Collecting Commission on "For Sale by Owner" Transactions

Requirements of a Service Agreement

The *Real Estate Act* (the "*Act*") defines an "**agency agreement**" as an agreement between a brokerage and a seller or buyer for a trade in real estate.

Section 57(2) of the *Act* states that a **written agency agreement** is not valid unless:

(a) it contains an expiry date;
(b) it contains only one expiry date;
(c) the expiry date is less than 12 months from the date of the agency agreement;
(d) it shows the total amount of commission, as a lump sum or as a percentage, to be paid to the brokerage; and
(e) a true copy of the agency agreement is immediately delivered to the seller or buyer who signed the agency agreement.

Bylaw 116 defines a "**service agreement**" as an agreement that establishes a relationship between a brokerage and a person that identifies the responsibilities of each party and includes the services to be performed by the brokerage and the fee for service payable to the brokerage. A service agreement is considered to be a written agency agreement for the collection or attempted collection of remuneration for services in connection with a trade in real estate pursuant to Section 68(2) of the Act.

Bylaws 732 and 733 specify other information that must be included in a service agreement.

Therefore, a **service agreement** should:

(a) be made in writing;
(b) be executed in the presence of a witness;
(c) contain an expiry date;
(d) contain only one expiry date;
(e) contain an expiry date that is less than 12 months from the date of the agency agreement;
(f) show the total amount of commission, as a lump sum or a percentage, to be paid to the brokerage;
(g) contain the name and address of all parties;
(h) contain the date the agreement was signed and the commencement date of the agreement;
(i) set out the specific trade in real estate and the duration of the trade for which a fee for service applies; and
(j) contain disclosure stating the amount of the fee for service and that the fee is not payable until the trade is complete.

A true copy of the agreement must immediately be delivered to the seller or buyer who signed it.

Agency Considerations when Dealing with a Private Seller

Registrants often turn to service agreements when representing a buyer client who is interested in purchasing a property from a private seller (i.e. a seller who has not listed his or her property with a brokerage). The buyer's agent may approach the private seller to request that the seller pay the agent's commission out of the proceeds of the sale, rather than requiring payment directly from his or her buyer client.

The registrant does not intend to take on the private seller as a client, but must have some written notation that the seller has agreed to pay the registrant's commission in order to collect payment. As such, the buyer's agent may request that the private seller sign a service agreement with the agent's brokerage in which the private seller will agree to pay a fee to the brokerage in exchange for the brokerage bringing a buyer.

In these instances, the registrant is looking to be paid a commission by the seller, but does not want to establish an agency relationship between the seller and the brokerage.

There is nothing in the legislation to prohibit a registrant from adding a term or condition to the service agreement stating that the private seller is not a client of the brokerage and an acknowledgement from the seller that the registrant is not acting as his or her agent. This "waiver" or "exclusion clause" would essentially amount to a registrant's attempt to contract out of forming an agency relationship with the seller that might give rise to fiduciary obligations owed to the seller.

The complexity arises when determining whether or not contracting out of one's fiduciary duties is permitted by law and would be accepted by the courts. Such a determination would likely be made on a case-by-case basis.

Courts across Canada have recognized that it is the nature and substance of the relationship between parties that gives rise to a fiduciary duty, not the specific category of actor involved. [1, 2] As such, a registrant will not necessarily owe fiduciary duties to a person simply because the registrant has entered into a service agreement with that person. It is the nature of the agreement and the relationship between the parties that must be considered.

The parties to a brokerage contract are entitled to include an exclusion clause or waiver in the service agreement stating that the agreement will not give rise to the regular fiduciary relationship. However, the inclusion of such a clause will give rise to two questions: (i) whether or not such a clause is enforceable, and (ii) whether or not the actions of a registrant create a fiduciary relationship regardless of the existence of an exclusion clause.

[1] (1992) 70 BCLR (2d) 388 (CA).
[2] (1985) 25 OR (3d) (Gen Div).

(i) Enforceability of Exclusion Clause

The enforceability of exclusion clauses was addressed at length by the Supreme Court of Canada in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*.[3]

When determining the enforceability of exclusion clauses, the court must consider three things.

