

SECTION 50 (1)(c) ESTATE AGENTS ACT 1980 (VIC): AGENTS' RIGHT TO COMMISSION UNDER STANDARD FORM AGENCY AGREEMENTS

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Whether an estate agent is entitled to commission depends upon the terms of his or her engagement to act read in light of the *Estate Agents Act 1980* (Vic). If the engagement specifies the events upon which commission is to be earned it is simply a matter of construing the terms employed.¹ If the authority does not specify those events it is a matter of determining the prerequisite acts which will be implied.

In *Luxor (Eastbourne) Ltd v. Cooper*² commission was payable "on completion of the sale". The Plaintiff (agent) introduced the proposed purchaser who was willing and remained willing to purchase the property. The Defendant (principal) was unwilling to sell to him. There was no sale. The pre-conditional event on which commission depended did not take place. The agent contended that it should be an implied term of the authority that the principal would not do anything to prevent him earning commission in accordance with the authority. The House of Lords held that no such term should be implied; it was simply a question of interpreting what the authority required the agent to do. Lord Russell³ summarised the position as follows:

1. Commission contracts are subject to no peculiar rules or principles of their own. The law which governs them is the law which governs all contracts and all questions of agency.
2. No general rule can be laid down by which the rights of the agent or liabilities of the principal under commission contracts are to be determined. In each case, these must depend upon the exact terms of the contract in question or upon the true construction of those terms.
3. Contracts by which owners of a property, desiring to dispose of it, put it in the hands of agents on commission terms are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. There is no real analogy between such contracts and contracts of employ-

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¹ *Luxor (Eastbourne) Ltd v. Cooper* [1941] A.C. 108.

² [1941] A.C. 108.

³ *Ibid.*, 124-125.

ment by which one party binds himself to do certain works and the other binds himself to pay remuneration for the doing of it."

It should be added that an implied term will not be introduced unless it is necessary to give business efficacy to the authority.⁴

How do these general principles apply to standard form agency agreements currently in use? We will consider:

1. The Real Estate and Stock Institute of Victoria Sole Agency Agreement (Residential Property) (hereafter R.E.S.I. Sole Agency Agreement); and
2. The Real Estate Agents' Association Composite Listing Form (hereafter R.E.A.A. Composite Listing Form).

R.E.S.I. SOLE AGENCY AGREEMENT

In the R.E.S.I. Sole Agency Agreement the agent contracts with the vendor for authority to act as sole agent for a certain period (30 days). The agreement provides, inter alia, as follows:

"The agent undertakes to endeavour to sell the property in a consideration for which the vendor hereby agrees to pay to the agent commission at the maximum rate prescribed by the Rules:

- A. If at any time during the authority period the property is sold by the agent or by any other agent or by the vendor or by any other person for the said price upon the said terms; or
- B. If within 120 days after the expiration of the authority period the property is sold for the said price and on the said terms to a person introduced to the property within the authority period (whether such introduction was by the agent, by any other agent, by the vendor or by any other person) or to a person introduced to the property by the agent before the signing hereof; or
- C. The property is sold subsequent to the expiration of 120 days after the expiration of the authority period to a person introduced to the property within the authority period (whether such introduction was by the agent, by any other agent, by the vendor or by any other person) and whom as a result of such introduction the property is sold."

PARAGRAPH B

The agent is entitled to commission under paragraph B if there is:

- (1) (a) "Introduction"⁵ within the authority period; or
 - (b) "Introduction" by the agent before the signing of the authority; and
- (2) The property is "sold" (whether by the agent or not) within 120 days after the expiration of the authority period.

⁴ *L. J. Hooker Ltd v. W. J. Adams Estates Pty Ltd* (1977) 51 A.L.J.R. 413.

⁵ The R.E.S.I. Sole Agency Agreement defines "introduced" as follows: "The property shall be deemed to have been 'introduced' to a person if the fact that the property is available for purchase is made known to that person and . . . a person shall be deemed to have been introduced to the property by the agent if he becomes aware that the property is available for purchase as a result of reading any advertisements boards or placards referring to the availability of the property for sale prepared, published or erected by or in the name of the agent."

The meaning of "introduction" is crucial. In the unreported Victorian County Court decision of *J. Collorafi Pty Ltd v. Kolders*⁶ the plaintiff (estate agent) sought to recover from the defendant (vendor) commission owed as a result of sale of property, pursuant to an authority in standard R.E.S.I. form. The relevant part of the contract was:

"I/We hereby engage you to act as an agent in respect of the above-mentioned property.

