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Real Estate Law News
13 October 2011

RISK LOSING YOUR COMMISSION FOR FAILURE TO COMPLETE FORM 22A APPOINTMENT

A recent decision of the Queensland Supreme Court of Appeal held that no commission was recoverable by a real estate agent because the *Property Agents and Motor Dealers Act 2000* approved Form 22a Appointment of Real Estate Agent (Sales and Purchases) ("Form 22a") was not substantially completed.

The seller appointed the real estate agent to sell its vacant land situated in Redbank Plains, Queensland. The appointment was made using the approved Form 22a. The agent claimed its commission of $226,139 but the seller refused to pay on the basis that cl 4.1 (which stipulates how the real estate agent will perform the services) of the Form 22a had not been completed.

On appeal, the real estate agent argued that there had been substantial compliance and that the failure to complete cl 4.1 of the form had not adversely affected the seller's interests. This was because the Form 22a contained information throughout it concerning how the service was to be performed.

The Queensland Supreme Court of Appeal in dismissing the real estate agent's appeal, looked at s 49 of the *Acts Interpretation Act 1954* (Qld) which stipulates that if a form prescribed or approved under an Act requires specified information to be included in the form, the form is not properly completed unless the requirement is complied with. The Form 22a was one such form. The required information was not included in cl 4.1 of the form and the appointment was therefore not properly completed for the purposes of s 49.

Section 140 of the *Property Agents and Motor Dealers Act 2000* prohibits an agent from recovering a commission unless the agent has been properly appointed. As the agent was not properly appointed, it was not entitled to sue for or recover any commission.

The court also held that the requirement to state how the service is to be performed in s 133(3)(a) of the Property Agents and Motor Dealers Act and in cl 4.1 of the form is of considerable practical importance in defining the role of the agent and apprising the client of the services to which the client is entitled and of the way in which those services are to be performed. There could be no substantial compliance with the Form 22a without cl 4.1 being completed. The omission was substantial.

This case serves as a timely reminder for agents and Principals to ensure full compliance with the provisions of the *Property Agents and Motor Dealers Act 2000* and that all approved forms are properly and thoroughly completed.

Citation: *Yong Internationals Pty Ltd* v *Gibbs & Ors* [2011] QCA 161.

OWNER BUILDER - REQUIREMENT TO ISSUE WARNING TO PROSPECTIVE BUYER

Agents should investigate the title to the property for the purposes of preparing the contract of sale and as part of its due diligence process, we recommend agents take particular notice of administrative dealings relating to owner builder notifications on title. Under the *Queensland Building Services Authority Act 1991,* a seller must notify prospective buyers if building work on the property was constructed by an unlicensed person within the last six (6) years. Before the contract of sale is signed by the buyer, the seller must give the prospective buyer a notice containing details of the building work and a warning in the form required by section 22(1)(b) of the *Queensland Building Services Authority Regulations 2003* on the following terms:

"WARNING — THE BUILDING WORK TO WHICH THIS NOTICE RELATES IS NOT COVERED BY INSURANCE UNDER THE QUEENSLAND BUILDING SERVICES AUTHORITY ACT 1991"

If the notice is not given, the seller will be taken to have given the buyer a contractual warranty that the building work was properly carried out. Failure to provide the warning notice may therefore give rights to the buyer in circumstances where the works are not properly carried out and *may* result in the agent being joined as a party to a claim made by the buyer for damages. Accordingly, to avoid any exposure, we recommend that agents inform their seller clients of the requirements to provide notice to the buyer in the approved form where there is an owner builder notification on title.

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DUPLEXES AND THE REQUIREMENT TO PROVIDE A DISCLOSURE STATEMENT

A duplex is governed by the requirements of the *Body Corporate and Community Management Act 1997* and accordingly when preparing contracts for sale, agents should always use the appropriate contract form – either the REIQ Contract for Residential Lots in a Community Titles Scheme (4th Edition) or the ADL Contract for Sale of Residential Lots in a Community Titles Scheme (version 10.2) (which are the current approved forms and subject to change). Further, the BCCM Form 14 Information Sheet and the Disclosure Statement must be provided to the buyer.

When in doubt as to whether the property forms part of a scheme (and therefore subject to the above disclosure requirements), we recommend agents review the title search to determine if there is a Community Title Scheme (CTS) number. If there is no CTS number and you believe there may be common property owned jointly by the duplex owners, we recommend that you advise the seller to contact its solicitor for further advice.

Failure to provide the Disclosure Statement in circumstances where there is a community title scheme will give the buyer termination rights under the *Body Corporate and Community Management Act 1997* at any stage prior to settlement of the contract (section 206(7) of the Act). In turn this may expose the agent to a claim for negligence.

SIGNING A CONTRACT UNDER NOMINATION

Selling agents should be careful when buyers or their agents wish to sign contracts as 'and or nominee' and it is recommended that agents refer the buyers to a solicitor from the outset. It is a common misconception that by including these words to the contract, the buyer can be changed at a later date without any risk. Agents should refrain from giving any advice in regard to the use of nominations, the implications of duty or the requirements under the *Duties Act (Qld) 2001.*

To make proper use of a nominee contract, a written appointment of agency should be prepared and signed by the nominee (as the principal) before the contract is signed by the named buyer (as agent). Failure to have the correct authority prior to signing the contract may result in the commissioner treating the nomination of the intended buyer as a secondary transfer and therefore incurring additional stamp duty. As the agency appointment must be in existence prior to the signing of the contract by the agent, the nomination of a company or a trustee of a trust will not be recognised unless the company is incorporated or the trust settled prior to the agent signing the contract of sale as there will not be proper authority given prior to the named buyer signing the contract.

Even if the right process is followed, the named buyer who originally signed the contract will ordinarily remain bound to carry out its terms until all parties agree otherwise or settlement occurs. If the nominee is unable to proceed for any reason, then the named buyer may be put in a potentially disastrous position.

POOL OWNERS GIVEN A REPRIEVE UNTIL 4 NOVEMBER 2011 TO REGISTER

In December 2010, the Queensland Government introduced a two-stage pool safety regime for existing regulated pools. Under this regime, pool owners were required to register their pool with the chief executive by 4 May 2011.

However, in recognition of the hardships caused by the recent Queensland natural disasters, the date for compliance has now being extended to 4 November 2011 to provide pool owners additional time to register — see the Building and Other Legislation Amendment Regulation (No 3) 2011.

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