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## This Business of "Procuring Cause" in Virginia

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## THIS BUSINESS OF “PROCURING CAUSE” IN VIRGINIA

ROBERT LUTHER III\*

### ABSTRACT

*This Article aims to provide a basic overview of Virginia law resulting from suits for sales commissions, with a special emphasis on “procuring cause” case law. By thinking ahead to the kinds of issues that have resulted in the recovery or failure of sales commissions by agents in past sales commission cases, real estate litigators will be in a better position to advise their clients. To that end, this Article further seeks to serve as a brief, yet stout, reference resource for real estate litigators and members of the Virginia bench confronted with facts directed towards this often nuanced area of Virginia law.*

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\* Mr. Luther’s practice is based in Williamsburg, Virginia, and emphasizes business, civil, real estate, and constitutional litigation. Please note that the opinions expressed in this Article are exclusively those of the author and do not constitute legal advice, nor does the receipt or review of the information contained herein establish an attorney-client relationship. Comments are graciously received at <http://www.RobLuther.com>.

TABLE OF CONTENTS

INTRODUCTION .....	183
I. THE NATURE OF A LISTING AGREEMENT IN MODERN REAL ESTATE PRACTICE .....	185
II. WHEN IS A COMMISSION DUE?.....	186
III. PROCURING CAUSE: A QUESTION OF FACT FOR THE JURY .....	188
IV. THE DEFENSE OF ABANDONMENT: ALSO A QUESTION FOR THE JURY .....	190
V. “BAD FAITH” OF SELLERS: AN AID TO “PROCURING CAUSE” AND ALSO A JURY QUESTION .....	193
OBSERVATIONS AND CONCLUSIONS.....	197

## INTRODUCTION

It has long been the practice in the United States for judges to decide questions of law and juries to decide questions of fact.<sup>1</sup> Put simply, whereas “[i]t is the duty of the court to construe a deed, or contract,”<sup>2</sup> it is the duty of juries to consider testimony and determine factual matters such as whether “the light was green” when the two cars collided.<sup>3</sup> Unfortunately, the reality is that trial court practice is often not particularly tidy; most cases involve mixed questions of law and fact. Legendary evidence Professor James Bradley Thayer has even gone so far as to say that “[a]ll questions of fact ... are mixed questions of law and fact.”<sup>4</sup> Given these semantics, perhaps distinction by analogy is helpful here. It has been suggested in modern legal scholarship that, “the most frequently given example of a mixed question of law and fact is the question of whether a person is ‘negligent.’”<sup>5</sup> Although “negligence” is a word of common definition, in the law it has a specific definition realized upon the application of facts as found by a jury to the legal standard of duty, breach, causation and damages.<sup>6</sup>

Akin to negligence, Virginia law has its own specific definition for the occasion when an agent<sup>7</sup> is entitled to a commission for his or her market-

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<sup>1</sup> George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 14 (1992).

<sup>2</sup> Realty Co. of Va. v. Burcum, 106 S.E. 375, 376 (Va. 1921) (asserting that it is the role of the Court and not the jury to decide questions of law, which include “the legal effect of a deed or contract”).

<sup>3</sup> See generally *id.*

<sup>4</sup> JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 224–25 (Rothman Reprints, Inc. 1969).

<sup>5</sup> Christie, *supra* note 1, at 14.

<sup>6</sup> See 13 PETER NASH SWISHER, ROBERT E. DRAIM & DAVID D. HUDGINS, VIRGINIA PRACTICE SERIES: TORT AND PERSONAL INJURY LAW § 3:1 n.25 (Thomson Reuters/West, 2011 ed.) (citing WILLIAM LLOYD PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON TORTS 164–68 (West 5th ed. 1984) and DAN B. DOBBS, THE LAW OF TORTS 269–73 (West 2000)); see also *McGuire v. Hodges*, 639 S.E.2d 284, 288 (Va. 2007) (“To establish negligence sufficient to sustain a judgment against Mrs. Hodges, McGuire was required ‘to show the existence of a legal duty, a breach of the duty, and proximate causation resulting in damage.’”) (citations omitted).

<sup>7</sup> The cases have not spilt much ink distinguishing between agents, brokers, and realtors in the context of commission litigation. That said, as a general proposition, any of these three classes of individuals who are authorized to and enter an agency relationship to facilitate the sale of real estate would seem to have these cases at his or her disposal, subject to express prohibitions to the contrary, ethics codes (where applicable), and defenses raised by counsel in litigation suggesting reasons why they should not apply. Most frequently, cases involve an individual seeking to recover a commission from a

ing efforts. That phrase is “procuring cause.”<sup>8</sup> Like “negligence,” the “procuring cause” of a real estate transaction has typically been determined at trial by a jury’s application of facts to the legal standard instructed, unless the parties agree otherwise.<sup>9</sup> Yet there is some question as to whether these “procuring cause” cases have produced a unified body of law. The Supreme Court of Virginia has paid special note to this difficulty and suggested that:

It is impossible to reconcile either the expressions of the courts or the various cases involving the commissions of real estate brokers, and it would be a thankless and unprofitable task to review [even] a limited number of the cases. There are, however, certain fundamental rules which are everywhere recognized, even if it may appear that they have not always been observed.<sup>10</sup>

This Article accepts the *Leicht-Benson Realty* court’s outstanding invitation for clarification, and aims to provide a basic overview of those “fundamental rules which are everywhere recognized,”<sup>11</sup> and which comprise the basics of Virginia’s body of “procuring cause” case law. By thinking ahead to the kinds of issues that have resulted in the recovery or failure of sales commissions by agents in past sales commission cases, real estate litigators will be in better positions to advise their clients. To that end, this Article further seeks to serve as a brief, yet stout, reference resource for real estate litigators and members of the Virginia bench confronted with facts directed towards this often nuanced area of Virginia law.