"The terms of this engagement are that the commission payable shall be as prescribed under the Estate Agents Act and that such commission shall be payable by me/us to you upon a person found or introduced by you signing (either by himself or by his agent) a document whereby that person legally binds himself to become the purchaser of the property."

This engagement has two conditions:

1. The agent finds or introduces a person to the property.
2. The person found or introduced subsequently legally binds himself to become the purchaser of that property.

As to the first condition Leckie J. decided that the purchaser had not been found or introduced by the agent. The purchaser had visited the property prior to the agent's introduction. The agent had therefore failed to comply with the terms of the authority. However, His Honour found that previous telephone communications by the purchaser enquiring as to the availability of the property did not constitute an introduction. His Honour appeared to add that the introduction must have a business-like character. For example, if a prospective purchaser mentions to the vendor that if his property ever comes on to the market he would consider purchasing it, that would not constitute a prior meeting which would effect the agent introducing the purchaser to the property in accordance with the terms of an authority signed at a later date.

What of the situation when the purchaser is introduced by the agent prior to the signing of the authority? From *dicta* in *J. Collorafi Pty Ltd v. Kolders*⁷ the agent would not be entitled to his commission. Leckie J. considered that section 50 (1)(c) of the *Estate Agents Act* 1980 was applicable. That section provides:

"subject to subsection 2 an Estate Agent shall not be entitled to sue for or recover or retain any commission for or in respect of any transaction unless . . .

(c) the written engagement or appointment is held by him before he has done everything required of him under the terms of his engagement or appointment to be entitled to his commission;"

His Honour considered that at the time when the introduction was made the agent had already done everything required under the authority prior to the authority being executed. Therefore the agent had not complied

⁶ Judgment handed down on June 22, 1982.

⁷ *Ibid.*

with section 50 (1)(c). It appears therefore that the part of paragraph B which considers the introduction of the purchaser prior to the signing of the authority is rendered nugatory by section 50 (1)(c).

It will be recalled that in the R.E.S.I. agreement all that an agent is required to do in order to earn commission under paragraph B is to introduce a person to the property who subsequently makes an offer to purchase. This term historically was intended to cover the case when a vendor and purchaser (after having been introduced by the agent) contacted each other and organized the sale of the property themselves. In that situation the agent would still be entitled to his commission. To avoid the difficulties placed on the agent by section 50 (1)(c), redrafting of the Agreement would be necessary to ensure the preconditions that the agent is required to fulfil in order for commission to be earned are increased, so that when a person is introduced, the agent has not done everything required of him before the authority is signed. For example, it may well be more satisfactory if the agent undertakes to endeavour to sell the property in consideration for which the vendor agrees to pay to the agent commission at the maximum rate prescribed by the Rules. Paragraph B could be drawn as follows:

If within 120 days after the expiration of the authority period the property is sold by the agent for the said price and on the said terms to a person introduced to the property within the authority period (whether such introduction was by the agent, by any other agent, by the vendor or by any other person).

This term requires the agent to introduce the eventual purchaser, "a person", to the property within the authority period. The property must thereafter be "sold" by the agent within 120 days following expiration of the authority period.

EFFECTIVE CAUSE

"Sold" is defined to be at least an offer in writing which, if accepted, is capable of resulting in a legally binding contract of sale. If the agent is required to procure, at the very least, an offer in writing a new problem arises: was the agent the "effective cause" of the offer being made by the person introduced? At this point it is necessary to consider the effect of the following type of term which *could* have been used instead of our draft paragraph B. After the agent's introduction to the property, the property is to be "sold by the agent or by any other agent by the Vendor or by any other person".⁸

Thus, if prior to the signing of the authority the agent has introduced a person to the property and that person subsequently makes an offer in writing, the agent has done everything required of him and will not be entitled to his commission on the basis of section 50 (1)(c). The agent is not under an obligation to obtain an offer for the property in order to earn

⁸ See R.E.S.I. Sole Agency Agreement, paragraph B.

his commission. This obligation is capable of performance by "any other agent or by the vendor or by any other person". The event upon which commission is earned is the introduction alone.

