fact that otherwise it would not have been obvious to the vendor client that she could potentially be liable to the agent.

29 A further recent case shows that the requirement that the agent must be an effective cause of the transaction will often be implied into a contract where an agent is acting for the purchaser as well as for an agent acting for the vendor. In *MSM Consulting Ltd v Tanzania* [2009] EWHC 121 the Court in fact held that no agreement had been reached between the agent and the Government of Tanzania for the payment of commission. However, the Court went on to consider whether or not effective cause would have been a requirement in any agreement. The Court held that although it was not possible to follow Lord Neuberger’s reasoning in *Bicknell* and to construe the express terms of the contract as requiring a causal connection in this situation where the agent acted for the purchaser (where the wording was “purchase a property that we have introduced to the client”), it was nevertheless necessary to imply the effective cause term into the contract. The principal reasons for implying such a term were those stated in previous vendor’s agent cases – i.e. that commission based on the value of the transaction requires effective cause to give business efficacy to the contract and otherwise there would be a risk of the client paying two commissions. It therefore appears that there is no distinction in the way in which the Courts will interpret vendor/purchaser agents’ contracts.

30 It should be noted that it is not enough for an agent to show that he was involved at some point in the causal chain giving rise to the transaction (the *sine qua non* test), rather the agent must be the or an effective cause. The cases are undecided as to whether the test is “the” or “an” effective cause. The Courts have shied away from providing a definitive answer and have been able to do so because each case depends very much on the facts of the particular case. The real question for the Court is whether or not the agent is to be regarded as having been sufficiently involved in the transaction as to be

able to describe it as brought about by the agent's efforts. If the answer to this is positive, then the Court will hold the agent to have been the or an effective cause.

31 In cases where two agents have claimed commission in respect of the same transaction, the Courts generally tend to treat the question as being which of the two agents is entitled to the commission (rather than asking independently whether each agent might be entitled to commission under its contract). There is no reported case in which the Courts have held two agents to be entitled to commission on the facts of the particular case, albeit that this ought conceivably to be possible. However, it is not possible for the client to take advantage of this situation and to interplead: *Greatorex v Schackle* [1895] 2 QB 249.

When does effective cause not apply?

32 It had been thought that in cases involving the terms "sole agency" and "sole selling rights" there could be no requirement of effective cause: *Fleurets Ltd v Dashwood* (on the basis that there was no room for the implication of a term). However, in the light of the decision in *Bicknell* this case must now be taken as overruled (although it doesn't appear to have been cited to the Court). Equally, there is no easy distinction to be drawn between consumer and all other cases: in *MSM Ltd v Tanzania* the Court stated that the fact the client was not a consumer buying residential property did not affect the Court's willingness to imply the term. Hence it now appears that it is only in cases where the express terms of the contract are clearly against the requirement of effective cause that an agent will not need to satisfy the test.

33 In *County Homeseach Co (Thames & Chilterns) Ltd v Cowham* the estate agent acted for the purchaser of a property, had initially brought the property to the purchaser's attention but it was clear on the facts of the case that the

agent had not had a causative role in the purchase. The contract provided for commission on an introduction, but included a “deemed introduction” clause which provided for there to be a deemed introduction solely on receipt of particulars of the property. The Court accepted that it was less likely that a client would be liable for two commissions in a purchaser’s agent situation, but did not base its decision not to imply the term on this. Instead it was held that the express wording requiring a deemed introduction in circumstances where there was no causal connection made it impossible to imply such a term.

34 In *Glentree Estates Ltd v Favermead Ltd* [2010] EWCA Civ 1473 the agreement provided for a fixed fee in the event that the agent introduced an applicant who subsequently purchased the property, or 20% of that fee in the event that the vendor found a purchaser through its own endeavours. In the event, the property was sold to a purchaser subject to an agreement for 50% of any profit realised on a resale within 5 years. The agent agreed with the original vendor to seek a new purchaser for the property on the same terms. The property was re-sold within 5 years to a purchaser introduced by the agent and accordingly a claim was brought for the fixed fee. The Court declined to imply a term into the agreement that the agent needed to be the effective cause of the transaction or to read the terms as requiring this expressly. The Court relied on the very unusual nature of the transaction (the sale of the property for \$105 million between two companies), the fact that the contract was drafted specifically for the individual transaction and the fact that the contract provided for a specific fee to be payable even where the purchaser had been found through the vendor’s own efforts. Certainly one of the two main factors influencing the Courts to imply an effective cause was absent in this case: the commission was based upon (very large) fixed fees rather than by reference to the purchase price and this no doubt influenced the Court to come to its decision.

