

AN ESTATE AGENT'S DUTY TO LIST AND MARKET A PROPERTY AT MARKET VALUE

1 Introduction

For most people the sale and purchase of a house is a stressful exercise. In fact, a quick internet search reveals that it is rated among the ten most stressful things in life, outranked only by divorce and death of a loved one (http://wiki.answers.com/Q/What_are_the_top_10_most_stressful_things_in_life; <http://littleshoolive.wordpress.com/2008/03/01/10-most-stressful-things-really/>). This is hardly surprising, since experts have found that moving house is “the most expensive and life-changing financial transaction most people ever undertake” (<http://www.keepthedoctoraway.co.uk/showArticle.aspx?loadid=00497>). A wrong decision is not easily rectified, and may have significant financial implications. Fear and uncertainty, not knowing whether the right decision has been made, exacerbate the stress. An informed decision is therefore crucially important, meaning that all relevant information must be gathered and carefully weighed before a final commitment is made.

Every seller of immovable property wants to sell at the right price. But what is the right price? The valuation of immovable property is not an exact science, and values change depending on market conditions. Nevertheless, as a point of departure it is safe to say that a property is sold at the correct price if the price offered and accepted matches the property's market value at the time of sale, the market value being the price a willing buyer would pay to a willing seller on a specific date. It must be properly understood, however, that the market value of a property is not necessarily the price paid by the particular buyer who actually bought the property. The “willing seller” and the “willing buyer” are not the actual persons buying and selling, but a notional willing seller and a notional willing buyer negotiating with each other on an equal footing, assuming that neither party is overly anxious to buy or sell by reason of special or extraordinary reasons: *Sher NNO v Administrator, Transvaal* (1990 4 SA 545 (A) 547H). A property can therefore be sold below its true market value, which happens frequently in the case of forced sales and sales between relatives.

Many homeowners are not pressed to sell, but are prepared to do so at the right price. For them, discovering that their most valuable investment was sold below its market value may be the worst nightmare come true. Obviously, the best way to avoid this is to be informed about the property's market value prior to putting it on the market. Here estate agents enter the picture. In practice they handle the vast majority of sales of residential properties, and both sellers and buyers rely heavily on them for advice and assistance. This Note discusses the question to what extent an estate agent is under a legal duty to provide the seller of a house with information about the market value of the property, prior to the marketing and/or sale thereof.

More specifically, the focus falls on whether, in the absence of an express instruction or request from the seller, an estate agent is under a legal duty to

- (a) advise the seller at listing stage that the seller's asking price for the property is less than its likely market value;
- (b) market and sell a property at market value; and/or
- (c) advise the seller, when submitting an offer, that the price offered is below market value.

The common law of estate agency in Australia in many respects closely resembles South African law. For that reason the Note commences with a brief discussion of the legal position under Australian law.

2 Australian law

It is settled law in Australia that an estate agent is under a contractual duty to act with care, skill and expertise, and that he would act in breach of this duty if he sells a property at less than the market value. The same applies if care and skill is not exercised and a property remains listed for sale at a price greater than market value. Mendes (*Real Estate and Estate Agency Law in NSW* 2ed (1991) 233) summarises the position as follows:

"It goes without saying that an agent must perform the contract of agency in accordance with its terms. Further, in performing the contract of agency, the agent must exercise the degree of care, skill and expertise which would be expected of a licensed agent. Thus, an agent would be failing in his or her duties under the contract of agency if the agent failed to exercise care and skill and allowed land or a business to be sold for less than its market value, or allowed rental premises to be leased at less than the rental market value, or failed to advise as to the proper reserve at an auction. If such care and skill is not exercised and property is sold or leased for less than market value, then the agent is in breach of the contract of agency and liable in damages to the principal for the difference which would bring the price or rental to market value. Similarly, if such care and skill is not exercised and property remains listed for sale or lease at greater than market value, then the agent is again in breach of the contract of agency, and liable in damages to the principal for the principal's loss resulting from the property not being sold or leased, because it could have been had the agent performed the contract of agency with skill and care and advised the principal to accept less than the amount listed."

