

## **AGENT'S DUTY TO THE VENDOR MIGHT INCLUDE AN OBLIGATION TO MEET THE PURCHASER**

Section 62 of the Real Estate Agents Act 1976 stipulates two things. Firstly the agent cannot sue for or recover any commission for services provided unless the agent holds the appropriate licence under the Act and secondly, unless the agent's appointment is in writing signed by the vendor, or the vendor's lawful representative. Refer to the section itself for the precise wording.

For the requirement of appointment in writing to be satisfied it is not necessary to have the vendor sign a written listing agreement, although of course the practice is desirable. The requirement can legally be satisfied by incorporating details of the appointment and of the commission into the standard Law Society/REINZ approved agreement for sale and purchase of real estate. This practice is widespread and approved by the Courts.

### **Houlahan v Royal Oak Realty (1993) Limited (1996) 3 NZLR 513 CA.**

Once these two requirements are satisfied, the law in New Zealand is relatively simple - namely the agent will be entitled to recover his/her commission as soon as the agreement becomes unconditional.

### **See *Latter v Parsons* (1906) 26 NZLR 645.**

*Latter v Parsons* is well established law in New Zealand. It has been followed on numerous occasions in the Court of Appeal right up to this day and appellate Judges have from time to time commented that New Zealand law in this respect is different from English and maybe Australian law as well.

Problems arise when the unconditional deal doesn't settle for some reason or another. Failure on the part of the unconditional purchaser to stump up with the money on possession date will not necessarily mean that the agent cannot recover the commission. In fact, if a deposit has been paid there is no obvious reason why the agent cannot at the appropriate time deduct the commission and send what is left (if any) to the vendor or to the vendor's solicitor. In that case the vendor cannot really complain. The deposit has been paid and the vendor has power to cancel the agreement and to put the property back on the market for sale. In some cases the vendor may have a cause of action against the defaulting purchaser.

As said, it is immaterial that the deal for one reason or another does not settle, unless the listing agreement expressly provides to the contrary. This principle which has been the law in New Zealand since 1906 is subject to one very important proviso and that is that the vendor can avoid liability for payment of the commission if he/she can show that the agent was in some way in breach of the agent's duty as such.

At the core of the agent's duty is the obligation of good faith honesty and of full and frank disclosure of material facts known. Deception or concealment of material facts concerning the purchaser or the deal or collusion by the agent with the purchaser will mean that the vendor can avoid liability for payment of commission to the agent if the deal falls through.

There are many cases that illustrate the principle. In ***Pemberton v Action Realty Limited*** [1986] 1 NZLR page 286, the deposit was paid by cheque that was post dated until after the possession date. It was held by the Judge that the agent was in breach of his duty by not informing the vendor of these details regarding the cheque. In the end the cheque bounced and the Court held that the agent could not have his commission.

In most cases it is implicit in the standard agreement that the agent must collect the deposit when the agreement becomes unconditional or earlier. If the agent fails to do this and settlement never takes place this will amount to a breach of the agent's duty.

In ***Columbus v Williamson & Co Limited*** [1969] NZLR page 708, the claim for commission failed because the agent knew that the purchaser's ability to settle the unconditional deal was nevertheless dependent upon the purchaser's ability to sell his existing property. The agent failed

to disclose this important fact to the vendor and the Court held that he could not have his commission.

Recently a novel set of facts has come before a District Court Judge at summary judgment level on Auckland's North Shore. The agreement was declared unconditional in writing by a solicitor who represented the purchaser named in the agreement. The purchaser however failed to settle and also failed to pay a substantial deposit which was due when the agreement became unconditional. The agent sued the vendor for the commission and the vendor resisted liability.

Although the deposit was not paid it was accepted by the parties that this was not the agent's fault. The reason stated by the vendor for refusing to pay was that the purchaser had disappeared and that the agent had admitted to the vendor, after the agreement had been cancelled, that he had never actually met the purchaser in person. The agent said he had always dealt with a person who he had met who claimed to be the legal representative of the purchaser.

Although the case was not resolved it raised difficult points and highlighted a potential trap for unwary agents. It must be a reasonably common occurrence where agents do not actually meet purchasers named in agreements for sale and purchase of land. The purchaser might be an overseas domiciled individual or a \$100 company, or a trustee or trustees of a secret trust. Even where these sorts of entities named in the agreement as purchaser are represented by a local solicitor the agent would be wise to make all the facts expressly known to the vendor. In that way the agent makes it clear that any decision to proceed to sign up with the purchaser and any judgment made about the ability of that purchaser to settle will fall upon the vendor himself or herself and that no reliance is placed upon the agent in that regard.

Having said that, it should be sensible practice for any agent to make diligent enquiry concerning purchasers and potential purchasers, or their representatives, about the identity of the purchaser as well as issues of finance and ability to settle. All information garnered should then be passed on to the vendor warts and all. One would expect that in those circumstances the court will give the agent judgment for the commission even though the deal has fallen through.