SUPREME COURT OF QUEENSLAND

CITATION:	*Yong Internationals Pty Ltd v Gibbs & Ors* [2011] QCA 161
PARTIES:	**YONG INTERNATIONALS PTY LTD** ACN 064 818 980 (appellant) **v** **PATRICK DAVID BRITTEN GIBBS** (first respondent) **JONATHAN WYLIE TALBOT GIBBS** (second respondent) **MARCIA McDONALD GIBBS** (third respondent) **PRUDENCE TALBOT GIBBS** (fourth respondent) **GAVIN HAMILTON PATTERSON** (fifth respondent)
FILE NO/S:	Appeal No 13276 of 2010 DC No 2252 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2011
JUDGES:	Muir JA, Margaret Wilson AJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – AUCTIONEERS AND AGENTS – CONSTRUCTION OF STATUTORY PROVISIONS – QUEENSLAND – where the respondents appointed the appellant as the respondents' agent for the sale of property – where the appointment was in an approved Form 22a under the *Property Agents and Motor Dealers Act* 2000 (Qld) – where the appellant failed to complete clause 4.1 of the Form 22a that provided for how the service was to be performed – whether there had been "substantial compliance" with the approved Form – whether the appointment was invalid – whether the primary judge erred in finding that the appointment was invalid

PROFESSIONS AND TRADES – AUCTIONEERS AND AGENTS – REMUNERATION – where clause 2.1 of the standard terms and conditions of appointment provided for a commission in the event that the Contract of Sale was completed, the Client terminated by default, the deposit was liable to be forfeited or the Contract was terminated by mutual agreement – where the appellant submitted that the deposit was liable to be forfeited and that the Contract was terminated by mutual agreement – where the parties signed a Deed of Compromise – whether the appellant was entitled to commission under the terms and conditions of the appointment – whether the primary judge erred in finding that no commission was recoverable

Acts Interpretation Act 1954 (Qld), s 49
Property Agents and Motor Dealers Act 2000 (Qld), s 128, s 133, s 134, s 134A, s 135, s 136, s 136A, s 140

Colbron v St Bees Island Pty Ltd (1995) 56 FCR 303; [1995] FCA 1107, cited
Davies v Sweet [1962] 1 All ER 92; [1962] 2 QB 300, cited
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12, cited
Freedom v AHR Constructions Pty Ltd [1987] 1 Qd R 59, cited
Howe v Smith (1884) 27 Ch D 89, cited
Jenkins v Kedcorp Pty Ltd [2002] 1 Qd R 49; [1999] QCA 452, cited
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41; [2008] QCA 257, considered
Sultana Investments Pty Ltd v Cellcom Pty Ltd [2009] 1 Qd R 589; [2008] QCA 357, cited

COUNSEL: N M Cooke for the appellant
R G Bain for the respondents

SOLICITORS: Sparke Helmore Lawyers for the appellant
Dale & Fallu Solicitors for the respondents

[1] **MUIR JA**: **Introduction**
The appellant appeals against an order of a judge of the District Court made on 11 November 2010 dismissing the appellant's claim against the respondents for commission of $226,139 in respect of the sale of a parcel of real property at Redbank Plains owned by the respondents.

[2] The grounds of appeal are commendably brief and it will be useful to defer discussion of them until after an explanation of the critical facts.

The evidence

[3] By a document dated 16 June 2006 ("the appointment") executed by the first respondent on behalf of all respondents, the respondents appointed the appellant as the respondents' agent for the sale of the property. The appointment was in

Form 22a, the form approved under the *Property Agents and Motor Dealers Act* 2000 (Qld) ("the Act").

[4] Prior to the appointment, Mr McBride, a director or employee of the appellant which carried on business as a real estate agent, contacted the first respondent with a view to having the property listed with the appellant. His unchallenged evidence of what then ensued is as follows. The first respondent told him that the respondents had buyers looking at the property but that he would consult others about the proposed listing.

