

Case update – *Chief Executive, Department of Justice and Attorney General v Peterson Management Services Pty Ltd*

WORDS BY CARTER NEWELL SENIOR ASSOCIATE, ANDREW PERSIJN

In the February 2017 issue of the REIQ Journal, we considered the initial decision in *Chief Executive, Department of Justice and Attorney General v Peterson Management Services Pty Ltd* [2015] QCAT 473 as well as the appeal decision.¹ The decisions considered the operation of the following sections of the former *Property Agents and Motor Dealers Act 2000* (Qld) (**PAMD Act**):

- Section 133 (appointment of real estate agent – general);
- Section 139 (commission may be claimed only in relation to actual amounts);
- Section 140 (restriction on recovery of reward or expense – no proper authorisation); and
- Section 141 (restriction on recovery of reward or expense above amount allowed).²

Background

The Department of Justice and Attorney General (**Department**) commenced disciplinary proceedings against Peterson Management Services Pty Ltd (**Peterson**), the letting agent at a resort located at Currumbin Beach. Peterson held signed PAMD Form 20a's (Appointment of agent – letting

and property management) for each property in the letting pool. Annexed to each PAMD 20a was a schedule outlining the agreed charges for a number of services (**schedule**).

The Department submitted the following four grounds for instituting disciplinary proceedings against Peterson:

1. General cleaning services – Peterson breached section 141(6) of the PAMD Act by charging unit owners an amount above that allowed (**Ground One**).
2. Window cleaning services – Peterson breached section 140(2) of the PAMD Act by retaining a charge for window cleaning where it was not properly authorised to do so (**Ground Two**).
3. Foxtel services – Peterson breached section 141(6) of the PAMD Act by charging unit owners an amount above that allowed (**Ground Three**).
4. Wotif bookings – Peterson breached section 139(2) of the PAMD Act by charging commission on the amount Wotif received from guests and not the amount Peterson received, after Wotif had taken its commission (**Ground Four**).

In relation to Ground Two, Peterson conceded that it was not properly authorised, as required by section 140(1)(c) of the PAMD Act, to charge what it did for the window cleaning. Accordingly, the Queensland Civil and Administrative Tribunal (**Tribunal**) found a breach of section 140(2) by Peterson for raising a charge for that work.

In order to determine Grounds One and Three, consideration also needed to be given to the proper interpretation of section 133 of the PAMD Act.

The Tribunal and Appeal Tribunal decision

The Tribunal found that a disciplinary ground had been established as to Ground Two only (window cleaning services). The Tribunal held that the remaining three breaches were not established. The Department appealed the Tribunal's decision.

The Appeal Tribunal reversed the Tribunal's decision and held that the Tribunal's dismissal of the charges relating to general cleaning services, Foxtel service and the commission on Wotif bookings was erroneous as a matter of law.

In arriving at its conclusion, the Appeal Tribunal respectfully criticised the approach of the Tribunal member in relation to section 133 of the PAMD Act and stated "its context, policy and a sense of fairness appear to be surer guides to its meaning than exquisite semantic dissection."³

The Appeal Tribunal found that the global sums set out in the PAMD Form 20a and the schedule should have been particularised to show the "fees, charges and commission" on one hand and the expenses incurred in providing the subject services on the other. This was required in order for the consumer to be fully aware of the nature and amount of the charges, with the "nature" of the charges being more than a bald total price; a distinct separation between the expense paid to the third party service provider and the amounts received as a personal payment to the agent was required.⁴

It was clear, in the view of the Appeal Tribunal, that the consumer protection policy of the PAMD Act extends to the separate disclosure of the agent's fees for their services, as distinct from payments to a third party.⁵ Peterson subsequently appealed the Appeal Tribunal's decision.

The Court of Appeal decision

In May 2017, the Court of Appeal allowed the appeal from Peterson and set aside the orders made by the Appeal Tribunal: *Peterson Management Services Pty Ltd v Chief Executive, Department of Justice and Attorney-General* [2017] QCA 89.

Peterson's appeal concerned two issues:

- The proper interpretation of section 133 of the PAMD Act; and
- The failure of the Appeal Tribunal to give any adequate reasons concerning Ground Four under section 139(2) of the PAMD Act. The Department did not contest this point and conceded that an error of law was made by the Appeal Tribunal.

