

PROCURING CAUSE

THE REALTOR IN ARBITRATION

It is the duty of a REALTOR® to submit to arbitration, disputes with his fellow REALTORS® and under circumstances, non-REALTORS®.¹ The majority of all arbitrations involve disputes over money, and the majority of those disputes involve disputes over commissions. The question in such disputes usually centers about, who as between two licensees, is entitled to the selling commission.² One of the questions arbitrators normally consider in this connection is who is the "procuring cause," i.e. who procured the ready and willing buyer.

Definition

The question of how to define procuring cause has been a source of conflict and confusion among boards of REALTORS®. We have seen varying interpretations of what constitutes procuring cause being applied by different boards.³ Thus one board may apply the so-called "law of the jungle," another "barnyard equity," another the "threshold rule" and yet another "execution of documents unless procured by fraud."⁴ It is the position of the California Association of REALTORS®, however, that in order to avoid dissatisfaction with arbitration as a mode of settling controversies, it is best to follow the standard set out by the courts of the State of California. This writer sets forth the following as his analysis of what the courts have said on the subject.

"Procuring cause" has been defined as "the cause originating a series of events that, without breaking their continuity, result in the accomplishment of the prime object of the employment."⁵ The principle factual consideration determining whether a particular broker has been the procuring cause in a transaction is how far along the transaction must be brought for the broker to be considered the pro-



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curing cause. In this regard it should be noted that "it is unnecessary for the broker to prove that he was the first one to bring to the attention of the purchaser the fact that the property in question was for sale."⁶ And, in fact, "merely introducing the principal to a party who comes to an agreement with him after the termination of the agency but who was not ready, willing and able to consummate the transaction during the life of the agency is in itself insufficient to entitle the broker to a commission."⁷

The courts have indicated that "the word 'procure' does not necessarily imply the formal consummation of an agreement,"⁸ nor is merely being the first person to cause the property to be called to the attention of the person who subsequently made the purchase in and of itself enough to make the broker the procuring cause.⁹ Nor is it necessary for the broker to be actually present at the consummation of the transaction for him still to be the procuring cause.¹⁰ Under certain circumstances it may not even be necessary to bring the parties to a full meeting

of the minds. Thus, where the terms which the seller requires are not specific the broker is considered the procuring cause when he has procured a buyer on terms to be arranged with the principle.¹¹

First of a Series

As noted above, procuring cause is considered the first of a series of events without a break. Once a broker "procures a customer able, ready and willing to enter into the transaction on terms acceptable to the principle, neither the principle nor the customer may defeat the brokers claim to compensation by concluding the transaction without his aid."¹²

However, even though a broker has put a prospective purchaser on the track of a piece of property, the broker will not be deemed to be the procuring cause if "he finally fails in his efforts, without fault or interference of the owner, to induce a prospective purchaser to buy or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual at the price and upon the terms for which the property was originally offered for sale."¹³ Thus prior dealings alone between the broker and the eventual buyer are not enough when there has been a break in the chain of causation.¹⁴

Where more than one broker has been involved in the transaction it is necessary to determine which one was predominantly the cause of the transaction being consummated. Thus "where several agencies have been active in bringing about a sale the crucial question is, which was the predominantly efficient cause."¹⁵

In each case this must be determined by the facts not by the mechanical application of any set for-

mula. Thus to understand the application of the above standards one must review the actual situations in which they have been applied.

