

# Entitlement to fees

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***Several queries have been raised recently by members with regard to entitlement to fees. The following article will clarify when a fee is due and also emphasises again how vital it is that members confirm terms and conditions to clients at the outset (as required under IAVI rules).***

Entitlement to fees, expenses and so on is principally governed by the terms of the contract (express or implied) between the estate agent and the seller. Normally this means that an agent is entitled to be paid if the sale of a specific property is completed, as that is what most contracts between agent and seller provide. Implicit in this is the fact that the agent must introduce the buyer to the seller and be instrumental in completing the sale (see “Agency and “effective cause” below). There should be a causal link between the introduction of the seller and purchaser and the ultimate sale (*Egan Lawson Ltd v Standard Life Assurance Co. [2001] 08 EG 168*).

Because of the ‘no sale, no fee’ basis of most agency contracts, if a sale is not concluded during the term of agency the seller will not be required to pay agency fees. The seller will, however, be liable for any expenses/outlay such as advertising costs incurred by the agent.

## **Seller default**

There is case law stating that if a contract for sale is entered into, but is not completed because of the seller’s default, the estate agent is entitled to recover his commission from his principal, the seller (*Fowler v Bratt [1950] 2KB 96*). However a court will always consider the precise facts of each case (that is, why the seller defaulted) and the terms of the agency contract to decide if an agent is, in fact, entitled to his commission in these circumstances.

## **Purchaser default**

If the sale does not complete because of the purchaser’s default, the estate agent is not entitled to his commission (*Poole v Clark [1945] 2 AER 445*). There is further case law to confirm that this is the case even where the seller has forfeited the deposit (*Boots v Christopher & Co [1952] 1 KB 89*). Where deposits have been forfeited an agent could ask the seller for some payment,

however the agent would be relying on the seller’s goodwill in terms of any payment being made.

Specific performance is a court remedy that compels one party to comply with the conditions of a contract existing between both parties. An estate agent is not entitled to insist that the seller issue proceedings for specific performance against a purchaser, although if such proceedings are taken and are successful, the commission would become payable.

## **Agency and “effective cause”**

Under general principles of agency law an agent is not entitled to commission on a transaction unless the agent’s services were the “effective cause” of the transaction.

In determining whether an agent’s work was an “effective cause”, rather than simply a “cause”, the question is whether an agent actually brought about the relationship between the buyer and seller. Whether an agent is the “effective cause” will depend on the facts of each case.

The main Irish case is *Murphy, Buckley and Keogh Limited v Pye (Ireland) Limited ([1971] IR 57)*. In this case the plaintiffs were sole estate agents for the defendants in selling their factory on the basis that they would receive a commission if they sold the factory. The eventual purchaser made an enquiry about the factory to the defendants before the plaintiffs were appointed and the defendants negotiated the sale to the purchaser during the continuance of the plaintiffs’ agency without informing them of the negotiations. The plaintiffs unsuccessfully brought an action to recover their commission. The High Court held that the plaintiffs had not played any effective part in the sale of the factory and that the contract did not contain any express term forbidding the defendants to negotiate a sale during the continuance of the plaintiffs’ agency therefore there were no grounds for implying a term to that effect.

## Code of practice

The National Property Services Regulatory Authority (Authority) published a Code of Practice for Property Services Providers (Auctioneers and Estate Agents) (Code) in November 2007. It is available on their website [www.npsra.ie](http://www.npsra.ie).

Clause 2.2 of the Code under the heading 'Provision of Service' requires that an agreement for the provision of a service be in writing, that the terms of any such agreement are lawful, fair and reasonable and include the following:

*"The amount of the fee or commission. If expressed in percentage terms, the cash equivalent, based on the Advised Value, with details of VAT and a statement of the circumstances under which the fee becomes payable."*

Clause 2.5 deals with fees and states that:

*"Property Services Providers should notify clients in writing of fees and outlays payable or the means by which fees may be calculated prior to an agreement being entered into. The means by which fees are calculated must be transparent and, where not readily understood, must be explained to the client."*

This provision reinforces the fact that agents and sellers can agree between themselves how fees will be calculated and in what circumstances a fee will become payable. It is important that the agreement is clear and understood by the client. The Code is currently voluntary but once the Authority is established on a statutory basis the Authority will have the power to make it legally binding.

## Multiple agencies

Whether the estate agent needs to introduce a purchaser or whether the introduction has to be an "introduction to the sale" in order for the estate agent to obtain his commission is not always clear-cut. Ultimately, the answer is dependent on the facts, although the courts are generally in favour of avoiding double commission payment.

A purchaser may be introduced by an agent and then the property may be taken off the market for some time and ultimately sold, some months later, to that purchaser, through a different agent or privately.

This issue was highlighted in a recent English case (*Foxtons Limited v Pelkey Bicknell [2008] EWCA Civ 419*). The seller in this case signed a sole agency agreement with Foxtons to sell her house. She agreed to pay a sole agency commission of 2.25% or a multiple agency commission of 3% if contracts

were exchanged "with a purchaser introduced by Foxtons during the period of the sole agency". In June 2005, Foxtons showed the property to a prospective purchaser who did not like it. In July 2005, the seller appointed another agency Hamptons on a multiple agency basis. Foxtons continued to act for the seller but on a multiple agency basis. In October 2005, the same prospective purchasers viewed the property with Hamptons and decided to buy it. Commission was paid to Hamptons. Foxtons brought proceedings in order to recover their commission.

The English Court of Appeal held that Foxtons were not entitled to recover commission. The court decided that the term "a purchaser introduced by Foxtons" meant that if Foxtons were entitled to commission, they would have had to establish that they had introduced the purchaser and that it was this introduction that led to the decision to buy. In this case the purchaser decided to buy at a later date having been shown around the property and negotiated the purchase through Hamptons.

With the current downturn in the property market, it is likely that sellers will resort to multiple agencies to enhance their chances of a sale. Therefore it is important that estate agents protect their claims to any commission payments by setting out their terms clearly and drawing this to the attention of sellers before terms are signed and again when a sales agreement is changed from a sole agency to a multiple agency.

## What can agents do?

**Agents should review their standard terms of engagement. Agents and principals are free to agree whatever terms they wish. They can, for example, provide for payment of fees on exchange of contract; on completion of sale; and/or for payment on a *quantum meruit* basis ("what the job is worth") if the sale does not complete for any reason. In the absence of agreement, the usual rule will apply, namely that commission will only be payable by a seller when the property is sold. If specific terms are agreed, it is important that clear and unequivocal language is used. Agents can avoid the risk of litigation and damage to reputation by ensuring that sellers fully understand the terms for payment of commission.**

**In the current economic climate agents could consider putting provisions in their standard terms of engagement to provide that the commission will become payable prior to completion in specified circumstances. However a requirement to pay a full agreed fee, in circumstances where the sale does not complete, may not be considered fair and reasonable under Clause 2.2 of the NPSRA Code. ■**