

When is a real estate agents commission payable?

As most people will know, the usual arrangement with a real estate agent is that they are entitled to payment of a commission once an unconditional sale and purchase agreement has been concluded.

However, is a real estate agent entitled to commission or damages from the vendor when it introduces a purchaser who makes an unconditional offer at the price nominated in the listing agreement, but the vendor chooses not to accept the offer because they subsequently decide not to sell the property?

This was the issue in the recent case of *Picton Real Estate Ltd v Barton*. The defendants were the Trustees of the Ongaha Trust. They entered into a sole agency agreement with Picton Real Estate to sell the Trust's property at Torea Bay, Queen Charlotte Sound. The listing authority was the standard form used for the "Professionals" group of real estate agents. The listing price was \$750,000.

Picton Real Estate marketed the property extensively and within the first five weeks four separate offers were presented to the Trustees. The fourth offer was unconditional and at the listing price of \$750,000. At this point one of the Trustees phoned the listing agent and advised her that three of the four Trustees no longer wanted to sell the property and requested that the property be taken off the market.

Picton Real Estate sued for commission and/or damages of \$28,406.25 together with interest and costs being the amount of commission that it would have earned if the Trustees had signed the unconditional offer for \$750,000.

Picton Real Estate argued that they did all that could be expected of them under the sole agency agreement, that they had completed their side of the bargain and that the trustees changing their mind selling had unjustifiably denied them earning their commission.

The Trustees response was that the sole agency agreement only refers to commission or damages being payable when a contract to sell the property is actually entered into.

The issue for the Court to decide was whether or not a term should be implied into the contract to the effect that if Picton Real Estate presented an unconditional offer at the listing price, then they were entitled to their commission. The general legal principle is that for a term to be implied in a contract that implied term must be necessary to give "business efficacy" to the contract.

Justice Harrop noted that the listing form was a standard form used by a chain of real estate agencies, and that considerable real estate and legal expertise would have gone into drafting it. He queried why, if it was such an obvious term that it must be implied, that it had not been included in the standard form contract.

The judge also considered that Picton Real Estate was giving undue prominence to the inclusion of \$750,000 as the listing price. He noted that there was no reference to the listing price when the commission was referred to. Instead the commission was calculated on a percentage of the actual sale price, which was consistent with commission only accruing when there was a sale.

Justice Harrop also reasoned that there might be two offers, one unconditional at \$750,000 and one conditional at \$850,000. A Vendor would be perfectly entitled to accept the higher conditional offer. But on Picton Real Estates argument, if the conditional contract did not

become unconditional, the agent could have a claim for its commission on the basis of the rejection of the lower unconditional offer.

The judge found that the \$750,000 listing price was merely a guide and was not in any way understood by either party to be pivotal either in terms of earning commission or in terms of binding the Vendor to accept an offer at that price.

Another argument raised by Picton Real Estate was that the Vendors were under an implied correlative duty not to hinder the agent in carrying out its tasks and earning its commission. This argument failed because the case cited in support of that argument was distinguished from this case on its facts.

The Court therefore found that it was not necessary to imply the term to give business efficacy to the listing contract and Picton Real Estate's claim was dismissed.

As the Judge expressed, vendors up and down the country would be startled by the proposition that by including a price in a Listing Authority they were binding themselves to accept an unconditional offer at that level or at least that if they did not do so they were liable for commission.