

FACTORS THAT THE COURT CONSIDERS WHEN DETERMINING THE EFFECTIVE CAUSE OF A SALE:

'Effective cause' is the causal link which induces the buyer to ultimately purchase the property. In other words, the property practitioner's efforts are ultimately the reason for the purchaser buying the property and thus concluding the sale. It is important to establish if the property practitioner is the effective cause of sale to determine who has a claim to the commission payable.

The following court cases have established certain factors that the Court takes into consideration when determining whether a property practitioner was the effective cause of a sale:

1. BASIL ELK ESTATES (PTY) LTD V CURZON

A property practitioner must first prove on a balance of probabilities that they are the effective cause of sale before they can claim commission. It was found that the property practitioner who initially introduced the purchaser to the property or who has concluded the sale is not necessarily the effective cause of sale. The facts and circumstances must be considered, meaning that the courts determine the effective cause of sale on a case-by-case basis.

In the abovementioned case, some intervening factors outweighed the general rule of "first introduction". There were some personal circumstances which prevented the potential purchaser from concluding the sale after the first introduction to the property. Several months later, the purchaser obtained the necessary funds and concluded the sale through another property practitioner. The court ruled that some intervening factors could render the initial introduction trivial.

2. BARNARD & PARRY LTD V STRYDOM

In this case, the court had to determine whether the practitioner's actions were "the decisive factor" of the transaction. The initial property practitioner introduced the buyers to the property, but at that time, they were not financially ready to make a purchase. It was the arrangements made by the second property practitioner regarding financing that ultimately led the buyers to decide to proceed with the purchase. The court determined that the second property practitioner was the effective cause of the sale, as the initial practitioner did not hold a "proprietary right" over the buyers, and the intervening factors were more significant than the initial introduction.

As such, all circumstances and evidence presented by the parties must be considered. If a sale, through one property practitioner, is concluded after the property was introduced by another property practitioner, the purchaser's mind leading up to the sale is important but cannot always be taken at full face value. This is also the case if the offer to purchase has a clause stating that a specific practitioner will be deemed to be the effective cause. Such clause will only have evidential value in a dispute involving another property practitioner. The first property practitioner was therefore not entitled to claim commission.

3. WAKEFIELDS REAL ESTATE (PTY) LTD V ATTREE AND OTHERS

In this matter the first property practitioner introduced the property to the purchaser, but the purchaser could not afford it at the time. Approximately 3 months later the purchaser informed a second practitioner that she was interested in the property. However, it was the third property practitioner who was given sole mandate to conclude the sale at a reduced price. Even though the seller had given the third property practitioner sole mandate, they had informed other agencies, including the second practitioner of the reduction of the purchase price. The second practitioner then contacted the purchasers, negotiated a further reduction of the purchase price again and concluded the sale. As a result, the second practitioner was paid commission and shared it with the third practitioner who had a mandate. The first practitioner then instituted a claim stating that they were the effective cause of sale.

The court reiterated that cases of this nature is decided on a case-by-case basis. The court applied the 'but-for test': but for the first practitioner's introduction, the second practitioner's subsequent actions would not have yielded results. The court also stated that the effective cause is not determined by who did the most work, but rather by the results. As such, the court ordered the sellers to pay commission to the first practitioner as well. The court viewed that it was the seller's own fault for having to pay commission twice.

4. AIDA REAL ESTATE LTD V LIPSCHITZ

In this matter, the practitioner had introduced to the seller a prospective purchaser, but the purchaser went on to negotiate directly with the seller and concluded the sale. It was held that the introduction of a prospective buyer would normally be the effective cause. However, if intervening factors, of the making of the practitioner, contributes to the conclusion of the sale, a further enquiry must be done. The court in this instance, found that the intervening factors did not render the initial introduction trivial. The property practitioner should have been given credit for making an impression on the purchaser that they concluded the sale. The Court determined this by applying the 'but-for-test': but for the practitioner's wisdom and business skills, the purchaser would not have known about the property and would not have concluded a sale. The property practitioner was therefore entitled to commission.

Summary

In conclusion, it is evident that there is no definitive test and each case must be dealt with separately, taking into consideration all relevant circumstances and factors.

The **initial introduction to a prospective buyer plays an important role**, but it is important to establish whether there are intervening factors and if they outweigh such introduction. Intervening factors can include the purchasers' financial position or their state of mind during the process.

As the property practitioner, you should ensure that **you have met all statutory requirements** as set out in the Property Practitioner's Act, that the mandate given to you is in writing and comprehensive.