The author refers to *Georgieff and Georgieff v Athans & Athans* ((1981) 26 SASR 412), where the court said the following:

"(A) land agent ... who is employed by a person to sell property on his behalf, puts himself in a position in which he contracts to exercise his professional knowledge and his best skill care and diligence to the advantage of his principal and in which the principal is, of necessity and with propriety, entitled to rely for his own protection on the professional knowledge, skill, care and diligence of the land agent."

Lang (*Estate Agency Law and Practice in New South Wales* 5ed (1994) 362) states the following:

"Estate agents are generally employed to obtain the best price reasonably obtainable. 'It was their duty at least to see that an inadequate consideration

was not accepted without advising as to values' on a sale: *How v Carman* [1931] SASR 413. An estate agent selling below the reasonable market value or leasing below current rental value is in breach of the obligation to perform her or his duties with care and skill, if having failed to advise the principal with reasonable accuracy regarding the value of the property in terms of price or rental."

Australian law does not prescribe any specific valuation method to be applied by estate agents in order to arrive at an assessment of the market value of a property. What is clear, however, is that it is not expected of an estate agent to value a property with absolute accuracy, or in the same way as a registered valuer would. Moreover, as Lang puts it (363), an agent "would not be liable for a slight difference in value, but would be liable where there is a substantial difference between the value of the property and the amount for which he or she negotiated a sale, without having pointed out the current value to the principal". The principle was formulated as follows in *Weber v Land and Business Agents Board* ((1986) 40 SASR 312):

"(S)ubject to such special instructions, if any, as may be given by the vendor, the agent is to act assiduously and diligently at all times to achieve a fair and reasonable price on behalf of his client upon such terms and conditions as are fairly advantageous to his client ...

In considering the duties of a land agent to his vendor/client, it should be borne in mind that the object of any sale should be the achievement of the fair market value of the property and this value should be desirably, but not always, equate with a fair and reasonable price. Sometimes a fair and reasonable price may be more than the fair market value and sometimes it may be less than the fair market value. Luck as well as judgment and economic factors can play some part in determining the ultimate sale price of a property. But having said this, all would agree that the element of luck should be minimal and the element of judgment should be maximal ... A land agent is not expected to have the knowledge of a land valuer, but he is expected to make all such inquiries and to acquire all such information as is reasonable in the circumstances – as well enable him to advise his client reasonably and properly. As I have said, an agent may at the time of a listing already possess that information: because of his work in, and knowledge of, the particular area, he may have already made the necessary inquiries: he may already have several potential purchasers for a property in the particular area."

An estate agent can escape liability for not having sold a property at market value if he stated expressly that he accepted no responsibility as to value (*Luciano v DG (Pty) Ltd* (1980) 25 SASR 568).

3 South African law

There is no reported South African case law or other authorities dealing specifically with any of the questions referred to above. However, a somewhat similar issue arose in *Poultney v Absa Insurance Brokers (Pty) Ltd* (unreported, case no 430/2000 (EC)), which involved a financial investment advisor. A policyholder, accepting the advice of the financial advisor, had sold an endowment policy for R463 353, assisted by the financial advisor. The buyer sold the policy on the same day to a third party for R950 000. The latter, again on the same day, sold the policy for an amount of R1 042 482. The policyholder sued the advisor for damages on

the grounds that he had not given her proper advice; her case was that had she been given the correct advice she would have sold the policy at its true market value. The claim was based on breach of contract, alternatively delict.