[5] On 15 June 2006, Mr McBride told the first respondent about discussions he had held with persons he said were interested buyers. The first respondent told Mr McBride that as long as Mr McBride had "potential buyers which were viable buyers for the property" he would "sign an open listing." Mr McBride then "contacted some party and they told [him] that they were interested". It seems that some negotiations took place between Mr McBride and the last mentioned person or persons. Further discussions took place on 15 June 2006 between the first respondent and Mr McBride in which Mr McBride said "there was a buyer wanting to proceed further", but that he "could not produce that buyer to him until the [Form] 22a had been completed." The first respondent agreed to list the property and said that Mr McBride could then "produce to him buyers by appointment."

[6] On 16 June, the first respondent provided Mr McBride with some conditions of contract for inclusion in any contract of sale of the land which was to be entered into. From that, Mr McBride said that "it was easy to determine that it wasn't going to be a standard residential contract of sale, that there was (sic) going to be some complexities involved and that any parties involved would have to be of sophisticated buying." Mr McBride discussed the conditions supplied to him with a prospective purchaser or purchasers.

[7] The appointment was received by Mr McBride mid morning on 17 June 2006. Mr McBride arranged a meeting between the prospective purchaser, the first respondent and one or more of the other respondents at the property that day. The terms of the contract of sale were negotiated between the respective solicitors for the parties to the contract, but Mr McBride "had a number of conversations with the [respondents'] solicitors during that time and with all parties concerned".

[8] A contract for the sale of the property was entered into on 17 July 2006 for a sale price of $9m. Deposit moneys were payable under the contract as follows: $5,000 on signing; $5,000 after 30 days of signing; and $100,000 upon satisfaction of due diligence in Special Condition 3.

[9] Special Condition 3 made the contract conditional upon the buyer satisfying itself "with investigations in relation to [the property] and in particular the viability and feasibility of the Buyer's proposed development of the [property] within 60 days of the date of [the] Contract." Under Special Condition 4.1, the respondents consented to the buyer applying to the Ipswich City Council for a material change of use and/or reconfiguration of the property. Special Condition 4.3 made the contract subject to the buyer lodging the applications referred to in Special Condition 4.1 within 120 days of the satisfaction of Special Condition 3.1 and upon the buyer obtaining the approvals for which it applied "upon conditions satisfactory to the Buyer in all respects within 300 days of the date of satisfaction of Special Condition

3.1." Special Condition 4.4 placed an obligation on the buyer to provide written reports to the respondents, informing them as to the progress of any applications for Council approval, every 21 days after the date of satisfaction of Special Condition 3.1.

[10] Special Conditions 4.5, 4.6, 4.7 and 4.8 provided:

> "4.5 If the Buyer fails to lodge the applications as provided for in Special Condition 4.3(a) and comply with 4.4 the Seller may, by notice in writing to the Buyer terminate this Contract and the deposit shall be forfeited to the Seller without deduction.
>
> 4.6 Subject to Special Condition 4.7, if Special Condition 4.3(b) is not satisfied or waived within the 300 day timeframe provided therein, either party may terminate this Contract by written notice to the other to that effect, and the deposit shall be forfeited to the Seller without deduction.
>
> 4.7 In the event that the Buyer is unable to obtain the approvals provided for in Special Condition 4.1 within the 300 day timeframe specified in Special Condition 4.3(b) due to circumstances beyond the Buyer's control, the Buyer may obtain one extension (not exceeding an aggregate of 90 days) for the satisfaction of Special Condition 4.3(b) by giving written notice to the Seller specifying the extension, but subject to the Buyer demonstrating to the reasonable satisfaction of the Seller that the delays are beyond the Buyer's control. Should the Buyer require an extension, a further non-refundable deposit of $100,000.00 is payable on granting of the required extension.
>
> 4.8 If this Contract is terminated as a consequence of non satisfaction of Special Condition 3 or 4, all reports, applications and approvals obtained or made by the Buyer shall (subject to any copyright) be the property of the Seller, and the Buyer must assign or use its best endeavours to obtain the copyright holders consent to the assignment to the Seller of the benefit of any licence to utilise any copyright."

[11] By letters from the buyer's solicitors to the respondents' former solicitors dated 30 October 2007 and 2 November 2007, the buyer purported to waive Special Condition 4.3(b) of the contract. The respondents' former solicitors, in a letter to the buyer's solicitors of 23 November 2007, purported to give notice of termination of the contract pursuant to Special Condition 4.6 on the grounds that the buyer had not obtained development approvals pursuant to the Special Conditions of the contract.