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successful seller. Less frequently, cases involve real estate entities seeking to recover commissions believed to be owed by successful sellers or purchasers for the listing entities’ role in the resulting sale. *See, e.g.*, *Edmonds v. Coldwell Banker*, 377 S.E.2d 443, 445 (Va. 1989); *R.A. Poff & Co. v. Ottaway*, 62 S.E.2d 865, 866 (Va. 1951); *Wilson v. Schmidt & Wilson, Inc.*, 35 S.E.2d 737, 738 (Va. 1945); *Realty Co. of Va. v. Burcum*, 106 S.E. 375, 376 (Va. 1921).

<sup>8</sup> *Edmonds*, 377 S.E.2d at 445.

<sup>9</sup> *See, e.g.*, *Duncan v. Barbour*, 49 S.E.2d 260, 261 (Va. 1948); *Edwards v. Cragg*, 50 S.E.2d 281, 281 (Va. 1948); *Richeson v. Wilson*, 47 S.E.2d 393, 394 (Va. 1948); *Long v. Flory & Garber*, 72 S.E. 723, 723 (Va. 1911) (cases where parties agreed to try commission cases by judge alone).

<sup>10</sup> *Leicht-Benson Realty & Constr. Corp. v. J. D. Stone & Co.*, 121 S.E. 883, 884 (Va. 1924).

<sup>11</sup> *Id.*

I. THE NATURE OF A LISTING AGREEMENT IN MODERN REAL ESTATE PRACTICE

Real estate listing agreements are not entirely unlike standard form contracts; consequently, the requirements for valid enforcement are similar.<sup>12</sup> Though Virginia realtors in 2012 primarily use the Virginia Association of Realtors Exclusive Authorization to Sell (closed listing) form when engaging a hopeful seller, nothing precludes a court from enforcing or declining to enforce unique listing agreements prepared by realtors on case-by-case bases, presuming they comply with standard contract law requirements and are otherwise duly executed.<sup>13</sup>

Assuming the listing agreement is duly executed, and litigation subsequently commences, a court charged with reviewing the listing agreement will start its analysis the same way it would consider any other contract: by first asking whether it is enforceable as it is written within its four corners.<sup>14</sup> In Virginia, listing agreements are most likely to be unenforceable when: (1) they contain no termination language, and (2) a sale is consummated after the ninety-day window from the date on which the realtor’s services were secured.<sup>15</sup> This is the case because the Virginia Code (the Code) requires that such agreements include a date<sup>16</sup> or event<sup>17</sup> upon

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<sup>12</sup> See generally *Price v. Francis*, 35 S.E.2d 823, 825–26 (Va. 1945).

<sup>13</sup> Obviously, when circumstances arise where it is appropriate for a realtor to go beyond the Virginia Association of Realtors Exclusive Authorization to Sell (closed listing) form and prepare a unique listing agreement, the prudent course for both the realtor and hopeful seller would be to have counsel review the form of listing agreement prior to its execution.

<sup>14</sup> See *Price*, 35 S.E.2d at 825.

<sup>15</sup> See *Bryant Real Estate, Inc. v. Toll Brothers, Inc.*, 106 F. App’x. 182, 185 (4th Cir. 2004) (applying the Virginia Code Section 54.1-2137(B) in a situation where broker-plaintiffs failed to discuss or memorialize in the form of agreement any language concerning a termination date whereby their brokerage services to Toll would terminate).

<sup>16</sup> See VA. CODE ANN. § 54.1-2137(B) (2011) (“Brokerage agreements shall be in writing and shall: 1. Have a definite termination date; however, if a brokerage relationship does not specify a definite termination date, the brokerage relationship shall terminate 90 days after the date of the brokerage agreement”).

<sup>17</sup> See *Piedmont Assoc., Inc. v. Little*, 49 Va. Cir. 488, 490 (Va. Cir. Ct. 1999) (rejecting the argument that a specifically fixed “date” was necessary). In *Piedmont*, the court concluded that the statute meant that a definitive “event” upon which termination would occur satisfied the statutory requirement of a definite termination date. *Id.* It said:

which the agreement is set to terminate. It is uncomfortably easy to see how this situation may arise, because an agent may quite reasonably continue to market an unsold property beyond the explicit three-month window of protection provided under the Code.<sup>18</sup> Absent a contract to the contrary, if successful in securing a sale but denied a commission by the seller, the agent will be left only with a remedy in *quantum meruit*.<sup>19</sup>

## II. WHEN IS A COMMISSION DUE?

In Virginia, an agent is due a commission “when he produces a purchaser ready, willing and able to buy on the terms authorized by or accept-

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The Court having examined the structure of §54.1-2137 is convinced that the legislature did not intend or mean this statute to require that every brokerage contract have a date certain (i.e., a month, day, and year) on which it terminates but that a brokerage contract needs to have only a stated date or the occurrence of a specified event from which a fact finder can reasonably determine if contractual obligations have been timely fulfilled.

*Id.* The court further noted that, “[b]y that language, the legislature clearly appears to have contemplated that parties can enter into brokerage contracts which have as their termination point the occurrence of a certain event or events.” *Id.*

<sup>18</sup> However, a listing agreement that defines its term as “month-to-month” should not be held unenforceable for lack of a definite termination date. The meaning of the term “month” is *definite* as a matter of law, and is not cause for a court to render said agreement unenforceable. The Virginia Code specifically defines “month” to be “a calendar month.” VA. CODE ANN. § 1-223 (2008). Moreover, the frequent use of “month-to-month” terminology in landlord-tenant, employment, and other commercial endeavors makes clear that “month” is a *calendar* month, subject to termination in the event the property is sold or upon notice by the other party. *See, e.g.*, Sentara Enters., Inc. v. CCP Assocs., 413 S.E.2d 595, 596 (Va. 1992) (landlord-tenant); Title Ins. Co. of Richmond v. Howell, 164 S.E. 387, 389 (Va. 1932) (employment); SoftPros, Inc. v. Privacy Vaults Online, Inc., 78 Va. Cir. 323, 326 (Va. Cir. Ct. 2009) (software services contract); *see also* VA. CODE ANN. §§ 55-223, 55-248.7 (2007) (month-to-month).

