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Real estate brokers serve an important function in the commercial world by bringing buyers and sellers together. The broker's compensation for this service is usually predetermined by an agreement known as a "listing" between the broker and his client. In this Article, Professor Rogers examines various types of these listings in light of their practical significance under Georgia law.

A real estate broker or agent is a person engaged in the business of arranging real estate transactions for his clients.[1] The most fundamental aspect of his work is the procurement of a buyer, seller, lessor, or lessee. He may also be required to perform many other tasks for his principal, such as negotiating a loan on real estate security or managing certain real estate.[2] For these services he is obviously entitled to be compensated. His rights to compensation, however, have been and continue to be the subject of legislation and extensive litigation. Although such statutes and decisions have done much to define and clarify the broker's rights, a continuing volume of litigation indicates that much confusion still exists. It is the purpose of this Article to examine employment contracts of Georgia real estate brokers and to consider the brokers' rights to compensation under these contracts.

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1 For a more detailed definition, see GA. CODE ANN. § 84-1402 (1970).

2 For purposes of convenience and simplicity, throughout this Article the principal will be treated as the owner and seller of land, and the broker will be treated as the agent of the owner and seller for the purpose of procuring a ready, willing and able buyer, unless otherwise stated. Terms such as "sale" or "sell" will be employed to indicate the real estate transaction or its performance which will entitle the broker to his commission. It should be remembered, however, that the broker may represent others besides an owner-seller (buyer, lessee, etc.); the transaction may be almost any kind of commercial transaction affecting real estate and documents may have different names from those used herein.

It should be noted that while a broker may represent any party to the transaction, if he secretly undertakes to represent both the seller and the prospective purchaser, he may not recover commissions from either. Gann v. Zettler, 3 Ga. App. 589, 60 S.E. 283 (1907). Dual agencies are not invalid, however, where the parties are fully knowledgeable of the double employment and consent to it. Winer v. Flournoy Realty Co., 27 Ga. App. 87, 107 S.E. 398 (1921).

I. The Employment Contract

A. *Employment: No Recovery by a Volunteer*

The basis of all claims for brokerage commissions is a unilateral contract of employment in which the commission is promised in exchange for the broker's performance of some service. Therefore, unless the broker has been employed as an agent, he may be deemed a mere volunteer not entitled to recover a commission.[3] In a suit for commission, the broker must allege[4] and prove[5] that he acted under a contract of employment. The mere fact that the broker has procured and presented an offer to purchase which is accepted by the seller does not automatically entitle him to compensation from the seller.[6] There must be a preexistent principal-agent relationship between the seller and the broker. In Georgia, however, the contract of employment may be implied from the conduct of the parties.[7] In *D. L. Stokes & Co. v. McCoy*,[8] the broker alleged that the seller had placed property on the market, that the broker had advertised and shown the property to numerous prospective purchasers with the full knowledge and complicity of the seller, and that the seller had knowingly sold the property to a purchaser procured by, and known by the seller to have been procured by, the broker. The court of appeals held that the Georgia law required some explicit agreement between broker and principal and that no employment contract could be implied from the alleged facts. Hence, the broker, being a mere volunteer, could not recover. The supreme court reversed, holding that a real estate broker, like others engaged in the business of

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3 Galloway v. McKinley, 73 Ga. App. 381, 36 S.E.2d 485 (1945).

4 *Id.*

5 Wilharbla Realty Co. v. Carrington, 62 Ga. App. 778, 9 S.E.2d 842 (1940). However, evidence that (1) the seller did not expressly promise to pay a commission, (2) the broker told the prospective purchaser that the broker would get the house for him at the lowest possible price, (3) the seller refused to allow the broker to advertise the house at a particular time, (4) the seller refused to keep the house open at a particular time for broker to exhibit, and (5) the seller sold the house himself for a price lower than that listed with the broker did not demand a finding for the seller, but was a jury question. This was so because there was also evidence to support a finding that the property was listed with the broker for sale at a named price for a reasonable commission. *See* Peachtree Rd. Realty Associates v. Woolard, 97 Ga. App. 455, 103 S.E.2d 442 (1958).

6 John v. Thrower, 11 Ga. App. 494, 75 S.E. 819 (1912).

7 Similarly, a promise to pay a commission may be implied. In a letter to an owner of property a broker specified a commission. Replies from the owner agreed to list the property with the broker, but did not promise to pay the broker a commission. The court of appeals held that such a promise was clearly implied. *See* Hall v. Vandiver, 37 Ga. App. 656, 141 S.E. 332 (1928).

8 212 Ga. 78, 90 S.E.2d 404, *rev'g* 92 Ga. App. 472, 88 S.E.2d 802 (1955).

performing services, might recover the reasonable value of services rendered and accepted by an action in assumpsit on a *quantum meruit* basis because there was an implied obligation to pay. In spite of this holding, since brokers may represent many interests, including those of purchasers or lessees as well as those of sellers or lessors, the courts are reluctant to find an implied employment contract between the broker and any one party unless the conduct of the parties clearly indicates the presence of a contractual arrangement between them from which an obligation to compensate the broker may be drawn.

B. Formalities of the Employment Contract

1. License.—In Georgia it is unlawful to engage in the business or activity of a real estate broker without a license.[9] Obviously, one of the most effective methods of enforcing the licensing law is to prohibit the recovery of a commission by an unlicensed broker. Accordingly, Georgia law provides as follows: "No person, firm, or corporation shall have the right to enforce in any court any claim for commission, profits, option profits, or fees for any business done as real estate broker or salesman, without having previously obtained the license required under the terms of this Chapter."[10] Thus, in any suit to collect a commission, a broker must plead and prove that he has the required license.[11]

Numerous attempts have been made to circumvent the license requirement by alleging that the statute does not apply to certain situations. The following arguments have all been propounded at one time or another by advocates for unlicensed brokers: (1) the statute does not cover a broker who acts only in a single transaction;[12] (2) the statute does not prohibit recovery in *quantum meruit* but only prohibits recovery of a promised commission;[13] (3) a contract which establishes a promise to pay a finder's fee for locating the ultimate buyer does not establish a brokerage agreement within the meaning of the statute;[14] (4) a disabled war veteran is exempt from the coverage of the statute;[15] and (5) state

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9 GA. CODE ANN. § 84-1401 (1970).

10 GA. CODE ANN. § 84-1413 (1970).

11 Beets v. Padgett, 123 Ga. App. 68, 179 S.E.2d 560 (1970); Cline v. Crane, 90 Ga. App. 192, 82 S.E.2d 175 (1954). Furthermore, one who pays a broker's commission, not knowing that the broker is unlicensed, may recover the commission paid. Drake v. Parkeman, 79 Ga. App. 679, 54 S.E.2d 714 (1949).