The court held in favour of the policyholder on the grounds that the financial advisor had not acted with the necessary degree of care and skill. It was pointed out that it is expected of the average or typical financial advisor to undertake the required investigations to determine the true value of an investment policy when advising the policyholder to sell. Kroon J summarised the law as follows:

"[23] I accept the validity of the principle that the nature of the mandate given to an adviser can have a bearing on the ambit of the matters in respect of which he is required to observe the requisite standard of skill. *Cf Lenaerts v JSN Motors (Pty) Ltd* 2001 4 SA 1100 (W) 1108H-1109D, where the statement in an English case, that the precise extent of an insurance intermediary's duties must depend in the last resort on the circumstances of the particular case, including the particular instructions he has received from his client, was referred to with approval. It remains, however, one of the *naturalia* of contracts of mandate in general, that the mandatory is obliged to perform his functions faithfully, honestly and with care and diligence. See *David Trust v Aegis Insurance Company Ltd* 2000 3 SA 289 (A) 298G-H (para [20]). A further observation may be made: In *Randeree v WH Dixon & Associates* 1983 2 SA 1 (A) 4E, after a reference to *van Wyk's* case, approval was expressed of the following *dictum* in *Paris v Stepney Borough Council* 1951 AC 367 382:

'If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in like circumstances.'

...

[50] If, in the result, and after the required investigations had revealed what could be done with the policy, the decision was that the policy should be sold, the second defendant ought to have undertaken the necessary, adequate, investigations to determine the true value of the policy so as properly to be in a position to advise the plaintiff as to the best price that she could realise for the policy."

In *Poultney* the mandate given to the advisor was to "ensure that the plaintiff received proper advice as to the most advantageous manner of dealing with the policy, and, specifically, in the matter of the sale of the policy, as to the best price that she could obtain therefor" (par 36). Mandates given to estate agents by sellers of immovable property are normally quite different. The usual mandate is not to advise the seller on any matter, but to find a buyer willing to purchase a certain property on the terms and at the price acceptable to the seller. The question is whether the estate agent is under any duty to prevent a seller from accepting an offer in the mistaken belief that the price matches the property's market value.

The word "price" requires some explanation. A distinction must be drawn between a seller's asking price; the price at which the property is marketed, and the actual selling price. The seller's asking price is invariably discussed and determined at the stage when the estate agent lists the property, *ie* when the mandate to sell is conferred ("the listing stage"). It is usually (but not necessarily) the price which the seller expects (or hopes) to get, and could be (but is often not) the minimum price at which the seller would be

prepared to sell. The marketing price is the price at which the property is advertised for sale. In terms of the estate agents' code of conduct (clause 5.4) the marketing price must be agreed to by the seller, and the estate agent may market the property at that price only. Normally the marketing price would be the same as the asking price, although a higher price is often set in the hope that a purchaser would submit an offer matching the asking price. The seller may also agree to so-called "parameter marketing", a selling technique where the property is advertised for sale on the basis "offers upwards of Rx will be submitted"; "Rx or nearest offer", or "Rx negotiable". The actual selling price is the price offered by the buyer and accepted by the seller.

At common law a seller is at all times entitled to revoke an estate agent's mandate, thereby terminating the mandate (*Tony Morgan Estates v Pinto* 1982 4 SA 171 (W); and *Pretorius v Erasmus* 1975 2 SA 765 (T)). Accordingly, a seller who confers on an estate agent a mandate to find a buyer at a certain price may at common law simply terminate the mandate if he discovers before selling that his asking price is less than the market value of the property. Alternatively, the seller may simply reject any offer below the market value without incurring any liability towards the buyer or the estate agent. This is so even if the offer matches the seller's asking price (*Gluckman v Landau* 1944 TPD 261; and *Brayshaw v Schoeman* 1960 1 SA 625 (A)). However, a mandate can be worded to the effect that the seller commits breach of contract if he revokes the mandate before an agreed period, or if he refuses to accept an offer containing the terms stipulated in the mandate (*The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* 1984 2 SA 881 (A)). This occurs often in the case of sole mandates, where the seller agrees to appoint a particular estate agent to market the property and nobody else. The practical effect of such mandate is that if the seller refuses to sell on the terms and at the price stated in the mandate, he exposes himself to a claim for damages equaling the commission that the estate agent could have earned had a sale been concluded (*The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd supra*).