Examples

Example 1: Broker was authorized to represent seller in the sale of a motel. The seller specifically indicated that he would not consider a trade but only a sale. The broker introduced the eventual buyer to the seller and furnished him information concerning the motel. The broker put the seller on notice that he considered himself to be the procuring agent and claimed a brokerage fee in the event of a sale. The seller notified the broker he was taking the property off the market but continued to negotiate directly with the individual buyer. The seller consummated an exchange with the buyer. The court held that the broker was the procuring cause and that the seller could not escape his liability to the broker by revoking the broker's authority after a prospective purchaser for the property had been procured, such conduct by the seller being in bad faith and for the purpose of avoiding the payment of the agreed commission. The fact that the property was in fact exchanged rather than sold did not act to defeat the broker's claim for commission since the change in terms was made by the seller after having been introduced to the buyer.¹⁶

Example 2: Broker was authorized to negotiate an oil lease for the owner. The broker discussed the possibility of leasing the property with several major oil companies and in fact the owner contracted with one of the companies with whom the broker had discussed the property. At the time the broker had introduced the eventual lessee to the lessor, the lessor was seeking a \$100 an acre bonus for his property but the eventual lessee was only willing to pay \$60 per acre. There was no agreement as to the amount of land to be leased and it was clear there not only had there been no meeting of the minds but that not even the broad terms of the transaction had been agreed upon. The court held that the broker was not the procuring cause since merely introducing the principal to a party who comes to an agreement with him after the termination of the agency but who was not ready, willing and able to consummate the transaction during the life of the agency is insufficient to entitle a broker to a commission.¹⁷

Example 3: Broker obtained a listing from owner for the sale of a ranch. The day after he obtained the listing the broker contacted a party who he knew was interested in acquiring a ranch. He described the place thoroughly giving him detailed informa-

tion concerning the improvements, the ability of the property to sustain a cattle raising business, possible means of acquiring the property including taking other property in trade. He asked the prospective buyer to go and view the property but the buyer while expressing his interest did not go saying he was too busy at the time. The broker promptly telephoned and also wrote to the seller telling him of the prospective buyer's interest indicating that he might soon go out to visit the property. The seller indicated that he would fully cooperate if the proposed buyer appeared. The broker made several attempts to get the prospective buyer to see the property urging him to either go see it with him or by himself. Finally the prospective buyer went by himself and negotiated directly with the seller purchasing the ranch from him. The court held that the broker was the procuring cause in the transaction even though the final consummation resulted from negotiations directly between the buyer and seller.¹⁸

Example 4: Broker obtained a listing on a tract of land from the owner. The broker found a prospective buyer and offered it to him at a higher price than the buyer was willing to pay although the buyer liked the property. The buyer told the broker that the price was prohibitive and thereafter the broker had no further dealings with the buyer. Shortly thereafter an agent of another real estate firm approached the buyer and offered him the same tract of land for substantially less money. The original broker heard of the transaction and tried to induce the buyer to buy the property at the same price through him. The buyer refused, indicating that inasmuch as the other broker had offered the property for sale at a price he was willing to pay the purchase would be made through the other broker. The court held that the broker was not the procuring cause of the transaction even though the buyer first became interested in the property through his efforts. The court noted that the broker never introduced the buyer to the seller and that the buyer never made an offer through the broker to the seller offering to purchase the property. The court noted that merely putting a prospective purchaser on the tract of property which is on the market will not suffice to entitle the broker to the commission if the negotiations break down and later are picked up again by others where it was not done through the fault or interference of the owner or the other broker.¹⁹

It should be borne in mind by arbitrators that the mere fact that a particular broker is not determined

