

Neutral Citation Number: [2008] EWCA Civ 419

Case No: A3/2007/1692

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
KINGSTON UPON THAMES COUNTY COURT
(HER HONOUR JUDGE WILLIAMS)
Case No 6KT01606

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd April 2008

Before :

LORD JUSTICE WALLER
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE RIX
and
LORD NEUBERGER OF ABBOTSBURY

Between :

Foxtons Limited	<u>Respondent</u>
- and -	
Pelkey Bicknell & Anr	<u>Appellants</u>

(Transcript of the Handed Down Judgment of
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Mr Patrick Blakesley (instructed by **Foxtons Legal Department**) for the Respondent
Mr Clive H Jones (instructed by **Blake Laphorn Tarlo Lyons**) for the Appellant

Hearing date: 18th March 2008

Judgment

Lord Neuberger of Abbotsbury:

1. This is an appeal brought by Mrs Treld Bicknell against a decision of HHJ Williams given on 12 June 2007, in the Kingston upon Thames County Court. The Judge held that Mrs Bicknell was liable to pay Foxtons Ltd, the well known residential estate agents, commission on the sale of her house, 29 Lancaster Park, Twickenham, because the person who purchased the house, Mrs Kim Low, had been first introduced to the house as a potential purchaser at a time Foxtons were appointed sole agents.

The background to the dispute

2. Following discussions about the proposed sale of her house, on 15 October 2004, Mrs Bicknell appointed Foxtons on a sole agency basis to sell her house, on their standard conditions of appointment. In their letter of appointment, Foxtons referred to their recommended “asking price of £1,400,000”, and explained that their fees would be “calculated at the sole agency rate of 2.25% of the achieved sale price plus VAT...”. The letter, which was countersigned by Mrs Bicknell, contained “a copy of [Foxtons’] terms of business which should be read in conjunction with this letter”.
3. Those terms (“the Terms”) stated that Foxtons’ standard rate of commission was 2.25% of “the sale price achieved” if they were appointed on a sole agency basis, and 3% if they were appointed on a multiple agency basis (i.e. if the vendor appointed other agents to act for her as well). The Terms also provided that such fees “become due and payable on exchange of contracts”, although there was also a provision that Foxtons could agree to wait for payment until completion.
4. Most importantly, the Terms included the following:

TYPE OF AGENCY

Sole Agency

Where Foxtons acts on your behalf as your sole agents, *you will be liable to pay remuneration to us, in addition to any other costs or charges agreed, if at any time unconditional contracts are exchanged:-*

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

A sole agency can be terminated by either party giving four weeks notice in writing.

Multiple Agency

Where Foxtons is instructed along with other agents, you will be liable to pay remuneration to us, in addition to any costs or charges agreed, if at any time unconditional contracts are exchanged:-

with a purchaser introduced by us; or with a purchaser to whose attention we brought the availability of the property.

A multiple agency can be terminated by either party giving four weeks notice in writing.

Sub Instruction

Foxtons reserves the right to sub-instruct other agencies at any time during our agency if we consider that this would be in your best interests. This will not involve any extra costs....

