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A T T O R N E Y S

## **CLAIM FOR COMMISSION**

Presented by Meumann White Attorneys

An estate agent that wishes to proceed to recover commission in terms of the mandate agreement (as opposed to claiming such commission in terms of a benefit created in favour of the agent in a sale agreement) must allege and prove:-

Compliance with S26 of the Estate Agents Act;

A mandate;

Performance of the mandate which in the absence of special terms involves

That he has introduced a purchaser to the seller;

That the purchaser was, when the contract was signed, willing and able to purchase the property;

That a valid contract of sale was concluded;

That the introduction was the effective cause (*causa causans*) of the contract.

The commission payable

The question as to whether an estate agent was the effective cause of a sale usually arises in two instances:-

Where an estate agent introduces a purchaser to the seller and the parties conclude a private sale; and

Where an estate agent introduces a purchaser to a property who eventually purchases it through another estate agent.

The issue in both instances is whether the estate agent who first introduced the purchaser is entitled to the commission, and in deciding this factor each case has to be carefully scrutinized

before this can be answered. However the following general points can be made:-

Where the seller sells privately various factors can indicate whether or not the estate agent was the effective cause;

The nature and effect of the estate agents efforts (eg. A simple phone call leaving a business card, driving purchaser past the property and pointing it out may well in certain circumstances constitute the effective cause of the sale);

The period which has lapsed between the estate agents introduction and the conclusion of the sale;

The terms of the sale must be viewed against the terms of the mandate (the mere fact that the purchase price of the sale is lower/higher than that of the mandate is not decisive);

If the seller grants the purchaser financial assistance may be a factor, but this too is not decisive;

Where the estate agent introduces a purchaser but later breaks off negotiations does not necessarily terminate the influence of the introduction but it does effect the value of the introduction.

Where an estate agent introduces a purchaser to a property who eventually purchases it through another estate agent, the first agent will only be entitled to commission if he can show that it was his efforts which resulted in the conclusion of the agreement notwithstanding the intervention of the second agent. Although what has been covered in (1) above will also apply here it must be remembered that if a property is listed with several competing estate agents there is no rule that the estate agent who first introduced a purchaser is entitled to commission. The real issue is whether it was the first or second agents efforts which were the effective cause of the sale (eg. Offer submitted by first agent rejected because it was too low, second agent concludes sale because he obtains

financing for purchaser who then submits higher offer: first agent would not be entitled to commission in these circumstances. What about the situation where the sale is concluded because the second agent reduces his commission and as a result the seller "clears" more of the purchase price?)

There are situations where it is impossible to distinguish between the efforts of one agent and another in deciding who was the effective cause. In such situations it may well be that the seller is liable to pay commission to both estate agents. In such circumstances the seller has only himself to blame if he appoints more than one agent without ensuring that he will be liable for the commission of only one estate agent, as there is not obligation on an estate agent to acquaint the seller with all the various people introduced to the property .

The requirement that an estate agent must be the effective cause of a transaction before he can claim commission can be excluded by agreement, however such agreement is not readily assumed and must be set out in very clear terms in order to be binding.