

IF AN OPEN MANDATE HAS A SET TERMINATION DATE, DOES THIS MAKE IT A FIXED TERM CONTRACT UNDER THE CPA?

We recently came across an open mandate which commenced on 1 September 2022 and ended on 1 December 2022. The mandate then also referred to the Consumer Protection Act and stated that if the seller wanted to terminate it, she had to give 20 business days' written notice to do so. This has raised an interesting question – can (or should) an open mandate be seen as a fixed term contract under the CPA simply because it is only valid for a certain period of time? What if the seller then does give another agency a sole mandate over and above the open mandate? What then?

Here is our view: If 20 business days' notice is required to terminate the open mandate, and in the absence of a clause which allows the seller to terminate the open mandate any other way, it could also mean that if the seller accepts any other offer in that time (as she is supposed to be able to do given that it is an open mandate), that he/she would still need to give the open mandate holder 20 business days' notice to terminate! This obviously poses a vexing problem to the seller. Although it could be implied that if you have an open mandate, the intention is that upon the sale of the property via another agent, the open mandate automatically expires, regardless of the need to give 20 days' notice, what if the open mandate agency challenges it? It is our view that only one fixed term contract for the sale of property should be destined to exist exclusively between a consumer and a property practitioner unless of course it is a joint mandate. An open mandate should entitle a seller to always and immediately terminate the mandate, especially if he has sold it through another agent. This has always been our understanding of an open mandate. Sadly, the term "fixed term contract" is not defined in the CPA but when considering the fact that a sole mandate is after all, considered to be a fixed term contract, for an open mandate to then require 20 business days' written notice without any qualifications, could be interpreted to mean some degree of exclusivity for those 20 days. The open mandate now amounts to a "quasi" sole mandate. It is thus our view that open mandates should always be terminable without reference to the CPA at all. Or, if you are going to make reference to a 20 working day notice period in an open mandate, you should then at least qualify this and then make this subject thereto that if the seller does sell through another agent, that the open mandate then lapses right away. At least then there is certainty.