Peterson submitted that the Appeal Tribunal erred in law by misconstruing section 133 of the PAMD Act, and that the "expenses" referred to in section 133(3)(c)(ii) are expenses which the agent is authorised to incur in connection with the performance of the relevant service.⁶

The Department submitted that section 133(3)(c)(ii) required disclosure of any expenses actually incurred in connection with the provision of services to an owner.⁷

The Court of Appeal viewed the Department's characterisation as "inviting confusion" and criticised the Appeal Tribunal for not having paid close attention to the text of section 133(3)(c)(ii). The Appeal Tribunal re-characterised the reward (i.e. the fee or charge for the general cleaning service or Foxtel service) as an expense, attempted to separate out some of the costs associated with providing the service (i.e. a payment to a third party), and then characterised the balance of the amount as a reward requiring separate disclosure.⁸

However the Court of Appeal did not uphold this analysis and reinforced that section 133(3)(c)(ii) is concerned with expenses the agent is authorised to incur in connection with the performance of a service, not all the expenses actually incurred.⁹

The Court of Appeal held that:

*"The essential fact in this case is that the client received the service it contracted for at a price it contracted to pay, being the fee or charge stated in the schedule to the appointment form for the 'clean and service' of a unit and the monthly Foxtel services. The applicant [Peterson] did not seek to recover or retain more than the reward stated in the appointment form for providing those services."*¹⁰

The Court of Appeal stated that it was not necessary for the Appeal Tribunal to analyse the terms of the relevant provisions with "exquisite semantic dissection,"¹¹ rather a conventional approach to statutory interpretation was all that was required.

Accordingly, the Court of Appeal found that the Appeal Tribunal "did not properly interpret the statutory provision which was to be construed."¹²

The Court of Appeal concluded that the Appeal Tribunal misconstrued section 133 PAMD Act, amounting to an error in law.

Conclusion

One of the key findings of the Court of Appeal was that:

*"...subsections 133(3)(c)(i) and (ii) enable a client to know the fees, charges and any commission payable for a service. They also enable a client to know the expenses, if any, which the agent is authorised to incur and which the agent will seek to recover from the client...In this case the agent did not charge the client, and recover from the client, the expenses it incurred in performing the required services, such as the expense of the cleaning contractor. The reward which the applicant was to receive by way of fees or charges was stated in the appointment form. As a result there was no breach of s 140 or s 141."*¹³ (our emphasis added).

The Court of Appeal viewed the Department's characterisation as "inviting confusion" and criticised the Appeal Tribunal for not having paid close attention to the text of section 133(3)(c)(ii).

As this matter demonstrates, the appointment agreement between an agent and a client (the Property Occupations Form 6) is paramount in demonstrating an agent's compliance with the *Property Occupations Act 2014* (Qld), in particular section 104. Agents should always ensure that they obtain a valid appointment including clear written instructions regarding not only the fees, charges and any commission payable for the service being provided, and when those fees, charges and any commissions become payable, but also the expenses, if any, the agent is authorised to incur in connection with the performance of each service or category of service.

Agents should also ensure that they keep appropriate written records, such as files notes of meetings and telephone conversations, and copies of all emails and letters, and make sure that those materials are readily available, if later required, to evidence the agent's role in the performance of any service agreed by the parties.

¹ *Chief Executive, Department of Justice and Attorney General v The Respondent Services Pty Ltd* [2016] QCATA 163.

² See sections 88, 89, 90 and 104 of the *Property Occupations Act 2014* (Qld).

³ *Department of Justice and Attorney General v Peterson Management Services Pty Ltd* [2016] QCATA 163, [15].

⁴ *Ibid* [18].

⁵ *Ibid* [14].

⁶ *Peterson Management Services Pty Ltd v Chief Executive, Department of Justice and Attorney-General* [2017] QCA 89, [23].

⁷ *Ibid* [24].

⁸ *Ibid* [37].

⁹ *Ibid* [40].

¹⁰ *Ibid* [39].

¹¹ *Department of Justice and Attorney General v Peterson Management Services Pty Ltd* [2016] QCATA 163, [15].

¹² *Peterson Management Services Pty Ltd v Department of Justice and Attorney-General* [2017] QCA 89, [43]-[45].

¹³ *Ibid* [51] and [52].