# Put it in writing as soon as possible

By Andrew Myers | 11-03-2019 | 15:05

The recent Supreme Court decision of *Wells* v *Devani* [2019] UKSC 4; [2018] PLSCS 33 (EG, p57 and 13 February, p58) provides a salutary reminder to all agents of what they need to do if they want to get paid for their work. Mehul Devani must have been a very effective estate agent: within half an hour of Edward Wells instructing him, he had made a call to a buyer who, a week later, agreed to buy at the asking price all seven of Wells' hitherto unsold flats.

Devani was, however, less effective at the paperwork. He had set his terms out in a phone call with Wells that was so brief that the Court of Appeal considered the contract incomplete and thus void. Devani did send written confirmation of his terms, but only after the buyer he had found had agreed to buy the flats. That was too late.

Thankfully, the Supreme Court considered Devani *did* have a valid contract, although his non-compliance with the Estate Agents Act 1979 (the 1979 Act) led to a one-third reduction in his fee.

**Principles to adhere to…**

Usually, to be paid, an estate agent needs to do the following four things:

**1. Have a contract**

A commission is not payable unless somebody has agreed to pay it. So there needs to be an agreement on the terms of the fee – what percentage and payable in what circumstances, ie what event triggers payment? Devani was fortunate in that the Supreme Court interpreted the imprecise words he used on his phone call with Wells as meaning that completion triggered payment, although that was not the view the Court of Appeal had taken. Hence the need to spell out what the trigger event is. As in any contract there needs to be an agreement by both sides (an offer and an acceptance), an intention to be legally bound, and consideration (which for the agent is the promise of *future* work in finding a buyer).

A valid contract can be created orally, although the agent runs the risk of his client's recollection being different – as Devani found.

**2. Compliance with section 18 of the 1979 Act**

This section is a form of consumer protection – applying to all property, whether commercial or residential. It, and the supporting regulations (the Estate Agents (Provision of Information) Regulations 1991), require all buying and selling agents to give their clients, in writing, certain information including:

- what services the agent is offering;
- particulars of the circumstances in which the agents' fee becomes payable;
- how that fee is calculated;
- what other expenses or charges are payable; and
- an explanation of certain terms, if used, eg sole selling rights, sole agency, etc.

This information has to be supplied when communication commences with the client, or as soon as is reasonably practical thereafter. Crucially, it must be supplied *before* the client is committed to any liability.

Best practice therefore is for the estate agent *before* he starts work, to get his client to sign a written contract, compliant with the 1979 Act.

If the agent fails to comply with the 1979 Act, the starting point is that his fee agreement is unenforceable. He must apply to court. The court may refuse to allow the contract to be enforced, if it considers that the just outcome in light of the prejudice to the client caused by the agent's non-compliance and his degree of culpability for that failure. The court can also reduce the fee to compensate the client for any prejudice suffered as a result of the agent's non-compliance. A good example is Devani's case – by not giving the required information in time, Wells did not appreciate that he might have ended up having to pay both Devani and a penalty fee to his existing agent. The court said that prejudiced Wells and justified a fee reduction.

**3. Be the effective cause**

There is usually implied into an estate agent's contract a term that a fee is only due if that agent is the effective cause of the transaction. Clear words are needed in the contract if the agent wants to be paid when he is not the effective cause. So if agent A shows a prospective purchaser a property and nothing happens, and then, months later, agent B persuades the prospective purchaser to take a second look at the property, and that second viewing results in the purchaser buying the property, then the effective cause of the purchase is agent B. Absent clear words in agent A's contract saying otherwise, only agent B gets a fee.

**4. Contract with a client worth suing**

An estate agent's fee is, in reality, an unsecured debt. It *ought* to be paid by the seller's solicitors out of the sale proceeds but if it isn't, the estate agent will only be paid if the entity he has contracted with is still at that point good for the money.

**… but don't despair if you haven't**

Although the lessons to be learnt from *Wells* are clear, agents who have only an oral conversation to go on for a fee agreement should not give up. Devani's version of his conversation was accepted by the judge and he did recover two-thirds of his fee. I have secured fees for agents who have had only the briefest of oral conversations on fees to go on. *Wells* confirms that that is enough to create a binding contract. Agents often work hard to find their clients a buyer (or, in the case of a buyer's agent, the right property). When the deal is done and the sale completed, it is easy for clients to forget that crucial call the agent made to the right contact. *Wells* confirms that the court will enforce agreements, even brief oral ones, to pay agents' fees.

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