DISTRICT COURT OF QUEENSLAND

CITATION:	*Yong Internationals Pty Ltd v Gibbs & Ors* [2010] QDC 423
PARTIES:	**Yong Internationals Pty Ltd** **(plaintiff)** **v** **Gaven David Britton Gibbs, Jonathan Wiley Talbot Gibbs, Marcia McDonald Gibbs, Prudence Talbot Gibbs and Gaven Hamilton Paterson** **(defendants)**
FILE NO/S:	BD 2252/08
DIVISION:	
PROCEEDING:	Hearing
ORIGINATING COURT:	
DELIVERED ON:	11 November 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2010
JUDGE:	Samios DCJ
ORDER:	**The plaintiff's claim against the defendants is dismissed.**
CATCHWORDS:	Principal and agent – right to commission – sections 133, 134, 140 and 598 *Property Agents and Motor Dealers Act* 2000 *Acts Interpretation Act 1954* s 49(1) *Property Agents and Motor Dealers Act* 2000, s 133, s 134, s 140, s 598 *QUYD Pty Ltd v Marvass Pty Ltd* [2008] QCA 257 *Freedom v A.H.R. Constructions Pty. Ltd.* (1987) 1 Qd R 59 *Rose v Ken Guy Real Estate Pty Ltd* (2004) QDC 435
COUNSEL:	Mr Cooke for the plaintiff Mr Bain QC for the defendants
SOLICITORS:	Sparke Helmore for the plaintiff Dale and Fallu for the defendants

[1] The plaintiff is a licensed real estate agent. The defendants are the owners of 34.91 ha of land at Lot 1 Redbank Plains Road, Redbank Plains (the property).

[2] On 16 June 2006 the plaintiff and the defendants entered into a written agreement under which the plaintiff was appointed the defendant's real estate agent to sell the property (the appointment).

[3] The term of the plaintiff's appointment was from 16 June 2006 to 31 July 2006. The agreed commission to be paid by the defendants to the plaintiff was 5 percent on the first $18,000 and 2.25 percent on the balance of the sale price, and 10 percent of the total commission for GST.

[4] After the appointment was executed the plaintiff's agent Mr McBride arranged a meeting to take place between the defendants and a potential buyer, Precinct Lawnton Pty Ltd (Precinct).

[5] A contract for the sale of the property was entered into between the defendants and Precinct on 17 July 2006. The purchase price was $9m. (The contract.)

[6] The contract was varied by a deed made between the defendants and Precinct on 27 October 2006 (the deed).

[7] By a letter dated 23 November 2007 the solicitors for the defendant on the stated ground that Precinct had not obtained the development approvals pursuant to the special conditions of the contract by 21 November 2007, terminated the contract pursuant to special condition 4.6 of the contract.

[8] Notwithstanding the letter dated 23 November 2007, Precinct commenced proceedings against the defendants in the Supreme Court of Queensland seeking specific performance of the contract.

[9] By deed of settlement between the defendants and Precinct and its directors made 17 March 2008 the Supreme Court proceedings were settled (the deed of settlement).

[10] The effect of the deed of settlement was that the defendants retained the property as owners and paid Precinct $80,000 upon the terms and conditions of the deed.

[11] The plaintiff claims in these proceedings against the defendants $226,139 for commission payable under the appointment. The defendants deny the plaintiff is entitled to commission under the appointment.

[12] The issues between the plaintiff and the defendants are whether the appointment was invalid under the provisions of the *Property Agents and Motor Dealers Act* 2000 (the Act). Further, if the appointment was valid, whether the plaintiff was entitled to the commission under condition 2.1.3 or 2.1.4 of the appointment.

[13] Section 133 of the Act provides:

> **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 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.

(4) A continuing appointment must state—

(a) the date the appointment ends; and

(b) that the appointment, other than to the extent it relates to the sale of land or interests in land, may be revoked on the giving of 90 days notice, or some lesser period (not less than 30 days) agreed by the parties.

(5) The notice revoking a continuing appointment must be by signed writing given to the other party.

(6) The revocation of a continuing appointment does not affect existing contracts entered into by the real estate agent on behalf of the client.

