REAL ESTATE COMMISSION PAYMENT

The topic of this short presentation is a review of some recent case law surrounding Clause 14 of our standard form Agreement of Purchase and Sale.

That clause (which is the acceptance clause immediately above the Vendor's signature) states the following:

> I hereby accept the above offer and agree to sell on the terms as therein set forth and I agree to pay to the agent _____ a commission of $_____or_____ __% of the sale price plus all applicable taxes for having procured this offer. Said commissions to be deducted from the deposit. I further instruct the agent to remit any balance and deposit monies to my solicitor herein, and I irrevocably instruct my solicitor to pay direct to the said agent any balance of commissions from the proceeds of the sale.

The majority of jurisprudence surrounding this clause has dealt with the issue of whether or not a salesperson using that clause, can sue for payment of commission, in lieu of not having a written listing agreement. A review of that case law is not the subject matter today.

There have been two Ontario decisions that examine potential liability for solicitors who choose to ignore the direction given in Clause 14. Those cases examine the question of whether or not the Vendor's solicitor should ignore paying the commission if instructed to do so by his or her client.

Many practitioners have been involved with situations where the Vendor may for arbitrary or valid reason not wish the balance of commission to be paid at closing. Those directions are given to their solicitor, even though Clause 14 contains the phrase "irrevocably instruct". I believe lawyers pay little attention to that phrase if a client issues contrary instructions.

The two cases to be reviewed are **Family Trust Corp. v. Morra** (1987), 60 O.R. (2d) 30, 39 D.L.R. (4th) 762 and **ReMax Garden City Realty v. 828294 Ontario Inc., Louras and Flemming** (1992) 8 O.R. (3d) 787.

The fact situation in each of these cases was in essence the same with the Vendor's solicitor receiving instructions from their client not to pay the real estate commission. In both instances suits were commenced by the listing broker naming the Vendor's solicitor as a party. The "irrevocable" direction given to the solicitor on the Agreement of Purchase and Sale was similar in wording to the one cited above.

In the **Family Trust** case, a lower Court had found in favour of the Plaintiff broker against the Vendor's solicitor. The matter was then considered on appeal with the judgment of the Appeal Court being delivered by Trainer, J.

The Appeal Court noted at page 32 of their Decision that:

> "Counsel for the Appellant does not take issue with the Judge's finding that the direction in the Agreement of Purchase and Sale, coupled with the receipt of closing funds, constituted a "complete equitable assignment of the balance of the commission", thereby engaging the solicitor's liability for failure to honour the assignment, provided their consisted valid consideration moving from the agent to the client in exchange for the assignment of direction.
>
> The Agreement of Purchase and Sale is not under seal. The Plaintiff, agent, is not a party to it."
>
> (underlining is that of the writer's)

The Appeal Court then reviewed the Trial Judge's citing of **Palmer v. Carey**, (1926) A.C. 703. The Trial Judge Rapson D.C.J. had referred with approval to a passage in the **Palmer** case at pp. 706-7 which he found applicable to this matter. It stated that:

> "An agreement for valuable consideration that a fund shall be applied in a particular way may be found an injunction to restrain its application in another way. But if there would be nothing more such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a Court of equity will decree specific performance."

In reviewing that citation, the Appeal Court concluded their decision by stating at page 33 that:

> "In the subject case there was no consideration from the agent for the client Vendor's irrevocable direction to his solicitor. As a consequence, in law, if not in morality, the client was free to withdraw his direction and the solicitor was bound to comply without incurring liability to the Plaintiff.
>
> The Appeal is therefore allowed, with costs to the Appellant here and in the Court below."

I think that Decision probably supports what has been the general practice of most solicitors; if your vendor client gives you instructions not to pay the real estate commission, one does not do so. The result is that you spend most of your time trying to explain to the real estate firm why payment has not been forthcoming.

It would also lead one to the conclusion that the use of the word "irrevocable", in this context, is of little comfort.

In reading the **ReMax Garden City** case it would appear that, in certain instances, this direction may be much more than cold comfort for real estate brokerage firms.

