Effective Cause of Sale

In the past few weeks, I have received an increased number of calls from agents who pose the question in relation to safeguarding their commissions. In particular, the question is “What is the effective cause of sale?” and “how do we prove that we were the one responsible for the sale?”.

We have spoken of this issue in the past in our College Chronicles, and will probably do so on a yearly basis purely because it is always a relevant concern for Agents.

What is the effective cause of sale test?
Generally the test looks at who was the agent that brought the buyer to the transaction that later signed the contract for the sale of land. And herein lies the first issue. It takes more than merely getting a purchaser to sign the contract to pass the test, and it takes more than merely introducing a purchaser to a property to be equally entitled for a claim to commission. The leading case in this area of real estate is Moneywood Pty Ltd v Salamon Nominees Pty Ltd [2001] HCA 2 where Justice Kirby stated the following:

“Introduction is necessary because, without it, no completed transaction will usually be possible. But it is insufficient because many transactions fail. The purchaser who is introduced may be willing, but not able, to complete the contemplated transaction. Into the failure of one transaction will often step other agents with the same principals but with access to funding that cures the purchaser’s previous inability to complete the transaction. When this happens, such agents will commonly stake their own claims to commission. This will then oblige courts, in resolving disputed claims, to determine the contested issues of causation which such claims present.”

Essentially what the courts are looking for is, did your introduction of the purchaser to the property do more than simply introduce the purchaser to the property?

Introduction is only the first of a number of steps involved in having a successful transaction completed and if that were the only criteria to satisfy, any agent that has a sign in the front yard of a property is essentially introducing potential purchasers to properties without having to do anything other than have the sign erected.

A recent case, which will be left uncited, heard in the Local court over a claim for commission, stemmed from the first contracted agent...
having lost their property listing to another agent after their exclusive period had ended. The first agent had gone above introducing the purchaser to the property, including that they had assisted with other transactions to enable the purchaser to purchase the property, showed the property to the potential purchaser at least twice and conducted a number of negotiations between the vendor and purchaser to attempt to get the two at an agreed price. Unfortunately, the agent was not able to get the deal finalised due to a difference in price.

The second contracted agent eventually had the two parties agree on a price that was not significantly different to the offers that were being negotiated with the first agent. The first agent proceeded to claim through the local court for their commission as they felt they were the agent who was the effective cause of sale - having conducted the vast majority of work within the transaction. The courts did find that the first agent was the effective introducer of the property and stated: “the preponderance or substance of the evidence is that the sale of the property was brought about by the “effective cause” or “state of affairs” by the actions of the Plaintiff between August and September 2011. That it was not the sole cause of the sale is not to the point as Justice Callinan has said. The Plaintiff did more than simply introduce the Cross-Defendants on the one occasion”

The sad part to this story is the second issue in attempting one of these claims. For the Courts and Tribunals to be in a position to allow the commission to be paid to that first agent (any agent), the agent must have a legally valid Agency Agreement. Unfortunately in this case this was the undoing of the first agent. They were the effective introducer, however their agency agreement was defective. This resulted in no commission being paid to either the first or the second agent.

So, as we are constantly discussing in our CPD classes, make sure that your documentation is accurate, as it has a huge effect on the payment of your commission.

And good luck with all your property dealings this week.

Til next time,
Wishing you every success in your business ventures,
Rosy Sullivan

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