It follows that in the case of an ordinary (common law) mandate a seller who is not prepared to sell below market value must be familiar with the market value *at the latest* when a decision is to be made whether or not to accept a particular offer. Where a mandate is worded in the manner explained in the previous paragraph, it is essential to know the property's market value before the mandate is conferred. Lack of the required knowledge may result in the seller unwittingly signing a contract of sale with a buyer at a price that is less than what he actually wanted as a minimum, namely the market value. Such lack of knowledge may also induce the seller to enter into a contract of mandate with the estate agent, which he would not have done had he known that the asking and/or marketing price stated in the mandate is less than the true market value of the property. A loss can, however, also arise where the marketing price is *higher* than the market value. This typically occurs where a seller agrees to an exaggerated marketing price, not knowing that it substantially exceeds the market value. The marketing price of a property is extremely important, as it is rarely in a

seller's interest to market a property at a price in excess of its market value. Few buyers are attracted to an overpriced property and a property marketed at the wrong price may stay on the market a long time, eventually developing a negative reputation. In the end it may be very difficult to sell the property at a decent price, especially if the market has turned negative in the meantime. A seller who is not prepared to sell at a giveaway price may ultimately have no choice but to remove the property from the market, which in turn may trigger some or other loss.

The question for present purposes is whether the seller in any of these scenarios may hold the estate agent liable for any losses suffered based on the estate agent's non-disclosure of the property's true market value. Delictual liability is discussed first, followed by liability based on contract.

3 1 *Delictual liability*

Delictual liability for not disclosing a property's true market value may arise in both a contractual and non-contractual setting. In both the seller would have to prove the elements for an actionable misrepresentation taking the form of a non-disclosure. One of the elements is that of wrongfulness, which requires proof that the estate agent failed to disclose a material fact in circumstances where he or she was under a duty to speak. The test for establishing wrongfulness in a pre-contractual setting is the same as that applied in the case of a non-contractual non-disclosure (*Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A) 568F-I and 570D-G; and *Absa Bank v Fouche* 2003 1 SA 176 (SCA) par 4). In each the legal convictions of the community are the benchmark (*Absa Bank v Fouche supra* par 4; see also *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) par 13 and 14; and *Trustees Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) par 12). There is, however, no ready formula for determining wrongfulness. The test involves "objective reasonableness" and whether the *boni mores* require the conduct in question to be regarded as unlawful (*Knop v Johannesburg City Council* 1995 2 SA 1 (A)). The *boni mores*, in turn, "is a value judgment that embraces all the relevant facts, the sense of justice of the community and considerations of legal policy, both of which now derive from the values of the Constitution" (*Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) par 41). Each case must be decided on its own facts (*Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 834B; and *Bayer South Africa (Pty) Ltd v Frost supra* 570E) although this may be "somewhat of an overstatement" given the fact that there are indeed categories of unlawfulness fixed by law (*Telematrix (Pty) Ltd v Advertising Standards Authority SA supra* par 15).

In *Absa Bank v Fouche (supra)* Conradie JA explained the test for a wrongful non-disclosure in a contractual context as follows:

"[5] The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context - a non-disclosure - have been synthesized into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about

anything that may be material (*Speight v Glass & Another* 1961(1) SA 778 (D) at 781H – 783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful (*BoE Bank v Ries* 2002 (2) SA 39 (SCA) at 46 G – H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances'. (*Pretorius and Another v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 (3) SA 410 (W) at 418E-F)."

The relevant principles were summarized as follows in *McCann v Goodall Group Operations (Pty) Ltd* (1995 2 SA 718 (C) 726A-G):

"From the foregoing exposition of the law the following principles emerge:

- (a) A negligent misrepresentation may give rise to delictual liability and to a claim for damages, provided the prerequisites for such liability are complied with.
- (b) A negligent misrepresentation may be constituted by an omission, provided the defendant breaches a legal duty, established by policy considerations, to act positively in order to prevent the plaintiff's suffering loss.
- (c) A negligent misrepresentation by way of an omission may occur in the form of a non-disclosure where there is a legal duty on the defendant to disclose some or other material fact to the plaintiff and he fails to do so.
- (d) Silence or inaction as such cannot constitute a misrepresentation of any kind unless there is a duty to speak or act as aforesaid.

