SUPREME COURT OF QUEENSLAND

CITATION:	*Sultana Investments P/L v Cellcom P/L* [2008] QCA 357
PARTIES:	**SULTANA INVESTMENTS PTY LTD** ACN 094 174 240 (plaintiff/respondent) **v** **CELLCOM PTY LTD** ACN 060 776 098 (defendant/appellant)
FILE NO/S:	Appeal No 10648 of 2007 DC No 1897 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	14 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2008
JUDGES:	McMurdo P, Holmes JA and White AJA Judgment of the Court
ORDER:	**1. Appeal allowed** **2. The judgment in favour of the respondent in the District Court on 26 October 2007 be set aside and in lieu thereof the respondent's claim be dismissed** **3. Judgment for the appellant on its counterclaim in the sum of $121,000 together with interest from 19 April 2006 to judgment**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – the appellant operated a property development business and asked the respondent, which operated a finance planning business, to recommend residential units to the respondent's clients – the appellant agreed to pay the respondent $10,000 for each unit sold, of which $5,000 was payable after the sale was unconditional and $5,000 after settlement – a number of units had unconditional contracts signed but did not settle – whether the respondent is entitled to receive $5,000 for those units PROFESSIONS AND TRADES – AUCTIONEERS AND AGENTS – CONSTRUCTION OF STATUTORY

PROVISIONS – QUEENSLAND – REMUNERATION – the respondent was a not a licensed real estate agent – under the *Property Agents and Motor Dealers Act* 2000 (Qld) only a licensed real estate agent may recover remuneration for work performed in Queensland as a real estate agent – whether the respondent performed work as a real estate agent – whether the work was performed in Queensland

ESTOPPEL – ESTOPPEL IN PAIS – MATTERS AGAINST WHICH ESTOPPEL DOES NOT PREVAIL – STATUTORY PROVISIONS – the respondent submitted that the appellant was estopped by its conduct from relying on the statutory prohibition on recovering remuneration for unlicensed work as a real estate agent – an estoppel cannot operate to defeat a statutory provision will depend on whether the statutory provision is imposed in the public interest – whether s 140 of the *Property Agents and Motor Dealers Act* 2000 (Qld) is in the public interest

Property Agents and Motor Dealers Act 2000 (Qld), s 10, s 19, s 36, s 128, s 133, s 138, s 140, s 573A, s 573B, s 573C, s 573D

Blackman v Milne [2007] 1 Qd R 198; [2006] QSC 350, cited
Colbron v St Bees Island Pty Ltd (1995) 56 FCR 303, cited
Day Ford Pty Ltd v Sciacca [1990] 2 Qd R 209, cited
Freehold Land Investments Ltd v Queensland Estates Pty Ltd (1970) 123 CLR 418; [1970] HCA 31, cited
Garnac Grain Company Inc v HMF Faure & Fairclough Ltd [1968] AC 1130, cited
In Re A Bankruptcy Notice [1924] 2 Ch 76, cited
Jenkins v Kedcorp Pty Ltd [2002] 1 Qd R 49; [1999] QCA 452, cited
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993, followed
Maritime Electric Co Ltd v General Dairies Ltd [1937] AC 610, cited
Marshall v Marshall [1999] 1 Qd R 173; [1997] QCA 382, cited

COUNSEL: J B Sweeney, with J K Meredith, for the appellant
D R Kent for the respondent

SOLICITORS: Greg Chapman for the appellant
O'Reilly Lillicrap for the respondent

THE COURT:

[1] The appellant has appealed the order of a District Court judge that it pay the respondent $77,000 plus interest on the claim brought to enforce payment of consultancy fees for the successful introduction of buyers for the appellant's apartment development. The appellant has also appealed his Honour's dismissal of

its counter-claim for $121,000 being moneys already paid as consultancy fees to the respondent.

[2] The appellant was the owner of land on which it proposed to develop a residential apartment complex at Bowen Hills in Brisbane known as The Mews consisting of some 175 units. In 2002 the appellant and its parent, the SSI Group, were engaged in selling the apartments prior to construction.

[3] The respondent operated a Sydney based finance broking and planning business with clients who, as part of their investment planning, purchased units for the rental market. The respondent had, in the past, recommended property development projects in south-east Queensland to its clients who utilised a Brisbane solicitor, Mr George Makridakis, for the conveyancing work.

[4] The appellant appointed PRD Realty Pty Ltd as the "sole exclusive"[1] selling agent for the development by a project marketing agreement dated 11 September 2002.[2] That agreement set out the circumstances in which PRD Realty would earn commission and envisaged that purchasers might be introduced by other agents or investment groups.

