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BE CAREFUL WHAT YOU SAY

Representations and Non-Reliance Clauses

Tanya Thomas & Nicole Ferreira-Aaron

In recent years, banks, finance houses and insurance companies have become increasingly sophisticated in marketing products and services to their target audiences. These efforts may range from glossy ads and eloquent brochures to promotional presentations. Whatever the advertising medium used, the main objective is to stand out amongst one's competitors. However in so doing, some companies have inadvertently misrepresented their products or services and landed themselves in hot water. The recent UK case of *Quest 4 Finance Ltd v Maxfield [2007]* highlights the increasing vulnerability companies face when promoting their services to the public.

THE CASE

- *Wageroller* was a short-term finance product being offered by *Quest* to companies.
- During a meeting with a director of *Hilmax* to market *Wageroller,* a broker representing *Quest* verbally represented to the director that no personal guarantees of directors would be required as a condition of *Hilmax* obtaining *Wageroller*. He also gave the director a brochure describing *Wageroller* which also expressly represented that no personal guarantees would be required from the directors, but merely a Warranty to cover the event of any fraudulent acts being knowingly committed.
- *Hilmax* then entered into an Agreement for the *Wageroller* and warranted in the Agreement that no winding up proceedings or other liquidation arrangements would be instituted against it.
- The *Hilmax* directors signed a Warranty making themselves liable to indemnify *Quest* should *Hilmax* breach any warranty in the Agreement. This Warranty effectively constituted a Guarantee.
- The Warranty contained a declaration that in deciding to sign it the directors fully understood its true nature, meaning and effect and that they placed no reliance on the advice or opinion of *Quest* or any person representing its interest (the 'non-reliance declaration').
- *Hilmax* eventually went into administration and *Quest* terminated the Agreement and sued the directors for breach of the Warranty. The directors claimed that the Warranty should be set aside because they were induced by a misrepresentation that personal guarantees were not required.
- Quest was unable to prove that it believed the non-reliance declaration to be true and that Quest had relied on it.

The Judge dismissed *Quest's* claim and declared the Warranty be set aside on the grounds of a material misrepresentation.

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TWICE THE COMMISSION FOR ONE SALE?
THE RISK OF DOUBLE ESTATE AGENT COMMISSION

Keomi Lourenço

VENDORS BEWARE! You may be liable to pay two real estate agents for one sale. The recent English Court of Appeal case of *Dashwood v Fleurets* has increased a vendor's susceptibility to inadvertently having to pay two commissions to different real estate agents in respect of the completion of a single sale where either: (a) the vendor has engaged the services of more than one agent simultaneously or (b) he has switched agents.

The good news is that an aware vendor can seek to minimise, although not altogether eliminate, this risk by:

- negotiating and analysing the terms of the estate agents' contract of engagement prior to acceptance; and
- by being aware of interaction with the estate agent during the negotiations and conduct of the sale.

Understand the Risk

The terms of the estate agent contract regarding the obligation to pay a commission or fee generally states that the fee becomes payable if the agent "introduces a purchaser", "produces a successful purchaser" or "finds a purchaser". Such phrases usually place an onus on the agent to establish that he was the effective cause of the sale in order to be entitled to the commission. The foundation of the effective cause test is based on applying the facts of the circumstances to determine which estate agent's actions brought about the ultimate sale of the property. Although *Dashwood v Fleurets* does not change the test of effective cause, the ruling implies that this test does not apply to carefully drafted "sole selling rights" agreements.

Two estate agents can easily claim a right to a commission where one agent had initial interaction with the eventual purchaser but the second agent closes the deal even where neither contract was of a sole selling nature. In the case of *John D Wood v Danata*, the courts recognised the possibility that the application of the effective cause test could result in the payment of two commissions. However it was noted that if the vendor knew that both agents were dealing with the same purchaser and had continued to negotiate with the same purchaser via both agents, the obligation to pay both agents would have ensued.

Prior to *Dashwood v Fleurets* the effective cause test was applied to agreements that were of a sole selling nature. Under such agreements the agent has the benefit of an exclusive period of marketing the property. If the eventual purchaser was introduced to the vendor during such exclusive period by or the agent or in fact , by any other person, *during* the sole selling period , then the agent is entitled to a fee, *even if* the sale is concluded after the said exclusive period. If, therefore, the agent does introduce the eventual purchaser during the exclusive selling period, he is entitled to commission even if another agent concludes the deal.