5. The wording of the Terms' sole agency provisions is not without some general significance, as it is almost entirely based on a prescribed provision contained in the Estate Agents (Provision of Information) Regulations 1991, S.I. 1991/859. These Regulations were made pursuant to section 18 of the Estate Agents Act 1979, which, by subsection (4), enables the Secretary of State to prescribe information which must be provided by estate agents to their clients as to "particulars of the circumstances in which the client will become liable to pay remuneration to the agent" - subsection (2).
6. By article 5(1)(b) of the 1991 Regulations, if, "in the course of carrying out estate agency work", an estate agent uses the term "sole agency", he is required to "explain the intention and effect of [that] term.... to his client.... by means of a written explanation having the form and content set out in paragraph (b) to the Schedule to these regulations", although the wording should be altered to the extent it is misleading "by reason of the provisions of the contract in which those terms appear". Paragraph (b) is precisely the same as the parts of Foxtons' standard sole agency terms italicized in the above quotation. Thus, subject to the addition of the words "or offering via", Foxtons took the prescribed words from the 1991 Regulations *verbatim* when setting out the sole agency terms.
7. Immediately following their appointment as sole agents, Foxtons put the house on the market at an asking price of £1.4m. On about 8 April 2005, the asking price was reduced to £1.25m. On 23 June 2005, Miss Kate Jolley of Foxtons showed the house to a Mr Alisdair Low, who was looking for a house on behalf of his former wife. According to Miss Jolley, he "loved" the house, and viewed it again a week later, when his interest in the house "remained clear". He then visited the house with Mrs Low (who said in her evidence that she did not recall the visit) on 26 July. On that visit, Miss Jolley said, Mrs Low did not like the house even enough to proceed beyond the first floor, as, "the property required too much work".
8. Miss Jolley did not seek an offer from the Lows, not least because, she said, "there was a lot of interest in the property"; indeed, according to the Judge, she gave "the impression that the price was not negotiable". Miss Jolley also stated that Mr Low's "interest in the property went from very high, when he said he loved it, to being entirely lost when his wife viewed it". After 26 July 2005, Foxtons had no further contact with Mr or Mrs Low until after Mrs Low had bought the house.
9. By the time of Mr Low's third visit to the house, Foxtons' sole agency had been determined. This occurred on 15 July, when they agreed with Mrs Bicknell that they would act under a multiple agency agreement, at their standard commission rate of

3%. Around the same time, Mrs Bicknell appointed another well known firm of estate agents, Hamptons International (who had valued the house on 1 July no doubt in anticipation of being appointed) to market the house, also on a multiple agency basis, but at a commission rate of 2.25%.

10. On 5 July 2005 (prior to the determination of Foxtons' sole agency, but no point is taken in that connection), Mr Daniel Hutchins of Hamptons sent particulars of the house to Mr Low, who told him that he had already inspected it. On 9 August Mr Hutchins sent Mr Low a mailshot, which included details of the house, and it does not appear that Mr Low followed this up. In early October, Mr Low and Mr Hutchins had a telephone discussion, in which the house was mentioned, although, according to the Judge, "it is not clear who raised the matter of this particular property". Apparently as a result of that discussion, Mr Hutchins arranged for Mr and Mrs Low to visit the house again, which they did on 15 October.
11. Following that visit, Mrs Low made an offer to purchase the house for £1.1m. Mr Hutchins took instructions from Mrs Bicknell, and refused the offer. Mrs Low then increased her offer to £1.15m, which was accepted by Mrs Bicknell. Matters proceeded without any significant problem to exchange of contracts and then to completion on 4 January 2006.
12. Mrs Bicknell then paid Hamptons commission at the agreed rate of 2.25% (plus VAT) out of the proceeds of sale in the normal way. She then instructed Foxtons to help her find a property to rent. It was as result of that instruction that Foxtons learnt that the house had been sold by Mrs Bicknell to Mrs Low. Foxtons made further investigations, and, after discussions with Mrs Bicknell and with Hamptons, they began these proceedings for recovery of their commission.

The issues and the decision at first instance

13. Foxtons' case before the Judge, as before this court, is simple. Under their sole agency contract, they were entitled to commission if contracts were exchanged with "a purchaser introduced by" them, Mrs Low was introduced to the house by Foxtons in June (through her former husband) or July 2005, and Mrs Low became a "purchaser" by January 2006 at the latest, having exchanged contracts prior to that. Foxtons advanced two arguments. The first was that, on the true construction of their agreement with Mrs Bicknell, these bare facts were enough to entitle them to commission on the sale to Mrs Low. In the alternative, if, contrary to that simple argument, Foxtons had to show that they were the "effective cause" of the sale to Mrs Low, they could satisfy that requirement on the facts of this case.
14. After having heard oral evidence from all the individuals that I have mentioned, Judge Williams, in a clearly expressed reserved judgment, decided in favour of Foxtons on both arguments. First, she accepted the argument that the Terms "expressly negate the introduction of an implied term that the agent has to be the effective cause of the sale", especially relying on the words "at any time". Secondly she held that, in any event, Foxtons were the effective cause of the sale to Mrs Low, on the basis that "there was no evaporation of [Mr Low's] interest [in the house], merely a lull during the summer". She added that Mr Low had not "given up" on the house, and that his "interest was always there, if not pursued" for a time.

