
Understanding Claims for Commission in the Commercial and Industrial Sector

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Introduction

Commission disputes in commercial sales and leasing transactions can be disruptive for agencies and their clients alike. Understanding the core principles that govern when and why commission is paid and how important Code of Conduct obligations such as Rule 9.1, 9.10 and 9.11 are, is fundamental to real estate agency work. It is also relevant to resolving or preventing any disputes over commissions.

The Real Estate Agents Act 2008 (**Act**) and the Real Estate Agents Act (Rules of Conduct and Client Care) set the legal framework to determine who is entitled to commission payments. This document is issued by the Registrar of the Real Estate Authority and provides guidance for the real estate sector in light of the purposes of the Real Estate Agents Act 2008. It has been prepared following feedback from licensees, including representatives participating in REA's Industry Advisory Groups. It is intended to assist licensees in understanding the legal framework, including guidance from court decisions, and key principles that apply to commission claims and how to use those principles in practice. However, it is not binding and is not a substitute for legal advice and should not be relied on as a definitive interpretation of the law. If licensees are unsure about matters relating to commission, or a dispute arises, licensees are strongly encouraged to seek independent legal advice.

What is a commission?

Section 4 of the Act defines a commission as "remuneration by way of commission, fee, gain or reward for services provided by an agent in respect of a transaction". For there to be commission, there must therefore be a qualifying transaction.

"Transaction" is also defined in section 4 of the Act and includes sales, purchases and other disposals and acquisition of freehold estates in land but also includes transactions involving leasehold or other interests in land, licenses under the Land Transfer Act 2017, and occupation right agreements under the Retirement Village Acts.

When is a commission payable?

Understanding when a commission is payable is relevant to resolving or preventing commission disputes. Disputes typically arise where there is uncertainty or disagreement about a licensee's entitlement to be paid. This commonly occurs in relation to whether the licensee was "instrumental" in bringing about the transaction, particularly where multiple licensees are involved, or a sale is concluded after an agency agreement has ended.

Disputes may also stem from unclear or incomplete agency agreements, including ambiguity as to when commission is triggered or how it is calculated. In some cases, concerns about a licensee's conduct, or issues relating to the timing and termination of an agency agreement can also give rise to disputes.

At all times, licensees are reminded of the importance of complying with rule 9.1 and 9.10 of the Code of Conduct, which requires licensee's to act in the best interest of their client. This includes in relation to commission arrangements and entitlements. Commission is payable in accordance

with the Act and principles developed by the Court and Real Estate Agents Disciplinary Tribunal. Commission disputes can diminish trust and confidence in the profession particularly if the client/customer is pulled into the dispute.

It is therefore important for licensees to understand and consider the following when undertaking real estate agency work in the commercial and industrial sector.

1. *An agency agreement must be in place*

To be entitled to claim a commission on a transaction, a licensee must first ensure they have an enforceable agency agreement. Section 126 of the Act prohibits a real estate agent from recovering a commission unless there is a written agency agreement signed by both parties in place. A copy of the signed agency agreement must be sent to the client within 48 hours of them signing it.

2. In the case *Soft Technology JR Ltd v Jones Lang Lasalle Limited* [2023] 3 NZLR 223 the Court of Appeal has confirmed that in order to claim a commission, section 126 also requires that the agency agreement be signed **before** the agent undertakes any work to which the commission will relate. The Court stated, at [45] that "*the terms of s 126 preclude an agent enforcing a claim for commission or expenses unless the agent has performed the work it charges for "under" a written agency agreement". Terms of the agreement are important*".

When and who is entitled to receive commission on a transaction depends primarily on the terms of the agency agreement. Clearly drafted agency agreements can reduce the scope for disputes over commission.

Parties are free to negotiate and agree terms between themselves, but proactive drafting can mitigate the need to dispute later or remove uncertainty about how to assess whether a licensee was instrumental in bringing about the transaction.

The drafting of the agreement was important in a recent commission dispute in the rural sector. In *Beatson (as trustees of Waiaruhe Trust) v Property Brokers Ltd* (2024) 26 NZCPR 462, an agency agreement provided that commission would be payable to the respondent upon **any sale** of the station in Dannevirke that became unconditional during the agency period. Because of the terms of the agency agreement, there was no need for the licensee to show instrumentality to be paid a commission.

