

Beware the dreaded 'double-commission' claim

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As the property market continues to heat up and shortages of homes for sale in certain areas and price brackets start to develop, hopeful buyers and investors are increasingly turning to estate agents directly and paying them a fee to go out and find suitable properties.



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And while there's nothing at all wrong with that, home owners and sellers do need to understand that any agent who introduces a buyer in these circumstances is actually working for that buyer.

The agent's primary responsibility will thus be to act in the interests of the buyer – and that could include negotiating to try to secure the property at the best possible price.

In addition, home sellers who have already given a different agent a mandate to market their property should be very wary of accepting an offer from an agent who scouted their home on behalf of a buyer, as this could quite easily give rise to a 'double-commission' claim.

'Effective cause' of sale

The reason is that the agent who introduced the buyer might well claim that they were the 'effective cause' of the sale and thus entitled to a commission.

However, if the sellers agree to this, the original agent with the mandate could then launch a claim against them for breach of contract - and damages equal to the amount of the commission already paid.

The only way this can be avoided is if the sellers tell their original agent about the offer brought by another agent and ask for a written indemnity against any later legal claims for damages – before they accept the offer from the second agent. Hopefully, the agents will also reach an agreement to share the commission.

Similarly, home sellers should be very wary of giving mandates to multiple agents simultaneously, as this can also lead to disputes over commission and again end up with them having to pay twice for the same service. What might happen, for example, is that a prospective buyer views the property through one agent and then, at a later stage, decides to purchase but makes an offer through a different agent who also has a mandate.

Secure indemnity against legal action

Both agents might feel that they were the 'effective cause' of the sale and entitled to the commission, and if the sellers want to avoid a 'double-commission' situation, they will again need to secure indemnity against legal action and, ideally, an agreement for the agents to split the commission – before they accept the offer to purchase.

The problem, though, is that you as a seller may not be aware that your buyers have engaged with more than one agent and to avoid this, we suggest you should make sure that any offer to purchase made in a multiple mandate situation contains a clause in which the buyers warrant that they did not view the property through any other agent and indemnify you against any claim by another agency.

An even better alternative is to do your homework and choose one agent in your area who has an excellent reputation and

a track record of successful sales, and grant them a sole mandate.

You should also make sure that the mandate document accurately reflects what was discussed with regard to the marketing of your property – and look out for a clause that stipulates that the agency will still be entitled to commission if the property is sold to anyone who viewed it during the mandate period, even if that sale takes place after the mandate has expired.

This is very common and there is nothing wrong with it, but to make life easier and lower your risk of a ‘double-commission’ claim, you should then add a condition that the agency must provide you with a list of all the people who view the property during their mandate period. If they don’t achieve a sale during this period and you only get an offer to purchase at a later stage, you will then easily be able to check the buyers’ names against this list.

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