12 Hazlehurst v. Southern Fruit Distributors, Inc., 46 Ga. App. 453, 167 S.E. 898 (1933).

13 Dixon v. Rollins, 120 Ga. App. 557, 171 S.E.2d 646 (1969).

14 *Id.*

15 Dixon v. Brooke, 44 Ga. App. 608, 162 S.E. 287 (1932).

lines remove the necessity for compliance with the statute where the broker is a resident of another state[16] or where the land in question is located in another state.[17] All of the foregoing arguments have been rejected. It is clear that the language of the statute is sufficiently broad to encompass any effort to recover compensation for the selling of an interest in another's real property.[18]

2. Written Contract.—Brokers' employment contracts have repeat-

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16 Pratt v. Sloan, 41 Ga. App. 150, 152 S.E. 275 (1930). However, a broker licensed in one state is not barred from recovery of a commission merely because the land sold is located in another state where he is unlicensed. Folsom v. Young & Young, Inc., 216 F.2d 352 (5th Cir. 1954); Tillman v. Gibson, 44 Ga. App. 440, 161 S.E. 630 (1931); *see* GEORGIA REAL ESTATE COMMISSION, 5 RULES AND REGULATIONS OF THE STATE OF GEORGIA chs. 520-5-.03, 520-5-.05 (1967) [hereinafter cited as 5 RULES AND REGULATIONS OF THE STATE OF GEORGIA] for the Georgia rules concerning non-resident brokers.

17 Dixon v. Rollins, 120 Ga. App. 557, 171 S.E.2d 646 (1969).

18 GA. CODE ANN. § 84-1401 (1970). Specific statutory exceptions to the licensing requirement include the following provisions—

(1) GA. CODE ANN. § 84-1401 (1970):

> regular licensed practicing attorneys where the transaction involved the relation of attorney and client.

(2) GA. CODE ANN. § 84-1402 (1970):

> the sale or subdivision into lots by the bona fide fee simple holder of any tract or parcel of land; also any person, firm or corporation subdividing a tract of land into 20 or more lots, or offering for sale a tract of land already subdivided into 20 or more lots, where such person, firm, or corporation sells or offers any of said lots for sale through salesmen, whether such salesmen be regularly or occasionally employed, and whether they be paid salaries or commission.

(3) GA. CODE ANN. § 84-1403 (1970):

> The provisions of this Chapter shall not apply to any person, firm or corporation, who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned by them; nor to persons, firms or corporations not real estate brokers or real estate salesmen holding a duly executed power of attorney from the owner for the sale, leasing or exchanging of real estate: Provided, however, that no such unlicensed persons, firms or corporation may continuously engage in or perform any of the acts as defined in section 84-1402 under the pretense or guise of acting under a power of attorney so as to circumvent and evade the provisions of this Chapter. The provisions of this Chapter shall not apply to a receiver or trustee in bankruptcy, an administrator, or executor, or trustee, or any person selling real estate under order of court, or pursuant to the terms of a will, mortgage or deed of trust or deed to secure a debt.

Applying § 84-1402, the Georgia supreme court has held that a corporation which sold cemetery lots for another corporation whose subdivision contained more than 20 cemetery lots was neither a real estate broker nor a real estate salesman as defined by Chapter 84 of the Code, and therefore was not required to be licensed in order to collect commissions. *See* Southern Cemetery Consultants, Inc. v. Peachtree Memorial Park, Inc., 218 Ga. 389, 128 S.E.2d 200 (1962).

Obtaining persons to join with the defendant in forming a corporation to purchase land and to develop a shopping center was held to be a service not limited to licensed real estate brokers. Charles F. Noyes Co. v. Hadsell, 220 Ga. 215, 138 S.E.2d 307 (1964).

edly been held to be outside the scope of the Statute of Frauds.[19] Many of the early cases based this holding on the fact that the contracts had been fully performed and were thus exceptions to the Statute.[20] More recently, the courts have held that the contract between the broker and the client is an agency agreement and hence not a "contract for the sale of lands, or any interest in or concerning them."[21] Nevertheless, while there is no statutory requirement in Georgia that the broker be employed by a written contract, the need for clear and explicit terms which will avoid confusion and resulting litigation suggests the wisdom of having such contracts reduced to writing whenever possible. Furthermore, the Georgia Real Estate Commission has provided in its Rules that: "Exclusive listings must be in writing and each listing agreement shall fully set forth its terms and have a definite expiration date. At the time of securing a listing each person signing must be furnished a true copy thereof."[22] Although it is unlikely that failure to follow this rule would invalidate the contract, violation is a ground for the suspension or the revocation of a broker's license.[23] Therefore, a direct burden rests upon every broker to secure every exclusive listing in writing.

3. Consideration.—The usual broker's employment contract contains a recital of the consideration given by the broker in exchange for the principal's promise that the agency will be exclusive or that it will continue for a fixed period. Usually this recital will provide for consideration of "one dollar and other valuable consideration," although the form "in consideration of [broker's] advertising and making reasonable efforts to sell the property," is also common. If the stated consideration has actually changed hands, or if the broker has actually expended time or money in attempts to procure a purchaser, then the contract becomes bilateral and irrevocable.[24] Until that time, however, the

19 *See, e.g.*, Orr v. Smith, 102 Ga. App. 40, 115 S.E.2d 601 (1960); Lingo v. Blair, 32 Ga. App. 111, 122 S.E. 802 (1924); Garrett v. Wall, 29 Ga. App. 642, 116 S.E. 331 (1923).

20 *See, e.g.*, Cantrell v. Johnston, 74 Ga. App. 74, 38 S.E.2d 893 (1946); Garrett v. Wall, 29 Ga. App. 642, 116 S.E. 331 (1923).

21 Pierve v. Deich, 81 Ga. App. 717, 595 S.E.2d 755 (1950); *see* Orr v. Smith, 102 Ga. App. 40, 115 S.E.2d 601 (1960); GA. CODE ANN. § 20-401 ¶ 4 (1965). However, the Statute of Frauds would probably bar proof of any oral contract giving the broker an exclusive listing for more than one year. *See* GA. CODE ANN. § 20-401 ¶ 5 (1965). Furthermore, an oral contract must be clear and precise in its terms to withstand a defense of vagueness. McRee v. Frederick, 18 Ga. App. 321, 89 S.E. 381 (1916).

22 5 RULES AND REGULATIONS OF THE STATE OF GEORGIA ch. 520-2-.01. *See also id.* ch. 520-6-.01(j), requiring that the broker "see that financial obligations and commitment regarding real estate transactions are in writing . . . ."

23 GA. CODE ANN. §§ 84-1404, -1417(k) (1970).

24 Stone v. Reinhard, 124 Ga. App. 355, 183 S.E.2d 601 (1971); Pfarner v. Poston Realty

owner may revoke the agency without liability.[25] If the broker promises to expend effort to secure a purchaser in exchange for the seller's promise to make the agency exclusive for a specified period, then the mutual promises should logically result in an immediate and irrevocable bilateral contract,[26] but several Georgia decisions cast doubt upon this principle.[27]

Another problem involving consideration arises when the promise to pay a commission is not made until after the buyer and seller have signed the sales contract. In some states it has been held that if the services were rendered before the promise to pay was made, the contract is unenforceable because based on past consideration.[28] Research reveals no Georgia cases specifically involving real estate brokers; yet Georgia has generally followed the rule that a past consideration will not support a subsequent promise.[29] However, this rule should present no particular difficulty in the straightforward brokerage case, for the courts of Georgia also acknowledge the propriety of restitutionary recovery if the recipient knowingly accepts the services.[30]

4. Property Description.—The description of the listed property contained in the employment contract does not have to be as explicit as that required for a real estate sales contract or a deed.[31] While it is true that the contract must identify the property to be placed with the broker,[32] extrinsic evidence may be admitted to clarify latent ambigui-

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& Ins. Agency, Inc., 109 Ga. App. 14, 134 S.E.2d 835 (1964); Thompson v. Hudson, 76 Ga. App. 807, 47 S.E.2d 112 (1948).