[5] It was uncontentious that in late September 2002 Mr George Vasiliou, who was employed by the appellant to market and sell The Mews, contacted Mr Martin Comer, a financial planner employed by the respondent, by telephone to discuss the development project to ascertain if the respondent was interested in recommending The Mews to its investors. Mr Vasiliou was directed to the respondent by Mr Makridakis, Mr Vasiliou's brother-in-law.

[6] Mr Comer was interested in learning more about The Mews project and came to Brisbane with Ms Trudie Sultana, a principal of the respondent. They visited the project site and discussed the fees the respondent would receive if they successfully introduced their clients to the apartments. The primary judge found that Mr Comer and Ms Sultana told Mr Vasiliou that they did not hold a Queensland real estate agent's licence pursuant to the *Property Agents and Motor Dealers Act* 2000 ("PAMDA"). They were concerned, in the climate then prevailing against excessive real estate marketeering, that the commission earned by the respondent should be clearly identified in any contracts with the investors. The fee proposed to be paid to the respondent for each unit sale was $10,000. The form of the deposit by the purchasers was discussed and, since the respondent had a relationship with a financier who gave deposit bonds, that form was acceptable to the appellant.

[7] Mr Vasiliou put the proposal to the appellant's Development Committee comprising the directors and attended by Mr George Petersen, the development manager and Mr Vasiliou. The Committee agreed, and Mr Vasiliou prepared a letter of offer to the respondent settled by the appellant's solicitors.

[8] The letter, dated 25 September 2002, was faxed to the respondent in Sydney. The appellant offered seven units to the respondent to market to its clients in the following terms:

---

1 Exhibit 20, cl 1(a). Section 135 of the *Property Agents and Motor Dealers Act* 2000 provides for an agency to be "sole" or "exclusive" and s 19 explains the difference.

2 Exhibit 20.

"Thank you for your time on Monday and the interest you showed in The Mews at Bowen Hills and the future projects we have planned for West End.

After our discussions I thought it would be favourable to get off on the right foot and forge a successful relationship whereby you will have access to luxurious apartments in one of Australia's fastest growing cities. To achieve this I would like to take this opportunity to offer your company 7 of the largest and best situated apartments in the Mews at the following deal:

1. A discount off the list price for your client eg unit 3410 $390,000 now $380,000

   Unit 3510 $399,000 now $389,000

   Unit 3511 $399,000 now $389,000

   Unit 3610 $421,000 now $411,000

   Unit 3611 $411,000 now $401,000

   Unit 2502 $398,000 now $388,000

   Unit 2402 $385,000 now $377,000

2. A $10,000 consultancy fee for each apartment sold. $5,000 payable 30 days after the sale goes unconditional and $5,000 30 days after the properties settle. This fee will be plus GST.

3. A 10% deposit will be required payable preferably by bank guarantee but a deposit bond will suffice.

4. This offer is subject to your company complying with PAMD ACT QLD so far as disclosure is concerned.

I trust this proposal will meet your company's investment criteria. You can gather that our company has taken the steps to begin a working professional relationship with Sultana Investments and would gladly offer you apartments in future projects before they reach the initial marketing stage. I stress that this offer is very favourable and is only available up until 12 noon Friday the 4th of October."

That offer was accepted by telephone a few days later. It will be referred to as "the Agreement".

[9] The initial seven units were quickly the subject of contracts with the respondent's clients and the appellant offered the respondent more stock. The respondent was successful in marketing 22 of the units to its investor clients, that is, 22 purchasers signed unconditional contracts. The respondent had a database of investors who were contacted by telephone to set up a personal meeting in Sydney with the respondent's representative and told of The Mews development in the context of

providing them with financial planning advice. The clients selected were those for whom The Mews development would be suitable for tax planning purposes. The price was not negotiable and was understood by the respondent's personnel not to be negotiable. The clients were given a brochure about the development prepared by the appellant and were encouraged by the respondent to refer to the development website and talk to local (Brisbane) real estate agents. There was no evidence as to whether any did contact any local real estate agent as no client gave evidence. The clients who were interested travelled to Brisbane to inspect the project. Their fares were paid by the respondent as part of the fee charged for the investment advice. That advice included, particularly, the income tax implications for the clients in light of "[t]he large depreciation allowances which [came] with a brand new property".[3] It was, according to Mr Comer, not just a case of the property being "liked" by the client; it had "to fit certain parameters" and the clients were given advice as to whether it was "a wise purchase or unwise purchase for that particular person".[4] Mr Comer explained the process in cross-examination:

> "They [the appellant] would provide us with apartments that they had available and we [the respondent] would provide people who would purchase them from them."[5]

[10] The contracts were sent in bulk to the respondent by the appellant after an indication that there were buyers. The particulars were filled in in Sydney by persons associated with the respondent, in most instances. The contracts were all in the same form identifying, inter alia, the buyer, the seller, the seller's agent, the solicitors, the price, the deposit and the deposit holder – PRD Realty.