There have been a number of decisions which have considered whether or not an agent was the "effective cause" of a particular transaction. The answer to this issue is a question of fact. In each case it will depend on the steps taken by the agent and the nexus between his efforts and the ultimate transaction. For example, in *Moran v. Hull*⁹ a substantial period expired between the original introduction and subsequent negotiations which occurred without the intervention of the agent. The negotiations eventually led to the sale on terms materially different from that upon which the agent was engaged to sell. The Court concluded that the agent was not the effective cause of the sale and not entitled to commission.¹⁰ The Court observed that the effective cause of the sale was to be regarded from a businessman's point of view. The agent had to show that his actions brought about the sale as a businessman would see it. Further, the Court considered that the agent was not the effective cause of the sale even though the purchaser would not have learned of the property but for the agent. Another example is *Birtchnell v. Morris*.¹¹ After the original introduction the agents were informed by the purchaser that he did not wish to be pushed into the sale and accordingly the agent did not enter into further negotiations. The vendor and purchaser continued negotiations, not by personally communicating but through an agent appointed by the purchaser, which eventually led to the sale. The court held that the agent was entitled to commission. It was not necessary that the agent should be the sole cause of the sale. It was enough that the agent's efforts effectively brought about the relationship between the vendor and purchaser.

A further problem arises concerning "effective cause" where a person other than the agent removes an obstacle to the completion of the transaction. Generally, in such cases the agent is not entitled to commission.¹² In *Baker v. Leonard Oades Pty Ltd*¹³ the Court said:

"Where some known impediment or inhibition exists in relation to a sale to an otherwise willing buyer, it will usually . . . though perhaps not always, be the case that, unless the agent plays some part, even though a minor one, in overcoming the difficulty, he cannot be said to be an effective cause of the sale, although a clear exception to this would be in the case where the only difficulty is as to the price, and the vendor without the agent's knowledge, reduces it".

However, in *Crerar v. McCooke*¹⁴ the court held that the agent was not

⁹ [1967] 1 N.S.W.R. 723.

¹⁰ N.B. Section 50 (1)(d) *Estate Agents Act* 1980.

¹¹ [1923] V.L.R. 201.

¹² See Storey, H. and A. H. Goldberg, *Real Estate Agency in Victoria* (2nd ed; Sydney, Butterworths, 1974) pp. 146-148.

¹³ [1964-1965] N.S.W.R. 1745, 1747 (per Brereton J.).

¹⁴ [1913] V.L.R. 62.

entitled to commission even though he was responsible for achieving the event on which the purchaser was willing to continue with the completion of the transaction.¹⁵ Here the purchaser (introduced by the agent) would buy the property in question provided he was able to sell his own property. The agent was unable to do this but another party was able to do so. The purchaser then bought the property from the principal. The court held that the agent was entitled to his commission.

The principal laid down in *Baker's* case is logically acceptable. It is difficult to argue that an agent is the effective cause of a sale if he does not at the very least commence the negotiations which eventually leads to a sale. However, every case will turn on its own facts. To say the court in *Crerar's* case was in error is to over-generalize the holding in *Baker's* case, for on the facts in *Crerar's* case, intervention by the other party did not affect the sale of the principal's property, but that of the purchaser's property.

PARAGRAPH C

Under paragraph C of the R.E.S.I. Agreement the following prerequisites must be fulfilled before the agent is entitled to commission:

- (1) "Introduction" — within the authority period;
- (2) The property is "sold" subsequent to the expiration of 120 days after the expiration of the authority period.
- (3) The property is "sold" as a result of the introduction.

These prerequisites have been considered in relation to Paragraph B.

PARAGRAPH A

Under Paragraph A the following prerequisites must be fulfilled before the agent is entitled to his commission:

- (1) the agent undertakes to endeavour to sell the property;
- (2) the property is sold during the authority period by the agent or by any other agent or by the vendor or by any other person.

This paragraph entitles the agent to commission where he makes "sufficient" efforts to sell the property (such as the placement of advertisements, boards or placards, or taking prospective purchasers to the property) but later the property is sold by another person. (This includes sale by a sub-agent.) The agent therefore need not be the effective cause of the transaction. The sale may be affected by *any* other person.

An interesting problem arises where, before the signing of an authority, the agent takes a prospective purchaser to the property but the property is subsequently sold within the authority period by the vendor and purchaser negotiating between themselves. It could be argued that the agent has done everything required of him prior to the signing of the authority. Under section 50 (1)(c) he could not be entitled to commission. This may

¹⁵ Cf. *Wyatt v. Ball* [1955] St.R.Qd. 515; *Jack Windle, Ltd v. Brierey* [1952] 1 All E.R. 398.

be so, even though the authority expressly states that the agent is entitled to his commission if the property is sold by the vendor.

