

REAL ESTATE AGENTS AND THE LAW

The Queensland Court of Appeal has recently handed down two (2) decisions about Real Estate Agents:

- 1 The formalities of the Agency Agreement; and
- 2 A right to Commission.

1 FORMALITIES OF THE AGENCY AGREEMENT

1.1 In Brief

In *QUYD v Marvass Pty Ltd (2009)* the Court considered the situation where an Agent made a mistake in completing the Agency Agreement.

The *Property Agents and Motor Dealers Act* says that an estate agent cannot recover commission unless they have been appointed in writing in the “approved” form.

The Agent and the Seller had signed a form which was the “approved form” except for one matter – it gave the old phone number of the Office of Fair Trading – although a person calling that number would be transferred to the new number.

The Seller refused to pay the agent commission as the “approved” form had not been signed by the Seller.

1.2 What the Court had to Consider

The Court had to consider whether the form used was the “approved form” so that the Agent could recover their commission.

Did the mis-statement of the telephone number mean that the form was not in the “approved form”?

The Court had to consider whether the relevant section of the *Property Agents and Motor Dealers Act* insisted on a pedantically strict compliance or whether it could apply Section 49 of the *Acts Interpretation Act* which says that where a statute prescribes a form substantial compliance is enough unless the specific Act says otherwise.

1.3 The Decision

Common sense prevailed and the Court of Appeal found that the *Property Agents and Motor Dealers Act* did not require a strict pedantic compliance and that the mistake produced no consequence adverse to the Seller’s interests and in fact produced no consequence at all.

This decision does not mean that the Courts will disregard any mistake in the formalities of the Agency Agreement and each matter will depend on the particular circumstances. Strict compliance is always advisable so that the Agent’s commission is not at risk and the current and correct forms should always be used.

2 A RIGHT TO COMMISSION

2.1 In Brief

In *Sultana Investments Pty Ltd v Cellcom Pty Ltd* (2008) Cellcom activity sought out buyers for Sultana's residential development.

Cellcom was a financial planner and did not hold a Real Estate Licence but the Seller agreed to pay Cellcom a consultancy fee of \$10,000.00 for each property sold. The Seller had properly appointed a licensed Real Estate Agent as well to market and sell the development.

2.2 What the Court had to Consider

The *Property Agents and Motor Dealers Act* prohibits a person from suing for a "reward or expense" for the performance of "an activity as a real estate agent" unless the person holds a Real Estate Agent's licence.

The Court of Appeal had to consider whether Cellcom was acting as a Real Estate Agent in introducing buyers to the property.

2.3 The Court's Decision

The Court of Appeal held that a Real Estate Agent was a person whom a landowner authorises to introduce prospective buyers and who then participates in the process of negotiating a contract between the Seller and a buyer. The Court found that Cellcom was acting as a Real Estate Agent and it was irrelevant that the Seller had appointed a licensed Real Estate Agent or that the buyers regarded Cellcom as a marketeer, not as an estate agent.

The Court of Appeal found that as Cellcom did not hold a Real Estate Agent's Licence it could not recover the agreed commission.

The Court rejected an argument by Cellcom that the Seller could not take the point because Cellcom had acted to its detriment by relying on the Seller to ensure that the agreement was in accordance with Queensland law.

The Court held that as the *Property Agents and Motor Dealers Act* is directed at consumer protection there was a wide public interest in regulating the activities of Real Estate Agents beyond the particular parties to the transaction. The Court found that it was the clear intent of the Act that the parties themselves could not contract out of the Act even where as in this case it meant a windfall for the Seller who refused to honour an otherwise binding agreement.

The lesson here is a simple one. If a party is assisting an owner to market a property for reward then that person should be a licensed Real Estate Agent.

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