

Entitlement to Commission

Real estate agents can be fined \$2,000.00 if they sue for recovery of a commission that they are not entitled to, and in light of the proposed repeal in 2012 of the PAMD Act by the Property Agents Bill and some recent cases it is useful to revisit the basics. An agent is entitled to a commission if they meet 5 criteria:

1. Licencing

Under Chapter 2 of the PAMD Act the agent must hold the appropriate real estate agents licence for the type of agency activity the agent intends to perform. These provisions are to be retained in the new Property Agents Bill without much significant variation. If real estate agents are engaged to sell strata title managed investment schemes it is recommended that they also obtain financial product provider licencing under the Corporations Act, otherwise a vendor might argue that an agent's failure to hold that licence also precludes the agent from recovering its commission.

2. Appointment

The agent must be retained by the seller under the approved appointment form setting out the method of calculation of the agent's commissions and any other reward. The form should also stipulate the type of appointment, so it is useful to be familiar with the following differences:

- an Open Listing is where a commission is paid only if the agent is the effective cause of sale;
- a Sole Agency is where a commission is not paid if the vendor is the effective cause of the sale; or
- an Exclusive Agency is where a commission is payable irrespective of who may be the effective cause.

3. Effective Cause

In April, 2011 in *Orchard Avenue Realty v Abdul* the District Court considered the sellers defence that commission was not payable on the grounds that the agent didn't earn the commission because it didn't introduce the buyer, but the court dismissed the defence on the face of the wording of an exclusive appointment. But where the appointment isn't exclusive, the question of whether the agent is the effective cause of the sale can still be a contentious issue. The authority is the 2001 High Court case of *Moneywood v Salaman* in which it was determined that an agent's commission is not earned merely by finding or locating an individual who, independently of any further action by the agent, later agreed to buy the subject property. To determine that the agent is the effective cause of sale it is necessary to ascertain what work was performed by the agent and if the work of the agent flowed through to the completed contract. Therefore, as in the *Moneywood* case, if the work of the agent leads to a contract that initially falls over, but the work of the agent flows through to a second contract brought about by the parties varying the terms, the agent may still be the effective cause of the second contract. Conversely, an agent's mere attendance at negotiations does not make them the effective cause of an agreement for sale made by the parties.

4. Trigger

The REIQ provides members with a form of standard conditions to insert into the appointment forms which stipulate that commission is payable to the agent where:

- the contract is completed;
- the vendor defaults and the contract is terminated because of that default;
- the contract is not completed and the deposit is wholly or entirely forfeited; or
- the contract is terminated by mutual agreement between the vendor and purchaser.

In November, 2010 in *Yong v Gibbs*, the District Court considered an agents claim for recovery of a commission on the grounds that the vendor and purchaser had terminated the contract by mutual agreement, but the court found that the vendor had sued for specific performance and had settled the litigation, and those steps did not amount to a 'termination by mutual agreement'.

5. Calculation

It probably goes without saying that the commission claimed must be in accordance with schedule 1A of the PAMD Regulations, at least until the industry is deregulated.

Feedback on this edition of 'Clear Title' or suggestions for topics in upcoming editions may be forwarded to Paul Kelly at paul.kelly@kellylegal.com.au or by direct phone number 07 49110510.