The type of agency agreement can also be relevant. For example, under a sole agency agreement, the client agrees not to instruct any other agent to act for them in relation to the transaction to which the agreement relates. Sole agencies would typically make it clear that the vendor assumes liability to pay commission on a sale irrespective of the role played by the agent. Under a general agency agreement, more than one licensee may be authorised to act for the vendor in a transaction, and the terms would provide for when the licensee under the general agency agreement is entitled to a commission.

Licensees should consider the type of agreement that is being entered into and consider bringing any unusual or onerous clauses to their client's attention. Licensees are also reminded of their obligation under rule 9.10 to explain the risk of a double commission if their client has already entered into another agency agreement. This is particularly important if the original agreement was a sole agency that defaulted to an open-ended general agency, without the express agreement by the client.

3. Instrumentality

Not all work carried out by a licensee in relation to a property or for a potential vendor will secure a commission, even if there is, or was, an enforceable agency agreement in place.

Through a series of decisions under the Act (and its predecessor), the Courts have held that, subject to the terms of contract, for an agent to be entitled to a commission on a sale, the licensee's work must have been **instrumental** in bringing about that sale. In other words, it is not enough for the licensee to simply introduce the purchaser; the introduction must have been causative of the sale and had a material bearing on the sale. This was observed by Tipping J, in *Harcourts Group Ltd v McKenzie* HC Christchurch AP 129/933, 9 September 1993, Tipping J, where he stated:

*In my judgment questions of causation, for present purposes, must be approached on the basis that the primary contractual stipulation is that commission will be payable if the property is sold to anyone introduced to the property through Harcourts' agency. If the agent can show that the ultimate purchaser was introduced to the property through his agency then prima facie as a matter of construction commission is payable. The prima facie obligation to pay commission ceases only when the agent's introduction ceases to have a material bearing on the sale. By that I mean that the agent's introduction was no longer instrumental in any material way in bringing about the sale. That, in my judgment, is the only way to harmonise the words of the contract with the proposition established by the authorities that there must be some **causal connection between the introduction and the sale**. In an ordinary case the connection will be self evident. In a case where the point is in dispute it will ultimately be a matter of fact and degree whether the introduction remained instrumental.*

[emphasis added]

To determine if the licensee's work was instrumental to bringing about the sale, the Court "considers the connection between the introduction and the eventual sale and whether there has been a break in the chain of causation sufficient to destroy it" (*Brandon v Baywide Realty Ltd* (2006) 12 BCB 85, Harrison J, at [14]).

It can be difficult to define when a licensee has been instrumental to the sale because in each case it is a question of fact and degree. In some cases, it will be obvious. But in other situations, the situation may not be so clear cut. *The principles from the cases to guide the approach to instrumentality*

The important principles from the cases are:

- The key question to ask is whether "*what the agent has achieved was relevant in effect and in time to the eventual purchase*" (*Brandon v Baywide Realty Ltd* (2006) 12 BCB 85, Harrison J at [14]; *Lewis v Wong* (1982) 1 NZCPR 533, Bisson J at 535-536).
- Once an agent under a sole agency has introduced a buyer and established that causal link, the agent "*does not have to satisfy a high threshold to succeed*" in claiming a commission (*Brandon v Baywide Realty Ltd* at [14]; *Harcourts Group Ltd v McKenzie* HC Christchurch AP 129/933, 9 September 1993, Tipping J).

- An agency must "establish that its work was an effective, not exclusive, cause of sale" (*Brandon v Baywide Realty Ltd* at [14]; *The Real Estate Centre Ltd v Chamberlain*, Tauranga Registry, AP44/94, 24 July 1995, Blanchard J).
- For an introduction of a prospective buyer to a seller to be an instrumental introduction, the introduction must "continue to have a material bearing on the sale" (*Harcourts Group Ltd v McKenzie*).

4. *Factors to consider when assessing instrumentality*

REA considers that the following factors may be considered in assessing whether a licensee has been instrumental in bringing about a transaction. These are not exhaustive, nor is this a checklist, and every situation will depend on their own facts.