Following *Dashwood v Fleurets*, the agent's obligation under sole selling agreements to introduce the purchaser no longer places the onus of establishing effective cause on the agent. There was no need to imply the effective cause test where such an implication was not necessary to give business efficacy to the contract.

It was further held that the wording "introduced to you during a period by us or any other person" merely places an obligation to introduce somebody who turns out to be the eventual purchaser even if that person becomes the purchaser by another route unconnected with the original agent. Therefore the vendor was found to be obligated to pay commission to the first agent due to the fact that the purchaser initially took notice and interest in the property during the sole selling rights period stipulated under the contract AND to the second agent who prepared the documents and facilitated the sale by, *inter alia,* financing the purchaser with the purchase money.

The case of *Peter Yates and Co v Bullock* provides yet another example where a vendor had to pay two commissions. In *Bullock*, the issue was whether the first agent was the effective cause of the sale by introducing the purchaser in the transaction notwithstanding that the sale was actually concluded by the second agent with whom the vendor

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BE CAREFUL WHAT YOU SAY:
Representations and Non-Reliance Clauses (cont'd)

The Rationale

The Judge was of the view that usually the purpose of a non-reliance declaration is merely to confirm that the rights of the parties are governed by the written agreement. In this case, because Quest made clear and unequivocal statements in its brochure which were calculated to be relied upon by the directors of companies seeking finance (the substance of which was quite different from the legal effect of the documentation required to be subsequently signed), the Judge held that there could be no presumption that Quest believed the non-reliance declaration to be true. Quest then needed to prove that it did believe the declaration to be true. It failed to do so and the Judge held *Quest* accountable for representations made outside of the written agreement.

Lessons to be Learnt

- Be careful what you say and what is said on your behalf;
- Ensure that your message is accurate and consistent;
- Let your legal documentation corroborate rather than contradict what you say;
- Do not be complacent: a non-reliance declaration is not an impenetrable shield.

Protect Yourself

To safeguard against the risks or misrepresentation parties should draft all marketing material carefully and accurately, avoiding vague or ambiguous terms or phrases and seek advice as to their legal effect. One should also develop a specific marketing strategy and insist upon its strict adherence. Both verbally and in print, parties should also recommend that counterparties seek independent legal advice before contracting.

TWICE THE COMMISSION FOR ONE SALE? (cont'd)

entered into a sole selling agreement. The fact that the vendor paid commission to the second agent was not in contention as the court identified the agreement as one in which a fee is payable where an agent acted in but was not the effective cause of the sale.

Thus where a vendor has entered into a sole selling agreement with an agent, the obligation on the agent can be fulfilled by merely producing the particulars to a person who then turns out to be the eventual purchaser. It matters not whether another agent was actually the effective cause of the sale.

Recommendations

- Where entering a sole selling agreement cannot be avoided, vendors should negotiate for the express inclusion of a term which states that the estate agent must be the effective cause of the sale as such a term will **not** be implied. Inclusion of such an express term minimises the vendor's risk of having to pay commission to two estate agents.

- Reconsider the decision to engage more than one agent simultaneously. Vendors who decide to switch agents should ensure that the first agency contract is properly terminated. Notwithstanding a proper termination of the contract, an agent can be entitled to a fee if the eventual sale is to a purchaser who had been introduced during the sole selling rights period *unless* recommendation #1 has been implemented.

- Where more than one agent is engaged and there appears to be prospective sales from both, a vendor should, if possible, procure from the estate agent the identity of the purchaser to ensure that the purchaser is not the same person. If it is the same person, the vendor should determine whether he can properly terminate one of the contracts. On the other hand, the anonymity of the purchaser to the Vendor in the *Danata* case was a factor which prevented the vendor from having to pay two sets of commission.

Unfortunately, the risk of inadvertently having to pay two estate agents cannot be entirely eliminated, but the aware vendor is in a better position to minimise such a risk as he can and should employ the tool of negotiation before engaging an estate agent.

ADDRESSEE

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