<sup>19</sup> *See* Ford v. Gibson, 59 S.E.2d 867, 869 (Va. 1950); Va. Bus. Exch., Inc. v. Mathews, 38 Va. Cir. 370, 371 (Va. Cir. Ct. 1996) (“With regard to whether plaintiff was the procuring cause of the sale, plaintiff relies on well-settled Virginia law that even in the absence of an express contract, where a broker ‘perform[s] services which [are] the procuring cause of the sale and under such circumstances as to give the owner reason to believe they [are] performed with the expectation of compensation,’ the broker may recover a reasonable commission under the doctrine of implied contract.”) (citing Korzendorfer Realty v. Hawkes, 178 S.E.2d 524, 526 (Va. 1971)); *see also* Wilson v. Schmidt & Wilson, Inc., 35 S.E.2d 737, 742 (Va. 1945) (“Of course, the broker’s right to commissions must be based on a valid contract, express or implied”); Shea Realty Corp. v. Page, 69 S.E. 327, 328 (Va. 1910) (all cases recognizing an implied contract to pay commission if broker is determined to be the “procuring cause” of sale).

able to the seller.”<sup>20</sup> Naturally, the follow-up question asks whether the contract must close as a prerequisite for the agent’s entitlement to a commission. The Supreme Court of Virginia considered this question in *Kuga v. Chang*.<sup>21</sup> In *Kuga*, Chang was a broker acting on behalf of the Kugas.<sup>22</sup> The listing agreement entitled Chang to a six percent commission.<sup>23</sup> Chang procured the signature of Rainwater on a contract for the purchase of the Kugas’ home.<sup>24</sup> Rainwater backed out of closing, and a number of suits against the parties ensued, including a suit by Chang against the Kugas for her commission under the listing agreement as modified by the sales contract.<sup>25</sup> The circuit court ruled for Chang and the Supreme Court of Virginia affirmed.<sup>26</sup> The court held that a broker is entitled to a commission from the owner when the broker produces a purchaser ready, willing, and able to buy the property on the owner’s terms, regardless of whether the sale is ultimately consummated.<sup>27</sup>

So when, as a matter of law, is a prospective purchaser “ready, willing and able to buy the property?”<sup>28</sup> Virginia law requires neither that an agent generate a contract of sale,<sup>29</sup> nor that the sale be otherwise consummated,<sup>30</sup> unless a specific condition precedent in the contract between the

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<sup>20</sup> See VA. MODEL JURY INSTRUCTIONS—CIVIL, Jury Instr. No. 43.000 (Repl. Vol. 2011) [hereinafter JURY INSTRUCTIONS].

<sup>21</sup> *Kuga v. Chang*, 399 S.E.2d 816, 817 (Va. 1991).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 818.

<sup>26</sup> *Id.* at 819.

<sup>27</sup> See *Kuga*, 399 S.E.2d at 819; see also *Kingsland Land Corp. v. Lange*, 160 S.E.2d 872, 874 (Va. 1950) (announcing, for the first time in Virginia, the rule that the “right to a commission will not be defeated by the failure or financial inability of the purchaser to perform.”).

<sup>28</sup> See JURY INSTRUCTIONS, *supra* note 20, No. 43.050 (“A purchaser is ready, willing and able to buy if he wants to buy and if at the time he is produced to the seller he has the ability to obtain any necessary financing at the closing”).

<sup>29</sup> See, e.g., *Richeson v. Wilson*, 47 S.E.2d 393, 396 (Va. 1948) (“[U]nless his agreement with the owner so provides, the broker is not required to procure a written contract signed by the purchaser as a condition precedent to his right to recover commissions.”); *Duncan v. Barbour*, 49 S.E.2d 260, 263 (Va. 1948) (same); *Low Moor Iron Co. of Va. v. Jackson*, 84 S.E. 100, 102–03 (Va. 1915) (affirming jury verdict for broker and holding that, unless stated otherwise, a broker is not required to procure a written contract signed by purchaser as condition precedent for right to recover commission for producing ready, willing, and able buyer).

<sup>30</sup> See, e.g., *Duncan*, 49 S.E.2d at 263 (stating that a broker’s right to recover commission is not dependent upon consummation of sale); *Massie v. Firmstone*, 114 S.E. 652, 653 (Va. 1922) (same).

broker and seller calls for as much.<sup>31</sup> As described *supra*,<sup>32</sup> the law of “procuring cause” with respect to broker commissions in Virginia has never been, and is not now, that formalistic or narrow.<sup>33</sup> However, simply because an agent need not produce a contract of sale to be entitled to a commission, this is not to say that failure to have a valid listing agreement outstanding with the seller upon the property’s sale entitles the agent to a commission.<sup>34</sup>

### III. PROCURING CAUSE: A QUESTION OF FACT FOR THE JURY

Let us back up a moment to the court’s statement in *Kuga* that a broker or agent must produce a purchaser ready, willing, and able to buy the property on the owner’s terms, regardless of whether the sale is ultimately consummated.<sup>35</sup> What does the court mean by “produce?”<sup>36</sup> Essentially, the court means that the broker or agent must be the “procuring cause” of the sale, but with one caveat.<sup>37</sup> The Supreme Court of Virginia has suggested that it is impossible to satisfy the requirements of “procuring cause” without first producing a ready, willing, and able buyer.<sup>38</sup> The production of a “ready, willing, and able” purchaser is the foundation upon which the attempt to prove “procuring cause” will be built. At this point, it is helpful to consult the “procuring cause” jury instruction. In a “procuring cause” controversy, the standard the facts must meet in order to

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<sup>31</sup> See, e.g., *Richeson*, 47 S.E.2d at 397 (“[T]he payment of the commission was stipulated to be conditioned upon the consummation of the particular sale, at the particular price and within a specified time.”); *Long v. Flory & Garber*, 72 S.E. 723, 723–24 (Va. 1911) (“[T]he right of the plaintiffs[’] [brokers] to demand commissions was predicated upon the consummation by them of a sale *at the price named.*”) (emphasis added) (denying plaintiff’s commission when property sold for less than the amount required under the broker-seller arrangement).

