

Q&S CONVEYANCING UPDATE

ISSUE 25, 16 APRIL 2009

SECURING RECOVERY OF COMMISSION INCLUDE A CHARGING CLAUSE IN THE APPOINTMENT TO ACT AS AGENT

Every Real Estate Agent has been duded at sometime by a Seller who does not pay a commission. Not only is there the loss of income to the Agency but the impact on the hard working salesperson is not only financial but is bad for morale. In these difficult times when every dollar in revenue is important it is even more important to take every avenue legally open to secure payment of your hard earned commission.

We were recently contacted by an Agent who was finding it difficult to recover her commission. The Agent had been the effective cause of the sale of her client's property by finding a Buyer to enter into a Contract of Sale within the term of the Agent's appointment.

The Contract was unconditional but was terminated by the mutual agreement of the Seller and the Buyer and accordingly, the Agent was entitled to commission pursuant to the standard conditions of the Property Agent Motor Dealers Act Form 22A.

The Seller refused to pay the Agent her commission and there was a nominal deposit insufficient to cover the commission.

The statutory preconditions for recovery of commission are:

1. That the Agent is a holder of a real estate agent licence;
2. That the Agent is authorised under the licence to perform the activity;
3. That the engagement or appointment to act as an Agent in relation to the transaction is in the approved form and signed by the client;
4. The commission is not in excess of the amount prescribed by legislation.

Where there is little or no deposit and assuming that the above preconditions have been met, an Agent's usual recourse to recover commission is by legal proceedings. As everyone knows legal proceedings are often lengthy and expensive. This is what our client faced but she wanted to put in place something to stop this happening again in the future.

The usual situation when a sale falls over is that the Seller sells the property either through another Agent or by private treaty within a very short time.

We suggested to our client that one way to secure payment of her commission in the future, was to include a charging clause over her client's property as a special condition to the Form 22A Appointment to Act as Agent (and attached as a schedule).

A charging clause is common in contracts for mortgage brokers as they are more familiar with securing loan monies but there is no reason that they can not be utilised in the real estate agency Appointment to Act.

(continued overleaf)



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(continued)

Such a clause charges the client's listed property being sold pursuant to the Appointment to Act with the payment of all commission due to the Agent and gives the Agent a caveatable interest over the listed property.

A Caveat stops registration of dealings until it expires (usually after 3 months) or after 3 months where court proceedings are commenced to support the Caveat until those proceedings are determined.

Given that the Seller has to remove the Caveat in order to complete any sale the Agent has enormous leverage as settlement of the second contract cannot take place until the Caveat is removed. The Agent can use the Caveat to obtain payment of their commission without the cost delay and angst connected with court proceedings.

A Caveat might cost \$660 and be registered in a day which is far less and much quicker than legal proceedings.

Please contact our office if you want further information or would like us to provide you with an appropriate charging clause to include in your Appointment to Act as Agent Forms.

**Richie Muir, Solicitor,
Quinn & Scattini Lawyers**

If you would like to ask any question about this or any other similar issue Richie may be contacted on 3821 2766 between 8.30am to 5pm Monday to Friday or email rmuir@quinnscattini.com.au

*In addition to residential and commercial Conveyancing services,
our team of experienced lawyers practice in Business Law, Commercial Litigation,
Property Law, Wills & Estates, Criminal Law and Family Law.*



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