15. Mrs Bicknell now appeals against this decision, with the permission of Sir Henry Brooke.
16. In my judgment, there are two issues to be determined, and they are very similar, although not identical to, those identified by the Judge (although it is only fair to add that her characterisation of the issues faithfully reflected the arguments before her). The first issue is one of contractual interpretation: it is to identify the meaning of the Terms, and in particular the meaning of the words “a purchaser introduced by us”. The second issue is one of factual inference: it is whether, on the facts of this case, Mrs Low was indeed “a purchaser introduced by [Foxtons]”.
17. Before the Judge, and indeed before us, although it is fair to say that Mrs Bicknell’s case also fastened on the meaning of “purchaser”, the argument on these two questions tended to centre on whether it would be appropriate to imply a provision into the Terms that Foxtons have to be the effective cause of the purchase in question before they are entitled to be remunerated, and, if so, whether, in fact, Foxtons were the effective cause of the sale of the house to Mrs Low. I am not, in fact, convinced that those are quite the right questions, although a brief consideration of the cases to which we were referred to on those issues is undoubtedly of assistance.

The case law

18. Article 57 of *Bowstead and Reynolds on Agency* (18th edition) states that, at least usually, “where the remuneration of an agent is a commission on a contract to be brought about, he is not entitled to such commission unless his services were the effective cause of the transaction being brought about”. The implication of such an “effective cause” term in an agency contract appears to have been first raised by Henn Collins MR in the relatively briefly reported case of *Millar Son & Co v Radford* (1903) 19 TLR 575. However, while such a term will relatively readily be implied into an estate agency contract, it was made clear by Viscount Simon in *Luxor (Eastbourne) v Cooper* [1941] AC 108 at 119 that, where there is an argument whether or not such a term is to be implied, the issue should be resolved by reference to the normal rules relating to implication of terms.
19. We were referred to a number of cases decided by this court in the past twenty years, which did not involve the same express terms as this case, and in which either the implication of an “effective cause” term was rebutted (*Brian Cooper & Co v Fairview Estates (Investments) Ltd* [1987] 1 EGLR 18 and *The County Homesearch Company (Thames and Chilterns) Ltd v Cowham* [2008] EWCA Civ 26), or such a term was assumed by all parties to be implied (*John D Wood & Co v Dantata* [1987] 2 EGLR 23, *Peter Yates & Co v Bullock and Anr* [1990] 2 EGLR 24, *Chasen Ryder & Co v Hedges* [1993] 1 EGLR 47, and *Egan Lawson Ltd v Standard Life Assurance Co* [2001] 1 EGLR 27). The one case to which we were referred which involved a contract with the same form of words as the present case (*Burney v The London Mews Co Ltd* [2003] EWCA Civ 766) turned on its own very unusual facts.
20. Having said that, the judgment in one of these cases, *John D Wood*, gives guidance (discussed below) as to the meaning of “introduced”, and, more generally, the judgments in those cases establish the following propositions. First, the term identified in Article 57 of *Bowstead* is “very readily” implied, especially in a residential consumer context, unless the provisions of the particular contract or the

facts of the particular case negative it (see per Woolf LJ in *Brian Cooper* at 19H-J and per Longmore LJ in *County Homesearch* at para 11). Secondly, the main reason for implying the term is to minimise the risk of a seller having to pay two commissions (see per Longmore LJ *County Homesearch* at para 14). Thirdly, it is not entirely clear whether the test is “an effective cause” or “the effective cause” (see per Mummery LJ in *Egan Lawson* at 29M to 30B, a point also discussed in Article 57 of *Bowstead*). Fourthly, whether an agent was the effective cause is a question whose resolution turns very much on the facts of the particular case (see e.g. per Nourse LJ in *John D Wood* at 25H and per Mummery LJ in *Egan Lawrence* at 29L). Fifthly, while two commissions are to be avoided, there will be cases where the terms of the relevant contracts and the facts compel such a result (as in *Brian Cooper* and *County Homesearch*). Sixthly, where the term is implied, the burden is on the agent seeking the commission to establish that he was the effective cause (see per Staughton LJ in *Chasen Ryder* at 28G).

