24/71

SUPREME COURT OF VICTORIA

TROTTER & GREER AUCTIONEER & ESTATE AGENTS v DASCOLI

Adam J

28 October 1971

ESTATE AGENTS – WRITTEN AUTHORITY TO ACT AS AGENTS SIGNED BY VENDORS – PROPERTY SOLD – COMMISSION PAYABLE – AGENT'S AUTHORITY NOT IN THE SAME TERMS AS THE CONTRACT OF SALE – THE AMOUNT OF DEPOSIT TO BE PAID AS SPECIFIED IN THE AUTHORITY WAS $500 COMPARED WITH $1000 IN THE CONTRACT OF SALE – WHETHER THIS DIFFERENCE BARRED THE AGENT'S RIGHT TO CLAIM COMMISSION – MAGISTRATE HELD THAT THE CLAIM FOR COMMISSION WAS MADE OUT – WHETHER MAGISTRATE IN ERROR: *ESTATE AGENTS ACT* 1958, S33.

HELD: Order nisi discharged.

1. So that the terms in the contract complied with the authority, in so far as a terms of sale was procured, and that instalments should be payable over a period of five years, and that the unpaid principal should carry interest at the rate of 8% quarterly, the only departure was in respect of the amount of the deposit stipulated for by the contract itself as compared with the amount of the deposit referred to in s33(1)(b) notice.

2. The important thing was whether the transaction as ultimately effected, in respect of which the commission was claimed, was <u>in substance</u> the transaction for which the agent was authorised to act in writing in compliance with s33(1)(b) of the *Estate Agents Act* 1958.
***Theobald & Son v West Heidelberg Motors Pty Ltd* [1970] VicRp 72; [1970] VR 552, applied.**

3. The situation remained as was originally authorised a sale on terms at a rate provided for unpaid purchase money, and it would have been quite unrealistic to treat the nonconformity which was entirely for the real benefit of the vendor as one which was so removed from the terms of the appointment to act as agent, as to make such a transaction a different transaction. When one had regard to the nature of the deposit, that in construing an appointment to act as agent on terms of a deposit of $500, $500 deposit should have been treated as a minimum – as a deposit below which the agent was not entitled to sell – and not as excluding, in any event, from the ambit of that authority, any increase over that $500 by way of deposit if the agent could manage to procure it. In effect the authority should have been construed to sell with a deposit of $500 or better.

4. Accordingly the Magistrate was not in error in holding that the complainant was entitled to the commission awarded notwithstanding that the complainant's engagement or appointment pursuant to s33(1) of the *Estate Agents Act* 1958 as amended, authorised acceptance of a portion of the purchase price by way a deposit of $500 whereas the contract of sale claimed by the complainant to be the basis of its claim for commission, provided for payment of a deposit of $1000.

ADAM J: This case has been well argued on both sides, and I do not think any benefit would be derived from my giving further consideration to my decision.

It is the return of an order nisi to review the decision of the Magistrates' Court at Ferntree Gully on the 17 May of this year. The respondent to this order to review had on a default summons claimed that the defendants, Mr and Mrs Driscoll were indebted in the sum of $390, being monies due on commission in respect of the sale of a property at 46 Trafalgar Street, Ferntree Gully.

The complainant below, and the respondent in these proceedings were estate agents trading as a firm and the commission was claimed because it was beyond dispute that having been employed by the defendants to act as their agents, they had procured a purchaser for the property. The terms on which they had procured the purchaser appeared in the Contract of sale which was put in evidence, which had been signed by purchasers. That Contract of sale showed that the property in question 46 Trafalgar Street, Ferntree Gully had been sold to the purchasers for a sum of $10,850, and that the terms of payment were a deposit of $1,000 and the residue over a period of five years, by weekly instalments of $20, which was to include principal and interest

at the rate of 8% on purchase money unpaid, and that the full balance of the purchase money would become due and payable at the expiration of the five years. The contract included as a special condition the right of the purchasers to pay $10 or any multiple thereof in reduction of the principal monies on any of the quarterly days provided for payments of instalments including the right, on any quarterly day to pay off the full balance of the purchase money, owing with interest, to the date of payment.

A number of defences had been taken in the Court below, but in view of the Magistrate's findings of fact, and in view of concessions, either made before the Magistrate or before me, there is only one defence which now requires consideration in these proceedings. That is a defence based on s33 of the *Estate Agents Act* 1958 as amended. Section 33 prescribes certain conditions precedent an to estate agent recovering any commission or retaining any commission for in respect of transactions which he has otherwise earned the right to commission. One condition precedent is that is that he,

> "At all material times in relation to the transaction is the holder of an estate agent's licence."

The point was made before the Magistrate, that there was insufficient evidence that at the time the complainant was the holder of an estate agent's licence. That point was abandoned under circumstances that I need not discuss. I would think properly another requirement under s33, and the one of direct importance in the case is one which bars the right of an estate agent to recover commission on a transaction, unless to use the words of this sub-clause:

> "His engagement or appointment to act as agent in respect of such transaction is in writing, signed by the person charged, or to be charged, with the payment of the commission for his agent or representative."