(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.

(9) If an appointment under this section authorises a sale by auction, an appointment under section 210 is not required.

(10) This section does not apply if the service to be performed is the sale of livestock".

[14] Section 134 of the Act provides:

"**134 Form of appointment**

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

(2) The approved form must include a prominent statement that the client should seek independent legal advice before signing the appointment.

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

[15] Section 140 of the Act provides:

"**140 Restriction on recovery of reward or expense—no proper authorisation etc.**

(1) 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—

(a) …

(b) …

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

[16] Division 2 contains sections 133 and 134 of the Act.

[17] Section 598 of the Act relevantly provides:

"598 Approved forms

(1) Forms may be approved for use under this Act.

(2) A form may be approved by –
(a) …
(b) otherwise – the chief executive".

[18] There is no dispute between the parties that the appointment was in the form approved by the chief executive except in the place in the form which makes provision for stating "how the service is to be performed" there has been no statement made. The defendants say this omission makes the appointment invalid and hence the plaintiff cannot seek to recover commission from the defendants.

[19] In *Rose v Ken Guy Real Estate Pty Ltd* (2004) QDC 435 an appointment did not contain a reserve or listing price or a dollar amount of commission on a "reserve or listing price". In that case Dodds DCJ noted the form in accordance with s 133 of the Act advised that actual commission was payable on the contract sale price. His Honour said at para [28] that so long as the percentages for calculating the

commission do not exceed the maximum provided and are inserted after total commission in the form, so that actual commission may be readily calculated on the actual sale price, the vendor in that case was fairly informed. His Honour applied s 49(1) of the *Acts Interpretation Act 1954* and held there had been substantive compliance with the form. That section provides:

> "**Forms**
>
> (1) If a form is prescribed or approved under an Act, strict compliance with the form is not necessary and substantial compliance is sufficient".

[20] In *QUYD Pty Ltd v Marvass Pty Ltd* [2008] QCA 257, the form used gave a different telephone number for the Office of Fair Trading than provided for in the approved form. The trial judge held that s 49 of the *Acts Interpretation Act 1954* applied.

[21] There was evidence that if the phone number was needed one was put through to the Office of Fair Trading in any event. Section 4 of the *Acts Interpretation Act 1954* provides s 49(1) may not apply if a contrary intention appears in any Act. However, the trial judge did not consider a contrary intention appeared in the Act to displace s 49(1).

[22] In that case Fraser JA said at [21]:

> "Each case depends on the proper construction of the statute in issue, but expressions similar to those in s 134(1) of PAMDA (the Act) have been held to be satisfied where the form used was substantially in accordance with and did not depart from the prescribed form in any material respect."

[23] Dealing with the word "must" in s 134(1) of the Act, his Honour said at [26]:

> "The defendant's senior counsel argued that such a contrary intention was demonstrated by the use of the word "must" in s 134(1). I reject that argument. PAMDA does not provide that an appointment is valid 'if and only if' it is made in the approved form. That might have demanded strict compliance. Subsection 134(1) simply mandates the use of the approved form. The prescription of a form will normally be expressed in language of obligation rather than of permission: that raises the question whether a provision in the form of s 49(1) (*Acts Interpretation Act*) is excluded but it does not answer it."

[24] In the end his Honour found the appointment to be valid. He said:-

> "The defendant also relies upon the mandatory terms of s 133 and the provision in s 140(1)(c) that penalises non-compliance by depriving the agent of the reward it has earned for fulfilling the terms of its appointment. Section 133, with which the plaintiff complied, does not advance the argument and s 134(3) and s 140 are opposed to the defendant's construction. The consequence of excluding the application of an interpretative provision such as s 49(1) is a weighty factor to be taken into account in deciding whether a particular Act evinces an intention to exclude it. Sections 134(3) and 140 have a draconian effect, destructive of common law rights, where an appointment is not in the approved form. It seems most unlikely that the legislative purpose extended to visiting such extreme consequences for a trivial departure of the kind that occurred here".

[25] McMurdo P and Philippides J agreed with his Honour's reasons.