25 Friedman v. Ware & Harper, 17 Ga. App. 677, 87 S.E. 1099 (1916).

26 Pfarner v. Poston Realty & Ins. Agency, Inc., 109 Ga. App. 14, 134 S.E.2d 835 (1964); Werder v. Browne, 78 Ga. App. 587, 51 S.E.2d 567 (1949); 1 A. CORBIN, CONTRACTS § 142 (1963).

27 *See* Stone v. Reinhard, 124 Ga. App. 355, 183 S.E.2d 601 (1971); Ocean Lake & River Fish Co. v. Dotson, 70 Ga. App. 268, 28 S.E.2d 319 (1943); Barrington v. Dunwody, 35 Ga. App. 517, 134 S.E. 130 (1926); Garfunkel v. Byck, 28 Ga. App. 651, 113 S.E. 95 (1922).

28 *See, e.g.*, John Reis Co. v. Zimmerli, 224 N.Y. 351, 120 N.E. 692 (1918); Warner & Co. v. Brua, 33 Ohio App. 84, 168 N.E. 571 (1929).

29 *See, e.g.*, Bankers' Trust & Audit Co. v. Farmers & Merchants Bank, 163 Ga. 352, 136 S.E. 143 (1926) (Contract entered into by land for future payment of a salary is lacking in consideration if the stated consideration relates to services already performed in promoting and organizing said lands.).

30 *See* Guyton v. Young, 84 Ga. App. 155, 65 S.E.2d 858 (1950); Rhyne v. Price, 82 Ga. App. 691, 62 S.E.2d 420 (1950); W.A. Neal & Son v. Stanley, 17 Ga. App. 502, 87 S.E. 718 (1916); GA. CODE ANN. §§ 3-107, 4-212 (1962).

31 Crawford v. English, 26 Ga. App. 563, 106 S.E. 621 (1921). For an excellent discussion of the sufficiency of property descriptions in real estate sales contracts and deeds in Georgia, see G. PINDAR, GEORGIA REAL ESTATE LAW §§ 18-11, at 19-158 to -164 (1971).

32 Orr v. Smith, 102 Ga. App. 40, 115 S.E.2d 601 (1960).

ties.[33] Descriptions in listing contracts which have been held sufficient include the following: "1400 acres of land, more or less, in counties of Sumter and Schley, State of Georgia, where I now live . . .";[34] "my home at 401 North Jefferson Street" in an agreement captioned "Albany, Georgia";[35] and "323 North Coleman Road."[36] It is therefore apparent that a broker's employment contract does not require a highly-detailed, legal description of the listed property in order to withstand charges against its sufficiency. Nevertheless, both good practice and convenience suggest that the listing should employ the same description which will be used in the sales contract and deed. Not only does this help to avoid problems arising from differing descriptions in the employment contract and the sales contract or deed,[37] but it also tends to prevent inadequate descriptions from finding their way into the latter documents.[38]

C. *Terms of the Employment Contract*

The contract by which the broker is employed is usually referred to as the listing. The variety and classification of listings is almost limitless, with a new name and classification arising each time a new clause or provision is inserted to meet some particular need. Thus, while there are as many ways to classify listings as there are unique clauses, the majority of listings fall into a few categories.

1. The Open Listing.—An open listing is one by which the principal employs the broker as his agent to sell the land, but reserves the right to sell the land himself or to employ other brokers.[39] The broker who first procures a ready, willing, and able buyer is entitled to the commission, but if the principal sells the land without a broker's services there is no commission. Most of the difficulties concerning broker's compensation under open listings arise over disputes concerning the causation of the sale. To recover a commission under an open listing a broker must plead and prove that he was the "procuring" or "efficient" cause

33 Carter v. Ray, 70 Ga. App. 419, 28 S.E.2d 361 (1943).

34 Crawford v. English, 26 Ga. App. 563, 106 S.E. 621 (1921).

35 Carter v. Ray, 70 Ga. App. 419, 28 S.E.2d 361 (1943).

36 Orr v. Smith, 102 Ga. App. 40, 115 S.E.2d 601 (1960).

37 *See* Matthews v. Tucker Real Estate Co., 116 Ga. App. 214, 156 S.E.2d 669 (1967) (defective description in listing contract rectified by sufficient description in option contract); Pfarner v. Poston Realty & Ins. Agency, Inc., 109 Ga. App. 14, 134 S.E.2d 835 (1964).

38 *See* Chastain v. Allison, 122 Ga. App. 811, 178 S.E.2d 752 (1970), *discussed in* Groot, *Real Property, Annual Survey of Georgia Law June 1, 1970—May 31, 1971*, 23 MERCER L. REV. 243, 273 (1972).

39 *See* Craigmiles v. Steyerman, 27 Ga. App. 14, 107 S.E. 417 (1921).

of the sale.[40] All outstanding open listings are terminated by the good faith sale of the land by the principal himself or through any one broker.[41]

2. The Exclusive Agency Listing.—An exclusive agency listing is one under which the principal employs the broker as his exclusive agent to sell the land, but reserves the right to sell the land himself. The exclusive agency contract guarantees the listing broker that no other agent will be employed during the agency period, and assures him of a commission if he procures a ready, willing, and able buyer. Disputes over the effective cause of the sale present most of the difficulties surrounding exclusive agency listings. As in open listings, the broker must both allege and prove that he was the procuring cause of the sale if he is to recover a commission. This type of listing is terminated by the good faith sale of the land by the principal.

3. The Exclusive Right-to-Sell Listing.—The exclusive right-to-sell contract is one by which the principal employs the listing broker as his exclusive agent to sell the land and promises to pay the broker his commission if he or anyone else, including the principal, procures a ready, willing, and able buyer. Real estate brokers obviously prefer exclusive right-to-sell listings primarily because when the property is sold under such a listing, the broker is entitled to his commission without having to prove that he was the procuring cause of the sale.[42] So important is this feature that a number of real estate brokers in Georgia have candidly stated that they are not interested in any other types of listing; others acknowledge that while they accept other listings, they devote only minimum time, effort, or expense to them.

While the brokers strongly prefer exclusive right-to-sell listings, the legislative and judicial preference is for exclusive agency only. The General Assembly of Georgia has provided that "[t]he fact that property is placed in the hands of a broker to sell shall not prevent the owner from selling, unless otherwise agreed."[43]

The courts, interpreting this section, have taken the viewpoint that every landowner has an inherent right to alienate his property without

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40 Fields Realty & Ins. Co. v. Smith, 123 Ga. App. 342, 180 S.E.2d 909 (1971) (no commission recoverable in absence of proof that brokers were procuring cause of the sale). For further discussion of this problem, see text at notes 87-95 *infra*.

41 City Nat'l Bank & Trust Co. v. Orr, 39 Ga. App. 217, 146 S.E. 795 (1929) (bona fide disposition of listed property by owner terminates the agency).

42 Pfarner v. Poston Realty & Ins. Agency, Inc., 109 Ga. App. 14, 134 S.E.2d 835 (1964); *cf.* 5 RULES AND REGULATIONS OF THE STATE OF GEORGIA ch. 520-6-.01(o).