As previously mentioned, the general facts in the **ReMax** case match the **Family Trust** case; with two major exceptions. Adjacent to the signature lines on the ReMax Agreement of Purchase and Sale there were black circles resembling a seal with the word "Seal" printed underneath. In addition, the words "signed, sealed and delivered" and "hereunto set my hand and seal" were used.

The **Re-Max** application was a motion for summary judgment against Flemming, the Vendor's solicitor, who had failed to pay real estate commission based on instructions from his client (Vendor) not to do so.

After reviewing the facts of the case, Phillip, J. stated at page 789 of the Decision:

> "The issue before me is clearly one of interpretation of the Agreement made by Louras on behalf of 828, including the irrevocable direction contained in the Agreement of Purchase and Sale which was obtained by the Plaintiff as agent for 828...
>
> The case that has come before me from the Divisional Court of Ontario is **Family Trust Corp. v. Morra** (1987), 60 O.R. (2d) 30, 39 D.L.R. (4th) 762. In that case, Trainor, J. held in a similar clause contained in an Agreement of Purchase and Sale that there was no consideration from the agent for the Vendor to complete an irrevocable direction to his solicitor and, therefore, in that case, the previous decision of the Trial Judge was reversed and the agent's right to recover under the irrevocable direction from the solicitor was not allowed...without a seal, the need for consideration must prevail.
>
> In the tenth edition of Cheshire and Fifoot's Law of Contract (London: Butterworth's 1981), at p. 462, the author states:
>
> > '...a gratuitous agreement to assign a shows in action, like a gratuitous promise to give any form of property, is **nudum pactum** unless made under seal, and creates no obligation either legal or equitable.'

> On the basis of that principle, the Division Court ruled in the case of **Family Trust Corp. v. Morra**, supra, that the Agreement could not stand.
>
> It appears clear to me that the irrevocable direction is, in effect, an assignment by 828 to the Plaintiff of monies that would be coming into the possession of its solicitor when the purchase was completed. It was an assignment under seal and, in my view amounted to an equitable assignment which is enforceable. The Agreement of Purchase and Sale before me has printed opposite the signature of Louras a black circle that resembles a seal, and under that circle is the word '(Seal)'. It is clear from the document that the parties intended the black printed circle be deemed a seal. Above the signature of Louras appears the printed words 'in witness whereof I have hereunto set my hand and seal', and to the left where the witness signed are the words 'Signed, sealed and delivered in the presence of'.
>
> For the Defendant Flemming not to pay that money, which is clearly described as the net real estate commission due and owing to Re-Max Garden Realty Inc. was to breach the equitable assignment made by Louras on behalf of 828 to the Plaintiff...
>
> I am satisfied, having taken a 'good hard look', that the Plaintiff is entitled to its judgment against Arthur D. Flemming in the amount of $35,600.00 and that the Defendant Flemming is entitled to a summary judgment against 828 Louras on the basis of the indemnification agreement that he received from them when they instructed him to pay the balance of the commission to them rather than to the Plaintiff."

I would note that the pre-printed forms used by the Halifax/Dartmouth Real Estate Board now have that black imprinted seal but the current form does not have the word "seal" printed under that circle nor does it contain the wording indicated above. Those oversights are being corrected as we speak.

It would appear that the somewhat casual approach we have taken with Clause 14 of an Agreement of Purchase and Sale must now change. Our previous practice, which might have been to automatically accept the client's instructions not to pay the commission, may now have more serious ramifications.

Obviously, it is a two-edged sword. On one hand we contemplate the significance of the **ReMax** case and on the other hand we are faced with the consequences of not obeying our client's instructions. If the matter cannot be resolved, and legal action results, it would appear that the only solution would be for the solicitor to pay the funds into court and allow the brokerage firm and the Vendor to have a determination made at that level.

I am not aware of any judicial consideration, of this particular point, in Nova Scotia but it is certainly a subject matter that property solicitors would be well advised to note.