The meaning of “a purchaser introduced by us”

21. I turn, then, to the first question, which involves determining the true meaning and effect of the sole agency provisions in the Terms. Foxtons’ argument is, as already indicated, very simple. It is that Mrs Low was a “purchaser” with whom “unconditional contracts for the sale of the property [were] exchanged”, she was “introduced by [Foxtons]”, and, accordingly, Mrs Bicknell is “liable to pay remuneration to [them]”. As to the argument that Foxtons have to be the “effective cause” of the purchase before they are entitled to their remuneration, it is said that there is no warrant for implying such a term.
22. It seems to me that there are two possible readings of the expression “a purchaser” in the phrase “a purchaser introduced by us”. The first, which is favoured by Foxtons and was adopted by the Judge, is that the expression means “a person who at some time in the future becomes a purchaser”. The alternative reading, advanced on behalf of Mrs Bicknell, is that the expression means “a person who becomes a purchaser as a result of our introduction”. The first reading means that the expression extends to someone who, at some future time, happens to purchase the property, even though his purchase, or even his interest which gives rise to the purchase, owes nothing whatever to Foxtons. The latter, as Mr Clive Jones for Mrs Bicknell, says, involves requiring Foxtons to have introduced the person to the purchase rather than to the property.
23. Both interpretations are perfectly defensible as a matter of pure language (and it may well strike many people that, as a matter of first impression, the former reading is perhaps the more natural). However, I have reached the conclusion that the latter construction is correct, for a number of reasons, to which I now turn.
24. First, the interpretation accords better with the main principles which can be extracted from the cases. The notion that an estate agent can only recover commission if he introduces someone who becomes a purchaser as a result of the introduction sits well with the normal principle that an agent, whose commission is received on the basis of a successful transaction, must normally be the effective cause of the transaction if he is to receive his commission. Of course, in the case of a sole agency, the agent is entitled to somewhat wider rights, but, even there, it is by no means apparent why he should be entitled to commission on a purchase for which he had no responsibility, and which effectively originated after the sole agency had ended. Further, on my

preferred interpretation of the Terms, it is unlikely that a client who has instructed more than one agent will be liable for more than one commission (save if, effectively in breach of the sole agency contract, he instructs other agents before determining that contract). While I accept that there could be circumstances in which more than one commission could be payable, it would far rarer an occurrence than on Foxtons' interpretation.

25. This first aspect is especially significant in the present case for two reasons. First, in so far as they relate to sole agency, the Terms are substantially in the form prescribed by the 1991 Regulations, and it cannot be unusual for a sole agency instruction to end and to be followed by a sole agency with a different agent (or indeed, as in this case, multiple agency instructions). Particularly bearing in mind the consumer protection considerations which were plainly behind the 1979 Act and the 1991 Regulations, it seems to me likely that the draftsman of the Regulations would have wanted to minimise the potential exposure of sellers of residential property to paying more than one commission. Secondly the concept of "a purchaser introduced by us" is also in the multiple agency part of the Terms. The risk of exposure to more than one commission is all the greater for a seller who instructs more than one agent, and the words, when used in relation to a sole agency, must have the same meaning as when they are used in relation to multiple agency.
26. Secondly, the consequences of Foxtons' interpretation could be somewhat surprising. If a client put his property on the market through Foxtons (on a sole or multiple agency basis), then withdrew it and subsequently put it back on the market through other agents two years later, it would seem that, if those other agents happened to find a purchaser who had been introduced by Foxtons to the property two years earlier, Foxtons would nonetheless be entitled to their commission, even if that person may have had no interest in the property when introduced to it by Foxtons. The fact that there was no connection between Foxtons' efforts and the ultimate sale would be irrelevant, on Foxtons' case, as would the passage of time, especially in the light of the words "at any time".
27. The point is reinforced when one considers the multiple agency provisions, which would entitle Foxtons to commission where contracts are exchanged with "a purchaser to whose attention [they] have drawn the property". If Foxtons distributed a one-page "flier" advertising a property, on which they had a multiple agency instruction, and it was seen by a person who had not come across the property, Foxtons would have "brought the availability of the property" to his "attention", even if he had only cursorily looked at the flier, had thrown it away, and had done nothing further. On Foxtons' case, if another agent subsequently mentioned that property to that person, persuaded him to view it, and negotiated a sale with him, Foxtons could nonetheless claim commission from the seller. That would be an unwelcome and unexpected surprise to the seller, and appears an unlikely outcome. There would be no entitlement to commission in such a case if Foxtons's bringing the property to the purchaser's attention had to result in the purchase.
28. Mr Patrick Blakesley, for Foxtons, said that this type of problem had been considered by the relevant Ombudsman, who disallowed estate agents from claiming commission in such cases where the introduction (or, perhaps, the bringing to the attention) of the purchaser had been effected more than six months before contracts were exchanged. I am prepared to assume that that is correct, but I do not think that it will do as an