[12] The buyer commenced proceedings in the Supreme Court for specific performance of the contract. It alleged that the buyer had paid the respondents deposits totalling $300,000 and that the benefit of Special Condition 4 had been waived. The respondents' defence:

> (a) admitted that a deposit of $5,000 had been paid on execution of the contract and that a further $5,000 was paid by way of deposit 30 days after the execution of the contract;

(b) admitted that the payments alleged to have been made by the buyer had been made but denied that such payments were by way of deposit as three of the payments had been made pursuant to clause 4 of a Deed executed by the parties and were non-refundable, one had been paid pursuant to Special Condition 4.7 of the contract and was non-refundable and the remaining four payments were paid pursuant to clause 7 of the Deed and were non-refundable;

(c) alleged that the contract had been terminated by them pursuant to Special Condition 4.6.

[13] The Deed referred to in the defence was entered into between the respondents and the buyer. It was dated 27 October 2006 and relevantly provided:

"2. The Buyer advises that their due diligence enquiries have been satisfied.

3. The parties have agreed that as per special condition three (3) of the contract for sale, the amount of $100,000.00 is now due and owing as a non—refundable deposit by the Buyer to the Seller.

4. The Seller agrees to accept payment of the amount due and owing of $100,000.00, by way of the following installments (sic) to be paid to the 'McNamara and Associates Trust Account';
   a. $40,000.00 on or before 27 October 2006;
   b. $20,000.00 on or before 14 December 2006;
   c. $40,000.00 on or before 14 February 2007.

5. The parties agree that the payments referred to in clause 4 of this deed shall remain payable by the Buyer to the Seller, regardless of whether the contract for sale is subsequently terminated.

6. If the council issues their development approval notice on or before 30 June 2007, the purchase price will be reduced to $8,700,000.00.
   a. If the council issues their development approval notice after 1 July 2007, then the purchase price shall remain at $9,000,000. The parties do agree that an adjustment is to be made to the purchase price, in favor (sic) of the buyer. The parties agree that any amount in excess of the estimated $1,743,271 in council contributions shall be reduced from the purchase price, up to a maximum adjustment of $700,000.00.

7. The parties agree that if extensions are granted under clause 4.7 of the contract for sale, an additional non—refundable deposit $30,000.00 is payable for each thirty (30) day extension granted by the Seller to the Buyer:
   a. This amount must be paid to the 'McNamara and Associates Trust Account' no later than two (2) business days after the notification of grant of extension.
   b. Any additional deposits of $30,000 are additional to the purchase price and must be added to the total purchase price of the property."

[14] The Supreme Court proceedings were compromised by the respondents and the buyer in terms of a Deed dated 17 March 2007. It provided that the parties released each other from any actions, claims, suits or demands "in any way connected to the Contract" and that "[o]n settlement" the buyer would deliver to the respondents, in exchange for a bank cheque in the sum of $80,000 payable to the former solicitors for the respondents, certain documents, including an executed notice of discontinuance and a request to withdraw a caveat. Clause 3 provided that, notwithstanding settlement, the buyer would "do all acts and things necessary to give effect to clause 4.8 of the Contract."

The primary judge's reasons

[15] There appeared to be only two issues for determination at first instance:

(a) Whether the appointment complied with sections 133 and 134 of the Act and, if not, was it invalid?

(b) If the appointment was valid, did the appellant have an entitlement to commission under the conditions 2.1(3) or 2.1(4) of the appointment?

The primary judge found against the appellant on both issues.

[16] The deficiency in the appointment alleged by the respondents was the failure to complete clause 4.1 of the Form 22a.

[17] The primary judge accepted, on the authority of *QUYD Pty Ltd v Marvass Pty Ltd*,[1] that substantial compliance with the prescribed form was sufficient. He held, however, that there had not been substantial compliance.

[18] His Honour held that the two initial payments of $5,000 by the buyer had been made by way of deposit. He held that $100,000 was "converted to a non-refundable payment pursuant to the deed payable by instalments" of $40,000, $20,000 and $40,000 and that the further payments of $190,000 made by the buyer to the respondents were payments for extensions of time "which were to be added to the purchase price".

