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When is a Real Estate Agent's Commission Payable?

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WHEN IS A REAL ESTATE AGENT'S COMMISSION PAYABLE?

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The majority of real estate transactions see little, if any, dispute over whether or when a real estate agent's commission is payable. A commission statement is typically forwarded to the vendor's lawyer, the vendor reviews and approves same, and the vendor's lawyer pays from the balance due on closing any balance owing on the commission once the transaction successfully closes. Disputes, if any, are typically confined to addressing errors on the commission statement.

It is when transactions fail to close, or fail to get off the ground, that an agent may seek to apportion blame squarely at the vendor's feet, and assert that a commission is owing. In all such cases, it is key to consider the terms under which the vendor agreed to list the property, and the trigger events by which the payment of commission is engaged.

COMMISSION AS CONTRACT: Listing Agreement

A real estate agent's right to commission typically rests on contractual terms, usually contained in a listing agreement. A discussion of case law on commission invariably relates to *H.W. Liebig Co. v. Leading Investments Ltd* [1], a 1986 decision of the Supreme Court of Canada that articulates key principles on the payment of a real estate commission:

A commission agreement on a listing is fundamentally a matter of contract between the agent and the vendor. The parties are free to define any event that triggers the payment of commission, although if the trigger is to be anything other than a completed transaction, it must be outlined in "clear and unequivocal language"[2], otherwise the agent is not entitled to a commission if the transaction fails to close.

Two exceptions to this requirement were noted by the majority decision in *Liebig*. First, if the transaction fails to close because of the fault of the vendor, the realtor may seek recovery on the basis of breach of contract by the vendor, or on a *quantum meruit* basis for the full amount of the commission.[3] Much of the discussion that will follow relates to circumstances of purported vendor fault in failing to complete a transaction.

Secondly, if a subsequent action or settlement results in a financial settlement between vendor and defaulting buyer, the agent may be entitled to a portion of the proceeds, lest the vendor be unjustly enriched. In assessing how such compensation might be structured (which was not being adjudicated), the court suggested as follows:

> In such a case I would have thought a fair amount of compensation would be the agreed percentage of the amount received on the judgment or settlement, less the vendor's costs and

[1] [1986] 1 SCR 70, 1986 CanLII 45 (SCC), see esp. Para 12-23
[2] Ibid., at para 22
[3] Ibid., at para 30

probably a reasonable allowance for his efforts in proceeding with the claim. For a judgment is a very different thing from a sale; it involves many other risks and pitfalls. (at para 32)

CONTRACTUAL TRIGGERS AND LANGUAGE

When (or whether) a commission is payable depends heavily on the language of the triggering event in listing agreement, and the terms under which the vendor has agreed to list the property. Triggers might comprise the presentation of an offer, the acceptance of an offer, the closing of the transaction, or perhaps the mere introduction of vendor and purchaser. It is a matter of complete freedom of contract between the parties to determine the appropriate trigger event. Given the potential uniqueness of each listing agreement, any discussion of when a real estate agent's commission becomes payable cannot be universal, as the analysis of any specific scenario must make reference to the language of the operative agreements. Any general analysis of such a topic (such as this one) must accordingly be qualified by the caveat, "Subject to the specific terms of the specific listing agreement."

Ambiguity or lack of clarity of language in defining the trigger event can become problematic and require judicial interpretation. For example, the use of the word "sale" in isolation to define the trigger: in the scenario of a transaction failing to close in the face of such vagueness, an agent may feel that procuring a binding offer in itself constitutes a sale. In line with *Liebig*, courts have consistently interpreted such an ambiguous term as requiring that the agent must demonstrate that it produced a purchaser who must have been ready, willing, and able to close to be entitled to a commission – in normal circumstances, that the transaction closed.[4] Clarity and lack of ambiguity are paramount for an agent to assert that a commission has been earned.

This does not mean that analysis rests solely on language, no matter how clear and unequivocal it may be, as the equities arising from the conduct of the parties may result in the language of the contract being set aside.