Examples of a duty of this nature include the following:

- (i) A duty to disclose a material fact arises when the fact in question falls within the exclusive knowledge of the defendant and the plaintiff relies on the frank disclosure thereof in accordance with the legal convictions of the community.
- (ii) Such duty likewise arises if the defendant has knowledge of certain unusual characteristics relating to or circumstances surrounding the transaction in question and policy considerations require that the plaintiff be apprised thereof.
- (iii) Similarly there is a duty to make a full disclosure if a previous statement or representation of the defendant constitutes an incomplete or vague disclosure which requires to be supplemented or elucidated.

These examples cannot be regarded as a *numerus clausus* of the occurrence of a duty to disclose, as may possibly be inferred from the authorities mentioned above. There may be any number of similar factual situations which could give rise to such duty."

It may be argued that there is no duty on an estate agent to disclose a property's market value because information about the market value does not fall within an estate agent's exclusive knowledge; thus in a practical business sense the seller does not have him as his only source. However, "exclusive knowledge" in the context of a duty to speak does not mean that the knowledge possessed by the party in question must be secret or totally unavailable. What it means is that the knowledge must be "inaccessible to the point where its inaccessibility produces an involuntary reliance on the party possessing the information" (*Absa Bank v Fouche supra* par 8, referring to Christie (*The Law of Contract* 4ed (2001) 322)). It is submitted that in that sense an estate agent's knowledge about a property's market

value does constitute “exclusive knowledge”. Most house sellers are not familiar with the property market and they rarely have a realistic view of what their properties would fetch on the open market. They do not know what the demand for property is; what similar properties fetched in the recent past, or at what price similar properties are currently on the market. They have no idea how to go about doing a comparative market analysis in order to arrive at an estimate of a property’s market value. Estate agents, on the other hand, have to comply with extensive educational requirements before they are allowed to work as principal or employee estate agents. Although they are not professional valuers they are trained in the techniques of assessing the market value of residential properties, and they readily have access to all the information that is required to assess a property’s market value. Although the information is not totally inaccessible to sellers, it is inaccessible “to the point where its inaccessibility produces an involuntary reliance on the party possessing the information”, namely a professional estate agent.

It is submitted that, taking all considerations into account, the legal convictions of the community favour the imposition of a legal duty on estate agents to disclose to a seller the market value of a house in order to ensure that the seller does not unwittingly sell below market value. It is not unreasonable for a seller to expect of an estate agent to be acquainted with the market and to assist him in selling his most valuable investment – his house – at the best price possible, *ie* market value. In return, the seller is willing to pay the estate agent a substantial sum of money by way of commission upon fulfilment of the mandate. The *boni mores* dictate that it is wrongful for a professional house agent to accept a mandate on a house below market value, or to submit to the seller an offer below market value, without disclosing to the seller the true value of the property. The same applies where an estate agent accepts a mandate on a house greater than the market value, without disclosing to the seller the true value.

3.2 Contractual liability

In the absence of agreement between the parties, South African law imposes no *contractual obligation* on an estate agent to disclose the market value of a property. In *Bloom’s Woolens (Pty) Ltd v Taylor* (1961 3 SA 248 (N)) the court held that in our law there is an implied term in every contract of agency that the agent undertakes to act with the care and diligence of the ordinary prudent man when he engages upon his principal’s business (see too *Durr v ABSA Bank Ltd* 1997 3 SA 448 (SCA) 9D). The same applies in the case of contracts of mandate in general. As was stated by Nienaber JA in *David Trust v Aegis Insurance Company Ltd* (2000 3 SA 289 (A) 298G-H):