[19] It was found that no entitlement to payment of a commission under the appointment arose as there was no deposit "liable to be forfeited". His Honour also found that there was no termination of the contract by mutual agreement. Rather, there was a purported termination by the respondents which was not accepted by the appellant whose claim for specific performance was settled.

The relevant statutory provisions

[20] Sections 133 and 134 of the Act relevantly provide:

> "**133 Appointment of real estate agent—general**
>
> (1) A real estate agent must not act as a real estate agent for a person (***client***) to perform an activity (***service***) for the client unless—
>
> (a) the client first appoints the real estate agent in writing; or
>
> (b) a previous appointment by the client is assigned to the real estate agent under the terms of that

[1] [2008] QCA 257.

appointment or under section 135A and the appointment is in force.

Maximum penalty—200 penalty units.

(2) The appointment may be for the performance of—

(a) a particular service (***single appointment***); or

(b) a number of services over a period (***continuing appointment***).

(3) The appointment must, for each service—

(a) state the service to be performed by the real estate agent and how it is to be performed; and

(b) state, in the way prescribed under a regulation, that fees, charges and commission payable for the service are negotiable up to any amount that may be prescribed under a regulation; and

(c) state—

(i) the fees, charges and any commission payable for the service; and

(ii) the expenses, including advertising and marketing expenses, the agent is authorised to incur in connection with the performance of each service or category of service; and

(iii) the source and the estimated amount or value of any rebate, discount, commission or benefit that the agent may receive in relation to any expenses that the agent may incur in connection with the performance of the service; and

(iv) any condition, limitation or restriction on the performance of the service; and

(d) state when the fees, charges and any commission for the service become payable; and

(e) if the service to be performed is the sale or letting of property or the collecting of rents and commission is payable in relation to the service and expressed as a percentage of an estimated sale price or amount to be collected, state that the commission is worked out only on the actual sale price or the amount actually collected; and

(f) if the appointment is for a sole or exclusive agency, state the date the appointment ends.

Note—

For additional requirements for an appointment for a sole or exclusive agency, see section 135.

…

(7) The appointment must be signed and dated by the client and the real estate agent or someone authorised or apparently authorised to sign for the agent.

(8) The real estate agent must give a copy of the signed appointment to the client.

Maximum penalty—200 penalty units.

…

134 Form of appointment

(1) The appointment must be in the approved form.

…

(3) An appointment that does not comply with subsection (1) is ineffective from the time it is made."

[21] Section 140 of the Act prohibits an agent from suing for or recovering "a reward or expense for the performance of an activity as a real estate agent" unless the agent has been properly appointed under Division 2 of the Act by the person to be charged with the reward or the expense.

The form of appointment of agent

[22] Clause 4 of the Form 22a relevantly provided:

"

4. APPOINTMENT of AGENT

The Client appoints the Agent to perform the following service/s:

Sale of: *Place of Residence* Purchase of:
(e.g.) place of residence, land, business)

Sale by auction
The Client ~~does~~/does not *[delete as appropriate]* authorise the Agent to sell by auction.
Refer Item E in Items Schedule

4.1 Performance of Service

To the Agent: State how you will perform the service AND any conditions, limitations or restrictions on the performance of the service. (e.g. holding of open house, performing service as multi-list or conjunction sale, when and how auction to be conducted) *If space is insufficient, please attach additional sheet.*

4.2 Reserve or listing price: $8,500,000 –
or Marketing Terms (e.g. Price Range)

4.3 Single or Continuing Appointment
The appointment is a:
☒ Single appointment (for a particular service)
☐ Continuing appointment (for a number of services over a period)
End of continuing appointment:

> **To the Client**: If the appointment is a continuing appointment, you may revoke it by giving 90 days notice in writing to the Agent, unless you and the Agent agree to a shorter notice period (but it must not be less than 30 days)."

[23] It is now convenient to address the grounds of appeal.

The primary judge erred in finding that the appointment was invalid

The competing contentions

[24] Counsel for the appellant argued that there had been substantial compliance with the requirements of the Form 22a and that the failure to complete Item 4.1 had no adverse affect on the respondents' interests. Consequently, it was contended, there was substantial compliance with the approved form. It was submitted that there was in fact no breach of s 133(3)(a) by failing to state how "the service … is to be performed". The argument proceeded as follows. The appellant was appointed to perform the activity of selling the property. How that duty was to be performed was "dictated and restricted by the terms in the agreement." As the Form 22a contained information throughout it concerning how the service was to be performed, non-completion of clause 4.1 did not result in failure to substantially comply.