[11] The PAMDA Form 27b – the disclosure form – required that a disclosure be made of benefits received or expected to be received by the selling agent and others:

> "…# in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property."[6]

The form showed that the respondent was to receive "$10,000 consultancy fee" and PRD Realty Pty Ltd "1 % of purchase price (consultancy)".

[12] When the contracts were executed by the purchasers they were returned by the respondent to Brisbane either, as the primary judge found, to the clients'/respondent's solicitor, Mr Makridakis, or to Mr Vasiliou directly for execution by the appellant. All 22 contracts had been executed by mid-June 2003. After execution the respondent communicated the purchasers' colour scheme choices to Mr Vasiliou.

[13] The development was completed by the end of 2004 and the plan registered. In accordance with the terms of the contracts settlement became due on 29 September 2004. Some investors obtained finance without difficulty but for others extensions were sought and obtained from the appellant by the respondent. The predominant problem seems to have been that the valuations by the lending institutions were too

---

3 Evidence of Mr Comer, transcript p 57.
4 Transcript p 57.
5 Transcript p 55.
6 The contracts and disclosure forms constituted ex 8.

low for the contract prices. As a finance broker, the respondent assisted the clients to find suitable lenders.

[14] Fourteen of the contracts settled but eight did not. Those contracts were rescinded by the appellant through Mr George Petersen who had taken over Mr Vasiliou's duties in January 2005. At the same time Mr Comer was continuing to attempt to organise finance for those eight and was confident that given time he could have done so. As the primary judge found, the rescission of those contracts led to ill feeling between the representatives of the parties and the appellant called up the deposits via the deposit bonds. Mr Comer attempted to persuade the appellant to delay doing so but without success. By letter dated 24 January 2005 Mr Petersen wrote to Mr Comer attaching a revised price list for the remaining units available in The Mews. He wrote:[7]

> "Should any of your purchasers that have forfeited their deposits settle the purchase of a unit at The Mews at the revised price prior to the end of February 2005, Cellcom Pty Ltd [the appellant] agree to credit them an ex gratia payment equal to the value of their forfeited deposit."

Mr Petersen then turned to outstanding fees owing to the respondent.

> "... our calculations show the following
>
> | | |
> |---|---|
> | Total Fees Due (14 units x $10,000.00) | : $ 140,000.00 |
> | Less Previous Payments | : $ 110,000.00 |
> | Balance Due | :$ 30,000.00" |

He requested Mr Comer to forward a tax invoice for $30,000 plus GST. The $110,000 comprised $5,000, being 50 per cent of the $10,000 fee, x 22 contracts.

[15] By letter faxed on 25 January 2005 in response, the respondent contended that it was entitled to $5,000 plus GST for each of the 22 contracts after each became unconditional and $5,000 plus GST payable after the completion of the 14 contracts which settled consistently with point 2 of the Agreement. Taking into account monies already paid, Mr Comer asserted that the respondent was owed $70,000 plus GST. He contended that the appellant retained the deposit for the terminated contracts, so had not "lost" the $5,000 first part of the fee. The appellant's position was that only those 14 contracts which proceeded to settlement attracted the full fee of $10,000 and, by implication from the calculations, nothing was to be paid in respect of those contracts which were terminated.

[16] By the close of pleadings the appellant contended that on the proper construction of the Agreement:

---

7 Exhibit 15.

- an apartment was only "sold" if the contract of sale in respect of the particular apartment was carried through to completion;

- the respondent was only entitled to payment of any part of the consultancy fee if the contract of sale proceeded to completion; and

- accordingly, the respondent was required to disgorge to the appellant any payment [of $5,000] received in respect of a contract that did not settle.

[17] Moreover, as a complete defence to the claim, the appellant alleged that the respondent acted as an unlicensed real estate agent in respect of each contract and, by virtue of s 140 of PAMDA, was "not entitled to sue for, or recover or retain, a reward or expense for the performance of an activity as a real estate agent". By counter-claim the appellant alleged that it had paid the sum of $121,000:

- under a mistake of law in that it did not know that the respondent was not entitled to payment under the agreement; alternatively

- under a mistake of fact in that it did not know that the respondent did not hold the requisite licence and/or that the agreement was not an appointment pursuant to s 133 or s 134 of PAMDA

and the respondent was not entitled to retain the money so paid.

[18] The respondent alleged that it did not "negotiate" the buying of the apartments but marketed them as an investment opportunity and therefore did not require a real estate agent's licence. It pleaded an estoppel that the appellant, understanding that the respondent wished its role to be both fully disclosed to the purchasers and to be in accordance with Queensland law, authored the agreement implying that the respondent had a lawful entitlement to remuneration and the respondent acted to its detriment in relying on it.