The effect of the Estate Agents Act 1979 and the 1991 Regulations

35 In *Great Estates Group Ltd v Digby* [2011] EWCA Civ 1120, the Court dealt with a claim by an estate agent not for commission but for damages for breach of what was said to be a “sole agency” agreement. The client had signed the agreement, had a purchaser introduced to him, but only a day later accepted an offer from a purchaser introduced by another agent, to whom he paid commission. The agreement stated “This is a sole agency agreement” and throughout contained references to a sole agency but did not in fact contain a term expressly prohibiting the client from using another agent. Further, since the contract contained the phrase “sole agency” it was required to provide the explanation in the 1991 Regulations. The contract included most of the explanation provided for in the 1991 Regulations for sole agency, but omitted the words “...with a purchaser introduced by another agent during that period.”

36 The agent’s case was that the contract created a sole agency, as normally understood, and that it was not required by the 1991 Regulations to include the words above because its claim was not one for commission, but damages payable for loss of the opportunity to earn commission. Thus it was argued that where there is a reference to “remuneration” payable to the agent in the 1979 Act and the 1991 Regulations this does not apply to a claim for damages.

37 In relation to construction of the agreement, the Court was divided as to whether, in the absence of the prescribed words, the contract in fact created a sole agency. Lloyd LJ, dissenting, held that “sole agency” had a clear meaning even without a further express term preventing the client from selling through another agent and that therefore the client’s sale through another agent did amount to a breach. Toulson LJ held that use of the words “sole agency” alone did not prevent the client from selling through another agent. It is clear that his principal reason for so holding was that the purpose of the

1979 Act and the 1991 Regulations was to provide the client with information as to the circumstances in which he would be required to pay the agent and the effect of the agent's construction would therefore be to create a loop hole since the client would not know of the potential liability in damages. Rix LJ left the point of construction open, but the wording of his judgment strongly suggests that, if pushed, he would have agreed with Toulson LJ. Lloyd LJ strongly disagreed with the majority's approach of construing the agreement in the light of the 1991 Regulations (see para 47). However, as mentioned above, there is some support for such an approach in the judgment of Lord Neuberger in *Bicknell*.

38 As to whether the agent had breached the requirements of the 1979 Act and the 1991 Regulations by failing to include reference in the contract to the potential liability for damages for breach of the agreement, both Toulson LJ and Rix LJ construed "remuneration" in section 18 of the 1979 Act as including not just commission payable to the agent but also damages in lieu of commission. Accordingly, in their view the agent had breached section 18(2)(a) of the Act in that (on the assumption the agreement was a "sole agency" agreement) the agent had failed to give the client adequate particulars of the circumstances in which he would have to pay remuneration. Lloyd LJ interpreted "remuneration" as intended only to refer to actual commission, partly on the basis that damages in lieu of commission does not naturally fall within the phrase "remuneration for estate agency work" and partly on the basis that the agent cannot have been expected to provide particulars of the circumstances in which damages would be payable or how those damages could be calculated. The majority saw no such objection.

39 Toulson LJ in fact went further in his judgment and held that a sole agency agreement must always use the whole of the text in the 1991 Regulations, despite the apparent proviso to regulation 5 suggesting that the agent has a choice of relevant provisions to include in the contract. However, it is not clear on this interpretation what meaning is to be given to the words in the proviso.

- 40 The effect of the majority view in relation to both sole agency and sole selling rights cases is that where the agent has based his wording on that found in the 1991 Regulations, the claim in situations where the client has breached the agreement should not be for commission payable under the contract, but is limited instead to damages for breach of contract. Further, if the agent has not provided particulars of how damages might be calculated, then the agreement will not be enforceable without the Court's permission under section 18(6) of the 1979 Act.
- 41 Although the comments were *obiter*, the dissenting judgment of Lloyd LJ contains some guidance as to the Court's approach to applications for the Court's permission to enforce the agreement. The Judge held (and Toulson LJ and Rix LJ expressly agreed with this analysis) that there are 2 questions on such applications: (1) whether it is just for the Court to dismiss the application having regard to the prejudice caused to the client and the degree of the agent's culpability for the failure; and (2) the degree to which the Court should allow enforcement – i.e. whether in full or with the sum payable reduced so as to compensate the client for prejudice suffered.
- 42 On the first question, Lloyd LJ held that the mere fact that the agent is responsible for the omission of a proper explanation of liability in the contract does not amount to culpability for the failure. However, the burden will be on the agent to provide an explanation. On the facts of the particular case before the Court, Lloyd LJ would have held that the agent's failure to provide an adequate explanation as to how the contract was in the form it was did not amount to sufficient culpability to justify dismissing the application to enforce by itself. However, there was clear prejudice to the client since he had instructed other agents without knowledge of the potential liability in damages. That had led to the client incurring liability to other agents in the sum of £60,000, and therefore it was not just to allow enforcement or, alternatively, the sum payable should be reduced to zero to reflect the prejudice suffered.
- 43 Circumstances in which the client might be said not to have suffered any prejudice so as to justify refusing an agent's application to enforce under

section 18(6) would include where an agent repeatedly acts for the same client so that the client is well aware of its terms and conditions, albeit that they have not been reduced to writing for the purposes of the individual transaction: *Benhams Ltd v Kythira Investments Ltd* [2004] EWHC 2973.