<sup>32</sup> See *supra* notes 17–18.

<sup>33</sup> See *Richeson*, 47 S.E.2d at 396; *Massie*, 114 S.E. at 653; *Low Moor Iron Co.*, 84 S.E. at 102–03; *infra* notes 35–39.

<sup>34</sup> See *supra* notes 16–18; *infra* text accompanying notes 125–29.

<sup>35</sup> *Kuga v. Chang*, 399 S.E.2d 816, 818 (Va. 1991).

<sup>36</sup> *Id.* at 819.

<sup>37</sup> *Edmonds v. Coldwell Banker*, 377 S.E.2d 443, 445–46 (Va. 1989).

<sup>38</sup> See *id.* at 445. *Edmonds* reversed the trial court, which found that the brokerage “had *not* produced a purchaser ready, willing, and able to buy on the [sellers’] terms during the listing period,” but that the brokerage “*could* recover its commission because it was the procuring cause of the sale.” *Id.* (emphasis added). Later in the opinion, the court asserted that the brokerage could not be the “procuring cause” where it did not “arrange[] the terms which produced a purchaser ‘ready, willing, and able to buy.’” *Id.* at 446.

establish or refute liability against the seller is articulated in Virginia Model Jury Instruction No. 43.020, which provides as follows:

To earn his commission a broker must have been the predominant, procuring cause of the sale. This means that he must have been responsible for causing a series of events which, without a break in their continuity, resulted in completing a sale. If the services of a broker are the predominant procuring cause of the sale, then he is entitled to his commission even if the seller completes the sale directly with the buyer.<sup>39</sup>

The supporting cases for the model jury instruction include *Shalimar Development, Inc. v. FDIC*,<sup>40</sup> which cited a dispositive break in the continuity of offering properties for sale to the prospective purchaser, and cases such as *Paschall & Gresham v. Gilliss*,<sup>41</sup> and *Arents v. Casselman & Co.*,<sup>42</sup> in which the court recognized both the many variables that arise in brokerage commission cases, and the need for ultimate disposition by the fact-finder.

*Shalimar* is the most recent “procuring cause” case that the Supreme Court of Virginia has adjudicated.<sup>43</sup> Unlike the earlier case of *Kuga*, the

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<sup>39</sup> JURY INSTRUCTIONS, *supra* note 20, No. 43.020; *see also* Realty Co. of Va., Inc. v. Burcum, 106 S.E. 375, 378 (Va. 1921) (“Unless Denton’s acts were the ‘procuring cause’ of the ultimate sale then Burcum had the right to sell to Mr. Dick ‘without any compensation to the Realty Company.’”). In *Burcum*, a husband and wife solicited the Realty Company in 1917 to show them farms available for sale. *Id.* at 375. In traveling past one farm, the Company manager indicated that it was listed for sale with him, but the couple indicated that it was late and they declined to visit it, preferring to continue on to the other farm they and the Company Manager had initially agreed to visit. *Id.* The couple visited that farm but made no commitment to purchase it. *Id.* The next day they expressed to their host over breakfast that they were in the market for a farm. *Id.* at 377. The host indicated that the Burcum farm (the farm they had declined to view the day before) was on the market and the son-in-law of the owner of the farm, who was also at the breakfast table, offered to take them to view it. *Id.* In February of 1918 the couple purchased the Burcum farm. *Burcum*, 106 S.E. at 378. The Realty Company subsequently brought suit against the seller to recover a commission on the sale. *Id.* at 376. The jury declined to find the Company manager’s comments to the couple to constitute the “procuring cause” of sale and the Supreme Court of Virginia affirmed. *Id.* at 378; *see also* Wilson v. Schmidt & Wilson, Inc., 35 S.E.2d 737, 740 (Va. 1945) (“[T]he expression ‘procuring cause’ refers to the cause originating a series of events, which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which is the procurement of a purchaser ready, willing and able to buy the real estate on the owner’s terms.”).

<sup>40</sup> *Shalimar Dev., Inc. v. FDIC*, 515 S.E.2d 120, 122 (Va. 1999).

<sup>41</sup> *Paschall & Gresham v. Gilliss*, 75 S.E. 220, 221–22 (Va. 1912).

<sup>42</sup> *Arents v. Casselman & Co.*, 66 S.E. 820, 821 (Va. 1910).

<sup>43</sup> *Shalimar Dev., Inc.*, 515 S.E.2d at 124.

principal issue in *Shalimar* was not the extent of the broker's performance, but whether there was adequate continuity between the agent's actions and the ultimate sale of the property.<sup>44</sup> In *Shalimar*, the seller terminated the brokerage agreement, and all of the seller's assets transferred to a new owner.<sup>45</sup> The new owner then sold at a substantially reduced price.<sup>46</sup> Under these circumstances, the court decided that there had been a clean and distant break; consequently, the broker was not due a commission.<sup>47</sup>

As the cases of *Shalimar*, *Paschall & Gresham*, *Arents*, and also *Ford v. Gibson* and *Clarke v. Cosby*, discussed *infra*, indicate: "Whether a broker is the procuring cause of a sale of property listed with him is usually a question of fact" for the jury.<sup>48</sup>

#### IV. THE DEFENSE OF ABANDONMENT: ALSO A QUESTION FOR THE JURY

Defendants frequently raise the defense of abandonment when sued by agents demanding commissions.<sup>49</sup> In such cases, defendants argue that the agent abandoned his or her obligation to market the properties, and thus is not entitled to a commission.<sup>50</sup> As acknowledged *infra*, the cases of *Ford v. Gibson*<sup>51</sup> and *Clarke v. Cosby*<sup>52</sup> evidence that a seller who abandons his efforts to sell property is not entitled to a commission. But that is not the only point of law to be taken from this pair of cases. They each also make clear that whether an agent abandons his attempts to secure a sale is a

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 122.