43 GA. CODE ANN. § 4-213 (1962).

incurring a commission expense. This right may only be waived by clear, express, and unequivocal language. An examination of the language employed in a number of listing contracts indicates how demanding the courts have been. The following provisions have all been held to be insufficient to create an exclusive right-to-sell listing entitling the broker to a commission when the seller sold the property: "This agency is created for a term of three months, and is irrevocable;"[44] "[Seller] constitutes [Broker] sole agent and broker for the purpose of selling [the described property];"[45] "I hereby appoint [brokers] my agent, and give them the exclusive control . . . of the [selling] of the property described . . . and agree that if said property is [sold] within that time I will pay them the regular real estate commission for same."[46]

This statutory interpretation is harsh, but defensible. Most of the listing contracts are standard form contracts drafted by real estate boards with expert legal counsel; therefore, the court should resolve ambiguity in favor of the seller. Further, nothing in the language "right to sell" would indicate to a layman the severe limitation of this type of listing. Finally, the terms "exclusive," "exclusive listing," and "exclusive sales contract" are used in normal business conversation without any indication that they mean that the owner is relinquishing his own right to sell without incurring a commission expense. Therefore, the exclusive right-to-sell listing must not only be titled as such, but must also expressly renounce the owner's right to sell without paying the commission.

One Georgia case seemingly carried the legislative directive of section 4-213 to an extreme. The listing contract in *Ocean Lake & River Fish Co. v. Dotson*[47] provided: "[Seller] hereby gives you the *exclusive right and authority to sell* the property hereinafter described. . . . In the event a sale or exchange is made, or a purchaser procured therefor by you, *by the* [*seller*], or by any other person . . . the [seller] agrees to pay you the agent's commission. . . ."[48]

The court of appeals upheld the seller's demurrer to the count in the broker's petition claiming a commission after the seller had sold the land. The court suggested *two* possible grounds for its decision: (1) the contract failed as a unilateral contract lacking consideration; and

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44 Moore v. May, 10 Ga. App. 198-99, 73 S.E. 29 (1911).

45 Bradbury v. Morrison, 93 Ga. App. 704, 705, 92 S.E.2d 607, 608 (1956).

46 Irish v. Fisher, 74 Ga. App. 631, 40 S.E.2d 588, 589 (1946).

47 70 Ga. App. 268, 28 S.E.2d 319 (1943).

48 *Id.* at 269, 28 S.E.2d at 320 (emphasis added).

(2) the contract created only an exclusive agency.[49] Subsequent decisions indicate that the holding was based on the ground that the listing was only an exclusive agency listing.[50]

In *Stone v. Reinhard*,[51] the court of appeals reviewed this entire line of cases, recognized the confusion,[52] and seemingly dispelled the confusion by holding that the listing contract will not fail as unilateral if the broker has lived up to his obligations under the contract, nor will it create only an exclusive agency if it contains a clear and definite promise to pay the broker regardless of whether he or the seller or a third party is the procuring cause of the sale. Thus, regardless of the ground on which *Ocean Lake* was in fact based, it can probably be treated as exceptional today.

4. The Sales Agency Listing—Under Georgia law, a broker has earned his commission when "he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated

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[49] The two cases relied upon as authority in *Ocean Lake* suffered from the same failure to distinguish between the two reasons as the basis for their holdings. *See* Barrington v. Dunwody, 35 Ga. App. 517, 134 S.E. 130 (1926); Garfunkel v. Byck, 28 Ga. App. 651, 131 S.E. 95 (1922).

[50] *See* Pfarner v. Poston Realty & Ins. Agency, Inc., 109 Ga. App. 14, 134 S.E.2d 835 (1964); Irish v. Fisher, 74 Ga. App. 631, 40 S.E.2d 588 (1946).

[51] 124 Ga. App. 355, 183 S.E.2d 601 (1971).

[52] *Id.* at 356-57, 183 S.E.2d at 602-03:

> A real estate brokerage contract granting the exclusive selling agency or right to another will not prevent the owner from selling the property without liability for commissions where there is nothing in the contract expressly restricting the owner's right. . . . *Garfunkel v. Byck*, [28 Ga. App. 651, 113 S.E. 95 (1922)], might well have stood for no more than this. In that case a demurrer to a petition for brokerage fees was interposed on the ground that plaintiffs did not sell the property and that the contract was unilateral; the petition was dismissed and this court affirmed without discussion. *Barrington v. Dunwody*, [35 Ga. App. 517, 134 S.E. 130 (1926)], affirmed the dismissal of a similar petition without other discussion than to say it was controlled by *Garfunkel*; the dissenting opinion shows that the writer thought the question to be whether or not the contract was unilateral, and this view was apparently taken in *Ocean Lake & River Fish Co. v. Dotson*, [70 Ga. App. 268, 28 S.E.2d 319 (1943)], where the case was held controlled by *Garfunkel* and *Barrington*. However, *Garfunkel*, *Barrington* and *Ocean Lake* were all construed in *Bradbury v. Morrison*, [93 Ga. App. 704, 92 S.E.2d 607 (1956)], to have been affirmed on the basis that "though the owner appoints a real estate broker his exclusive agent to sell designated property, in the absence of a contractural provision to the contrary the owner may sell his own property without incurring liability to the broker for commissions." All three cases are authority for this proposition, which weakens the contention that they were decided on the theory that a contract such as here dealt with is unenforceable because unilateral. The most that can really be said on close inspection is that, for one or both of the above reasons, they were held defective.

by the owner."[53] Some cautious sellers, however, insist that the listing contract provide that the broker will be paid a commission only upon the consummation of a sale, rather than upon the mere presentation of an executory contract to purchase. Such listings are given their obviously intended interpretation.[54] The Georgia courts have referred to this type of arrangement as a "sales agency" listing.[55] To earn his commission under this type of listing, the broker must procure a ready, willing, and able buyer *and* the sale must be consummated. If, however, the seller causes the sale to fail because of his own default, bad faith, or capricious action, the broker will nevertheless be entitled to his commission.[56]

5. The Multiple Listing.—A broker stands in a fiduciary relationship to his principal,[57] and consequently he may not delegate his authority without his principal's consent;[58] however, this rule does not prevent a real estate broker from cooperating with other licensed brokers or salesmen.[59] It is therefore common practice for an organized group of brokers to enter into a formal arrangement whereby they "pool" their exclusive listings and divide the commission between the selling broker and the listing broker. A small amount may also be paid into the pool treasury to cover operating expenses.

Local practices and agreements concerning multiple listings vary considerably. The listing broker who has a "hot" new listing probably will not wish to share his commission until he has had a reasonable opportunity to sell the property himself. Thus, the intra-broker rules may allow him to withhold a new listing from the pool for a certain period of time. Similarly, the listing broker may be permitted by the group rules to deduct some or all of the advertising and other selling expenses from the selling broker's share. Each broker member of the "pool" may be required to advertise regularly a certain minimum amount of the property subject to multiple listing, or to maintain

53 GA. CODE ANN. § 4-213 (1962).

54 Hyams v. Miller, 71 Ga. 608 (1883); Ragsdale v. Smith, 110 Ga. App. 485, 138 S.E.2d 916 (1964).

55 *E.g.*, Ragsdale v. Smith, 110 Ga. App. 485, 138 S.E.2d 916 (1964).

56 Roberts v. Prater & Forrester, 29 Ga. App. 245, 114 S.E. 645 (1922); Hogan v. Gilbert, 27 Ga. App. 444, 108 S.E. 809 (1921).