In *Roi Corp. v. Burnham*[5], the Ontario Court of Appeal was faced with a vendor who refused to complete his side of a sale transaction and thereafter refused his agent's commission. The vendor felt himself on solid ground doing so: the listing agreement contained the express provision that the commission was not payable "unless or until this transaction is completed." In the face of such clear and unambiguous language, the Court nevertheless looked to the conduct of the vendor, causing his case to unravel: "It was acknowledged at trial and on appeal that the transaction in this case failed solely due to the actions of the appellant vendor." Accordingly "the appellant could not rely upon his own default as a basis for repudiating his obligation to the respondent broker who brought him a bona fide purchaser. Since that purchaser was ready, willing and able to close the transaction, the respondent broker was entitled to its commission."

[4] see Loveridge v. Cooper, [1959] O.W.N. 81, 18 D.L.R. (2d) 337; C and S Realties of Ottawa Ltd. v. McCutcheon (1978), 19 OR (2d) 247
[5] 1995 CanLII 1167 (ON CA)

As the agents had performed his end of the bargain in good faith, an expectation that the vendor will do so is similarly implied in the contract. As always, a party should beware of relying strict interpretation of contractual terms when there is a whiff (or stench) of bad faith.

In a good many transactions (certainly at the residential level), one might expect to find the standard OREA Listing Agreement (Form 200a). An exhaustive analysis of all terms of the agreement is beyond the scope of this paper, which will instead focus on the following key triggers under that listing agreement:

- "any valid offer to purchase the Property ... on the terms and conditions set out in this Agreement"
- the transaction fails to close "if such non-completion is owing or attributable to the Seller's default or neglect"

In light of the many potential courses that differing contractual language can take any analysis, the following discussion is largely confined to scenarios that raise issues similar to these triggers in the OREA form of listing agreement, to help provide some guidance in reasonably foreseeable scenarios.

VALID OFFER

The procuring by the agent and rejection by the vendor of a valid offer may constitute a trigger for commission. What constitutes a valid offer rests on what the vendor has previously indicated it would accept.

In *T. L. Willaert Realty Ltd. v. Fody*[6], an agent presented a vendor with an offer at the full list price of the subject property, and for all practical purposes complied with the listing terms. The offer was not accepted by the vendor, who went to some lengths to try to evade delivery of the offer. The failed offer was found to be valid, engaging the agents right to commission.

But an offer at the listing price alone may not necessarily constitute a valid offer that engages a right of commission. In *Bird v. Ireland*[7], an agent presented the vendor with an offer at the full list price, but containing warranties as to water potability and sufficiency, and the state of the septic system. While the listing itself provided a statement that the vendor was not aware of any issues with these services, giving of actual warranties beyond the stipulations of the listing agreement and the vendor was unprepared to provide such assurance. The offer was accordingly not accepted by the seller. The agent asserted that a valid offer had been presented, and sued for commission. In its findings, the court determined that the offer contained conditions not found in the listing agreement, that the vendor's refusal of the offer was accordingly not unreasonable. The claim for commission was not allowed.

[6] 2013 ONSC 7533 (CanLII)
[7] 2005 CanLII 44382 (ON SCDC)

Absent other circumstances or provisions in the listing agreement, an agent's commission may therefore be triggered by the rejection of an offer that mirrors the terms of the listing agreement. The agent has secured what the vendor hired him or her to to procure. A vendor who rejects an offer without valid reason can be seen to have frustrated the work of the agent, and acted contrary to the agent's understanding that, upon procuring an offer that complies with the listing agreement, his or her work would be complete.

A vendor wishing to have the unfettered discretion of rejecting such an offer arbitrarily would be encouraged to negotiate alternate language in the listing agreement. In light of *Roi Corp. v. Burnham*, such language should frankly be fairly explicit in defining the ability of the vendor to reject an offer arbitrarily and capriciously.