<sup>46</sup> *Id.*

<sup>47</sup> *Cf.* *Clarke v. Cosby*, 153 S.E. 727, 728–29 (Va. 1930) (stating misunderstandings between the parties caused an end to the relationship before plaintiff had a contract with the buyer).

<sup>48</sup> *Ford v. Gibson*, 59 S.E.2d 867, 870 (Va. 1950) ("Whether a broker is the procuring cause of a sale of property listed with him is usually a question of fact.") (citing *Rosenfield v. Wall*, 109 A. 409, 410 (Conn. 1920)); *Wilson v. Schmidt & Wilson, Inc.*, 35 S.E.2d 737, 739 (Va. 1945) ("Whether a broker is the procuring cause of a sale of property listed with him is usually a question of fact."); *Clarke*, 153 S.E. at 730 ("When a real estate broker is the procuring cause of the sale is a question of considerable difficulty; in the main, it is a question of fact."); *Shea Realty Corp. v. Page*, 69 S.E. 327, 328 (Va. 1910) ("[W]hether or not the agent or broker was the procuring cause of the sale is a question for the jury.").

<sup>49</sup> *See Blankenship v. Childress*, 31 S.E.2d 302, 303 (Va. 1944).

<sup>50</sup> *Id.* at 305.

<sup>51</sup> *Ford*, 59 S.E.2d at 870.

<sup>52</sup> *Clarke*, 153 S.E. at 731.

question of fact to be determined by the fact-finder, and not for determination by the court on demurrer or summary judgment.<sup>53</sup>

In *Ford*, a broker brought a potential buyer to view the seller’s farm, but no purchase was consummated.<sup>54</sup> After the twelve-month listing agreement had expired by its terms, the same potential buyer inquired eight months later, without revealing that he had previously seen the farm with the agent, and asked the seller “whether the property was still in the real estate agents’ hands and [the seller] said it was not.”<sup>55</sup> The seller then sold to the buyer.<sup>56</sup> When the broker sued to recover a commission, the Supreme Court of Virginia affirmed the jury’s conclusion that no listing agreement was in force requiring a commission to be paid, affirming that, “on the evidence the jury had a right to find that the plaintiffs were not the procuring cause of the sale,” and that the agent was not entitled to a commission.<sup>57</sup>

Like *Ford*, *Clarke* involved a broker who unsuccessfully brought suit against a party for a real estate commission.<sup>58</sup> In *Clarke*, two real estate brokers, Cosby and Stratton, brought suit against Clarke, a real estate auctioneer, for commissions allegedly owed.<sup>59</sup> The parties had an arrangement whereby Clarke would pay Cosby and Stratton two percent commission on all business solicited and secured.<sup>60</sup> In an attempt to secure commissions, the brokers-plaintiffs approached Davie, the owner of a tract of land, and attempted to persuade him to attend one of Clarke’s sales so that he could become familiar with him.<sup>61</sup> At the time, Davie was not interested.<sup>62</sup> “About two months after this visit,” however, Davie approached an agent of Clarke with a request to examine his property, which he did.<sup>63</sup> Davie testified that he had seen Clarke’s advertisements before the visit by Cosby and Stratton and had seen the advertisements since.<sup>64</sup>

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<sup>53</sup> See *Ford*, 59 S.E.2d at 870 (“Whether a broker is the procuring cause of a sale of property listed with him is usually a question of fact.”); *Clarke*, 153 S.E. at 730 (“When a real estate broker is the procuring cause of the sale is a question of considerable difficulty; in the main, it is a question of fact.”).

<sup>54</sup> See *Ford*, 59 S.E.2d at 868.

<sup>55</sup> *Id.* at 869.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 870.

<sup>58</sup> See *Clarke*, 153 S.E. at 728.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Clarke*, 153 S.E. at 728.

Shortly thereafter, Cosby and Stratton had a number of disputes with Clarke regarding commissions for properties they believed they had secured for Clarke.<sup>65</sup> “As the result of these misunderstandings, the relations of the plaintiffs and the defendant were severed before the plaintiffs had secured any contract with Davie.”<sup>66</sup>

Not surprisingly, the court concluded that, “the plaintiffs had severed their connection with Clarke before the Davie contract was entered into and had previously discontinued all their efforts to secure such a contract with Davie. Under such circumstances, without more, there [could] be no recovery of commission.”<sup>67</sup> The court thus reversed the jury’s verdict that a commission was owed to the plaintiffs.<sup>68</sup> Here, because “the relations between the plaintiffs and the defendants had been terminated *before* the [sales] contract was made ... and had ceased their efforts to procure it before it was made,”<sup>69</sup> the court decided that “there [could] be no recovery of commission.”<sup>70</sup> Although the court concluded that it “was not a case which should have been submitted to a jury in order to determine whether or not the plaintiffs were entitled to commissions,”<sup>71</sup> had the parties’ relationship not terminated, the issue of “procuring cause” would have gone to the jury.

In *Clarke*, as in *Ford*, a jury was permitted to make the determination of whether the facts gave rise to circumstances causing a commission to be due.<sup>72</sup> Unlike *Ford*, however, though the jury in *Clarke* concluded the plaintiffs were entitled to a commission, the Supreme Court of Virginia disagreed, finding that the case should not have gone to a jury because the broker’s relationship with the firm had terminated.<sup>73</sup> Notwithstanding the disposition, the *Clarke* case may still be helpful to agents seeking to recover commissions. Of note is its statement that, “a broker may be found to have been the procuring cause of the sale where the only act done by him was to show the property to the purchaser, or even to call attention to it, the sale being completed by the owner.”<sup>74</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 729.

<sup>68</sup> *Id.* at 731.