“The contract is one of mandate. The mandate given by each plaintiff to Katz Salber was to invest and administer funds entrusted to it by the plaintiff concerned and collected by it from the plaintiff’s debtors. These funds were to be invested in a bank, in this case Investec and Trust Bank respectively. It is one of the *naturalia* of each such contract, as it is of contracts of mandate in general, that the mandatory is obliged, first, to perform his functions faithfully, honestly, and with care and diligence and, secondly, to account to his

principals for his actions (cf De Wet and Van Wyk *Die Suid-Afrikaanse Kontrakereg en Handelsreg* 5uitg 18 Vol 1 386; 17 LAWSA (first reissue) par 11, and the common law authorities quoted therein.) (See too *Poultney v Absa Insurance Brokers (Pty) Ltd* (*supra* (par 23).)

Different principles apply, however, in respect of the normal mandate given to an estate agent to find a buyer. An estate agent is not a true agent – he ordinarily lacks the authority to bind his principal to a contract – and is also not a mandatory in the strict sense of the word because he is under no legal obligation to perform his mandate (*Gluckman v Landau & Co* 1944 TPD 261 293). The nature of an estate agent's mandate was described as follows in *Pace Real Estate (Pty) Ltd v Wilson* (1983 3 SA 753 (W)):

“De Villiers and Macintosh *The Law of Agency in South Africa* 3rd ed at 240 quote from F M B Reynolds ‘Agency: Theory and Practice’ (1978) 94 *LQR* 224 at 229, commenting on the position of an estate agent in England:

‘The traditional definition of an agent, however, does not cover such an intermediary [estate agent] nor many other persons whose function is to introduce business;’

and then go on as follows:

‘Professor E Kahn has referred to the estate agent as “that legal oddity, the estate agent” in (1980) 97 *SALJ* 342; Kahn states:

“Generally speaking, an estate agent is only entrusted with the task (no obligation) of finding a purchaser of immovable property. It is rare indeed for him to be an agent *stricto sensu*, clothed with authority to enter into a contract on behalf of his principal. It would be straining language to call him a mandatory, and the normal kind of contract he makes with the property-owner can only be called one *sui generis*.”

In *Ronstan Investments (Pty) Ltd v Littlewood* (2001 3 SA 555 (SCA)) the Supreme Court of Appeal (par 1) held unequivocally that

“(t)he appointment of an estate agent to find a purchaser for immovable property in return for commission, without more, places the agent under no contractual obligations. The contract is merely a promise, binding upon the principal, to pay a sum of money upon the happening of a specified event.”

On the facts the SCA held that the plaintiff (the seller of a property) could not hold the defendant (an estate agent engaged by the plaintiff to find a buyer) contractually liable for losses suffered by it following an unfavourable contract concluded with a buyer introduced by the estate agent. The estate agent had no contractual duties towards the seller, and thus did not commit any breach of contract that could give rise to contractual liability.

It follows that in our law there is no implied term in the ordinary estate agent's mandate that the estate agent is contractually obliged to act with care and diligence. Absent such a duty, there can be no suggestion of an implied contractual obligation on an estate agent to disclose to his principal (seller) the true market value of the property for which he is mandated to find a buyer. It is submitted, however, that a strong case can be made out for our common law of estate agency to be developed to the extent that an implied term be read into every estate agency mandate that the estate agent must act in the interests of the principal (seller) and perform the mandate with diligence and care. There are no closed categories of implied terms, and our courts may develop new implied terms as the need arises (*A Becker & Co (Pty) Ltd v Becker* 1981 3 SA 406 (A) 419F-420A; and *Anglo Operations Ltd*

