

The Supreme Court of South Australia's decision in the recent case of Murphy v Mitanovski may be relevant to brokers in any case where instructions are taken from a vendor to sell a hotel in circumstances where settlement pursuant to a previous sale contract did not proceed due to a failure by the previous purchaser. The principles apply whether the previous sale contract was dealt with by the current broker or by another agent. Unfortunately, the case is particularly relevant in the current economic climate.

Basic facts of the case

- The vendor contracted to sell her property to the purchaser for \$782,000.
- The purchaser, after considerable delay, failed to settle (in breach of the contract). The vendor terminated the contract and retained the \$10,000 deposit.
- Later, the purchaser renewed its offer to buy the property for the original purchase price, provided the purchaser received a credit for the amount of the deposit.
- The vendor did not accept this renewed offer, and one month later sold the property at auction to a new purchaser for \$750,000.
- The vendor sought to recover from the original purchaser the difference between the original sale price, and the sale price achieved at auction (\$782,000 – \$750,000 = \$32,000), and the additional advertising costs incurred in connection with the auction.

Relevant legal issue

Did the vendor properly mitigate her loss by not making enquiries of the original purchaser before going to auction to re-sell the property?

Relevant decision

The court found the vendor failed to properly mitigate her loss, because she decided to sell at auction without enquiring whether the original purchaser was still willing to pay the original purchase price of \$782,000 for the property.

In the circumstances, it would have been reasonable for the vendor to have instructed the agent to make this enquiry (and to require the original purchaser to provide evidence of its ability to complete the contract).

The vendor did not cause such an enquiry to be made of the original purchaser, so the vendor could not recover the \$32,000 difference between the contract price and the auction price, nor the additional advertising costs in connection with the auction.

Practise note

Extreme care needs to be taken by brokers to ensure that the loss of a vendor is mitigated when marketing a business or freehold in circumstances where a previous sale contract has failed, and the vendor's right to pursue the original purchaser for the difference in the sale price needs to be preserved.

Obviously, the above is a general summary of the case, and the specific circumstances of transactions need to be carefully considered.

We would be happy to assist if you have any specific queries.

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