[25] Counsel for the respondents submitted that the manifest purpose of the Act was to require specific disclosure of information in a particular form for the protection of clients and for the avoidance of disputes. In order to determine whether the appointment complied with the Act, one must look at s 133 and the terms of the Form 22a. When this is done, it was argued, it may be seen that one of the requirements of s 133 has been ignored and that there has not been substantial compliance with s 134(1).

Consideration

[26] Section 133 prohibits a real estate agent from acting as such for a client unless the client "first appoints the real estate agent in writing under this section." Sub-section (3) requires the appointment to state specified matters, including the service to be performed by the real estate agent and how it is to be performed. Sub-section (7) requires the appointment to be signed and dated by the client and the real estate agent. Sub-section (8) requires the real estate agent to give a copy of the signed appointment to the client.

[27] Section 134(1) requires the appointment to be in the approved form and s 134(3) provides that an appointment that does not comply with sub-section (1) is ineffective.

[28] Where the appointment is for the sale of a place of residence or land or an interest in either, the real estate agent "must specifically bring to the client's notice the information in the form" about the possible types of listing and the difference between a sole and an exclusive agency (i.e. s 134A). Sections 135, 136 and 136A concern the appointment of a real estate agent for a sole or exclusive agency.

[29] Section 137 renders "ineffective from the time it is made" an appointment of a real estate agent as sole agent for more than 60 days, and an appointment for the sale of a place of residence or land or an interest in either where the real estate agent commits an offence under section 134A or 135(1).

[30] Failure to comply with sections 133(1) and (8), 134A, 135(1) and 136 is an offence, the maximum penalty for which is 200 penalty units.

[31] Division 2 spells out whether a failure to comply with a provision is an offence and/or results in invalidity. The failure to make an appointment in the approved form results in an ineffective appointment but does not, necessarily, give rise to an offence. On the other hand, failure to comply with provisions of s 133 does give rise to offences but the section does not expressly invalidate a non-complying appointment. It may have been considered sufficient to invalidate an appointment not in the approved form, it being an obvious enough expectation that the approved form would encompass the requirement of s 133.

[32] It was common ground between the parties at first instance, accepting as authoritative pronouncements on the point in *QUYD P/L v Marvass P/L*,[2] that substantial compliance with the Form 22a was sufficient. On the hearing of the appeal, reference was made to s 49(2) of the *Acts Interpretation Act* 1954 (Qld). Sub-sections (1) and (2) of s 49 provide:

> "(1) If a form is prescribed or approved under an Act, strict compliance with the form is not necessary and substantial compliance is sufficient.
>
> (2) If a form prescribed or approved under an Act requires—
>
> (a) the form to be completed in a specified way; or
>
> (b) specified information or documents to be included in, attached to or given with the form; or
>
> (c) the form, or information or documents included in, attached to or given with the form, to be verified in a specified way;
>
> the form is not properly completed unless the requirement is complied with."

[33] The approved form specified that the agent "State how you will perform the service AND any conditions, limitations or restrictions on the performance of the service. (e.g. holding of open house, performing service as multi-list or conjunction sale, when and how auction to be conducted)." The approved form was thus one which "specified information … to be included in … the form". The required information was not included in clause 4.1 of the appointment and the appointment was therefore "not properly completed."

[34] It follows, in my view, that there was not substantial compliance with s 134(1) and that the appellant was not properly appointed under Division 2. Consequently, by operation of s 140(1), the appellant had no entitlement to sue for or recover any commission.

[35] Even without reference to s 49(2), I would have concluded that there had not been substantial compliance with s 134(1).

[36] The requirements of s 133(3), (7) and (8) are straight forward in their terms and can be complied with without difficulty. Moreover, in each case, it is possible to determine quite readily whether there has not been compliance.

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2 [2008] QCA 257.