57 Dolvin Realty Co. v. Holley, 203 Ga. 618, 48 S.E.2d 109 (1948); Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

58 GA. CODE ANN. § 4-103 (1962); *see* Berger v. Noble, 81 Ga. App. 34, 57 S.E.2d 844 (1950).

59 *See* 5 RULES AND REGULATIONS OF THE STATE OF GEORGIA ch. 520-6-.01(x).

within the "pool" listings which have a certain minimum value. Not surprisingly, well-established firms frequently refuse to participate in multiple listings, believing that such arrangements are primarily beneficial to small, new, unaggressive, or little-known brokerage firms.

The details of multiple listing arrangements are governed by the rules adopted by the participating brokers. Only the original broker may sue the principal for the commission.[60] The sub-broker's rights arise out of the intra-broker arrangements. In order to allay any concern that a multiple listing might be considered as an unauthorized delegation of the broker's authority, most brokers include an express authorization for multiple listings in their listing contracts.

6. Amount of Compensation.—A basic term of each listing contract is the promise to pay the broker a specified fee. While contracts are quite varied in these terms, most adopt one of the following forms: (a) a promise to pay a fixed or specified sum of money; (b) a promise to pay a certain percentage of the ultimate selling price; (c) a promise to pay the reasonable value of the broker's services; (d) a promise to pay the "usual," "regular," or "customary" commission, or simply to pay a commission; (e) a promise to pay at the rates established or recommended by a designated real estate board; or (f) a promise to accept a "net price," with the broker's commission being the difference between the net price and the selling price.[61]

(a) The fixed sum or the fixed percentage of the selling price.—A promise to pay a specified sum of money or a specified percentage of the final selling price is clear and definite. Therefore, in the vast majority of cases, the contract is enforceable without undue difficulty. One problem which may arise, however, when reference is made to a schedule of fees, is the determination of the applicable schedule provision. In *Fillingame v. Campbell,*[62] the schedule provided for a commission of 5% on "improved or vacant property" and 10% on "acreage and farms." Because of the ambiguity between the terms "vacant property" and "acreage" the trial court had to resort to parol evidence in order to determine which term the parties intended to be applied to the land sold. To obviate the need for reliance on parol evidence, indeed for litigation at all, the listing should clearly indicate the amount of the

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60 Miller v. Adams-Cates Co., 64 Ga. App. 858, 860, 14 S.E.2d 220 (1941).

61 Where the transaction is the procurement of a lease, or a peculiarly complex matter, the payment terms may be more involved. See p. 392 *infra*.

62 87 Ga. App. 481, 74 S.E.2d 392 (1958).

fee or the percentage of the selling price and designate the applicable schedule provision.

(b) The reasonable value of the broker's services.—When the seller promises to pay the reasonable value of the broker's services, such value must be proved by competent evidence. Research reveals no Georgia decisions directly in point. In other jurisdictions two kinds of evidence have been relied upon in determining fair and reasonable compensation: the commission rates fixed by the local real estate board and those normally charged by brokers within the community.[63] Since the real estate broker is regarded as an expert in all phases of a real estate transaction, he may testify as an expert as to the reasonable value of his own services.[64]

Occasionally the contract will state that the seller promises to pay a commission without any indication of what that commission will be. In these cases, the court will imply a condition that the commission is to be a reasonable amount.[65] It should also be noted that the reasonable value of the broker's services is the proper measure of recovery in a suit which is founded on an implied contract.[66]

A contract calling for the "usual," "regular," "standard," or "customary" commission is also governed by the same basic principles applicable to a contract for reasonable value. If a local real estate board had established a fee schedule, this schedule is normally regarded as evidence of the proper amount of the commission. If no such local real estate board schedule exists, then the broker may prove the local "custom and usage" regarding fees for similar services performed in relation to similar types of property. The broker must also prove that the seller knew of the local custom and usage.

(c) The rate schedule of a designated real estate board.—In recent years increasing emphasis has been placed upon the concept of "professionalism" among real estate brokers, with the result that real estate boards have been established and charged with the responsibility of improving the standards and practices of realtors. One prominent goal of such boards has been to eliminate unprofessional price-cutting

63 *See, e.g.*, Ingalls v. Streeter, 67 N.Y.S.2d 351 (Syracuse Mun. Ct. 1948).

64 *See, e.g.*, Clapp v. Schaus, 156 App. Div. 681, 141 N.Y.S. 451 (1st Dep't 1913).

65 Ray v. Hutchinson, 27 Ga. App. 448, 108 S.E. 815 (1921).

66 *See* D.L. Stokes & Co. v. McCoy, 212 Ga. 78, 90 S.E.2d 404 (1955); Cochran v. Cheney, 121 Ga. App. 449, 174 S.E.2d 234 (1970); McKenkin Ins. & Realty Co. v. Burton, 92 Ga. App. 832, 90 S.E.2d 27 (1955); Williamson v. Martin-Ozburn Realty Co., 19 Ga. App. 425, 91 S.E. 510 (1917).

competition. To implement this objective, most local boards have established minimum commission rate schedules. The boards have urged these schedules so effectively that they are almost mandatory for all local realtors. The practice of incorporating into each listing contract the schedule of rates of the local board has been encouraged. When this is done, a specific provision of the contract typically incorporates the applicable provision of the schedule, as well as the amount of the commission or the percentage of the selling price. Often similar provisions are also included in the real estate sales contract.[67]

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[67] Typical of the provisions concerning commissions in the contract for sale of real estate is the following, taken from the Athens, Georgia, Board of Realtors Standard Sales Contract:

> In negotiating this contract Broker has rendered a valuable service and is made a party to this contract to enable Broker to enforce his commission rights hereunder against the parties hereto on the following basis: Seller agrees to pay Broker a commission as hereinafter provided when the sale is consummated: Seller agrees that if he defaults and fails to consummate the sale except for his exercise of some elective or optional right of cancellation hereunder or for his inability to cure any title defects, he shall pay Broker the full commission and Broker shall return the earnest money to Purchaser: Purchaser agrees that if he defaults and fails to consummate the sale, except for the exercise of some elective or optional right of cancellation hereunder or Seller's inability to cure title defects, he shall pay Broker the full commission and Purchaser and Seller agree that Broker may apply the earnest money deposited by Purchaser toward payment of the commission, and turn the balance, if any, over to Seller to be applied to Seller's damages, and Purchaser agrees that thereupon Broker is released from any and all liability for return of the earnest money to Purchaser. All parties hereto agree that if Seller or Purchaser has any elective or optional rights of cancellation hereunder and such rights are exercised and the sale is not consummated, or Seller is unable to cure title defects and the sale is not consummated, then the earnest money shall be returned to Purchaser and no party shall have any right to commissions of damages.
>
> The commission to be paid in this transaction shall be calculated under Item — of Schedule of Commissions shown on reverse side of this contract, which schedule is made a part of this contract by reference as fully as if incorporated herein and amounts to —.

The schedule of commissions shown on the reverse side thereof reads:

Athens Board of Realtors
Schedule of Commissions

1. All commissions must be based on total value of property and not on equities or partial payments. Minimum commission on any sale shall be $50.00.
2. Residential Property within Clarke County:
   (a) On new and previously unoccupied residential property within Clarke County, a minimum commission shall be 5% of sales price.
   (b) On used, and formerly or presently occupied property within Clarke County, a minimum commission shall be 6% of sales price.
   (c) On apartment dwellings the commission shall be computed on the same basis as residential property.
   (d) On unimproved residential lots not under subdivision contract, the com-

The use of real estate board schedules has become widespread over the past several years. However, the apparent effect of a proposed consent decree to settle pending litigation between the United States Justice Department (Antitrust Division) and the Atlanta Real Estate Board is to preclude the use of these schedules in the future.[68] The Justice Department attacked the practice of the real estate board of publishing and recommending certain fee schedules for the Atlanta area as violative of the Sherman Act.[69] The proposed decree enjoins the board from "recommending or suggesting," "adopting or publishing" any schedule

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mission shall be 10% of the first $5,000.00 and 5% of the balance of sales price.