to be the procuring cause in the transaction does not necessarily mean he is not entitled to compensation for his efforts on another theory. Thus in *Buckaloo v. Johnson*²⁰ the plaintiff, A, a real estate broker had an exclusive right to sell property owned by the owner B. During the period of the listing, A made no sale. Several years later, B placed a sign on the property which stated "for sale, contact your local broker." C, the prospective buyer and D, a real estate salesperson, came to A's office inquiring about property, specifically about the property with the sign on it. A discussed that property along with others. Before they left, C and D indicated to A that they would discuss the matter further but they in fact never returned. A advised the owner, B, that he had "procured" C and asked B to refer them to him if B should hear from them directly. Some weeks later A learned that B had sold the property to C and paid in commission to D. The court noted that although A could not recover from B the owner of the property since he did not have a validly enforceable listing agreement sufficient to satisfy the statute of frauds, he could state a cause of action against the buyer C and the broker D on a theory of intentional interference with prospective economic advantage. The court noted that A probably had an advantageous business relationship with B and that if he could show that the buyer C and broker D induced B not to pay his commission, A could recover in tort for the interference in his business relationship with B. The court noted that the advantageous business relationship does not have to have ripened into a formal contractual agreement (thus the fact that no validly enforceable listing agreement was obtained would not defeat A's claim against the broker D and buyer B). Thus even in a situation where an arbitrator may find that a particular broker was not the procuring cause in a transaction, an award to that broker might be justified if it can be shown that there was a reasonable possibility that the economic relationship might have ripened into a contractual obligation.

Conclusions

Arbitrators should avoid developing "tunnel vision" in analyzing the rights and the remedies before them. The mere fact that one of the parties is unable to establish that he was the procuring cause of the transaction does not automatically mean that he may not be entitled to relief under another theory. Arbitrators should acquaint themselves with other possibilities such as interference with an advantageous business relationship or re-

covering based on the value of the services rendered.

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This discussion of recent cases is intended only as a general overview of the current state of the law. Readers are cautioned not to attempt to be guided by this material with reference to their own particular problems but at the advice of an attorney of their own selection.

Footnotes

¹"In the event of a controversy between REALTORS® associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their board or boards rather than litigate the matter." National Association of REALTORS®, Code of Ethics, Article 14 "Among the duties of membership are the following: . . . (c) To submit to arbitration all controversies specified in Part Two of this article by the procedure there provided, and to abide by the arbitrators' award." California Association of REALTORS®, Code of Ethics and Arbitration Manual, California Association of REALTORS®, Part One, Section 1.

²In the context of a multiple listing service the broker who obtains the listing, upon sale, receives a portion of the commission as the listing broker. The balance of the commission is given to the broker responsible for procuring the buyer. If the listing broker also procures the buyer, he would be entitled to the entire commission.

The question of "procuring cause" may also arise in a dispute between a broker and a seller, typically where there is no Exclusive Rights to Sell Agreement. In such a situation the broker must procure the buyer in order to be entitled to his commission. Since the more frequently encountered dispute in arbitration is between brokers, this article will focus on procuring cause in that context.

³See e.g. Lackman, "Procuring Cause: A Question in Conflict" *California Real Estate Magazine* 42 (April, 1975).

⁴*ibid*

⁵*Rose v. Hunter* 155 Cal. App. 2d 319, 317 P. 2d 1027 (1967)

⁶*ibid* 317 P. 2d at 1030

⁷*Tetrick v. Sloan* 170 Cal. App. 2d 540, 399 P. 2d 613, 616 (1959)

⁸*Rose v. Hunter* 317 P. 2d at 1030

⁹*Augustine v. Trucco* 124 Cal. App. 2d 229, 268 P. 2d 780 (1954)

¹⁰*Oaks v. Brahs* 132 Cal. App. 2d 182, 281 P. 2d 562 (1955)

¹¹*Justice v. Ackerman* 183 Cal. App. 2d 649, 6 Cal Rptr 921 (1960)

¹²*Justice v. Ackerman* 6 Cal. Rptr at 923

¹³*Cone v. Keil* 18 Cal. App. 675, 124 P. 548, 550 (1812)

¹⁴*Zeimer v. Antisell* 75 Cal. App. 509, 17 P. 642 (1888)

¹⁵*Rose v. Hunter* 317 P. 2d at 1030

¹⁶*Rose v. Hunter*, *Supra*

¹⁷*Tetrick v. Sloan*, *Supra*

¹⁸*Oaks v. Brahs*, *Supra*

¹⁹*Cone v. Keil*, *Supra*

²⁰117 Cal. Rptr 461 (1975) □