answer. It is for the courts to interpret the contract in the light of commercial common sense and the facts known to both parties. Quite apart from any other point, it seems unlikely in the extreme that a client, such as Mrs Bicknell, would be aware of the Ombudsman's ruling.

29. Thirdly, it appears to me that my preferred interpretation accords better with such relevant guidance as there is in the cases as to the language used in the Terms. In *John D Wood* at 25K-L, Nourse LJ considered "the familiar meaning of the word 'introduction'" in the context of the phrase "introduction of a purchaser". He concluded that the phrase could "only mean the introduction of the person who ultimately purchases, not to the property, but to the purchase, or, if you look at it from the vendor's angle, to the sale; in either case to the transaction that takes place". While this was an observation made in the context of the estate agency contract in that case, it is to be noted that it immediately followed the quotation of a short passage in an earlier edition of *Bowstead*, which used the words "introduces" and "introduction".
30. Fourthly, although some might think that, if only at first sight, Foxtons' interpretation of the Terms is the more natural, a closer examination suggests otherwise. The commission becomes due once "unconditional contracts ... are exchanged". Such exchange is to take place "with a purchaser", but it is obvious that the person with whom contracts are exchanged would be a purchaser. So, why is the word "purchaser" used? In my judgment, the use of the word "purchaser" immediately followed, as it is, by the words "introduced by us", is intended to indicate that the person concerned must have been introduced by Foxtons in his (eventual) capacity as a purchaser.
31. Fifthly, this case is concerned with Foxtons' standard terms. Accordingly, one should lean in favour of a construction which favours their client, particularly in the field of domestic estate agency contracts, where the agent is an expert, often professionally qualified, and normally legally advised, and the client will normally be a lay person who will not seek legal advice on those terms. It is true that Foxtons' freedom of manoeuvre in terms of drafting is cut down by the 1991 Regulations, but much of the drafting of estate agents' standard terms is still left to them.
32. It is fair to acknowledge that Foxtons' case to the contrary is not without its attractions. Thus, it is perhaps a little less likely to lead to arguments as to what actually occurred, as to what was in an eventual purchaser's mind, and as to whether a particular introduction was to the purchase or just to the property. On the other hand, it is not that hard to envisage circumstances which could lead to arguments if Foxtons' interpretation were correct. For instance, as to who first introduced an eventual purchaser to a particular property, whether there could be more than one introduction of the same person to the same property, or whether a particular flier was actually read by someone who ultimately purchased.
33. Support for Foxtons' case is also to be found in *Murdoch on Law of Estate Agency and Auctions* (4th edition) at pp 129-30, when discussing the 1991 Regulations. In a passage, which endorses the Judge's approach here, Murdoch says that a sole agent will be entitled to commission if "the relevant introduction takes place during the period of sole agency" and that "[a]n 'introduction' for this purpose merely requires the agent to have brought the property to the purchaser's attention (for example by sending sales particulars)...". The passage immediately goes on to state that "[t]here

is no requirement that the sole agent's introduction be the 'effective cause' of the sale in question", relying on the point that "it is specifically provided that mere 'negotiation' with the ultimate purchaser will be sufficient". These observations are referred to with apparent approval in *Bowstead* at para 7-037 of Article 58.