[26] In *Active Property Marketing Services v Jelco Pty Ltd* (2007) QSC 167, although not having to decide the point, Wilson J said at paragraph [18] said the omission of how the service was to be performed in clause 4.1 made it strongly arguable the appointment was not in the approved form.

[27] In this case most matters required by s 133(3) of the Act to be stated are stated in the appointment except for one matter. That is, nothing is stated as to how the service was to be performed. In my opinion the omission cannot be said to be trivial. Further there is no other provision of the appointment that can be read in such a way so as to be able to say the defendants were fairly informed about how

the service was to be performed. In the circumstances I am unable to conclude there has been substantial compliance with s 133(3)(a) of the Act.

[28] Therefore, I find the appointment is not valid and the plaintiff cannot sue on the appointment.

[29] If I am wrong in that conclusion the second issue in these proceedings is whether on the proper interpretation of condition 2.1.3 or 2.1.4 of the appointment the plaintiff has an entitlement to commission.

[30] Condition 2 of the appointment provides:

> "2 Entitlement to commission
>
> 2.1 The client agrees to pay the agent commission as specified in the appointment if a contract of sale of the sale of the property is entered into with the 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) …
>
> or
>
> (2) 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."

[31] Only one witness gave evidence at the trial. That was Mr McBride the plaintiff's agent. I am satisfied on his evidence that the plaintiff was the effective cause of the sale of the property.

[32] The plaintiff relies only on clause 2.1.3 and 2.1.4 of condition 2.1 in these proceedings.

[33] I am satisfied many payments were made by Precinct to the defendants over the course of the relationship between those parties. The total of those payments was $300,000.

[34] However, I do not accept that all of those payments were deposits as claimed by the plaintiff.

[35] Regarding the nature of a deposit and the forfeiture of a deposit McPherson J in *Freedom v A.H.R. Constructions Pty. Ltd.* (1987) 1 Qd R 59 at 64-66: said:

> "It is convenient before considering other factual matters to recall some propositions of law relevant to the recovery of money paid on account of purchase price under a contract for the sale of land that goes off before completion. For present purposes it is sufficient to repeat what I said on the subject in *Lexane Pty. Ltd. v. Highfern Pty. Ltd.* [1985] 1 Qd.R. 446, 453-455:
>
> > 'The fundamental principle applicable to a vendor who rescinds for breach after receiving payment, wholly or in part, on account of the price is that 'he cannot have the land and its value too': *Laird v. Pim* (1841) 7 M. & W. 474, 478; 151 E.R. 852, 854, *per* Parke B. Hence money so paid by the purchaser is recoverable from the vendor. At law it is recoverable as money had and received upon a total failure of consideration where the consideration for which it was paid is the conveyance or transfer that has not taken place: *McDonald v. Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457, 477-478, *per* Dixon J.; in equity it is recoverable by proceedings for restitution: *ibid*; see also 48 C.L.R. 457, 470, *per* Starke J. Equity relieves against a contractual provision purporting to entitle the vendor in the event of default to retain money so paid: *ibid*. A deposit properly so called falls outside the scope of this right to relief because it is paid as security for completion of the contract: *McDonald v. Dennys Lascelles Ltd. (supra)*, at p. 470. Equity has never intervened to relieve against forfeiture of a deposit that is reasonable in amount, and a deposit of no more than 10 per cent of a purchase price is *prima facie* reasonable: see

> *Mehmet v. Benson* (1963) 81 W.N. (Pt. 1) (N.S.W.) 188, 191, *per* Jacobs J. (revd. on other grounds: see 113 C.L.R. 295). Section 71 (2)(a)(i) of the Act also appears to assume that 10 per cent is a proper deposit. A vendor is therefore entitled to retain such a sum: *Mayson v. Clovet* [1924] A.C. 980; *McDonald v. Dennys Lascelles Ltd. (supra)*; *Pitt v. Curotta* (1931) 31 S.R. (N.S.W.) 477, 483; *Chard v. Willett* [1933] St.R.Qd. 182, 188; although credit must be given for the deposit in assessing any claim by the vendor for damages for breach of contract: *Cowan v. Stanhill Estates Pty. Ltd. (No. 2)* [1967] V.R. 641.'