(e) On residential property outside Clarke County which is a distance of 12 miles or more from the Court House of Clarke County, the minimum commission shall be 6% of the sales price, except as otherwise provided in this schedule.

3. Business Property:
On business property that is lots or lands zoned for or to be used for, business, improved or unimproved, a minimum commission to be charged shall be 6% of the sales price. Residential income property shall not be construed as business property.

4. Farms and Residential Acreage:
On farms and residential acreage wherever located, minimum commission shall be ten (10) per cent of the sales price. Acreage is defined as any residential tract comprising not less than five (5) acres, which, under its existing zoning classification can be divided into five (5) or more lots.

[68] *See* Atlanta Journal, January 5, 1972, § C, at 9, col. 2:

The Justice Department Tuesday filed a proposed consent judgment in Federal Court prohibiting the Atlanta Real Estate Board and its broker members from fixing commission rates of residential and commercial property sales . . . .

The February suit charged that the board and its more than 950 members combined to fix commissions and fees for services in connection with the sale, lease and management of real estate in the Atlanta area.

The alleged fixing of fees and commissions, said the Justice Department, is a violation of the Sherman Anti-Trust Act.

The February suit charged that the board and its members agreed to rates and fees which were published, circulated and adhered to by the members.

It was also alleged that the board members used standard contracts which contained the agreed-upon commission and fees.

. . . .

The consent agreement which the district court was asked to approve Tuesday would prohibit the fixing of commission fees and enjoin the Atlanta Real Estate Board from recommending or suggesting any schedule of fees for its members.

The board would also be prohibited under the judgment from adopting or publishing any public schedule or recommendations regarding commissions or fees to be charged by its members.

The proposed judgment also prohibits "any tentative action against any person for failing or refusing to charge any particular commissions or fees in connection with the sale, lease or management of real estate."

[69] 15 U.S.C. §§ 1-7 (1970).

or recommendations regarding real estate sales commissions and from taking any action against any of its members who fail to charge minimum rates.[70] The broad provisions of the decree would seemingly eliminate any further publication of fee schedules. In addition to eliminating provisions in brokerage contracts tying the fee to a published or incorporated schedule, the decree will apparently compound the problem of proving "usual," "customary," "regular," "standard," or "reasonable" commissions.

(d) Net price.—One of the most troublesome forms of commission agreements has been the "net listing." Under this listing no specific commission is promised the broker, but he may keep all of the money received in excess of the price fixed by the seller. For example, the seller may specify that he is willing to sell his property for "$30,000 net." If the house sells for $32,500, the broker's commission is $2,500.

There has been much criticism of this practice. Many authorities believe that net listings are incompatible with the broker's fiduciary obligations.[71] Because of the superior knowledge and ability of the broker, net listings may provide a ripe situation for fraud or misrepresentation by a dishonest broker. Consequently, the Georgia Real Estate Commission has prohibited the use of net listings.[72] The courts have also recognized the potential for abuse inherent in such contracts and have therefore repeatedly held that an agreement between an owner and a real estate broker for the sale of the owner's property for a fixed net amount to the owner does not import by implication a promise that the broker shall receive as a fee the excess of the purchase price above the fixed net price.[73] Rather, there must be an express promise to pay the excess as a commission.

One further problem inheres in the net price listing arrangement. Because the seller has little, if any, interest in obtaining a price greater than the net price, since all such excess is the brokers fee, he may, by accepting an offer of the specified net price or less, effectively eliminate any commission. In *Kuniansky v. Williams*,[74] the listing called for a net price of $22,000. After extensive negotiations, and after the seller had made improvements costing more than $1,500, the property was

70 Atlanta Journal, January 5, 1972, § C, at 9, col. 2; *see* note 68 *supra*.

71 *See, e.g.*, E. HEBARD & G. MEISER, PRINCIPLES OF REAL ESTATE LAW 394 (1967).

72 *See* 5 RULES AND REGULATIONS OF THE STATE OF GEORGIA ch. 520-2.02.

73 *See* Matheney, Beasley & Koon v. Godin, 130 Ga. 713, 61 S.E. 703 (1908); Norwood v. Robie, 102 Ga. App. 206, 115 S.E.2d 729 (1960); Tichnor v. Spence, 26 Ga. App. 663, 106 S.E. 809 (1921).

74 101 Ga. App. 678, 115 S.E.2d 204 (1960).

sold for $23,500. The jury verdict that the sale of the property as originally listed had netted the seller slightly less than $22,000 was upheld, and the broker was denied any commission. There is a suggestion in the opinion that if the seller had acted in bad faith the broker might have recovered a reasonable commission. However, unless the seller and buyer expressly conspire in order to benefit the seller above his net price or to interfere intentionally with the broker's opportunity to earn his commission, it is unlikely that bad faith will be attributed to the seller for accepting his net price or less. Indeed, bad faith on the broker's part is much more likely, since his self-interest might discourage him from encouraging an offer by a prospective buyer at or near the net price.[75]

Quite apart from the question of good faith, the net price compensation clause effectively converts all exclusive right-to-sell listings into open listings since a sale at or below the net price does not entitle the broker to a commission. In *Cole v. Pursley*[76] the listing contract was apparently drawn to correct such a deficiency. In this case the exclusive right-to-sell listing contract called for a net price of $15,000, with all over such net price to be paid to the broker as commission; and if the property was sold for less than the net price, the contract specified that the broker would receive a commission equal to 10% of the selling price. The property was sold by the owner himself for $15,000, the exact listing price. The court held that the broker was not entitled to recover any commission since the listing provided for a commission only if the property sold for more than or less than the net price.

The *Cole* court failed to discuss the obvious anomaly created by its decision. If the seller had sold the property for $14,900, he would have had to pay the broker a $1,490 fee. If he had sold for $15,100 he would have owed the broker only $100. By selling the property for $15,000, he owed no commission at all. Clearly, the seller is not required to accept an offer below his net price simply because it will benefit his broker. Nevertheless, the situation is ripe for "under the table" dealings between the seller and a prospective purchaser for the purpose of defeating or minimizing the broker's fee.

In light of the many problems arising out of net listing contracts, the Georgia Real Estate Commission is wise to prohibit their use. Enforcement of that prohibition, however, does not appear to be very

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75 *See* 5 RULES AND REGULATIONS OF THE STATE OF GEORGIA chs. 520-3-.02, 520-6.01(n), 520-3-.05.