<sup>69</sup> *Id.* (emphasis added).

<sup>70</sup> *Clarke*, 153 S.E. at 729.

<sup>71</sup> *Id.* at 731.

<sup>72</sup> *Id.* at 728.

<sup>73</sup> *Id.* at 731; *Ford v. Gibson*, 59 S.E.2d 867, 870 (Va. 1950).

<sup>74</sup> *Clarke*, 153 S.E. at 730.

## V. “BAD FAITH” OF SELLERS: AN AID TO “PROCURING CAUSE” AND ALSO A JURY QUESTION

Just as “a broker must do more than be the procuring cause of sale with a ready, willing and able buyer”<sup>75</sup> by acting in good faith with respect to his dealings, a seller is likewise obligated to act in good faith in his dealings with brokers.<sup>76</sup> The question of whether acts were conducted in good faith, like the question of “procuring cause” and the question of abandonment, is an issue of fact for the jury to decide.<sup>77</sup> As *Clarke*, discussed *supra*, demonstrates, an agent can recover a commission “in cases in which there has been a severance of relations by fault of the principal in bad faith and for the very purpose of avoiding the payment of commissions to a broker who has faithfully served him.”<sup>78</sup> Yet *Clarke*, decided in 1930, was not the first case in Virginia to say as much.<sup>79</sup> Earlier, in the 1912 case of *Paschall & Gresham v. Gilliss*, the agent introduced the seller to a purchaser, but the seller undertook to complete the sale himself without paying a commission.<sup>80</sup> In allowing the agent a commission, the Supreme Court of Virginia expressed in no uncertain terms the injustice that results when a seller, without paying a commission, negotiates a sale with a buyer procured by the agent.<sup>81</sup>

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<sup>75</sup> JURY INSTRUCTIONS, *supra* note 20, Civil Scope Note.

<sup>76</sup> *Id.* at No. 43.060.

<sup>77</sup> See *Paschall & Gresham v. Gilliss*, 75 S.E. 220, 224 (Va. 1912) (“The question as to bad faith on the part of the plaintiff, urged by the defendants, was one of fact, fairly to be submitted to the jury.”).

<sup>78</sup> *Clarke*, 153 S.E. at 729.

<sup>79</sup> See, e.g., *Paschall*, 75 S.E. at 220.

<sup>80</sup> *Id.* at 224.

<sup>81</sup> *Id.* at 226 (“If vendors were permitted ... to employ brokers to look up purchasers, and call the attention of buyers to property which they desired to sell, limiting them as to terms of sale, and then, when such purchasers were negotiating, take the matter in their own hands, avail themselves of the labor, services, and expenses of the broker in bringing the property into market, and accomplish a sale by an abatement in the price, and yet refuse to pay the broker anything, the business of a broker would not be worth pursuing. Gross injustice would be done. Every unfair and illiberal vendor would limit his property at a price slightly above the market, and make use of the broker to bring it into notice, and then make his own terms with the buyers, who were in reality procured by the efforts of the agent.”) (quoting *Keys v. Johnson*, 68 Pa. 42, 44 (1871)); see also *Foltz v. Conrad Realty Co.*, 109 S.E. 463, 467 (1921) (“[I]f a broker performs his part of a contract empowering him to sell the lands of a principal, and does all that he is required to do, and the sale is not consummated by reason of the default of the principal, the broker is entitled to his commissions, as the principal cannot wrongfully interfere with the broker, and escape liability.”); *Robertson’s Ex’r v. Atl. Coast Realty Co.*, 106 S.E. 521, 529 (1921) (“A principal cannot, after having made a valid contract with an agent for the

Likewise, in *Arents v. Casselman & Co.*,<sup>82</sup> the court found that where a brokerage agreement was revoked due to the withdrawal of a firm member, and the remaining firm members nevertheless maintained sales efforts after repeated urging from the seller to market the property, the question was one for the jury; to wit: had the original contract been renewed or continued, and, if so, was the seller liable in *quantum meruit* for the efforts provided.<sup>83</sup>

The seller, of course, is by no means the only one with a duty to act in good faith. The cases of *Owen v. Shelton*,<sup>84</sup> *Duncan v. Barbour*,<sup>85</sup> and *Mitchell v. Hughes*<sup>86</sup> offer three instances in which brokers were denied commissions for having engaged in actions that amounted to “bad faith.” *Owen v. Shelton* deemed the failure of the agent to inform the seller of a material letter threatening a lawsuit to constitute a breach of fiduciary duty.<sup>87</sup> In *Duncan v. Barbour*, the broker represented to the seller that changes were made to a contract rejected by the seller, when in fact most of the revised contract remained unchanged.<sup>88</sup> *Mitchell v. Hughes* dealt with an agent who sought a commission after sending the purchaser to negotiate with the seller without disclosing his representation of the buyer.<sup>89</sup> The details of these cases, as follow, are revealing.

In *Owen v. Shelton*,<sup>90</sup> a broker employed by the seller received a letter and check from the buyer indicating that payment for interest, here as the result of delay by the buyers, was being paid “under protest to close the transaction,” and that the buyers “reserve[d] right to demand refund or to litigate the matter.”<sup>91</sup> The broker failed to disclose this information to the seller he represented, and after the seller was sued, she in turn sued the broker.<sup>92</sup> The court held that the broker’s failure to inform the seller of this letter constituted breach of fiduciary duty.<sup>93</sup>

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exclusive right to sell, render performance on the part of the agent impossible by making the sale himself, and then successfully defend an action for breach of the contract by claiming that the agent might not have made the sale.”)

<sup>82</sup> *Arents v. Casselman & Co.*, 66 S.E. 820, 821 (Va. 1910).

<sup>83</sup> *Id.*

<sup>84</sup> *Owen v. Shelton*, 277 S.E.2d 189, 192 (Va. 1981).

<sup>85</sup> *Duncan v. Barbour*, 49 S.E.2d 260, 265 (Va. 1948).