Here it is necessary to add some further remarks about a deposit. The reason why a deposit is liable to forfeiture and retention by the vendor in the event of non-completion through default of the purchaser is that it is not merely "a part payment but is…also an earnest to bind the bargain": see *Howe v. Smith* (1884) 27 Ch.D. 89, 101, *per* Fry L.J. Simply calling the payment a deposit is ordinarily sufficient to attract the implication that the vendor is entitled to retain it on default: *ibid*. Whether or not that is so may, however, depend upon other factors. In *Coates v. Sarich* [1964] W.A.R. 2, 6, Wolff J. said that:

> '…when speaking about a 'deposit' it is not the fact that the parties call a sum of money the deposit: the circumstances of the bargain are the test."

In the same case Hale J. ([1964] W.A.Rl 2, 15) said:

> 'If the deposit is surprisingly large and if there is no express forfeiture clause the question may arise as a matter of interpretation whether the parties when using the word 'deposit' meant that the payment in question was in truth to have the normal incidents of a deposit of whether there was merely an error of nomenclature. Secondly, if that question is answered that there was no error of expression, or if there is an express forfeiture clause, a question may still arise whether what the parties have contracted for is in truth a penalty, and in the latter context the question whether the sum is a true deposit becomes the question whether it is a reasonable deposit or whether it is so unreasonable a sum to be forfeited that it should be treated as a penalty against which relief should be granted."

In the latter part of this passage Hale J. was referring to the power of equity to relieve against forfeiture of a sum, paid by purchaser before completion, that is unreasonably large. However, as appears from the extracts from the judgments of both Wolff and Hale JJ. there is an antecedent question to be asked, which is whether the payment, although described as a deposit, is intended to possess the normal incident of a deposit, which is that is liable to forfeiture upon default in completion by the purchaser".

[36] In this matter I find only two sums of $5,000 each were paid as deposits. That is $5,000 on the signing of the contract, and $5,000 30 days within signing of the contract (see the terms of the contract). There was a further sum of $100,000 to be paid on satisfaction of due diligence pursuant to special condition 3 of the contract (see the terms of the contract). However, I am satisfied that $100,000 was converted to a non-refundable payment pursuant to the deed payable by instalments as follows:

> $40,000 on or before 27 October 2006
> $20,000 on or before December 2006
> $40,000 on or before 14 February 2007.

(see clauses 3 and 4 of the deed).

[37] Further, sums totalling $190,000 were paid by Precinct to the defendants but I find those sums were not a deposit but rather were made up of payments for extensions of time which were to be added to the purchase price (see admissions in the pleadings and clause 7 of the deed).

[38] In my opinion for the purposes of condition 2.1.3 of the appointment at least the sum of $10,000 (the two payments of $5,000) were received as a deposit. There is no dispute the contract was not completed. Therefore, it remains to be considered were those sums liable to be forfeited?

[39] On the evidence before me I conclude this deposit was not “liable to be forfeited”. That is because the transactions between Precinct and the defendants were governed by the contract, the deed and the deed of settlement. Neither of those agreements between Precinct and the defendant purported to terminate the contract and forfeit

the deposit. Precinct and the defendants settled their claims. The terms of the settlement are to be found in the deed of settlement. There is nothing in the deed to suggest the deposit (however much it was) was "liable to be forfeited".

[40] There is no evidence that Precinct defaulted under any of the agreements with the respondents to make any sum paid as a deposit liable to be forfeited to the defendants (*Freedom v AHR)*.

[41] Further, for the purposes of condition 2.1.4 on the evidence I am satisfied there was no termination of the contract by mutual agreement. In my opinion, the defendants purported to terminate the contract which was not accepted by Precinct who then commenced proceedings for specific performance in the Supreme Court and those claims were then settled.

[42] Therefore, I find the plaintiff is not entitled to claim commission from the defendants under the appointment. I dismiss the plaintiff's claim against the defendants.

[43] I will hear the parties on the question of costs.