[19] The issues for consideration on this appeal are:

- the construction of the Agreement;

- whether the respondent performed an activity as a real estate agent for others;

- within Queensland; and

- whether the appellant is prevented from setting up the provisions of PAMDA against the respondent as the author of the Agreement.

Construction of the agreement

[20] It is convenient to set out point 2 of the Agreement again.

> "A $10,000 consultancy fee for each apartment sold. $5,000 payable 30 days after the sale goes unconditional and $5,000 30 days after the property settles. This fee will be plus GST."

The primary judge construed the Agreement in this way – the expression "sold" has no precise meaning but "in its common meaning" a property is sold once a contract of sale is brought into existence by the parties.[8] His Honour concluded that the second sentence, namely, "$5,000 payable 30 days after the sale goes unconditional and $5,000 30 days after the property settles", gave meaning and precision to the first sentence. His Honour was particularly influenced by the absence of a provision in the Agreement for the return of the first $5,000 in the event the contract ultimately failed to settle. As to this, his Honour mentioned that the parties were confident that the apartments would sell, to which may be added the comment that that is a common expectation amongst sales people.

[21] The appellant contends that the primary judge erred in applying his view about the common meaning of "sold" to construe the Agreement. What his Honour described, the appellant contends, was an offer to sell, and he ought to have been informed by the legal meaning, namely, property is sold when the title is conveyed.

[22] Even though the appellant's solicitor looked over the letter, it is not expressed as a formal document and it is correct to approach the letter with that in mind. The parties intended that the total fee if "sold" would be $10,000. That is expressed in the first sentence and there is no basis for giving "sold" any other than its ordinary legal meaning which, on any view, means "to completion". But that does not mean that the parties did not also agree that $5,000 would be earned when the sale became "unconditional". Signing up the investors as purchasers was, at the time of the Agreement, something of value to the appellant. It assisted the appellant in obtaining finance for the development which was yet to be built and in planning the development.

[23] The appellant contends that his Honour was unduly influenced by the meaning of "sold" as it appears in the agency agreement between the appellant and PRD Realty Pty Ltd.[9] His Honour was not influenced, unduly, or at all by that agreement. He refers to it for this purpose only in a footnote.[10] But it may be noted that that agreement was made on 11 September 2002 just two weeks prior to the Agreement between the appellant and respondent. By cl 16(b) property was deemed to have been "sold" "upon the signature of any person (either by himself or his agent) of a document whereby that person legally binds himself to become the Purchaser thereof #…". The respondent was neither a party to, nor familiar with that agreement. But it is part of the background with which the appellant made the offer to the respondent and the meaning which the respondent contends for was a meaning with which the appellant was familiar.

[24] His Honour was correct to be assisted by the absence of any reference to repayment of the first $5,000 should the contract not settle. The appellant submits that the parties had an "expectation" that there would be many sales over a period and a running tally of payments "on account" would occur. There is no evidence to

---

8 Reasons para [20].

9 Exhibit 20.

10 Reasons para [21] footnote 9.

support that contention. The Agreement refers only to seven apartments to be sold. The offer of other apartments came after the rapid sale of that first seven.

[25] There was no error in the primary judge's conclusion that the respondent was entitled to a fee of $5,000 for each of the 22 contracts of sale which were unconditional even though there may be a slight difference in approach to the construction.

Was the respondent acting as a real estate agent for others for reward?

[26] Chapter 5 of PAMDA concerns real estate agents. Part 1 concerns a real estate agent's authorisation and responsibility. A real estate agent's licence authorises the holder to perform certain activities "as an agent for others for reward" and includes the authority "to negotiate for the buying, selling ..." [11] of "places of residence".[12]

[27] The objects of PAMDA set out in s 10 are to provide a system of licensing and regulating persons, *inter alia*, as real estate agents, which achieves an appropriate balance between consumer protection and freedom of enterprise; and the protection of consumers against "particular undesirable practices associated with the promotion of residential property".[13] To this end suitable persons with appropriate qualifications may be licensed. A corporation is eligible to obtain a real estate agent's licence only if a director is a real estate agent.[14]

[28] A real estate agent:

> "…who is asked by a person (**"client"**) to perform an activity (**"service"**) for the client must not act for the client unless the client first appoints the agent in writing under this section."[15]

The appointment must be in the approved form and must set out certain matters including the service to be performed, the fees charged, and the source of any benefit or similar.[16] The appellant alleged in its defence and counterclaim that the respondent was the agent of the appellant and that the Agreement was not "an appointment" within the provisions of PAMDA. Although denying the agency relationship, the respondent agreed that the Agreement was not an appointment within the meaning of PAMDA, and it clearly is not.