FAILURE TO CLOSE – VENDOR'S FAULT

The failure of a transaction to close raises the question of allocation of responsibility, as whether the agent's commission is payable may hang in the balance of determining which party is at fault.

The scenario outlined earlier in *Roi Corp. v. Burnham* constitutes an unambiguous example of the vendor's default in performing the contract. In that case, even in the face of a contractual trigger predicated on actual closing, the court found commission payable when the vendor refuses to close. Coupled with *Liebig*, it would seem that this provision in the listing agreement merely reaffirms in contract an inherent obligation of the vendor to act in good faith to close a viable transaction, otherwise he or she will be liable to the agent for lost commission.

Complications arise when the deal collapses and blame is either uncertain or tends to point toward the purchaser. With potentially large commissions on the line, there can be a temptation to try to find ways to shift blame to the vendor. In certain instances, agents have asserted that their vendor clients ought to have been more aggressive in preserving a faltering transaction in a manner that might have safeguarded the commission.

Quoting from *Liebig*, "the vendor seeks to obtain is a sale, not a lawsuit"[8] as part of the services provided by a real estate agent. A vendor is not obliged to litigate to protect an agent's commission triggered by a closing, and is not precluded from cutting their losses and abandoning the deal in good faith.

In a simple context, this principle is well illustrated by *Century 21 Success Inc. v. Gowland*[9], in which the purchaser advised prior to closing that it would be unable to complete the transaction. The vendor accepted such position and entered into a mutual release, in which the purchaser agreed to forfeit the deposit. The real estate agents took the position that the vendor ought to have either litigated or tendered, and that the vendor's conduct amounted to a default or neglect

[8] *Liebig*, *supra* at note 1, at para 29
[9] 2003 CanLII 8136 (ON SC)

precluded the agent from a commission. The agent's position was rejected by the court, reasoning as follows:

> Accepting the financial distress of the buyer, the vendor in effect called off the transaction. That is a result of the behaviour of a buyer who could not complete a purchase. There was no action by the vendor to cause the deal to fall apart. (at para. 19)

Similarly, the vendor is not obliged to take on obligations outside of the requirement of the purchase agreement to protect the commission. In *Société en commandite Place Mullins v. Services immobiliers Diane Bisson inc.,*[10] a conditional offer granted the purchaser the opportunity to conduct due diligence on the property. Such enquiries revealed contamination of the lands, previously unknown to the vendor. The purchaser indicated that he was prepared to waive his condition only if the vendor would pay the cost of decontamination. Negotiations between the parties failed to resolve the matter, and the offer died before going firm. The agent sued, relying on a provision in the listing agreement stating that commission was payable "where the SELLER voluntarily prevents the free performance of this contract," and asserting that the vendor was at fault for not undertaking remediation at its expense.

In analysing whether fault should be allocated to the vendor, the court suggested that "such a fault may result either from a failure by the promisor-seller to do something it had an obligation to do, or from its doing something it had an obligation not to do" (at para 20). Determination of fault therefore rests with establishing that the vendor, by commission or omission, breached its obligations under either the purchase agreement or the listing agreement. Having no obligation under either agreement to remediate the land or accept an abatement, the vendor could not be found at fault for being unwilling to re-open the agreement to negotiate less favourable terms, or otherwise extend its obligations under an agreement..

Consistent in principle with the reasoning in *Bird v. Ireland* in determining the validity of an offer, an overarching determination in allocating fault looks to whether or not the party was acting within the scope of their requirements or obligations in allowing a deal to die. Good faith performance by the vendor is expected in accordance with the terms of a listing agreement or agreement of purchase and sale, but the courts are reluctant to extend the obligations of the vendor beyond matters to which they have bound themselves.

The relationship of vendor and agent requires that the transaction procured by the agent must be within terms agreed to by the vendor for the agent to collect its fee. While good faith is expected of the vendor at all stages, it is not incumbent on the vendor to make unpalatable concessions in relation to such requirements to protect the agent's fee.

[10] 2015 SCC 36