34. I acknowledge the expertise and authority (albeit, happily, not in the pedantically technical sense) of the authors of these two books, but, for the reasons given, I do not agree with much of what I have just quoted. It seems to me that they are right to say that there is no implied "effective cause" requirement, although it is fair to say that my preferred interpretation of the Terms is, in most cases, likely to produce an outcome similar to that arrived at if such a term were implied. *Murdoch* appears to assume that "introduction" means introduction to the property rather than to the transaction (and does not cite *John D Wood* in this connection), and does not consider my preferred reading of the Terms. As for his reliance on the provision relating to negotiations, it appears to me to raise the same point: "a purchaser... with whom we had negotiations about the property" refers, on the construction I prefer, to a person who became a purchaser as a result of such negotiations.
35. Foxtons also understandably rely on the evidence of Miss Jolley: she said that, if she mentioned a property to a prospective purchaser who told her that he had viewed the property through other agents, she would regard it as appropriate practice to recommend that the prospective purchaser returns to the other agents if he wishes to inspect, or make an offer on, the property. (This argument derives some support from the fact that Hamptons have been joined as parties to these proceedings, as they have agreed to meet any order for costs against Mrs Bicknell, and, I believe, any money judgment against her). It is not unreasonably argued that this practice shows that the risk of double commission is not considerable, and should therefore not play much part in our reasoning. In the first place, this was not a matter on which there was any finding, or significant argument or evidence below. Secondly, while there may be convention along the lines of Miss Jolley's evidence, it is not part of the law or even the professional rules of surveyors, let alone estate agents. Thirdly, it would not deal with many cases where a double commission could arise (e.g. where the prospective purchaser does not remember or chooses not to tell, or where the prospective purchaser saw another agent's flier).
36. These arguments, even if taken together, do not appear to me to call into question the conclusion that I have reached, namely that, in order to be entitled to a commission under the Terms for having introduced a purchaser, Foxtons have to show that they introduced the person concerned as the (eventual) purchaser, or, to put the point in Nourse LJ's words, that they introduced the purchaser to the purchase, and not merely to the property.
37. In these circumstances, it appears to follow that there can be no question of implying into the Terms a requirement that Foxtons must have been the, or an, effective cause of the purchase in question. It might well be said that this is an additional reason justifying my conclusion: it leaves no room for argument as to whether a provision, and if so precisely what provision, is to be implied into the Terms.

Was Mrs Low "a purchaser introduced by" Foxtons?