[29] A real estate agent for the sale of property is required to disclose to a prospective buyer, *inter alia*, any benefit received from any person to whom the buyer is referred by the agent; and any amount paid for "providing a service in connection with the sale". The examples given in PAMDA include finance broker and financial adviser.[17] By s 140:

> "A person is not entitled to sue for, or recover or retain, a reward or expense for the performance of an activity as a real estate agent unless, at the time the activity was performed, the person -

---

11 Section 128(e).
12 Section 128(a) and (f).
13 Section 10(2).
14 Section 36(3).
15 Section 133.
16 Section 133(3).
17 Section 138.

(a) held a real estate agent's licence; and

(b) …

(c) had been properly appointed under division 2 by the person to be charged with the reward or expense."[18]

[30] The primary judge characterised the respondent as acting "throughout as a financial planner"[19] and that the appellant "saw it as a financial planner acting for a group of investors".[20] Even so, his Honour said:

> "Although Sultana Investments acted in the course of its business as a financial planner when it approached its client purchasers and when it facilitated the purchases by them of apartments in The Mews, if its actions amounted to buying or selling, or negotiating for the buying or selling, of the apartments as an agent, it may nonetheless be caught by the statutory prohibition. Looking at the acts performed by Sultana Investments, they undoubtedly constitute buying or selling or negotiating for the buying or selling of apartments, despite Comer's disavowal in evidence that he acted as a real estate agent".[21]

[31] The respondent apparently does not challenge that characterisation of its conduct. His Honour noted that Mr Vasiliou thought the respondent was a marketeer.[22] His Honour thought this a more likely description of what the respondent did in relation to the appellant's development. A marketeer is defined in sch 2 and means:

> "(a) ... a person directly or indirectly involved in any way in the sale, or promotion of the sale, or provision of a service in connection with the sale, of residential property, alone, or with others under a formal or informal arrangement, ...
>
> (b) includes a person who –
>
> (i) causes or arranges for the sale, or promotion of the sale ... of residential property; or
>
> (ii) provides advisory ... or other services in connection with the sale, or for promoting the sale, ... of residential property."

A marketeer is not required to be licensed but certain conduct by a marketeer is prohibited.[23]

---

18 The version of s 140 set out by the primary judge contained subs (2) which created an offence for a person who "sues for, or recovers or retains a reward or expense for the performance of an activity as a real estate agent" as provided by subs (1). It is common ground that that provision did not commence until 15 March 2006 and was not relevant to these proceedings. His Honour did not make any reference to s 140(2) and it did not apparently inform his approach to the construction of the section.

19 Reasons para [31].

20 Ibid.

21 Reasons para [35].

22 Reasons para [38].

23 Sections 573A, B, C and D – misleading and unconscionable conduct and false representations respectively.

[32] His Honour concluded that even if any activities by the respondent fell within s 128 the respondent was not at any time acting as agent for the appellant. He noted the conflict of interest which arose when the clients could not settle to reach this conclusion. He identified the consultancy fee as in the nature of a "kickback or inducement".[24] The fiduciary nature of the principal/agent relationship is preserved by the Code of Conduct for real estate agents[25]. A real estate agent must use the agent's best endeavours for the client and must not have a conflict of interest with the client. "Client" under the Code of Conduct means:

> "a person who appoints a real estate agent to perform an activity mentioned in the Act, section 128(1)."

[33] Mr Vasiliou did not think the respondent was the appellant's agent and Mr Petersen did not say it was. A person may act as an agent for both parties and even if they do not recognise that they have established the relationship of principal and agent, or if they have professed to disclaim it, that relationship may subsist if the facts support it.[26]

[34] The expression "agent for others" in the context of the activities of a real estate agent has received judicial consideration. In *Freehold Land Investments Ltd v Queensland Estates,*[27] the High Court considered a definition of "real estate agent" which entailed activities such as buying, selling and letting properties carried out by "any person ... as agent for others and whether on commission or in expectation of a fee, gain or reward". Walsh J observed:

> "No doubt the main purpose of the inclusion of words 'as an agent for others' was to exclude from the operation of the Act investors and developers who buy and sell land on their own account. It is typical of the business of a real estate agent that the transactions of sale or purchase of land in which he takes part or with which he is associated are not his personal transactions but are those of other people."[28]

[35] In *Colbron v St Bees Island Pty Ltd,*[29] Lindgren J, applying the same definition used in a later Queensland Act, said:[30]

> "... it has commonly been held that the authority of particular real estate agents has not embraced authority to commit the principal to a sale and has not extended beyond authority to introduce prospective purchasers, the commission being earned when that introduction is the effective cause of the sale in question."

His Honour expressed his "tentative view"[31] that the words "as an agent for others" have:

---

24 Reasons para [41].

25 *Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation* 2001, s 6.

26 *Garnac Grain Company Inc v H M F Faure & Fairclough Ltd* [1968] AC 1130 at 1137.

27 (1970) 123 CLR 418.

28 At 442.

29 (1995) 56 FCR 303.

