

# Validity of Agent's Appointment: Lessons from *Yong Internationals v Gibbs* [2011]QCA 161

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In *Yong Internationals v Gibbs* [2011] QCA 161 (the *Yong case*) the Queensland Court of Appeal had to decide whether a real estate agent was entitled to a commission of \$226,000 in respect of a \$9m sale of property in circumstances where the agent failed to complete section 4.1 of the PAMDA Form 22a.

Section 4.1 of the PAMDA Form 22a relates to how the service provided by the agent is to be performed.

## **Relevant PAMDA provisions**

Section 133(1)(a) of PAMDA (the PAMD Act) relevantly provides that a real estate agent must not act as a real estate agent for a person (client) to perform an activity (service) for the client unless the client first appoints the real estate agent **in writing**.

Section 134 (1) relevant provides that the appointment must be in the **approved form** and section 134 (3) provides that an appointment that **does not comply** with sub-section 1 is **ineffective**.

## **Compliance with Form 22a – what is the threshold?**

For the purposes of compliance with s 134 of the PAMD Act, the Court of Appeal has previously held that “substantial compliance” with the prescribed form is sufficient<sup>1</sup>.

The question for the Court of Appeal in the *Yong case* was whether the agent “substantially complied” with the requirements of Form 22a even though the agent failed to complete section 4.1.

## **Court of Appeal Decision**

The Court of Appeal found that the agent did not “substantially comply” with the requirements of the Form 22a and therefore did not comply with s 134 (1) of the PAMD Act.

As a result, by operation of section 133(4) the appointment was ineffective barring any entitlement to recovery of the commission by operation of section 140 of the PAMD Act.

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<sup>1</sup> *QUYD P/L v Marvass P/L* [2008] QCA 257

In the Yong case, the Judge said:

*“The requirement to state how the service is to be performed...in item 4.1 of the approved form under the heading “Performance of Service” 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.”*

The Judge added that when item 4.1 is left uncompleted not only will there be no record of how the agent is to perform the work required of it but there will be no agreement in that respect – the omission will be “both substantial and material”.

#### **Lessons to be learned – How to complete Item 4.1?**

How does an agent ensure “substantial compliance” with the Form 22a in relation to item 4.1?

Interestingly, the Judge made some comments in this regard. For example, the Judge noted that section 133(1) of the PAMD Act defines “an activity” as a “service” and pointed out that s 128 of the PAMD Act lists the “activities” which a real estate agent’s licence authorises its holder to perform for others for reward. This is a good starting point.

The Judge said (in relation to s 128):

*“The activities include the buying, selling, exchanging or letting of “places of residence or land or interests in places of residence or land”. Also included is “to negotiate for the buying, selling, exchanging or letting” of such property. The relevant service in this case,*

*would appear to be selling of land and perhaps negotiating for the selling of land”.*

The Judge went on to say that:

*“Matters encompassed by the performance of such a service which would have been within the contemplation of the parties were: the introduction of a buyer to purchase the property by private treaty; assisting where practicable or reasonable in negotiations and facilitating the entering into of a contract for sale”.*

#### **Conclusion - Suggested wording for Item 4.1**

From a risk management perspective, it is imperative that agents complete Item 4.1 of the PAMDA Form 22a in order for the appointment to be valid and effective.

Based upon the comments of the Judge in the Yong case, it appears that the agent would have complied with the approved form if the agent had included a description of the services which he had agreed to perform in item 4.1 of the PAMDA Form 22a.

A suggested form of words for inclusion in item 4.1 is attached to this article as a guide. The wording is based upon the comments made by the Judge in *the Yong case*.

For more information on this topic please do not hesitate to contact Paul Watkins, Senior Associate at Kelly Legal on **(07) 3182 121** or by email: [paul.watkins@kellylegal.com.au](mailto:paul.watkins@kellylegal.com.au)



**DRAFT CLAUSE**  
**4.1.1 Performance of Service**

1. The introduction by the agent of a buyer to purchase the property by private treaty or by auction [whichever is the case] from the client; assisting the client where practicable or reasonable in negotiations with the buyer and facilitating the entering into of a contract for sale between the client and the buyer.
2. Marketing and advertising the property, including listing the property on the internet and displaying the property in agent office window and on marketing brochures distributed by the agent, and by erecting a sign on the property.
3. The services described in (1) and (2) above will be performed in accordance with [attach REIQ approved Terms & Conditions clauses 1- 10 inclusive]