v Sandhurst Estates (Pty) Ltd 2006 1 SA 350 (T) 374B). This should be done in accordance with the requirements of justice, reasonableness, fairness and good faith (*South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) 339E). The Estate Agency Affairs Act 112 of 1976 and the code of conduct for estate agents (R3415 of 24 December 1992) have introduced a regulatory framework and standard of conduct for estate agents aimed at converting the estate agency industry into an estate agency profession (*Noragent (Edms) Bpk v De Wet* (unreported, 23 September 1983 (T)). In terms of the Act and the code of conduct estate agents are expected to render a service to sellers and buyers at a much higher standard than what the case was traditionally. Statutory duties are imposed on estate agents similar to the duties placed on accountants, lawyers, bankers and other professional persons: see for example the Financial Intelligence Centre Act 38 of 2001 and section 35A of the Income Tax Act 58 of 1962. Ever-changing property and other laws have complicated property transactions significantly, and few sellers are capable of handling these transactions without the assistance of either an attorney or an estate agent. In the circumstances estate agency would be out of pace with reality if it fails to recognise that estate agents have a duty to act in their clients' best interests, and with care and diligence.

For present purposes the case for an implied term need not be discussed further. Suffice to state that *Ronstan's* case is no authority for the proposition that an estate agent can *never* face contractual liability for losses suffered by his principal (seller). As the law stands, contractual liability for not disclosing a property's market value can arise if the seller succeeds in establishing that it was an express or tacit term of the estate agent's mandate that the estate agent must, in performing the mandate, protect the interests of the seller and act with care and diligence. The traditional, well-established test for a tacit term has been formulated as follows (in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 605):

"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time of the contract was being negotiated someone had said to the parties, 'What will happen in such a case?', they would both have replied, 'Of course, so and so will happen: we did not trouble to say that; it is too clear'. Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

The test (commonly known as the "innocent bystander test") has been "consistently approved and adopted" by our courts: see *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* (1974 3 SA 506 (A) 532-533), where Corbett AJA pointed out that a court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation, requiring the term had been drawn to their attention.

It is submitted that ordinarily it should be a relatively straightforward exercise to prove the existence of a tacit term worded along the lines stated above. The reason is not difficult to find. In terms of the Estate Agency

Affairs Act 112 of 1976 all estate agents must adhere to the provisions of the code of conduct compiled by the Estate Agency Affairs Board. Failure to do so constitutes conduct deserving of sanction, exposing an estate agent to disciplinary action by the Board (s 30(1)(e) of the Estate Agency Affairs Act). If found guilty of a contravention of the code of conduct the Board may reprimand the estate agent, impose a fine of up to R25 000 or withdraw the estate agent's fidelity fund certificate: s 30(3). In the latter instance the estate agent is effectively expelled from the industry. The code of conduct is quite specific. Clause 2.2 obliges an estate agent to "protect the interests of his client at all times to the best of his ability, with due regard to the interests of all other parties concerned", while clause 2.3 prohibits any estate agent from "wilfully or negligently fail(ing) to perform any work or duties with such degree of care and skill as might reasonably be expected of an estate agent". These provisions are clearly aimed at safeguarding the interests of sellers in their dealings with estate agents and to prevent estate agents from taking advantage of sellers' general ignorance and lack of knowledge relating to property transactions. Accordingly, the innocent bystander, asking a seller and his estate agent whether the estate agent must protect the seller's interest and act with skill and diligence, will be met by an instant reply: "Of course ... we did not trouble to say that; it is too clear". The estate agent's response will be informed by the severity of the sanctions he faces for non-compliance with the code of conduct, while the seller's reply will be based on the assumption and expectation that the estate agent will render services in accordance with what the code of conduct prescribes. It may be contended, however, that the parties' response should be interpreted to mean simply that there is consensus that the estate agent will comply with his duties under the code of conduct and that he would face disciplinary action for not doing so; in other words, the parties had no intention to elevate those duties to *contractual obligations*. In my view this is a forced distinction, which no professional estate agent or seller ever makes in practice. In real life an estate agent's mandate is given and accepted on the understanding, express or tacit, that the estate agent will do his best for the seller and that he will act with care and diligence.