30 At 313.

31 His Honour was determining preliminary points on pleadings.

> "... a meaning related to the meaning of the expression 'real estate agent' as it is commonly understood, and so catch at least a person who is authorised by a landowner to introduce prospective purchasers, who does so and who then participates in the process by which the landowner and prospective purchaser come to terms by conveying offers and counteroffers."[32]

[36] In *Jenkins v Kedcorp Pty Ltd*,[33] this Court noted, with apparent approval, Lindgren J's view that it was not necessary that the agent possess authority to commit his principal contractually before it could be said that he had acted "as an agent for others" and held that the expression "simply connotes a person engaged to act on behalf of another". The Court continued:

> "The context, as the remainder of the definition indicates, is that of participating in some aspect of the buying and selling of real estate and associated activities. It is not amiss to note in this context that the classical function of a real estate agent has been regarded as 'to find a buyer' or to introduce a vendor and purchaser."[34]

[37] Something should be said about the expression "negotiate", particularly as here, the price was non-negotiable. It is an expression of wide compass. The Oxford Online English Dictionary offers as its first two principal definitions:

> "To communicate or confer (with another or others) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some compromise or settlement. ...
>
> To do business or trade; to engage in commerce."

[38] To earn the first $5,000 of the consultancy fee the respondent was required to introduce the client to the developer and an unconditional sale occur. In virtually every case the respondent procured the execution of the contract by its investor client and returned the documents to the appellant. It was the conduit through which colour choices and finishes appear to have been conveyed to the appellant. Although it negotiated the extensions of time for settlement for its investor clients it was also negotiating to bring about completed sales for the appellant. If successful, it would earn the second $5,000 of the consultancy fee. What, in a sense, clouded the issue for the primary judge was that the respondent was acting as agent for both buyer and seller. It was irrelevant that the appellant had appointed PRD as its principal selling agent. It was also irrelevant that the respondent may have fitted the description of marketeer vis-à-vis its clients. The respondent negotiated the selling of The Mews for the appellant for reward.

[39] It follows that the primary judge erred in concluding that the respondent did not fall within the prohibition in s 140 of PAMDA. It also follows that the appellant must succeed unless precluded by the other issues raised by the respondent.

Within Queensland

---

32 At 316.

33 [2002] 1 Qd R 49.

34 At 53-54 [16].

[40] The primary judge was particularly concerned that there was insufficient nexus between the respondent's activities and Queensland to bring into operation the Queensland legislation. This was a matter not pleaded by the respondent nor submitted to be an aspect of its case in reply. The primary judge raised the matter with the appellant's counsel in final submissions and appeared satisfied that the parties did not consider it a live issue. Nonetheless, he took the matter up in his reasons, acknowledging that the topic "was not really addressed in the submissions of counsel".[35] His Honour said of the evidence on the connection with Queensland:[36]

> "The Act, as we have seen, fixes on activity with a sufficient nexus with Queensland. Sultana Investments conducted its activity from and in New South Wales. It did receive documentation posted from Queensland, and in turn it posted back the executed contracts and associated documentation to Queensland. I assume also that some telephone calls were made from Cellcom to Sultana Investments or Sultana Investments to Cellcom. Is this contact a sufficient nexus to Queensland so that the activity in the other State is controlled by the Queensland Act? I doubt that it is, but I think that a stronger reason emerges for holding that Sultana Investments is not caught by the prohibition."

[41] Accepting that the respondent was "acting as an agent for others" the question is whether it was doing so "in Queensland". The 22 contracts were drafted in Queensland and were completed in Queensland when the appellant signed the offer to buy from the various clients.[37] There were numerous electronic communications by the respondent to the appellant either by facsimile transmission or telephone or email about aspects of the contracts, the finance and the painting and fit out. The respondent arranged for the clients to fly to Brisbane to inspect the development. This was arranged with the appellant.

[42] As a matter of conventional statutory construction the prohibition in s 128 does not extend to conduct wholly carried on outside Queensland.[38] That this is so is reinforced by s 573A, s 573B and s 573C[39] read in conjunction with s 573D(2) of PAMDA where the latter provides that those sections apply to conduct "... whether happening in or outside Queensland, relating to residential property in Queensland".

[43] Professor W D Duncan summarises[40] the approach to real estate activity which occurs partly in Queensland and partly out:

> "A person will still be acting as a real estate agent for purposes of this legislation if part of the work is performed in Queensland and part outside Queensland. There are a number of steps which are conventionally taken by a real estate in a negotiation and finalisation of any real estate transaction. Introducing the property and

---

35 Reasons para [35].

36 Reasons para [37].

37 *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 CLR 418 per Walsh J at 444-445.

38 *Freehold Land Investments* per Menzies J at 425 and see generally *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J.

