Consumer Property Acts Review Issues Paper No 1

Colliers responses to selected questions

Questions are in bold text and responses in normal font.

What would be the costs and benefits of regulating the conduct of estate agents in negotiating sales authorities and the content of those authorities?

As a result of the nature of our sales business, and because we deal almost exclusively with developer clients, this area is of great importance and interest to Colliers.

Conduct in negotiating sales authorities should to be regulated for some types of vendors, but not for others.

It is necessary and very important to distinguish between vendors of existing residential dwellings and vendors of off-the-plan property, a prime example being developers. This is due to the rise in off-the-plan apartment sales and land sub-division sales.

Vendors of existing (built) residential houses and apartments are typically 'mum and dad' vendors. These types of individuals are unlikely to be aware of certain regulated aspects of the sales process or of their rights under the Act. These vendors are also vulnerable and need to be protected by appropriate regulation. For example, a vendor may not know to ask for a sunset on the exclusivity period for the agent's engagement. Therefore, a mandated stated exclusivity period is important to ensure that the vendor can go elsewhere at the end of the period if they are unsatisfied with their chosen estate agent.

However, vendors of off-the-plan property are generally professional property developers. They are generally well informed about their rights as vendors and are, more than likely, in no way vulnerable consumers. It is very clear that property developers do not need the same protections as 'mum and dad' vendors.

The sales process is very different for the above two types of vendors. Typically, mum and dad vendors (for example, those purchasing a house or apartment) will complete the sales transaction in a relatively short period of time. In the case of off-the-plan sales however, a sale transacted today is likely to not settle for a number of years.

Mum and dad vendors also need a restriction on the duration of the sales authority. They generally will only have one property to sell (unlike those selling off-the-plan lots) and need to achieve the sale in a relatively short period of time i.e. a matter of months.

Off-the-plan properties are being sold in stages by professional property developers over a number of years. A restricted duration of the sales authority is inappropriate when estate agents are selling off-the-plan for property developers.

Colliers strongly contends that the strict and prohibitive disclosure requirements in the Act should not apply to agents selling property for developers. When applied in the context of an authority between an agent and a developer, or a "business to business" transaction, the current provisions can lead to a complete imbalance between the position of the developer and that of the agent. This is more likely to be in favour of the developer and is covered further in the next section.

In our view and for the protection of vulnerable vendors, there would be little or no cost associated with regulating the negotiation of sales authorities for mum and dad vendors (which is currently the case).

However, it should be noted that if the negotiations between real estate agents and professional property developers were unregulated, there would be no cost as well as no loss

of *consumer* protection. The benefits of this would include greater transparency, improved certainty and reduced litigation costs (because of this improved certainty). It is also worth noting here that, as an analogous matter, under the Sale of Land Act there is no cooling-off period to a contract of sale where the purchaser is either a company or an estate agent. This makes light to the fact that property professionals do not need the same consumer protections as mum and dad consumers. The same principle should be applied in the context of the Estate Agents Act. Developers will also often show an authority agreement to their lawyers, before signing.

What are your views on the current level of information disclosed by an estate agent to a client about commission, fees, rebates and other outgoings?

Further to the above discussion, the current level of information required to be disclosed by an estate agent (i.e. under Section 49A and other provisions) to a client about commission, fees, rebates and other outgoings is, again, appropriate for mum and dad vendors, but not for developers (i.e. off-the-plan sales).

Because of the disparity of knowledge between many such vendors and estate agents, disclosures are important to help protect the interests of mum and dad vendors. This disparity creates a power imbalance and the interests of the vendor must be protected by regulation.

However, again, vendors of off the plan property are property developers (mostly companies) who are as knowledgeable about property law as the estate agent. As there is no power imbalance, there is no need to regulate disclosure. However, light touch regulation assists industry by ensuring that the parties have a shared understanding of what is required. For example, rebates and outgoings should be disclosed, but where the commission is calculated on a percentage basis, an agent should not have to state a dollar amount of commission as well (commission is almost always percentage based) on every lot for a multi lot development, or disclose commission sharing arrangements.

The current requirements in section 49A of the Act are very strict (disproportionately so) and in the context of an authority with a professional developer, inappropriate and arcane. Particularly, the requirements to disclose both the percentage commission and dollar amount of commission, and the estimated sales price for every lot, serve no purpose and are being unethically abused by property developers. In off the plan sales, prices of lots or apartments move over the course of the development, so meaningful disclosure is not possible at commencement of a sales authority. It is very common to sell developments in stages, so it is impossible to state a dollar amount to be paid as a commission for every lot. It is possible to state a percentage or a flat fee, but not a dollar amount for every lot or apartment. It is an entirely unfair, and useless, regulatory requirement. It is common practice in multi lot staged developments to have lot prices increase, as sales increase. This requires a new authority each time.

Property developers have exploited the technical requirement to disclose a dollar value of commission, in the context of authorities which cover many proposed lots or apartments, instead of just the one property.

Examples of litigation in this space are emerging, and the consequences for agents, who have fairly and properly made the sales and spent resources and money doing so, can be quite drastic. At least one case has been heard in Court recently.

The company involved in the recently published case is ParkTrent. The available decision can be viewed at:

http://www.austlii.edu.au/au/cases/vic/VCC/2015/1012.html

This case involved several million dollars in commissions. Given we understand that

ParkTrent completed the required work professionally and appropriately, and in fact used a lawyer to prepare its authority, it is a gross injustice that they were not paid because of a pure technicality. In this case, we understand the vendor developer sought and has been awarded *repayment* of approximately $3 million of commissions.