76 86 Ga. App. 452, 71 S.E.2d 575 (1952).

strict. Probably the most effective method of enforcing this rule would be for the courts to deny recovery of any commission under a net listing.[77]

(e) Amount of commission in lease transactions.—The landlord-tenant relationship is a continuing one, with performance spread over a period of time. In listings concerning leases, the terms defining the broker's commission may well be more troublesome than those concerning sales listings. Consequently, the simple payment of a liquidated amount at the time of the initial procurement of a tenant is widely employed to avoid undue complications. However, since many brokers prefer a continuing commission, listings may frequently call for an additional fee each time the lease is extended or renewed.[78] Others require either a fixed amount or a specified percentage of each rental payment for the duration of the lease, including renewal or extension periods.[79] Problems concerning such continuing commissions are apparent whenever either the lessor or the lessee defaults or assigns his interest,[80] or whenever the tenancy is otherwise prematurely terminated such as by condemnation. In addition, the complexity of many modern commercial leases may create confusion about what constitutes the "rent" on which the percentage commission is to be based.[81]

7. Duration of Employment.—If no time limit is stipulated in the listing, then the broker must perform within a reasonable time, for after the expiration of a reasonable time, the employment is deemed to terminate.[82] Moreover, it is unnecessary that the broker be given notice of the principal's intention to revoke or terminate the agency.[83]

If a time limit is stipulated in the listing contract, time is deemed to be of the essence and the broker must complete his obligations within the time specified in order to recover.[84] Extension clauses are commonly

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77 *See* Express Realty Co. v. Zinn, 39 Misc. 2d 733, 241 N.Y.S.2d 954 (Dist. Ct. 1963) (Since Real Estate Commission's rules ban net listing, a broker who uses them is not entitled to any compensation.).

78 *See* Hunter v. Benamy Realty Co., 115 Ga. App. 829, 156 S.E.2d 160 (1967).

79 *Id.*; *see* Reynolds v Tufts, 123 Ga. App. 147, 179 S.E.2d 659 (1970).

80 *See, e.g.*, Belau v. Brown & Sons Realty Co., 122 Ga. App. 76, 176 S.E.2d 210 (1970); James Talcott, Inc. v. Roy D. Warren Commercial, Inc., 120 Ga. App. 544, 171 S.E.2d 907 (1969).

81 For a partial list of considerations which might be crucial in determining when the fee has been earned as well as the amount of the fee, see E. BISKIND & C. BARASCH, THE LAW OF REAL ESTATE BROKERS 249 (1969).

82 *See* Schaffer v. Padgett, 107 Ga. App. 861, 131 S.E.2d 796 (1963); Thornton v. Lewis, 106 Ga. App. 328, 126 S.E.2d 869 (1962).

83 Latimer v. Gifford, 37 Ga. App. 1, 138 S.E. 859 (1927).

84 Morris v. Jackson, 9 Ga. App. 848, 72 S.E. 444 (1911).

employed to relax the harshness of this rule. Such clauses provide that if the property is sold within a specified period after the expiration of the listing to anyone with whom the broker has negotiated during the term, the broker will be entitled to his commission. Where the seller neither acts in bad faith nor interferes to prevent a sale by the broker, he may immediately upon the expiration of the contract or the extension term, if there is one, sell to a buyer with whom he had been continuously negotiating through the broker without owing a commission.[85]

In the sales-agency listing, the sale itself must be concluded within the specified time. The Georgia courts have stringently enforced this requirement. For example, in *Langford v. Berry*,[86] under a listing which provided a term of 45 days[87] in which the property was to be sold, the broker had found a buyer with whom he had negotiated the signing of a real estate sales contract which gave the prospective purchaser a "reasonable time" in which to make a written objection to the seller's title and which required the seller to furnish "valid title" within a "reasonable time." The buyer's lawyer, however, did not get the title search completed within the 45-day term. Despite the fact that upon completion of the title search the sale was consummated under the terms of the sales contract, the broker was denied recovery of a commission. Obviously, the time limitation in a sales-agency listing must be carried forward into the sales contract so that the sale is completed before the agency expires.

Occasionally, the employment arrangement is stated to continue until terminated by notice to the broker.[88] Here, as in all other cases in which the principal has authority to revoke the agency, the seller must exercise good faith toward the broker and must not withdraw the listing capriciously or for the purpose of defeating the broker's commission.[89]

II. Earning the Compensation

Generally, a broker earns his commission when he completes the performance of the services specifically required of him by the listing

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85 Kenney v. Clark, 120 Ga. App. 16, 169 S.E.2d 357 (1969).

86 68 Ga. App. 193, 22 S.E.2d 349 (1942).

87 In computing time, the day on which the listing contract is signed is not included. Dobbs v. Conyers, 36 Ga. App. 511, 137 S.E. 298 (1927).

88 *See, e.g.*, Ocean Lake & River Fish Co. v. Dotson, 70 Ga. App. 268, 28 S.E.2d 319 (1943).

89 Morris v. Jackson, 9 Ga. App. 848, 72 S.E. 444 (1911); Williams v. Moore-Gaunt Co., 3 Ga. App. 756, 60 S.E. 372 (1908).

contract.[90] When the performance is accomplished under an exclusive right-to-sell listing, the broker is entitled to his commission regardless of who has effectuated the sale. Under other listing contracts, however, the broker must prove that he was, in fact, the "procuring cause" of the sale.[91]

A. Procuring Cause

The question whether the broker was the procuring cause normally arises when either the seller himself or another broker sells the property to a buyer who the broker claims was his client. Each case must necessarily be considered on its own facts, and generalizations are therefore difficult and unreliable. Nonetheless, a few general tests which are helpful in making the determination whether the broker was the procuring cause of the sale can be drawn from the decisions.

It is clear, for instance, that the broker's efforts need not be the sole or exclusive cause of the sale, and the fact that other persons and circumstances may have helped to influence the buyer does not preclude the broker from being the procuring cause of the sale.[92] Indeed, merely introducing the parties is sufficient in itself to satisfy the procuring cause requirement if the introduction sets in motion a series of events which, without a break in continuity, results in the sale on the principal's terms. This is true even though the seller and buyer negotiate and conclude the sale without further services from the broker.[93] However, merely introducing a prospect who subsequently buys the property may, in many instances, be insufficient to satisfy the causation requirement. Thus, if the broker is unsuccessful in soliciting an offer, the parties abandon negotiating efforts, and the seller subsequently sells to the prospect, the broker is not entitled to a commission.[94] Moreover, in most jurisdictions, if an unreasonable period of time has elapsed after the prospect has first seen the property so that the buyer may be said to have "rediscovered" the property uninfluenced by the initial effort of the broker, the broker is not considered to be the procuring cause

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90 In the context of the sale of realty, these services consist of procuring a ready, willing, and able buyer. *See* pp. 396-97 *infra*.

91 *See, e.g.*, Tidwell & Yarbrough Realty Co. v. Foster, 123 Ga. App. 192, 180 S.E.2d 259 (1971). In Georgia the term "efficient cause" is regularly used synonomously with "procuring cause." *See* Fields Realty & Ins. Co. v. Smith, 123 Ga. App. 342, 180 S.E.2d 909 (1971).

92 *See, e.g.*, Lundin v. Kuniansky, 107 Ga. App. 774, 131 S.E.2d 219 (1963).

93 *See id.*; Erwin v. Wender, 78 Ga. App. 94, 50 S.E.2d 244 (1948).

94 *See* Tidwell & Yarbrough Realty Co. v. Foster, 123 Ga. App. 192, 180 S.E.2d 259 (1971).

of the sale.[95] Similarly, if the seller sells to a buyer without knowledge that the buyer is a client of the broker, the broker is not the procuring cause of the sale.[96] Obviously, there are only thin lines of difference between these various situations which must be carefully and judicially drawn to protect all of the parties to the transaction.