39 Misleading and unconscionable conduct and false representations.

40 *Real Estate Agency Law in Queensland*, (4th ed, 2006) at pp 206 – 207.

> negotiating the contract and any special conditions is no less a part of negotiating the transaction as obtaining the signature of the seller to the contract and advising that signature to the buyer. Where a person acts partly in Queensland and partly outside Queensland, regardless of how minor the act inside Queensland, that person will be acting as a real estate agent in Queensland for the purposes of the legislation. For example, notwithstanding that all other activities took place outside Queensland, the mere production of the contract for signing by the seller in Queensland would be deemed one of the essential parts of a real estate agent's function in negotiating the selling of the land, and that person would have had to be licensed in Queensland to earn commission: *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 CLR 418 at 444-445 per Walsh J."

To the extent that the primary judge concluded that PAMDA did not apply to the respondent because there was insufficient nexus between its activities in respect of the purchase of the apartments and Queensland his Honour erred.

Estoppel

[44] The primary judge did not deal with the respondent's claim that if it was caught by the prohibition in PAMDA against retaining or recovering reward, the appellant was prevented from setting up s 140 of the Act because the respondent had acted to its detriment in relying on the appellant to ensure that the agreement was in conformity with Queensland law.[41] The respondent has filed a notice of contention and points to these facts.

(1) The Agreement was drafted by the appellant who, during negotiations, told the respondent that it would be (and was) checked by its solicitors.

(2) Full disclosure was to be included in any contract of sale to show the respondent's benefit from the contract.

(3) The respondent duly performed its part of the bargain for which it was to receive remuneration.

(4) The appellant encouraged the respondent to engage in further marketing of The Mews and made payments on the footing that the respondent was entitled to its remuneration.

(5) There was no suggestion until an amended defence was filed that the respondent was precluded by PAMDA from recovering its fee.

[45] The appellant relies on the general principle that a party cannot set up an estoppel in the face of a statute but contends that, if it could, the facts do not support an estoppel which goes to the failure of the respondent to be a licensed real estate agent. The appellant contends that any representation made by Mr Vasiliou that the Agreement document would be checked by the appellant's solicitors for compliance with PAMDA related to the marketeering and the need for full disclosure of benefits

---

41 Reasons para [43].

obtained by the respondent as a consequence of recommending The Mews to its investor clients and not to the requirement to hold a real estate agent's licence.

[46] Mr Comer's evidence, accepted by the primary judge in preference to that of Mr Vasiliou where they differed in their recollection, was to the effect that at the meeting on 23 September 2002 he was aware of and concerned about provisions in PAMDA and he and Ms Sultana discussed those concerns:

> "Was the legislation about real estate agents something that you were previously aware of?—Yes.
>
> And was it something that you were concerned about?—Yes.
>
> Were there discussions between you and Mr Vasiliou about that?—Yes.
>
> What were they?—Well, when we first met with George we – we said, 'Look, you know, we understand that there's a problem because we're not real estate agents and we're not licensed to – to sell real estate in Queensland, right, where the – where market is.' And he says, 'Oh.' I said, 'Look, you'll – you'll need to make sure that that's correctly identified so that it complies with the Queensland Act, right.' So, he said, 'Look, I'll go and see my solicitor, Mr Chapman, right, and he'll design a suitable contract that will comply, right.'
>
> Right?—I said, 'Okay.' So, that's when he went off and saw Mr Greg Chapman who designed the paperwork and he said that was suitable for the compliance of the Queensland Act."[42]

[47] In cross-examination Mr Comer maintained, as his Honour found, that Mr Vasiliou was told that "they", presumably, he and Ms Sultana, were not licensed real estate agents, but agreed that the reference by Mr Vasiliou to having the appellant's solicitor design a clause related to the issue of disclosure in the context of marketeering. Mr Vasiliou said he wanted "no consequences of anyone breaking the law"[43] when he sent the letter of offer which had been approved by the appellant's directors and the solicitor.

[48] It seems plain that the concern of the appellant was that its name not be tarnished[44] by newspaper articles about overpayment of commission and the like. That was the principal concern, and, as an aspect of it, not to be in breach of the legislation designed to protect purchasers. No witness said that the conversation, which included Ms Sultana,[45] addressed whether the respondent needed a real estate agent's licence to market the units.