- Did the licensee introduce the buyer to the property?
- Has the licensee brought the buyer to the property?
- Did the licensee introduce the buyer to the vendor?
- Did the licensee present a written offer from the ultimate purchaser?
- Did the licensee provide the information under rule 9.11?
- Did the licensee provide all of the due diligence documents to the buyer?
- Has the licensee ensured the agency agreement has been signed and a copy provided to the client before work is undertaken?

5. *Cancellation of an agency agreement*

When an agency agreement is cancelled, rule 9.11 of the Code of Conduct requires licensees to advise the client, in writing, of the names of each customer in respect of whom the licensee may claim commission. This is particularly important where a transaction may still occur with a party introduced during the agency period. If these implications are not clearly explained and understood at the time of cancellation, clients may mistakenly believe they have no further obligations, increasing the risk of dispute if a transaction is later concluded.

Clear communication and accurate record-keeping at the point of cancellation are therefore critical to managing expectations and reducing the likelihood of commission dispute.

6. *What if there is a private sale?*

Disputes can arise where a private sale occurs, either when a sole agency agreement is still in place, or even when there is no longer an agency agreement in place. In these circumstances, commission can still be payable to the licensee if the licensee was instrumental in the sale.

There are some examples in the cases of such situations. In *Harcourts Group Ltd v McKenzie*, the purchaser and seller had been originally introduced by a licensee but were unable to agree on a price. Later, the purchaser and seller met again by coincidence, remembered each other, and conducted a private sale. Because the purchaser only knew about the property and that it might be for sale because of the agent's introduction, the Court said that commission was still payable.

In another case, where the private sale took the purchase price that the agent had helped draw up documents for was the starting point for negotiation, commission was payable

(Mathews v CP Realty (PN) Ltd HC Palmerston North CIV-2010-454-276, 15 September 2010).

What impact do conditional agreements have on commission?

In *Soft Technology Limited v JLL*, the Court of Appeal considered that the entitlement to commission is triggered when the parties enter into a conditional agreement. The agent could demand commission once the conditions were satisfied and the agreement became unconditional.

The above principles are demonstrated by reference to examples in the table below (please note these examples are intended to be illustrative only):

| | Scenario | Likely position |
|---|---|---|
| 1 | <ul style="list-style-type: none"> A vendor engages an agent to sell their rural station and signs a sole agency agreement that provides that if the station is subject to an unconditional agreement during the agency period, the agent is entitled to Commission. The agency agreement is signed before the agent starts work. The agent introduces a buyer who enters into a conditional agreement to purchase the station. The agency period expires. Both parties renew it. The sale goes unconditional. | <ul style="list-style-type: none"> The requirement of section 126 to sign the agency agreement prior to commencing work is met. The agency period was renewed. The agreement goes unconditional during the agency period, having been renewed. Based on the language of the agency agreement, the agent is entitled to commission. Even if the agreement were less clear, the agent found the buyer and was likely instrumental to the sale. |
| 2 | <ul style="list-style-type: none"> An agent is engaged to sell a small commercial property under a sole agency. The agent introduces a potential buyer, whose offer is too low and is rejected. The seller takes the property off the market. 4 months later, the prospective buyer bumps into the vendor at the supermarket and asks if they're still keen to sell. Presented with the opportunity, the vendor agrees to a new slightly higher offer and completes the private sale. | <ul style="list-style-type: none"> It will be necessary to check the terms of the agency agreement. But, following Mathews, the fact the buyer and vendor met again only coincidentally may not prevent the agent from getting commission. The buyer only knew that the vendor might be willing to sell because the agent had previously introduced them in relation to the property. If there is an unbroken connection between that introduction to the property and the ultimate sale, the agent might be instrumental. Only 4 months have passed, which suggests the agent may be entitled |

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| | | to commission. |
| 3 | <ul style="list-style-type: none"> • An agent is engaged to find someone to rent commercial office space. • The agent never signs the agency agreement, but the owner of the property does. • The lease is entered into, and the agent claims commission. • The client refuses to pay. | <ul style="list-style-type: none"> • The Court decided in <i>Soft Technology Limited v JLL</i> that section 126 requires that the agreement be signed before work is undertaken. • No commission is payable. |

What can a licensee do if a dispute arises about a commission?

This note is intended to provide some guidance about commissions. If you encounter a dispute about commission in practice, REA strongly encourages you to seek independent legal advice.