Agents’ entitlement to commission

INTRODUCTION

In the ordinary course of events, an agent who has been validly appointed to sell a property pursuant to a Property Occupations Form 6 Appointment and reappointment of a property agent, resident letting agent or property auctioneer (Form 6) is entitled to receive a commission from their seller client upon the completion of the sale in accordance with the terms of the Form 6.

In the case of an open listing or sole agency, if a dispute arises between the agent and their seller client regarding the agent’s entitlement to the commission, an agent must be able to demonstrate that they are the effective cause of the sale in order to successfully recover their commission.

A Form 6 executed by the agent and their seller client is a precondition to determining whether the agent was the effective cause of the sale as the Form 6 establishes an obligation on the part of the seller client to pay the agent commission upon completion of the contract of sale.

What happens though in circumstances where a contract of sale for a property is not completed? Is the agent still entitled to commission? In this article, we examine an agent’s entitlement to commission in the event that a contact of sale is not completed.

THE FORM 6

Clause 5 of the REIQ Essential Terms and Conditions attached to the Form 6 for Residential Sales, prescribes that the seller client agrees to pay the agent commission (as specified in Part 7 of the Form 6) if a contract of sale is entered into with a buyer, where the agent is the effective cause of the sale, provided that:

5.1 the contract of sale is completed; or
5.2 the seller client defaults under the contract of sale and by reason of that default the contract is terminated; or
5.3 the contract of sale is not completed and the whole or part of the deposit paid is liable to be forfeited; or
5.4 the contract of sale is terminated by mutual agreement of the seller client and the buyer.

The courts in Queensland have previously considered an agent’s entitlement to commission in circumstances where a contract of sale has not been completed. In the decisions set out below, the agents commenced proceedings to recover commission from their respective seller clients, despite the fact that a contract of sale had not been completed.

YONG INTERNATIONALS PTY LTD V GIBBS & ORS [2011] QCA 161

In July 2011, the Queensland Court of Appeal dismissed an agent’s claim for commission in the amount of $226,139 because the PAMD Form 22a Appointment of real estate agent (Form 22a) (the precursor to the Form 6) was invalid as it had not been properly completed.

The two issues for determination by the Court of Appeal in this matter were:

a) whether the Form 22a complied with section 133 and 134 of the Property Agents and Motor Dealers Act 2000 (Qld) (the PAMD Act) (see sections 102 to 106 of the Property Occupations Act 2014 (the POA)) and, if not, was the Form 22a invalid; and
b) if the Form 22a was valid, did the agent have an entitlement to commission under clauses 2.1(3) and 2.1(4) of the Form 22a (clauses 5.1(3) and 5.1(4) of the Form 6).

The Court of Appeal held that in circumstances where the agent failed to complete section 4.1 of the Form 22a that provided for how the service was to be performed, there was not substantial compliance with section 134(1) of the PAMD Act and the agent was not properly appointed. Therefore, in accordance with section 140 of the PAMD Act (section 89 of the POA), the agent had no entitlement to sue for or recover any commission.

Notwithstanding this, the Court of Appeal discussed the operation of clauses 2.1 of the Form 22a (clause 5.1 of the Form 6). The Court of Appeal at [47] stated that:

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In construing clause 2.1, it should be borne in mind that the agency (Form 22a) 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."

Based upon the relevant facts in this particular case, the Court of Appeal determined that the contract of sale had been terminated by mutual agreement (as set out in clause 2.1(4)), but the agent had no entitlement to sue for or recover any commission because it was not properly appointed.

**HUDSON V STANDFIELD [2013] QDC 289**

In November 2013, the Queensland District Court dismissed an agent’s claim for commission in the sum of $59,400 in circumstances where a contract of sale was terminated before settlement.

In this case, the agent argued that by entering into a second contract of sale, the buyer and seller "brought to an end" the first contract of sale, which was in effect a mutual termination, falling within clause 2.1(4) of the Form 22a.

The main issues determined in this case were - firstly, whether the contract of sale was in fact terminated by mutual agreement between the buyer and seller and secondly, whether the agent had failed to comply with his obligations under section 134A and 135 of the PAMD Act which would prevent him from recovering commission altogether.

The Court rejected the agent's submissions and held that he was not entitled to commission as the contract of sale was terminated through the buyer's breach, not through mutual agreement. Accordingly, clause 2.1(4) of the Form 22a did not apply in this instance.

In any event, the Court held that the agent's failure to bring to the seller's attention information in the Form 22a about the effect of an open listing, exclusive agency or sole agency - which was a mandatory requirement of sections 134A and 135 of the PAMD Act - meant that the Form 22a was, in fact, ineffective.

As these two cases demonstrate, an agent's entitlement to commission will always be determined on the facts of each case. Notwithstanding this, clause 5 of the REIQ Essential Terms and Conditions for Residential Sales attached to the Form 6 for Residential Sales has been included to provide agents with an opportunity to recover their commission in the event that a contract of sale is not completed because, as outlined in Yong v Gibbs, after the Form 6 is entered into, the agent has "no control over the way in which that contact is negotiated, entered into, varied or brought to an end or as to how the deposit is treated".
LEGISLATIVE REQUIREMENTS

By now, agents should be familiar with the procedure for executing a Form 6 and ensuring that it is completed in accordance with the requirements of the legislation. Relevantly, the POA outlines the statutory requirements which must be satisfied for an appointment to be valid and enforceable. As outlined above, in circumstances where an agent’s entitlement to commission is contingent upon the appointment being valid, it is important that agents are attentive to detail when preparing the Form 6.

The general content requirements which must be satisfied in order for the appointment to be valid are listed in section 104 of the POA. It is important that agents are aware that section 112(4) mandates that any appointment is ineffective from the time it is made if the appointment does not comply with section 104.

Other requirements which must be satisfied in order for the appointment to be valid concern commission and notice of termination. Under the POA, agents are at liberty to negotiate commission with the client and express the amount of commission payable in any manner chosen. However, agents must have regard to section 105(2) of the POA, which requires that the appointment must specifically state the manner in which commission is calculated.

It is imperative that agents clearly express the commission payable and that the seller client fully understands the likely amount. The commission can be expressed in a number of ways, which may include as a percentage or a flat fee (or a combination of both). Similarly, the commission payable may be varied subject to a number of factors (for example, a higher rate of commission could be paid if a property sells or rents in the first two weeks of marketing).

Where agents are providing a service for the sale or letting of property or the collection of rent, and they elect to express the commission payable as a percentage of an estimated sale or rental price, they are required to insert a written statement into Part 7 which complies with section 105 of the POA.

Agents are also required to specify when commission is payable. To ensure compliance with this requirement, agents can state when the commission is payable or alternatively refer to an annexure or the REIQ Essential Terms and Conditions attached to the Form 6.

CONCLUSION

Hopefully this article has again emphasised that the agreement between an agent and their seller client is paramount in determining an agent’s entitlement to commission. Accordingly, agents should always ensure that they obtain a valid appointment in order to protect their entitlement to commission. Agents should also familiarise themselves with the terms of their appointment – specifically, what they are obliged to do in order to crystallise their entitlement to commission.

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