

## **Form 22a - What is Substantial Compliance?**

The Court of Appeal recently upheld the District Court's decision to dismiss a claim by Yong International Pty Ltd (the appellant) against Gibbs and Others (the respondents) for commission in the sum of \$226,139.

### **Facts**

The appellant is a real estate agency, and was purportedly appointed by the respondents as their real estate agent in respect of the sale of their land. A contract of sale resulted and interim payments were made. In a separate and earlier proceeding, the buyer sought specific performance after the respondents gave notice to terminate. The parties settled and the appellant initiated proceedings against the respondents to recover commission.

The Court of Appeal reaffirmed the trial judge's decision that (1) the appointment was invalid in the first place; and (2) even if the appointment were valid, the appellant was not entitled to commission.

### **Invalid appointment**

A Form 22a was finalised between the appellant and the respondents. However, the appellant failed to fill in Clause 4.1 (Performance of Service) of the form.

The Court of Appeal accepted that 'substantial compliance' with Form 22a is sufficient. However, it held that by failing to complete clause 4.1, the appellant failed to achieve 'substantial compliance'. Consequently, the appointment was invalid.

The Court reached this decision by interpreting clause 4.1 ("State how you will perform the service AND any conditions, limitations or restrictions on the performance of the service. (e.g. holding of open house, performing service as multi-list or conjunction sale, when and how auction to be conducted).") in accordance with the *Acts Interpretation Act 1954*, which provides that where an approved form requires "specified information...to be included...in the form, the form is not properly completed unless the requirement is complied with".

However, the Court further clarified that it would have reached the same conclusion without reference to the *Acts Interpretation Act*. With respect to this, it is important that agents note the appellant's submission in support of it having substantially complied. The appellant submitted that the terms in the agreement already stipulated how it will provide its service. Furthermore, parts of Form 22a other than clause 4.1 contained information as to how its service was to be performed.

The Court presumably rejected this submission when it held that one purpose of Form 22a is "to ensure not only that particular information is provided but that it be provided in the most effective way". The Court further observed that non-completion of clause 4.1 means that "not only will there be no record of how the agent is to perform the work required of it for the subject service but there will be no agreement in that respect."

### **Entitlement to commission**

While the Court's finding that the appointment was invalid was sufficient to dismiss the appeal, it nonetheless considered the appellant's entitlement to commission.

The appellant relied on the standard terms and conditions of its appointment, which relevantly entitled the appellant to commission if:

"(1) the Contract of Sale is not completed and the whole or part of the deposit paid is liable to be forfeited; or

(2) the Contract of Sale is terminated by mutual agreement of the Client and the buyer."

***Deposit liable to be forfeited***

There were three sets of payments by the buyer to the respondents that the appellant contended were "deposit[s]...liable to be forfeited":

1. \$5,000 paid on execution of the Contract of Sale; and \$5,000 paid 30 days after execution of the Contract of Sale (totalling \$10,000).

The Contract of Sale required these payments as "deposit moneys", and the buyer made the payments pursuant to the Contract.

2. Three (3) instalments broken down as follows: \$40,000; \$20,000 and \$40,000 (totalling \$100,000).

Together with the first set of payments, the Contract of Sale required this payment of \$100,000 as "deposit moneys" upon satisfaction of due diligence.

On completion of the buyer's due diligence, the buyer and the respondents executed a Deed acknowledging that pursuant to the Contract, \$100,000 is "due and owing as a non—refundable deposit" and shall remain payable "regardless of whether the contract for sale is subsequently terminated". The Deed provided for the instalment arrangement described above.

3. Four payments of: \$100,000; \$30,000; \$30,000 and \$30,000 (totalling \$190,000).

The Contract of Sale required a "non-refundable deposit" of \$100,000 if the buyer requires time extension to obtain development approvals. The Deed described above further provided that an "additional non-refundable deposit" of \$30,000 is required for each 30-day extension. The four payments were made pursuant to these provisions. The Court held that the reference in the terms of the appointment to "deposit...liable to be forfeited" is made with the well-established meaning that a deposit is "money paid as security for completion of the contract which is liable for forfeiture and retention by the vendor in the event of non-completion of the contract through the default of the purchaser". Therefore, the payments made in the second and third sets of circumstances above are neither "deposits", nor "liable to be forfeited".

The Court found that the first set of payments was deposit monies. However, the appellant and the trial judge never sought to establish whether it was "liable to be forfeited".

***Termination by mutual agreement***

The Court did find that the out of court settlement between the buyer and the respondents was an abandonment of the Contract of Sale that constituted a "termination by mutual agreement". Thus, if the appellant were validly appointed, it would have been entitled to the commission. However, this was not the case.

### **Impact for agents**

For agents, the most important part of this decision is the Court's finding that the appointment was invalid.

Agents should ensure that all parts of Form 22a are completed in strict accordance with the instructions on the form. From a technical angle, the Court's reliance on statutory interpretation legislation is difficult to overcome by argument. From a purposive angle, the Court has expressed its favour for consumer protection when it explicitly considered the role of Form 22a in "protecting the interests of the client" and downplayed the significance of the appellant's description of service included in other parts of the Form and the appointment agreement.

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