<sup>86</sup> *Mitchell v. Hughes*, 130 S.E. 225, 228–29 (Va. 1925).

<sup>87</sup> *Owen*, 277 S.E.2d at 192.

<sup>88</sup> *Duncan*, 49 S.E.2d at 265.

<sup>89</sup> *Mitchell*, 130 S.E. at 228–29.

<sup>90</sup> *Owen*, 277 S.E.2d at 192.

<sup>91</sup> *Id.* at 191.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 192.

In *Duncan v. Barbour*,<sup>94</sup> the broker obtained for his seller a contract that the seller rejected for failing to meet specific demands.<sup>95</sup> In response, the broker prepared a new contract that changed *one* item to comport with the seller’s specific demands, but remained otherwise unchanged.<sup>96</sup> The seller “read the contract hastily,” and was “under the impression that the broker was getting information to prepare a contract in accordance with the terms and conditions he had prescribed and had specifically and repeatedly told the broker he desired.”<sup>97</sup> The owner testified that he thought that the second contract contained his specific demands and would be signed by the buyers.<sup>98</sup> Shortly thereafter, following a conversation with his wife, the seller concluded he did not want to sell the property, phoned the broker “and revoked the authority of the broker to proceed with the negotiation of the sale, and told him not to make any other efforts ....”<sup>99</sup> Over the next few days the broker unsuccessfully tried to persuade the owner to change his mind, and at one point “took from his pocket a check and the second contract which had been signed by [the potential purchasers.]”<sup>100</sup> The seller said that ship had sailed, though negotiations continued between the seller and broker for about a week.<sup>101</sup> When it became apparent, however, that the parties would not reach an agreement, the broker demanded a commission, which the seller refused to pay, and suit followed.<sup>102</sup>

The Supreme Court of Virginia affirmed the trial court’s denial of the broker’s claim to a commission for two reasons. First, the court concluded that, under the employment contract between the seller and broker, the broker was *required* to procure a written contract in order to obtain a commission.<sup>103</sup> While this point was disputed at trial, the trial court concluded that, on *the facts*, the language of the parties’ agreement required the broker to produce a written contract.<sup>104</sup> Notably, the court recognized that under some “contract[s] of employment, the broker is not required to procure a written contract signed by the purchaser as a condition precedent to his right to recover commissions; nor does his right to compensation

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<sup>94</sup> *Duncan v. Barbour*, 49 S.E.2d 260, 264 (Va. 1948).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 265.

<sup>97</sup> *Id.* at 262.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Duncan*, 49 S.E.2d at 263.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

depend upon the consummation of sale.”<sup>105</sup> Whether the same circumstances would ring true in the case at bar, said the court, was a question for the jury to decide.<sup>106</sup> However, though the plaintiff had the opportunity to present his case before a jury, he elected in this instance to have the case adjudicated by the court.<sup>107</sup> Secondly, the court denied the broker a commission because he breached his duty of good faith by failing to “disclose to his principal the vital differences in the terms and conditions of sale contemplated by the parties.”<sup>108</sup> The court concluded that:

This duty was not discharged by simply handing to the owner an unsigned contract and directing his attention to one specific change. It was his duty to inform his principal of all facts which might influence his principal in accepting or rejecting the offer. An agent is not entitled to recover until he has fully performed this duty to his principal.<sup>109</sup>

Somewhat similarly to *Duncan, Mitchell v. Hughes*<sup>110</sup> concerned an appeal from a jury verdict awarding a broker a commission that the court had set aside.<sup>111</sup> Mitchell was a broker retained by Hughes to sell a parcel of land.<sup>112</sup> Although Mitchell was unable to find a buyer at Hughes’s desired price, he located a potential purchaser and instructed the purchaser to contact Hughes without mentioning his involvement.<sup>113</sup> After Hughes sold the property to the purchaser for less than he had sought to obtain from a sale with the broker’s involvement, Mitchell re-initiated contact with Hughes, informing him for the first time that he had directed the purchase to Hughes and was thus seeking a commission.<sup>114</sup> Not surprisingly, Hughes objected, indicating that he would not have sold the land for the lower price he received had he known an agent and a commission were involved.<sup>115</sup> Upon hearing the case, the Supreme Court of Virginia concluded that the jury had disregarded one of the jury instructions, and there-

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<sup>105</sup> *Id.*

<sup>106</sup> *Duncan*, 49 S.E.2d at 261.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 265.

<sup>109</sup> *Id.*

<sup>110</sup> *Mitchell v. Hughes*, 130 S.E. 225, 227 (Va. 1925).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 226.

<sup>113</sup> *Id.* at 226–27.

<sup>114</sup> *Id.* at 227.

<sup>115</sup> *Id.* In a telegraph message, Hughes wrote: “Do not understand Mitchell’s position in this deal, as option and contract was made direct with you [buyer] and price based on the understanding that no commission was to be paid.” *Id.*

fore affirmed the trial judge’s action.<sup>116</sup> Thus, in *Mitchell*, the broker acted in bad faith by deceiving the seller into thinking that no broker was involved, and then springing from the shadows after closing to inform the seller that he had sent the purchaser and was thereby due a commission.<sup>117</sup>

More recently—and on the extreme end of cases not suitable for presentation to a jury—the City of Roanoke Circuit Court, in *Gorman, Inc. v. Trans-World Enterprises*,<sup>118</sup> granted summary judgment against a broker who first “admitted that [he] never told defendant” of efforts to sell the property after the listing agreement expired,<sup>119</sup> and second, “testified to a belief that, if a real estate broker ever had supplied information necessary to consummate a sale of real estate, then the broker would receive a commission regardless of when the sale took place.”<sup>120</sup> When asked “why, if that be the case, one would include a provision granting a broker a commission for sales consummated within a specific period after the contract’s termination date ... [his answer was] ‘I don’t know.’”<sup>121</sup>

Keeping in mind that in all colorable cases “[t]he question as to bad faith on the part of the plaintiff [is] one of fact, fairly to be submitted to the jury,”<sup>122</sup> it is worth noting that in the three afore-discussed cases of *Owen v. Shelton*,<sup>123</sup> *Duncan v. Barbour*,<sup>124</sup> and *Mitchell v. Hughes*,<sup>125</sup> the question of bad faith was, indeed, reserved for decision by the fact-finder.

