

# Agent **STUCK** in the middle

*By Paul Hopkins, Senior Partner, Carter Newell Lawyers*

The Supreme Court recently had to consider an application by a real estate agent, Alpha Realty ("the agent"), seeking an order that deposit monies held in its trust account be paid into Court pending the determination of a dispute between the agent and the parties to a sale contract (Active Property Marketing Services (Aust) Pty Ltd trading as Alpha Realty –v– Joelco Pty Ltd and Iannoe Pty Ltd). The agent lost and was required to return the deposit to the buyer.

## **The Facts**

On 14 December 2006, the agent was appointed in accordance with a PAMD Form 22A by Joelco Pty Ltd to sell a property known as *Maleny Glen*, which consisted of 78 lots.

On 2 February 2007, the seller entered into a conditional contract to sell *Maleny Glen* for \$10.45 million to Iannoe Pty Ltd. The contract was subject to the buyer undertaking a due diligence investigation and expressing its complete satisfaction with that investigation within 14 days of the date of the contract.

In due course, the agent received a deposit payment from the buyer totalling \$110,000.

The buyer and seller also entered into a Deed of Agreement, pursuant to which the buyer authorised the agent to release the deposit to the seller, upon the buyer expressing its satisfaction with the due diligence special condition in the contract.





The buyer subsequently expressed its satisfaction with respect to its due diligence investigations and the seller instructed the agent to release the deposit to it in accordance with the Deed of Agreement. The agent refused to do so.

In doing so, the agent relied upon its obligations as stakeholder under the contract, and argued that the seller was obliged to pay to them its commission upon settlement from the deposit.

The seller's solicitors argued that the direction contained in the Appointment pursuant to which the seller undertook to pay the agent its commission from the deposit had been effectively revoked. However, the agent disputed that the seller had revoked the direction and insisted upon retaining the deposit.

In the meantime, a further complication had arisen between the buyer and the seller as to whether the *Maleny Glen* development was being sold as a going concern or not. This issue was important for GST purposes.

On 31 May 2007, the seller and the buyer concluded that there had never been a meeting of minds between them as to whether the development was being sold as a going concern or not and therefore there was not – and never had been – an enforceable contract between the parties.

The seller informed the agent that there was no agreement and instructed that the deposit be released to the buyer. The agent again refused to do so.

### Compliance with PAMD Form 22a Appointment requirements

The Court first considered whether the agent had been properly appointed as the seller's agent pursuant to the *Property Agents and Motor Dealers Act 2000*.

The Court concluded that it was not necessary to reach a definitive view on this issue, as nothing ultimately turned upon the point. However, it commented that in circumstances in which the Appointment had not been fully completed – insofar as it did not state how the agent's service was to be performed (as is required by sections 133(3)(a) and 134 of the PAMD Act) – then the Appointment had not been properly effected. Therefore, the agent would be prevented from recovering its commission.

### The effect of the Deed of Agreement

The Court then considered whether the Deed of Agreement prevailed over clause 2.4 of the contract of sale, which deals with the disposition of the deposit held by the agent. The Court noted that:

*"It is arguable that in doing so [by entering into the Deed of Agreement] they varied clause 2.4 of the standard conditions to provide that the seller was entitled to receive the deposit upon satisfaction or waiver of special condition 1. Even if that were so, it would still be arguable that the plaintiff (the agent) was precluded by sections 384 and 385 of the PAMD from paying the monies out of its trust account while the contract remained on foot."* (Emphasis added)

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Sections 384 and 385 of the PAMD Act prescribe when and what payments may be made from an agent's trust account.

### The agent's rights depend upon the seller's rights

However, the Court did not express a concluded view on this complex question because it ultimately concluded that:

*"An agent's right to commission depends upon the terms of its appointment; it is an aspect of its relationship with the seller completely different from and entirely unaffected by its role as stakeholder. (Emphasis added) By clause 7.1 of the terms of the plaintiff's appointment, commission was "due" when the contract became unconditional and "payable" on settlement of the sale. Here there will never be a settlement – either because, as the seller and the buyer contend, there never was a contract or because there has been a mutual release between the seller and the buyer. (Emphasis added) Clearly, the plaintiff would not be entitled to commission if there was never a sale, and it may well be that in the event of a mutual release commission otherwise due, ceased to be payable – but that is not a matter for determination at this stage. The buyer and the seller are agreed that the monies in the plaintiff's trust account should be paid out to the buyer." (Emphasis added)*

### Orders

The Court ordered that the deposit monies be paid by the agent to the buyer and that the agent pay interest on the deposit monies held by it to the buyer calculated at the rate of 10 per cent per annum.

### Analysis

Whilst the case did not finally decide the issue, the Court

was of the view that a Deed of Agreement entered into between the buyer and the seller, dealing with the early release of the deposit to the seller, may not override the standard terms and conditions of the contract of sale.

This case demonstrates that in circumstances in which the buyer and the seller have concluded that there is no agreement between them, then an agent cannot possibly hope to hold the deposit. This is because the agent can only hold the deposit in its capacity as the agent for the seller. If the seller disclaims the existence of a contract, and therefore disclaims any entitlement to the deposit, then the agent cannot justify any entitlement to hold those monies, or even seek that the monies be held in Court.

The case is also a timely reminder of the importance of ensuring that the Form 22A is fully and properly completed. If not, the Appointment will not be effective and the right to commission will be lost.

In the event that agents are confronted with conduct which they consider to be collusion between buyers and sellers to deprive an agent of his or her commission, it is imperative that legal advice be promptly sought. However, as the *Alpha Realty* case shows, if there is no longer an agreement between a buyer and seller then an agent cannot hold or control the deposit. ■



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