[49] Mr Petersen did not know anything about the respondent when the Agreement was reached except, presumably, from having the proposal put to the Committee of Management prior to Mr Vasiliou sending the letter of 25 September 2002 to the respondent. His evidence was that he understood that all of the entities who assisted

---

42 Transcript pp 19-20.
43 Transcript p 137.
44 Transcript p 138.
45 Who did not give evidence, but nothing turns on this.

the appellant in marketing The Mews were licensed real estate agents if they received a fee.[46]

[50] As Lord Radcliffe noted in delivering the opinion of the Privy Council in *Kok Hoong v Leong Cheong Kweng Mines Ltd*,[47] in most cases there is no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction on which he is being sued despite the fact that by conduct or other means he could otherwise be bound by estoppel. His Lordship observed that that principle is not confined to transactions that have been made the subject of legislation; or, where legislation is in question, the bare prescription that a transaction is unenforceable is sufficient by itself to justify application. Whether an estoppel is to be allowed or not will depend on whether the prohibition is imposed in the public interest.[48] His Lordship continued:[49]

> "General social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection, as in the case of the infant or other category of persons enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealings with them, as, for instance, the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms."

[51] This approach was endorsed by the Full Court in *Day Ford Pty Ltd v Sciacca.*[50] In that case the defendants contended that a written contract for the sale of land was avoided by the operation of s 8 of the *Land Sales Act* 1984-1985. The plaintiffs contended that the defendants had represented to the plaintiffs that the agreement was on foot by allowing them to enter the land and incur expense and otherwise act to their detriment so that it would be unconscionable to allow the defendants to deny their obligation to convey the land to the plaintiffs. Macrossan CJ referred with approval to the approach in *Maritime Electric Co v General Dairies Ltd*[51] where it was said that in deciding whether an estoppel might be set up against the operation of a statute:

> "…#the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision".

His Honour concluded[52] that the statute imposed an unconditional prohibition upon the very type of sale which the contract had provided for.

[52] A different result occurred in *Blackman v Milne*[53] where Douglas J held that it was open to a buyer to waive a breach of s 365(2)(c)(ii) of PAMDA[54] on the basis that this provision was a right created for a buyer's private benefit.

---

46 Transcript 151-155.
47 [1964] AC 993 at 1015-1016.
48 At p 1016. See also *In re A Bankruptcy Notice* [1924] 2 Ch 76 at 95 per Atkin LJ.
49 Ibid.
50 [1990] 2 Qd R 209 per Macrossan CJ at 216.
51 [1937] AC 610 at 620.
52 At 217.

[53] PAMDA legislation is principally for the benefit of consumers. In so far as real estate agents are concerned, those consumers may be buyers or sellers. There is a wider public interest in regulating the activities of real estate agents beyond the particular party or parties to any transaction, for example, into the security of the agent's trust account and to disclosure of interests which may conflict with those of a buyer or seller. The fees collected for a real estate agent's licence are directed to the Claims Fund established under the Act to which certain consumers may have resort. There are special provisions which will govern particular contracts, the benefit of which may be waived as in *Blackman v Milne*. However, s 140 is couched in absolute terms. It is very like provisions in the *Queensland Building Services Authority Act* 1991 considered by this court in *Marshall v Marshall*.[55] In that case McPherson JA referred to the public purpose of the legislation in protecting the public from poor workmanship by unlicensed builders by penalising them, and to provide for a fund for claims. On the facts of this case it might be supposed that the consumers to be protected are the investor clients. They make no complaint. There is no reward which the respondent seeks to recover from them. But notwithstanding the disclosure of the fee earned by the successful sale, the respondent was in a position of conflict with its investor clients, something which the Code of Conduct made under PAMDA condemned. The appellant had the benefit of the work done by the respondent in introducing 14 buyers who completed. It lost nothing on the termination of the contracts as the appellant kept the forfeited deposits and subsequently sold those apartments at a higher price. The clear language of the Act, together with the public purpose of the legislation, would, however, dictate that the respondent could not raise an estoppel against the appellant. It may seem an unattractive outcome, but that is the consequence of a legislative decision to require those who act as real estate agents to be licensed, and, if not, to be penalised.

[54] Even were s 140 to be characterised as for a private benefit so as to permit an estoppel the facts do not support an estoppel of the kind contended for. The evidence is clear that the concern about which the respondent wished protection was that of disclosure of a fee for introducing the investor clients to the development, not an anticipation that a real estate agent's licence might be required.

Conclusion

[55] It follows that although the respondent is successful in its construction of the Agreement it is caught by s 140 of PAMDA and may not raise an estoppel against the appellant.

Orders

[56] The following are the orders:

1. Appeal allowed.

---

53 [2007] 1 Qd R 198.

54 As amended and applicable to that case, which required the seller to direct the attention of the buyer to the warning statement and the relevant contract.

55 [1999] 1 Qd R 173 per McPherson JA at 176-178.

2. The judgment in favour of the respondent in the District Court on 26 October 2007 be set aside and in lieu thereof the respondent's claim be dismissed.

3. Judgment for the appellant on its counterclaim in the sum of $121,000 together with interest from 19 April 2006 to judgment.

[57] Unless there are circumstances to suggest a different order, the respondent should pay the appellant's costs of the hearing in the District Court and of the appeal to be assessed on the standard basis.