#### OBSERVATIONS AND CONCLUSIONS

This short work has touched on some of the most frequently cited “procuring cause” cases to have been adjudicated by the Supreme Court of Virginia. Yet it must be remembered that each case concerns a unique set of facts unlikely to ever be repeated. Consequently, the law in this area is highly fact-sensitive. It is possible, however, to draw some general observations and conclusions. Perhaps the clearest instruction from the cases is that an agent is least likely to recover when the agent fails to have a valid listing agreement outstanding with the seller at the time the property is sold, or when there is inadequate continuity between the agent’s actions

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<sup>116</sup> *Mitchell*, 130 S.E. 227, 229.

<sup>117</sup> *Id.* at 228–29.

<sup>118</sup> *Gorman, Inc. v. Trans-World Enters.*, 28 Va. Cir. 517, 517 (Va. Cir. Ct. 1992).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 519.

<sup>121</sup> *Id.*

<sup>122</sup> *Paschall & Gresham v. Gilliss*, 75 S.E. 220, 224 (Va. 1912).

<sup>123</sup> *Owen v. Shelton*, 277 S.E.2d 189, 192 (Va. 1981).

<sup>124</sup> *Duncan v. Barbour*, 49 S.E.2d 260, 265 (Va. 1948).

<sup>125</sup> *Mitchell v. Hughes*, 130 S.E. 225, 227 (Va. 1925).

and the ultimate sale of the property; indeed, these two situations are often six to one, half-a-dozen to another.<sup>126</sup> Though it is true that an agent's failure to proffer a valid listing agreement to the court may not always preclude recovery on a *quantum meruit* basis,<sup>127</sup> this would nevertheless surely result in an uphill battle.<sup>128</sup> Ultimately, therefore, though by law an agent need only procure a "ready, willing and able buyer," it can be significantly more difficult to prove this assertion than it is to make it.<sup>129</sup>

As is always the case in commercial transactions, the preferred course for parties seeking to collect on or defend against a suit for a commission is to secure legal counsel immediately.<sup>130</sup> If litigation should ensue, parties will be in a better position to have their interests protected if notes of all conversations and interactions with the relevant parties are documented by hand with the dates of the events in question denoted.<sup>131</sup> Further, all rele-

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<sup>126</sup> See, e.g., *Shalimar Dev., Inc. v. FDIC*, 515 S.E.2d 120, 124 (Va. 1999); *Ford v. Gibson*, 59 S.E.2d 867, 869 (Va. 1950); *Clarke v. Cosby*, 153 S.E. 727, 729 (Va. 1930); *Gorman, Inc. v. Trans-World Enters.*, 28 Va. Cir. 517, 517 (Va. Cir. Ct. 1992) (all cases where listing agreements had expired, there were questions as to adequate continuity, and where the court denied commissions).

<sup>127</sup> See *Arents v. Casselman & Co.*, 66 S.E. 820, 821 (Va. 1910) (permitting recovery on a *quantum meruit* basis); *supra* note 19. Moreover, where the seller exercised bad faith and circumvented his realtor to sell property to a person introduced by a realtor, the Virginia Supreme Court similarly recognized that recovery may occur alternately upon an express contract or on an implied contract, *quantum meruit* basis. See *Clarke*, 153 S.E. at 729 ("Of course we do not mean to say that there can be no recovery in cases in which there has been a severance of relations by fault of the principal in bad faith and for the very purpose of avoiding the payment of commissions to a broker who has faithfully served him."); *Paschall*, 75 S.E. at 224; see also *Hawthorne v. Hannowell*, 115 S.E.2d 889, 893-94 (Va. 1960); *Bear v. Parrish*, 139 S.E. 488, 489-90 (Va. 1927); *Palmer v. Showalter*, 101 S.E. 136, 139-40 (Va. 1919) (offering instances in which sellers acted in "bad faith," resulting in awards of commissions to brokers).

<sup>128</sup> In Virginia, the statute of limitations on a written agreement or written contract is five years. VA. CODE ANN. § 8.01-246(2) (West 2011). This means that any potential suit for alleged breach must be filed within five years from the date of the action alleged to constitute the breach of written agreement or breach of written contract.

<sup>129</sup> See, e.g., *Kuga v. Chang*, 399 S.E.2d 816, 819 (Va. 1991) (stating the "ready, willing, and able" standard); *Duncan*, 49 S.E.2d at 263 (same); JURY INSTRUCTIONS, *supra* note 20, No. 43.050 ("A purchaser is ready, willing and able to buy if he wants to buy and if at the time he is produced to the seller he has the ability to obtain any necessary financing at the closing").

<sup>130</sup> See, e.g., *Do You Really Need a Lawyer?*, LAWYERS.COM, <http://research.lawyers.com/Do-You-Really-Need-a-Lawyer.html> (last visited Jan. 20, 2012).

<sup>131</sup> See, e.g., David J. Freedman, *Okay, You Think You Might Be Sued. Now What? Litigation Holds and the World of Electronic Discovery*, BARLEY SNYDER BUS. & LITIG. UPDATE, (June 30, 2008), at 2, [http://www.barley.com/publications/article.cfm?Article\\_ID=262](http://www.barley.com/publications/article.cfm?Article_ID=262).

vant e-mails should be printed, and all documents, letters, and correspondence exchanged in connection with the transaction should be organized, kept clean, and preserved in a safe environment.<sup>132</sup> If these practices are followed, parties will be in a position of strength to marshal the facts and frame their argument in the light most favorable to them in the event that litigation ultimately ensues.

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<sup>132</sup> *See, e.g., id.*