[37] The requirement to state how the service is to be performed in s 133(3)(a) and in item 4.1 of the approved form under the heading "Performance of Service" is of considerable practical importance in defining the role of the agent and apprising the client of the services to which the client is entitled and of the way in which those services are to be performed. Section 133(1) defines "an activity" as a "service". Section 128 lists the activities which a real estate agent's licence authorises its holder to perform for others for reward. The activities include the buying, selling, exchanging or letting of "places of residence or land or interests in places of residence or land". Also included is "to negotiate for the buying, selling, exchanging, or letting" of such property. The relevant service in this case, would appear to be the selling of land and perhaps negotiating for the selling of land.

[38] Matters encompassed by the performance of such a service which would have been within the contemplation of the parties were: the introduction of a buyer to purchase the property by private treaty; assisting where practicable or reasonable in negotiations and facilitating the entering into of a contract of sale. As it happened, the appellant played only a peripheral role in contractual negotiations but events may well have turned out differently.

[39] There is some indication in the subject form of the nature of the service to be provided by the appellant, as sale by auction is excluded in clause 4 of the appointment. Clause 8 authorises the appellant to incur no expenses in relation to the performance of the services in advertising or marketing. It does not follow, however, that the parties understood or ought reasonably to have understood that no advertising or marketing was to be carried out by the appellant. After all, it is a fundamental role of a real estate agent acting for a vendor to market the property and to advertise it, at least to some degree, so that potential buyers are aware that the property is on the market.

[40] Although the parties had in mind a particular potential purchaser, the identity of which was unknown to the respondents, if a sale to that entity had not eventuated, the appointment would have continued until terminated by either the appellant or the respondents under clause 5 of the appointment. The evidence does not suggest that the parties expected the appellant to cease to act as agent if the prospective purchaser the appellant intended to introduce failed to sign a contract.

[41] In determining whether here has been substantial compliance with the approved form, it is a pertinent consideration that a role of the form is ensuring that the appointment by a client of a real estate agent to perform a prescribed service is in a document which fulfils the requirements of section 133(3) of the Act and appropriately serves the purpose of protecting the interests of the client. In other words, part of the function of s 134 is to ensure not only that particular information is provided but that it be provided in the most effective way.

[42] The information required by s 133(3)(a) and clause 4.1 of the Form 22a to be "stated" is important for the reasons previously given. Section 133(3)(a) states that the appointment "must" provide it.

[43] I am unable to accept that, despite its complete omission from the appointment, there was nevertheless substantial compliance. When clause 4.1 is left uncompleted, as this one was, not only will there be no record of how the agent is to perform the work required of it for the subject service but there will be no agreement in that respect. The omission was both "substantial" and "material".[3]

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[3] C.f. *Bluestone Holdings Pty Ltd v Juniper Property Holdings No 14 Pty Ltd* [2006] QSC 219 and *Equipment Investments Pty Ltd v M J Dowthwaite & Co Pty Ltd* (1969) 16 FLR 23, 31.

[44] In view of these findings, the appeal must fail and it is unnecessary to state a concluded view on the other grounds of appeal. However, as these grounds were argued at length and raise issues which may have some general significance, I will discuss them briefly.

The primary judge erred in finding that there was no deposit liable to be forfeited and in finding that an entitlement to commission did not arise under the terms of the appointment

The parties' respective contentions

[45] The respondents' entitlement to commission was provided for in the standard terms and conditions forming part of the appointment. Clause 2.1 provides:

> "The Client agrees to pay the Agent commission as specified in the Appointment if a Contract of Sale of the Property is entered into with a buyer, whether within the Term or after the Term, where the Relevant Person is the effective cause of the sale within the Term, provided that:
>
> (1) the Contract of Sale of the Property is completed; or
> (2) the Client defaults under the Contract of Sale and that Contract is terminated by reason of or following that default; or
> (3) the Contract of Sale is not completed and the whole or part of the deposit paid is liable to be forfeited; or
> (4) the Contract of Sale is terminated by mutual agreement of the Client and the buyer."

[46] The appellant contended that paragraphs (3) and (4) applied as, on any view of the matter, $10,000 was paid by way of deposit, there was no obligation to refund those moneys under the Deed of Compromise and, consequently, the deposit had, in fact, been forfeited.