R.E.A.A. COMPOSITE LISTING FORM

In the R.E.A.A. Composite Listing Form the agent may agree to one of the following:

- (A) The vendor engages the agent to act in respect of selling the property and the vendor will pay the agent commission if the property is sold by the agent or by any other person including the vendor during a period of 60 days from the date of the authority, hereof and to facilitate the sale the vendor authorizes the agent to give particulars to other estate agents.
- (B) The vendor grants to the agent (for 30 days from the date of the authority) the sole and exclusive right to sell the property and the vendor will pay the agent commission if during the 30 days the person is found by the agent or by any other person including the vendor who is willing to enter into or who is introduced to the vendor and at a later date enters into a valid and binding contract to purchase the property in accordance with the price and terms approved by the vendor.
- (C) The vendor engages the agent to act in respect of selling the property and the vendor will pay the agent commission if the agent finds a person who is willing to enter into a valid and binding contract to purchase the property in accordance with the price and terms approved by the vendor.

PARAGRAPH B

The agent is entitled to commission if he ensures any of the following.

- (1) The agent or any other person including the vendor introduces a person to the vendor within the period of 30 days, and that person at a later date enters into a valid and binding contract to purchase the property.
- (2) A person is found by the agent or by any other person including the vendor who is willing within the 30 day period to enter into, at a later date, a valid and binding contract to purchase the property.
- (3) At the expiration of 30 days (if there is nothing to the contrary in writing from the vendor) a person is found who is willing to enter into a valid and binding contract to purchase the property.

Transaction (1) is similar to the re-drafted paragraph B of the R.E.S.I. Agency Agreement discussed supra. Before an agent is entitled to commission the first condition, as previously discussed, was that a person is "introduced" to the property. What constitutes an introduction has been fully discussed except that it may be added that the introduction to the property or vendor may be sufficient to entitle the agent to claim commission.

For example, in *Mansell v. Clements*¹⁶ the purchaser visited the agent and was given a card which stated the price and particulars of several houses including the defendant vendor's property. The purchaser had previously observed the defendant's house was for sale, but evidence was led that the purchaser would not have returned had he not been given a card by the agent. The purchaser entered into negotiations with an agent of the defendant and eventually purchased the property. The Court concluded that the purchaser bought through the agent's intervention and allowed the agent his commission.

Paragraph B and transactions (2) and (3) may be discussed together, the only difference being the period in which the person is found. In general, these transactions are concerned with the situation where an agent is employed to find somebody who is willing to enter into a valid and binding contract to purchase. It is not necessary to prove that the person found or introduced (found and introduced may be considered to have the same meaning as in *J. Collorafi Pty Ltd v. Kolders*) has become the actual purchaser or has entered into a binding contract to purchase.¹⁷ This proposition follows the House of Lords decision in *Luxor's case*¹⁸ where several members of the Court considered that the purchaser was "able and willing" where his offer was accepted "subject to contract", thus leaving the parties still in a state of negotiation.

As stated previously, the event upon which the agent earns commission is the finding of a person "willing to enter into a binding contract of purchase". The authority does not state that the person be "able" or "ready" to purchase. Therefore it is possible for a principal to bind himself to pay commission merely on the introduction of a person who offers to purchase. Accordingly, terms have been devised which prevent principals from denying payment of commission by refusing to accept offers from persons willing to purchase.

For example, in the decision of *Giddys v. Horsfall*¹⁹ an authority agreement provided for the payment of commission upon the agent "introducing a party prepared to purchase on the terms of your instruction or on terms acceptable to you". The agent found a person who offered to purchase subject to contract, but no contract was executed and the vendor decided not to proceed with the sale. The Court held the agent entitled to commission. However, the Court of Appeal in *Graham and Scott (Southgate) Ltd v. Oxlade*²⁰ questioned *Giddy's case*. A person is not an "able and willing purchaser" if his offer is accepted "subject to contract". The right to withdraw the offer is reserved and is inconsistent with the view that

¹⁶ (1874) L.R. 9 C.P. 139.

¹⁷ *E. P. Nelson & Co. v. Rolfe* [1950] 1 K.B. 139; *Ackroyd & Sons v. Hasan* [1960] 2 Q.B. 144 (cf. *Dennis Reed Ltd v. Goody* [1950] 2 K.B. 277 per Denning L.J. (as he then was) but see *Christie Owen & Davies Ltd v. Rapicoli* [1974] 2 W.L.R. 723.

¹⁸ [1941] A.C. 108.