Clause 3.8 of the code of conduct specifically states that no estate agent may "knowingly or negligently make a material misrepresentation concerning the likely market value or rental income of immovable property to a seller or lessor thereof, in order to obtain a mandate in respect of such property". The typical mischief addressed by this clause is where an estate agent tries to impress a seller by exaggerating the market value of a property in order to persuade the seller to give him a sole agency on the property. However, it could equally apply to the situation where the estate agent refrains from disclosing the market value and markets the property at a price below market value in order to close an easy sale and earn a quick commission. For present purposes the clause need not be examined further. It is submitted that a tacit term imposing on an estate agent a contractual duty to protect the seller's interests and to act with care and skill, as a general rule embraces the specific duty to (i) assess the market value of the mandated property with care and skill and (ii) disclose such value to the seller in

circumstances where knowledge thereof is called for. Failure to discharge the duty constitutes breach of contract. The specific duty may be excluded by agreement on the understanding that the estate agent will in other respects act with care and diligence.

4 Conclusion

Against this background the questions posed in par 1 above can be answered as follows:

- (a) Subject to par (b) below, an estate agent mandated to find a buyer for a house has a legal duty in a delictual context to familiarise himself with the market value of the property and to speak up and disclose to the seller if –
- (i) at the listing stage there is a material difference between the seller's asking price and the market value of the house;
 - (ii) at any stage during the marketing process the seller agrees to a marketing price that materially differs from the property's market value; or
 - (iii) any offer to purchase presented by the estate agent to the seller is at a price lower than the property's market value.

Failure by an estate agent to do comply with these duties is wrongful. It exposes the estate agent to delictual liability based on misrepresentation (non-disclosure), provided the remaining elements for an actionable misrepresentation can be established.

- (b) An estate agent is not burdened with any of the duties mentioned in par (a) if –
- (i) at the listing stage the estate agent, acting in good faith, conveys to the seller in express terms that no responsibility is assumed to list, market or sell the property at market value; or
 - (ii) the market value is known to the seller at the relevant time.
- (c) Where an estate agent's mandate contains an express or tacit term that the estate agent will perform the mandate with care and diligence the estate agent is contractually obliged, subject to any exemption agreed upon, to (i) assess the market value of the mandated property with care and skill and (ii) disclose such value to the seller in the circumstances mentioned in par (a) above. Failure to discharge the duty constitutes breach of contract. No such duty arises if the estate agent is by agreement specifically exempted from the responsibility to list, market or sell at market value, while retaining the duty to otherwise act with care and diligence.

It falls outside the scope of this Note to analyse in detail the factors to be taken into account in determining whether an estate agent has acted negligently or in breach of a contractual duty to assess the value of a property with care and diligence. A few words will suffice. To discharge the

duties mentioned above an estate agent has to be familiar with the market value of the property in question. When faced with a claim for damages based on non-disclosure of the relevant facts, the estate agent's defence may well be that he did not consider it necessary to make any disclosure since the asking price, marketing price and/or selling price (as the case may be) matched his assessment of the market value. The defence may also be that the estate agent had in fact conveyed to the seller an assessment of the market value, which was in line with the relevant price. In both instances the question will be whether the estate agent had assessed the market value with the necessary degree of skill and care. As mentioned earlier, the valuation of immovable property is not an exact science and views about value can differ greatly. It must also be borne in mind that an estate agent is not required by law to be a professional valuer and cannot be expected to assess a property's value with the degree of care and skill required of a professional valuer. The benchmark to be applied is that of the ordinary, average estate agent. It is submitted that what is expected of an estate agent is to take reasonable steps and gather as much information as is readily available in order to arrive at an estimate of value. A comprehensive comparative market analysis (CMA), performed in the same manner as a valuer, is not compulsory. A more elementary approach may be followed, although it is difficult to see how an estate agent can arrive at the market value of a property without doing at least a basic or informal CMA. The CMA need not be in writing, but has to take into account similar properties recently sold in the same area and similarly properties currently on the market. Experienced estate agents who are active in the market where the property is situated will often arrive at an estimate with reasonable ease, taking into account the information at their disposal. Obviously, a mere thumb suck or uneducated guess would not suffice: any assessment of market value must be based on at least *some* information or data.

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