38. By concluding that Foxtons were the effective cause of the sale of the house to Mrs Low, it appears to me that the Judge probably made (and I am prepared to assume that she made) a finding tantamount to concluding that, on what I consider to be the correct construction of the Terms, Mrs Low was “a purchaser introduced by” Foxtons. While that was not a finding of primary fact, it was an inference from the facts, and therefore a conclusion with which an appellate court should be slow to interfere. Accordingly, at least at first sight, Mrs Bicknell faces an uphill task in seeking to establish on this appeal that Foxtons did not introduce Mrs Low as an eventual purchaser, or, to adopt the words of Nourse LJ in *John D Wood*, that Foxtons did not introduce Mrs Low to the purchase, of the house.
39. It is conceded on Mrs Bicknell’s behalf that Mr Low was Mrs Low’s agent in the context of any introduction effected by Foxtons, and the Judge found that his interest in the house, once initiated by Foxtons, “was always there”, and that there “was no evaporation of his interest”. However, even though the Judge found that Foxtons were the effective cause of the sale of the house to Mrs Low, and that conclusion involved, at least in this case, the same factors as establishing that Mrs Low was “a purchaser introduced by” them, within the meaning of the Terms, I am of the view that, on a proper analysis of the facts, this was a finding which was not justifiable on the facts.
40. In the first place, I am doubtful whether the Judge’s finding as to Mr Low’s interest was warranted on the evidence or even relevant. He said he had lost interest in the house after July, but she found him an unreliable witness. However, Miss Jolley, whom the Judge said was “very straightforward” and “entirely credible”, was clear that he had lost interest in the house after his third visit (because of Mrs Low’s rejection of the house). Further, although Mr Low was accepted as being Mrs Low’s agent for the purpose of instructions etc, I doubt that it is his interest which is central to the present enquiry. As Rix LJ pointed out during argument, it was Mrs Low who was looking for a house, and it was her interest which appears to be relevant. She was plainly not interested in the house after her visit on 26 July 2005.
41. Even ignoring this aspect, and concentrating on Mr Low, it seems clear that he ceased being a potential purchaser of the house after 26 July. His interest may not have “evaporated”, in the sense that he still liked the house, but there was no question of his being interested in purchasing it, as Miss Jolley realistically said in her evidence, because he was looking for a property for his former wife to buy and live in, and she had unhesitatingly rejected the house. What caused his interest to be revived is not entirely clear, but it appears pretty clearly to have been stimulated as a result of (and possibly during) the telephone conversation with Mr Hutchins in early October 2005.
42. It is, of course, conceivable that it was Mr Low who first mentioned the house in the early October telephone conversation with Mr Hutchins, and even that he did so because he wanted to reconsider purchasing it, for instance because Mrs Low had had second thoughts. If that is what happened, then, depending on the precise facts, Foxtons might well have been able to establish that they had “introduced” Mrs Low. However, the Judge made no finding to that effect: she expressly did not decide whether it was Mr Low or Mr Hutchins who first mentioned the house in their early October telephone conversation; nor did she say why Mr (and Mrs) Low agreed to visit the house on 15 October 2005. As already mentioned, the burden of proof in this connection is on Foxtons, and the absence of findings on these two issues (and there is

nothing to suggest that the Judge was asked to make such findings) is therefore a real problem for their case.

43. Quite apart from this, it seems unlikely that the topic of the house was first raised by Mr Low: he knew his wife had firmly rejected it, he had apparently given up on it, he had done nothing about it for ten weeks, he was apparently uninterested in the August mailshot, and he said that he thought that the house had been sold. It is, in my opinion, plainly more likely that it was Mr Hutchins who first mentioned the house in the conversation. As to what prompted Mr and Mrs Low to view the house on 15 October, one cannot say, but it is likely to have been, at least in part, what Mr Hutchins said, and it may also have been due to other factors, such as Mrs Low becoming dispirited by her experience of searching for the previous ten weeks, but that is pure speculation. What is clear is that there is nothing to suggest that Mrs Low's interest in October 2005 was based on Foxtons' earlier activities. It also is clear that no sale would have occurred without the view on 15 October. Mrs Low did not even complete her view of the house in July.
44. Even accepting the Judge's finding that Mr Low's interest had never "evaporated" since his visits to the house in June and July as justified on the evidence and relevant to the issue to be determined, it seems to me that, if one asks oneself whether his acquaintance with the house and his visits in June and July 2005 resulted in his ex-wife becoming a purchaser, the answer must be no. Although there are very few details of what was said in relation to the house between Mr and Mrs Low, and between them and Mr Hutchins, in October 2005, Hamptons' activities in October undoubtedly did result in Mrs Low becoming a purchaser, but, as already mentioned, that may well not be determinative of the issue as between Foxtons and Mrs Low. However, on the basis of the evidence which either was not challenged or was accepted by the Judge, I am of the view that, if anything, on the balance of probabilities, it is more likely that Mrs Low became a purchaser despite, rather than because of, what happened in June and July. Even if that is putting it too high, the evidence certainly does not enable Foxtons to establish that they introduced Mrs Low as the eventual purchaser or, in the words of Nourse LJ, to the purchase.
45. In these circumstances, I am of the opinion that Mrs Low was not "a purchaser introduced by" Foxtons.

Conclusion

46. For these reasons, I would allow Mrs Bicknell's appeal, set aside HHJ Williams's order, and enter judgment for the defendant.

Lord Justice Rix:

47. I agree.

Lord Justice Waller:

48. I also agree.