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Estates Agents Act 1979

18.— Information to clients of prospective liabilities.

(1) Subject to subsection (2) below, before any person (in this section referred to as “the client”) enters into a contract with another (in this section referred to as “the agent”) under which the agent will engage in estate agency work on behalf of the client, the agent shall give the client—

(a) the information specified in subsection (2) below; and

(b) any additional information which may be prescribed under subsection (4) below.

(2) The following is the information to be given under subsection (1)(a) above—

(a) particulars of the circumstances in which the client will become liable to pay remuneration to the agent for carrying out estate agency work;

(b) particulars of the amount of the agent's remuneration for carrying out estate agency work or, if that amount is not ascertainable at the time the information is given, particulars of the manner in which the remuneration will be calculated;

(c) particulars of any payments which do not form part of the agent's remuneration for carrying out estate agency work or a contract or pre-contract deposit but which, under the contract referred to in subsection (1) above, will or may in certain circumstances be payable by the client to the agent or any other person and particulars of the circumstances in which any such payments will become payable; and

(d) particulars of the amount of any payment falling within paragraph (c) above or, if that amount is not ascertainable at the time the information is given, an estimate of that amount together with particulars of the manner in which it will be calculated.

...

(4) The Secretary of State may by regulations—

(a) prescribe for the purposes of subsection (1)(b) above additional information relating to any estate agency work to be performed under the contract; and

(b) make provision with respect to the time and the manner in which the obligation of the agent under subsection (1) or subsection (3) above is to be performed;

and the power to make regulations under this subsection shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) If any person—

(a) fails to comply with the obligation under subsection (1) above with respect to a contract or with any provision of regulations under subsection (4) above relating to that obligation, or

(b) fails to comply with the obligation under subsection (3) above with respect to any variation of a contract or with any provision of regulations under subsection (4) above relating to that obligation,

the contract or, as the case may be, the variation of it shall not be enforceable by him except pursuant to an order of the court under subsection (6) below.

(6) If, in a case where subsection (5) above applies in relation to a contract or a variation of a contract, the agent concerned makes an application to the court for the enforcement of the contract or, as the case may be, of a contract as varied by the variation,—

(a) the court shall dismiss the application if, but only if, it considers it just to do so having regard to prejudice caused to the client by the agent's failure to comply with his obligation and the degree of culpability for the failure; and

(b) where the court does not dismiss the application, it may nevertheless order that any sum payable by the client under the contract or, as the case may be, under the contract as varied shall be reduced or discharged so as to compensate the client for prejudice suffered as a result of the agent's failure to comply with his obligation.

...

Estate Agents (Provision of Information) Regulations 1991

5.— Explanation of terms concerning client's liability to pay remuneration to an estate agent

(1) If any of the terms “sole selling rights”, “sole agency” and “ready, willing and able purchaser” are used by an estate agent in the course of carrying out estate agency work, he shall explain the intention and effect of those terms to his client in the manner described respectively below, that is to say—

(a) “sole selling rights”, by means of a written explanation having the form and content of the statement set out in paragraph (a) of the Schedule to these Regulations;

(b) “sole agency”, by means of a written explanation having the form and content of the statement set out in paragraph (b) of the Schedule to these Regulations; and

(c) “ready, willing and able purchaser”, by means of a written explanation having the form and content of the statement set out in paragraph (c) of the Schedule to these Regulations:

Provided that if, by reason of the provisions of the contract in which those terms appear, the respective explanations are in any way misleading, the content of the explanation shall be altered so as accurately to describe the liability of the client to pay remuneration in accordance with those provisions.

(2) Any other terms which, though differing from those referred to in paragraph (1) above, have a similar purport or effect shall be explained by the estate agent to his client by reference to whichever of paragraphs (a), (b) or (c) of the Schedule to these Regulations is appropriate, subject also to the proviso to paragraph (1) above.

(3) The explanation of the terms mentioned in paragraphs (1) and (2) above shall be given by the estate agent to his client in a document setting out the terms of the contract between them (whether that document be a written or printed agreement, a letter, terms of engagement or a form, and whether or not such document is signed by any of the parties), and shall be given at the time specified in Regulation 3(1) and (2) above.