The court must look to the parties' intentions, as expressed in the contract, to determine the enforceability of the exclusion clause. As such, parties must explicitly state their intentions in the written contract. If a registrant does not intend to form an agency relationship with a private seller, the service agreement must state this intention in a manner that is unquestionably clear to the seller and to anyone else reading the contract.

The court must then consider whether the clause was unconscionable at the time the contract was made.

If an exclusion clause is found to be applicable in the circumstances and the court has determined that it was not unconscionable, the court may then undertake a third enquiry and consider whether the court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy that outweighs the strong public interest in enforcing contracts. The burden of proving such a claim lies on the party seeking to avoid enforcement of the clause.

In *Tercon*, the court made specific reference to the importance of the integrity and business efficiency of the tendering process, which was at the forefront of the case. Extending this reasoning to the real estate industry suggests that maintaining the integrity and business efficacy of real estate contracts is an important consideration that will inevitably have to be taken into account should a court be tasked with determining the enforceability of an exclusion clause in a real estate service agreement.

In decisions like *Mega Reporting v Yukon (Government of)*, courts considering whether or not to refuse to enforce an exclusion clause on the basis of public policy have found that freedom of contract is paramount, regardless of the nature or character of the contracting parties.

Unless one is able to fit within one of the three exceptions to the enforcement of an exclusion clause as outlined in *Tercon*, the courts will give effect to such a clause.

(ii) Actions of a Registrant Creating Fiduciary Relationships

It must be noted, however, that the actions of a registrant may give rise to a fiduciary relationship regardless of the existence of an exclusion clause. An example of such conduct would be if a registrant were to provide advice about the value of a property or the price at which the FSBO seller should counter offer. Such conduct will create a fiduciary relationship between the registrant and the FSBO seller, regardless of whether or not an exclusion clause was included in the contract between them.

It is essential that registrants make very clear to private sellers that, while they are real estate agents, they are not the private seller's real estate agent. Play it safe, and avoid advice entirely. Do not counsel the private sellers on anything relating to the transaction.

The test for whether a registrant is in a fiduciary relationship with a person is as follows:

1) The fiduciary has scope for the exercise of some discretion or power.
2) The fiduciary can unilaterally exercise that power… so as to affect the beneficiary's legal or practical interests.
3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding discretion or power.[4]

The determinative factor for whether a fiduciary relationship exists is the "measure of the confidential and trust-like nature of the particular advisory relationship, and the ability of the plaintiff to establish reliance in face".[5] This means that a fiduciary relationship between a registrant and a client can arise as soon as an agent receives confidential information from the client. An example of such information would be the prices that the client is willing to accept or pay in a real estate transaction.[6]

It is important to note that a fiduciary relationship can arise in circumstances that may not seem obvious. This can include when a registrant acts on an unpaid basis, where a registrant is engaged in a joint venture with their clients, or where there is no express agreement between a registrant and a client.[7]

Conclusion

An exclusion clause that explicitly states that there is no agency relationship between a property owner and a registrant is likely the best option for registrants who want to receive payment on a trade in real estate from a FSBO seller.

Registrants must ensure that any exclusion clause they draft contains clear and concise language and be mindful of their interactions with a FSBO seller so as to avoid any confusion or misunderstanding between the parties as to the nature of their relationship or the duties the registrant does or does not owe to the FSBO seller.

Any exclusion clause may only be used in addition to all requirements of service agreements as laid out above, and all other mandatory forms as required by the Commission Bylaws, *The Real Estate Act*, and the Regulations.

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[3] 2010 SCC 4, 1 SCR 69 [*Tercon*].
[4] *International Corona v LAC Minerals Ltd*, 1989 CarswellOnt 126, (1989) SCJ No 83 at para 45.
[5] *Ibid.*
[6] *Anderson v Peters*, 2000 CarswellMan 610, 101 ACWS (3d) 668 (QB) at para 23.
[7] *Spencer v Invidiata*, 1994 CarswellOnt 737, 51 ACWS (3d) 941 (Ont Gen Div).