

Reap full rewards as listing agent as the 'effective cause of sale'



Typically the sole source of income for real estate agents in Queensland is commission earned on completed transactions. This means that whilst the financial reward for hard work in the industry can be substantial, a consistent income stream is not guaranteed and significant efforts made to assist clients may go unrewarded.

In order to provide 'consumer choice', there is a range of appointment options which offer varying degrees of security for agents. An **open listing** provides that the agent is appointed without exclusivity, and commission is only payable to the facilitating agent on completion of the transaction. An open listing can continue indefinitely, and may be used when a client wishes to appoint multiple agents. A **sole agency** means that the agent to whom the appointment is made in the first instance will be paid regardless of whether he or she sold the property, and whilst a second agent may be appointed, if the property is sold by the second agent, commission will be payable to both agents, regardless of who caused the ultimate sale. The most desirable appointment for agents is an **exclusive agency**, whereby the agent is appointed at the exclusion of all others, and commission is payable to that agent on the sale of the property during the term of appointment, regardless of how the sale came about.

Sole and exclusive appointments are limited to a maximum term of 90 days, lapsing to an open listing if not actively terminated. The greatest threat to the agent's security in this instance is where an agent fails to secure a renewed exclusive or sole appointment, but continues in efforts to clear the property. This gives other agents the opportunity to 'swoop' by building a relationship with the seller or potential buyers on the cusp of a deal, potentially leaving the original agent empty-handed.

From a seller's point of view there is a natural apprehension about putting all of one's eggs in one basket. However, sole agencies and exclusive agencies are effective in focussing the attention of a professional agent in the knowledge that he or she has an unimpeded opportunity to sell the property. It then becomes a matter for the seller to identify the right agent, and give that agent the best opportunity to sell the property, rather than second-guessing a marketing campaign by appointment of additional agents.

The ultimate question of entitlement to commission, applied to all types of appointment, is whether the agent claiming payment can be considered the *effective cause of sale*. Considerations to that end include whether the eventual buyer was first introduced by the agent, and how much time has lapsed since that introduction. Where another agent becomes involved, mere introduction of the eventual

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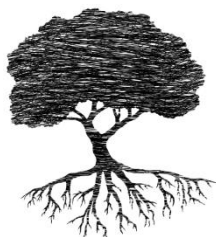


buyer would usually be insufficient to support a claim for full commission. The 2005 decision in *Emmons Mount Gambier Pty Ltd v Specialist Solicitors Network Pty Ltd*¹ confirmed that where a secondary agent becomes involved, the main considerations will be the time elapsed between the initial introduction and eventual purchase, and whether a significant price gap has been bridged by the work of the second agent. In that case, the sale of a hotel was effectively abandoned by the original agent who could not facilitate agreement between the potential buyer and seller. It was the work of a later intervening agent to extract a higher offer from the same buyer, who was considered the *effective cause of sale* and entitled to full and exclusive commission on the sale.

Usually, establishing an entitlement to commission as an agent is the simplest step. However when a marketing campaign is drawn out over a long period – the likelihood of which tends to increase with the value of the property – the best insurance policy for the agent is vigilance in keeping appointment forms up to date. In the event of conflict over payment, it is best to seek advice as soon as the problem arises: lengthy time delays may diminish the prospects of recovering a commission.

It is in the interests of neither the agent nor the seller to fall into dispute over commissions. Careful considerations of the terms of any appointment, and diligence in keeping appointments up to date serve the interests of both parties by bringing certainty to their dealings, and minimising room for dispute.

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This paper is prepared for general information only. It should **not** be treated as specific legal advice. Each circumstance is different. Please ensure that you take specific legal and accounting advice **before** entering into any transaction.

¹ *Emmons Mount Gambier Pty Ltd v Specialist Solicitors Network Pty Ltd* [2005] NSWCA 117