¹⁹ [1947] 1 All E.R. 460.

²⁰ [1950] 2 K.B. 257.

he is a willing purchaser. The issue arises as to whether these terms are implied to give business efficacy to the authority agreement. In *Sheggia v. Gradwell*²¹ the majority of the Court held that where the agent's authority provided for commission to be earned upon the introduction of any person who entered into a legally binding contract to purchase, this did not mean that the person introduced should be able and willing to complete the contract.

On this view it could be argued that the agent could introduce a person unable financially to complete the purchase and still receive commission. However, the majority did point out that if an agent introduced a person he knew or ought to have known could not financially complete the purchase, the agent would be in breach of his duty to act in good faith and would be liable in damages.

However, the decision of the majority in *Sheggia's* case was severally criticised by the Court of Appeal in *Wilkinson Ltd v. Brown*.²² The Court observed that:

“the majority of this Court considered that no implication could be read into that contract, and that the words ‘any person’ could not be read in their context as meaning ‘any person able to complete the purchase’. This manifestly leads to strange results, namely, that the prospective vendor was making himself liable to pay commission to the estate agent in consideration of his obtaining anyone’s autograph on a worthless scrap of paper. It was suggested that, even so, the vendor was protected because, if the estate agent introduced anyone whom he knew was a man of straw, he would be acting in breach of faith and therefore unable to recover his commission. If, however, the estate agent can comply with his contractual obligation by introducing anyone entirely without means or credit I do not, with respect, understand how he can be held in breach of faith or disentitled to his commission merely because he appreciates what he is doing. In my view no protection could be afforded to the vendor in the postulated circumstances unless one reads the word ‘person’ in the contract as meaning a person whom the estate agent believes to be able to complete. If one is prepared to take that step, I find it difficult to understand why one should stop short this side of reality by failing to take the step of reading ‘person’ as meaning ‘a person able to complete the purchase’. To me it is incredible that any sane vendor could intend to make himself liable to pay commission at any rate until the agent had introduced a prospective purchaser who was ready, able and willing to buy. Nor in my view would any reputable estate agent seek the right to be paid commission until such a moment had arrived.”²³

It is submitted that if commission is to be paid upon an agent finding or introducing a purchaser willing to sign a contract, the agent will only succeed if the person found is unconditionally ready or willing to make

²¹ [1963] 3 All E.R. 114.

²² [1966] 1 W.L.R. 194.

²³ *Ibid.* 202 (per Salmon L.J.).

such a contract, even though the principal may not wish to complete the sale.

It must be remembered that the above transactions are also subject to the condition enunciated in section 50 (1)(c) of the *Estate Agents Act* 1980. For example, if the agent finds a person ready, willing and able to purchase the property before the signing of an authority, it is submitted that he has done everything required under the terms of his authority and accordingly would not be entitled to his commission. To avoid the condition placed on the agent by section 50 (1)(c), redrafting of the agreement is necessary to increase the events that the agent is required to do in order for commission to be earned. When a person is found who is willing to enter into a binding contract to purchase, the agent has not done everything required of him before the authority is signed. For example, the adding of the requirement that the person found actually enters into a binding contract of purchase may suffice.

COMPANY PURCHASING FOR NATURAL PERSON

The final matter to be discussed is where, after the person is introduced or is found to be willing to enter into a binding contract for the purchase of the property, that person uses a company to purchase the property. In *J. Collorafi Pty Ltd v. Kolders*²⁴ Leckie J. concluded that if the agents had found or introduced the persons in accordance with the terms of the authority and section 50 (1)(c), the subsequent purchase by a trustee company (apparently a trustee company for the persons introduced) did not affect the agent's entitlement to commission. His Honour concluded that a company has to act through agents, and there was therefore an introduction of the property to the company by its agents. This proposition is necessarily correct in order to prevent persons avoiding the payment of commission (clearly payable to the agent) by the use of a supposedly separate legal entity. To hold otherwise would disentitle the agent from his commission when the purchaser, for a *bona fide* purpose of his own, purchases through a company.

CONCLUSION

There are inherent dangers in the drafting of agency agreements. If the events upon which commission is payable to the agent are few, then the agent may do everything required of him before he has an agency agreement signed. But if the agency agreement is drafted so that the events upon which commission is payable are greater, then there are problems of "effective cause". In practice agents give little thought to complying with the terms of their authority when they can get someone "signed up". The authority should be drawn to accommodate such common practices.

²⁴ Judgment handed down on June 22, 1982.