[47] In construing clause 2.1, it should be borne in mind that the agency pre-dates any contract entered into with a client and its construction should not be "coloured or subverted" by the conduct of the client and a third party in relation to any subsequent contract of sale. The agent has no control over the way in which that contract is negotiated, entered into, varied or brought to an end or as to how the deposit is treated. The provision should be given a practical common sense construction.

[48] Counsel for the respondents argued that the payments under clauses 3, 4 and 5 of the October Deed, which were made as a result of benefits obtained by the respondent as purchaser during the term of the contract could not be considered as deposits. In that regard, it was said that relief against forfeiture would not be available as the retention of such moneys in the event that the contract ended was "a function of the separate contractual stipulation which caused it to be paid."

[49] The same arguments were advanced in respect of the $190,000 paid by the buyer under Special Condition 4.7 of the contract and/or clause 7 of the October Deed.

Consideration

[50] Clearly, sub-clauses (1) and (2) of clause 2.1 have no application. The contract was not completed and it was not contended that the respondents defaulted under the contract.

[51] As for sub-clause (3), the contract was not completed but it was not shown that any deposit was "liable to be forfeited". Under the contract, and putting to one side for

the moment special conditions 3.3, 4.5 and 4.6, the deposit moneys were liable to be forfeited only in the event of breach by the buyer and termination of the contract by the respondents.[4] Under the October Deed, provision was made for payment of the $100,000 payable under the contract "upon satisfaction of due diligence in special condition No. 3" by three instalments as "a non-refundable deposit". Clause 5 obliged the buyer to make those payments "regardless of whether the contract for sale is subsequently terminated". The wording of the clause is ambiguous but it is not necessary for present purposes to resolve the ambiguity.

[52] The three payments totalling $100,000, payable under the October Deed, thus constituted instalments of the purchase price. They were also payments made to secure the rights and benefits under clause 3. A character which they lacked was that of deposit moneys. A deposit is money paid as security for completion of the contract which is liable for forfeiture and retention by the vendor in the event of non-completion of the contract through the default of the purchaser.[5] The description of a payment in a contract as a deposit does not necessarily give it the character of a deposit. That must be resolved by reference to the circumstances and contractual terms under which it is paid, held and is repayable.[6] When clause 2.1(3) of the appointment refers to the deposit being "liable to be forfeited", it is using conveyancing terms with well established meanings. It is referring to a sum of money recognisable as a "deposit" and to the circumstance that, by a breach of a contractual term by the purchaser, the vendor acquires the right to keep the deposit.

[53] For the same reasons, the $190,000 paid under Special Condition 4.7 of the contract and/or clause 7 of the October Deed were not deposit moneys. Also, none of these moneys were "liable to be forfeited".

[54] The two amounts of $5,000 were paid by way of deposit, but the appellant did not set out to establish, at first instance or on appeal, and the primary judge did not find, that circumstances had occurred which rendered those sums "liable to be forfeited."

Was the contract terminated by mutual agreement?

[55] In the Supreme Court proceedings, the buyer maintained that the contract remained on foot. The respondents contended that it had been terminated. As the proceedings were compromised, there was no determination as to whether the contract had, in fact, been terminated. The primary judge was not invited to decide the point. The appellant argued that the contract was necessarily terminated by the Deed of Compromise. But the Deed did not purport to terminate the contract. The parties to it merely agreed to resolve their differences on the terms stated in the Deed and to release each other from further claims connected with the contract. Consequently, neither party to the Deed intended that the contract be further performed and they must be regarded as having abandoned it.[7]

[56] It is arguable that this circumstance is not something which clause 2.1 has in contemplation. It may be argued that clause 2.1 is directed to an agreement between buyer and seller to bring the contract to an end, not the existence of circumstances from which it may be concluded that, although the parties to the contract had not

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4 Standard Terms and Conditions of Contract, clause 9.3.

5 *Howe v Smith* (1884) 27 Ch D 89 at 95 and *Freedom v AHR Constructions Pty Ltd* [1987] 1 Qd R 59 at 64-66.

6 *Freedom v AHR Constructions Pty Ltd* [1987] 1 Qd R 59 at 64-66; Wikrama-Nayake P N, *Voumard: The Sale of Land in Victoria*, 4th ed (1986), p 463.