Often a dispute arises between two brokers over which of them was the procuring cause of the sale. If the seller knows that a particular prospect is the client of one broker with whom negotiations are still pending, he is liable for a commission to that broker even though the sale is consumated through another broker.[97] If the negotiations have bogged down, however, and the first broker's efforts have been abandoned, then a second broker who brings about a sale is entitled to the commission.[98]

Not infrequently, two brokers both contribute to negotiations which lead to a sale. The Georgia courts have not divided the commission in these cases, but have insisted that the full commission go to the broker whose efforts are found by the jury to be the "primary, proximate and procuring cause of sale."[99] In this instance, as in others where the seller knows that competing brokers are dealing with the same prospect, the seller proceeds at his own peril in effecting the sale and paying the commission to the broker through whom the sale is consummated.[100] Under such circumstances, the seller should never pay the commission until he receives an agreement from both brokers acknowledging that he is liable for only one commission, and designating to whom it should be paid.

B. Other Conditions of Performance

In the absence of express provisions in the listing contract calling for different conditions of performance, the Georgia Code provides that "the broker's commissions are earned when, during the agency, he finds a purchaser ready, able and willing to buy, and who actually offers

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95 *See, e.g.*, Note, *Real Estate Brokers' Commissions in Ohio*, 38 U. CIN. L. REV. 115, 125 (1969).

96 Palmer v. Malone, 97 Ga. App. 666, 104 S.E.2d 131 (1958); State Life Ins. Co. v. Whitehurst, 67 Ga. App. 676, 21 S.E.2d 474 (1942).

97 Gilmer v. Carnes, 81 Ga. App. 555, 59 S.E.2d 292 (1950).

98 Girardeau & Saunders v. Gibson, 122 Ga. 313, 50 S.E. 91 (1905).

99 Davis v. Crawford, 98 Ga. App. 632, 106 S.E.2d 177 (1958).

100 *Id.; see* May v. Sibley, 85 Ga. App. 544, 69 S.E.2d 693 (1952) (seller must pay commission to broker who finds buyer even though sale is consummated through another broker); Nicholson v. F. M. Smith & Son, 29 Ga. App. 376, 115 S.E. 499 (1923) (broker who merely closes deal for seller not considered procuring cause where another broker finds ultimate buyer).

to buy on the terms stipulated by the owner."[101] This statute has been interpreted to require that the broker must procure an offer to purchase on exactly the terms stipulated by the seller.[102] Therefore, when an offer submitted through the broker has even a slight variance from the terms stipulated by the seller, the seller is under no obligation to accept the offer or to pay a commission.[103] Some sellers have attempted to use this rule in an effort to avoid the commission by overpricing the property, rejecting initial offers below the stipulated price, and then negotiating the sale to the offeror at less than the listing price. While this ploy has been successful in some states,[104] the Georgia courts have prevented it by consistently holding that if an offer is accepted or the sale is concluded the broker is entitled to his commission even though the terms differ from those of the listing.[105]

Where no terms of payment are specified in the listing, the broker has authority to sell for cash only.[106] If the listing specifies cash, an offer which promises to pay cash but which on its face indicates that the buyer is going to obtain part of the cash from a mortgage loan to a third party is insufficient to entitle the broker to his commission.[107] Procuring an offer to pay cash, where the listing requires discharge of existing loans, is likewise insufficient to earn the broker his commission since it places upon the seller the obligation of discharging a loan which might not be payable before maturity.[108]

An offer meeting the stipulated terms is itself sufficient to show that the buyer is "ready" and "willing"; the broker seeking to recover his commission, however, must also show that the buyer is "able"—that he is financially able.[109] Where the broker has procured an offer on the stipulated terms from an able buyer, he is entitled to his commission

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101 GA. CODE ANN. § 4-213 (1962).

102 *See* Atlanta Realty Co. v. Campion, 94 Ga. App. 136, 93 S.E.2d 781 (1956); Waring v. John J. Thompson & Co., 76 Ga. App. 494, 46 S.E.2d 364 (1948).

103 Thornton v. Lewis, 106 Ga. App. 328, 126 S.E.2d 869 (1962).

104 *See, e.g.*, Bauman v. Worley, 166 Ohio St. 471, 143 N.E.2d 820 (1957) (where owner sells at price less than that called for in listing contract, broker not entitled to commissions unless owner prevented broker from making the sale).

105 *See, e.g.*, Spence v. Walker, 92 Ga. App. 609, 89 S.E.2d 668 (1955).

106 Howard v. Sills & Purvis, 154 Ga. 430, 114 S.E. 580 (1922).

107 Waring v. John J. Thompson & Co., 76 Ga. App. 494, 46 S.E.2d 364 (1948).

108 Sikes v. Markham, 74 Ga. App. 874, 41 S.E.2d 828 (1947). *But see* Pope v. Peeples, 24 Ga. App. 467, 101 S.E. 303 (1919).

109 *See* Reisman v. Massey, 84 Ga. App. 796, 67 S.E.2d 585 (1951) (by accepting a buyer's offer, a seller normally accepts by implication that the buyer is "able," unless the seller's acceptance is in reliance upon the broker's misrepresentation of the buyer's financial ability); Davis v. Holbrook, 75 Ga. App. 417, 43 S.E.2d 791 (1947).

even though the seller[110] or the buyer[111] subsequently changes his mind and fails to complete the sale, or even though the sale fails because the seller is unable to convey good and marketable title.[112] Yet, if the listing requires the broker to procure an offer "satisfactory" to the seller, the broker will earn his commission only upon the seller's acceptance of the offer or upon his capricious or bad faith refusal to accept.[113] Moreover, a broker who negotiates an option to purchase earns no commission until the option is exercised since an unexercised option does not constitute an offer to purchase.[114] Similarly, an offer embodied in a real estate contract which proves unenforceable is insufficient to obligate the seller to pay the broker's commission.[115]

III. CONCLUSION

The foregoing analysis indicates that, as with most litigation concerning contracts for services, the majority of problems have arisen because either the parties never had an understanding as to the terms of the employment at all, or their understanding was not clearly expressed. Although the relationship between the real estate broker and his client is often personal and confidential, placing the broker who insists too zealously upon a formal contract in an awkward position, most problems would be avoided by his insistence upon a clear, straightforward, carefully written contract. Terms of a technical nature should not be used, and any "pitfalls" that are not obvious from the language of the contract should be explained. While a broker might lose an occasional listing from following such a practice, those losses will probably be far more than offset by the avoidance of misunderstanding and dissension and by the increased confidence on the part of most clients in the true professionalism of the broker.

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110 Rowland & Rowland v. Kraft, 31 Ga. App. 593, 121 S.E. 526 (1924).

111 Cox v. Dolvin Realty Co., 56 Ga. App. 649, 193 S.E. 467 (1937); *see* 19 MERCER L. REV. 460 (1968).

112 Smith Realty Co. v. Hubbard, 124 Ga. App. 265, 183 S.E.2d 506 (1971); M. C. Kiser Real Estate Co. v. Shippen Hardwood Lumber Co., 34 Ga. App. 308, 129 S.E. 294 (1925).

113 Atlanta Realty Co. v. Campion, 94 Ga. App. 136, 93 S.E.2d 781 (1956).

114 Snead v. Wood, 24 Ga. App. 210, 100 S.E. 714 (1919).

115 *E.g.*, Dunford v. Townsend, 100 Ga. App. 550, 112 S.E.2d 14 (1959).

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