7 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 434.

agreed to terminate it, it had, nevertheless, come to an end. Not without hesitation, I have concluded that the word "terminated" is apt to describe the circumstances under consideration. A necessary consequence of the Deed of Compromise was the bringing of the contract to an end. The Deed was the consequence of "mutual agreement" and the contract is properly regarded as having been terminated by mutual agreement: the mutual agreement recorded in the Deed of Compromise. Be that as it may, the appellant had no entitlement to sue for or recover any commission because it was not properly appointed.

Conclusion

[57] For the above reasons the appeal should be dismissed with costs.

[58] **MARGARET WILSON AJA**: I agree with the order proposed by Muir JA for the reasons given by his Honour.

[59] **FRYBERG J:** I need not repeat the facts which are set out in the reasons for judgment of Muir JA.

[60] Mr McBride knew of a potential buyer for the respondents' land. From previous dealings he knew that the respondents might be interested in selling their land. He wanted to earn his employer some commission for introducing them to the representatives of the potential buyer. On the evidence, he had no other purpose. He went about effecting his purpose by insisting that the respondents appoint him as their agent. To do that he sent them a Form of Appointment, Form 22a, a form published by the curiously named Department of Tourism, Fair Trading and Wine Industry Development of the Queensland government.

[61] Whether it was necessary for him to use this form if *all* he was to do was effect an introduction is uncertain. Introducing is not explicitly one of the activities authorised by a real estate agent's licence[8], and it is far from clear that the extended definition of "sell" in the *Property Agents and Motor Dealers Act 2000* catches it.[9] But the point is academic: real estate agents are usually called upon to do more than merely perform an introduction. In the present case, the appellant claimed not only that Mr McBride introduced but also that he facilitated negotiations between the buyer's representatives and the respondents; a claim which the respondents denied. That is clearly within the definition of "sell"[10] and that definition presumably determines the meaning of "sale" in the form made under the statute. At all stages the appellant's case has been presented on the assumption that what Mr McBride did was the performance of an activity as a real estate agent within the meaning of s 140 of the Act. It would be inappropriate now to depart from that assumption simply because in the event the appellant proved only the introduction.

[62] The form was an elaborate document. The opening words of section 4 provided:

4. APPOINTMENT of AGENT

The Client appoints the Agent to perform the following service/s:

Sale of: PLACE OF RESIDENCE Purchase of:
(e.g. place of residence, land, business)

Sale by auction
The Client ~~does~~/does not *[delete as appropriate]* authorise the Agent to sell by auction.
Refer Item E in Items Schedule

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8 Section 128.

9 Schedule 2.

10 *Sultana Investments Pty Ltd v Cellcom Pty Ltd* [2008] QCA 357.

[63] On its face it is a surprising authorisation to find in a document promulgated under an act intended to provide consumer protection. It grants the agent authority to sell land. It does not limit the authority to introducing a purchaser and facilitating the signing and completion of a contract signed by the principal. In the absence of anything to the contrary, the usual position in Queensland is that the authority of a real estate agent is limited, to exclude making or signing a contract on the principal's behalf.[11] One wonders whether the form was really intended to have this effect.

[64] Section 4.1 required Mr McBride to write in how the appellant intended to perform the service of selling the land. Perhaps because he did not intend to do anything except introduce the parties, he left the section blank. The appellant submitted that there had been substantial compliance with the approved form, relying on s 49(1) of the *Acts Interpretation Act 1954*. That submission should be rejected, for the reasons given by Muir JA. I agree with his Honour that in the absence of a properly completed authority, the appellant was not entitled to claim commission.

[65] It is unnecessary that I address either s 49(2) of the *Acts Interpretation Act 1954* or the question of entitlement to commission under the terms of appointment.

[66] I agree with the order proposed by Muir JA.

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[11] *Jenkins v Kedcorp Pty Ltd* [1999] QCA 452 [16]; [2002] 1 Qd R 49; *Colbron v St Bees Island Pty Ltd* [1995] FCA 1107; (1995) 56 FCR 303; see also *Davies v Sweet* [1962] 1 All ER 92 at 94; [1962] 2 QB 300 and Duncan WD, *Real Estate Agency Law in Queensland*, Law Book Co, 4th ed (2006) at [8.35].