It seems clear enough, as a matter of interpretation that what is required to comply with this condition precedent, is that an estate agents' appointment to act as agent must be in writing, and must be an appointment in respect of the transaction, in respect of which he is claiming commission.

The point taken before the Magistrate, and it was a point which failed before him, was that such authority as the complainant had in writing, signed by the defendant was not an authority in respect of the transaction which the complainant procured. The foundation of this contention was a disconformity between the terms of sale expressed in the appointment in writing pursuant to s33, and the contract of sale as signed by the purchasers, in respect of which commission was claimed. The appointment pursuant to s33 was certainly an appointment in writing, it was signed by the defendants. It indicated that the appointment was of the complainants to act as estate agents to sell the weather-board house situate at 46 Trafalgar Street, Ferntree Gully.

It also appointed them agents for the selling of the property for the sum of $10,850. To this point the contract of sale, in writing, to which I have referred, of course corresponded strictly with the authority to act as agents, But then the authority in writing expressed the terms on which the property should be sold for $10,850 as follows:

> "By a deposit of $500, balance over five years, interest 8% quarterly."

It will be seen that the terms of payment provided under the contract of sale were for a deposit of $1000, and by the subsequent provision as to the residue, the payment of the balance over a period of five years, carrying interest at the rate of 8%, quarterly unpaid the principal.

So that the terms in the contract do comply with the authority, in so far as a terms of sale was procured, and that instalments should be payable over a period of five years, and that the unpaid principal should carry interest at the rate of 8% quarterly, the only departure is in respect of the amount of the deposit stipulated for by the contract itself as compared with the amount of the deposit referred to in s33(1)(b) notice.

For the defendants, Mr Kay has urged in a persuasive argument that the requirements of s33(1)(b) have not been complied with because the appointment in writing to which I have referred is not an appointment of the complainants to act as agents in respect of the very transaction of

sale which they procured. It was an employment, or engagement, for them to act as agents in respect of a transaction of sale, a term of which should be that the deposit would be $500. The contract obtained as I say was one which provided for a deposit of $1000.

In dealing with this point, I must of course pay attention to the recent authority of the Full Court in the case of *Theobald & Son v West Heidelberg Motors Pty Ltd* [1970] VicRp 72; [1970] VR 552. One of the questions arising in that case was whether a contract of sale in respect of which the estate agents claim commission could be said to be a transaction for which the complainants had been appointed to act as agents, in writing. In that case the appointment of the agents was expressed to be to act as agents in respect of selling 49 Bell Street, West Heidelberg. Without further written authority to comply with s33(1) the estate agents procured the sale of that property, 49 Bell Street, West Heidelberg together with certain chattels. There was no reference in the authority to sell to the transaction including chattels as well as the land, and the question was whether by reason of this lack of correspondence between the authority to act and the transaction in respect of which the commission was claimed there was a non-compliance with s33(1)(b). The Court in that case proceeded on the footing that the appointment to act as agent must be in respect of the same transaction as that for which commission was claimed, but discussed the test as to whether within the meaning of the section, there was a compliance although in some respect the transaction as effectuated went further, or departed from, that which was expressly authorised in writing.

In dealing with the appropriate test, the Court had in mind the important circumstance that the authority in writing had to be signed and a copy of it had to be handed over to the principal prior to the completion of the transaction itself. That being so, it was considered that the enactment would, in many cases, preclude the recovery of commission by estate agents if the terms of the appointment to act as agent had to include all the terms which ultimately appeared in any resulting contract of sale. There must be, within the spirit of the enactment, some scope for negotiation of particular terms and so on. The important thing was whether the transaction as ultimately effected, in respect of which the commission was claimed, was <u>in substance</u> the transaction for which the agent was authorised to act in writing in compliance with s33(1)(b).

Smith J, in *Theobald's case* said at p557, dealing with this nonconformity between the ultimate transaction and the authority in writing:

> "The engagements and appointments, the contents of which s33(1)(b) is prescribing are instruments which must be committed to writing before the agent had done all that he is required to do to earn his commission. Accordingly it will ordinarily be impossible when the document is being written out, to foresee in full detail, the terms which will ultimately be embodied in the contract. It follows that to read the Statute as requiring a precise correspondence in all details between the terms of the proposed transaction referred to in the engagement or appointment, and the transaction on which commission comes to be claimed would preclude the recovery of commission in all but a small proportion of cases. This is not a result which can be supposed to have intended by the legislature, and in my view s33(1)(b) should not be construed as requiring any such precise and detailed correspondence. All that it requires by way of correspondence, is I consider, that transaction on which commission is claimed must be in substance the same transaction as that in respect of which the agent was engaged or appointed to act."

So there he indicates the test where there is not complete correspondence, "that the transaction on which the commission is claimed must be in substance the same transaction as that in respect of which the agent was engaged or appointed to act".

That judgment was concurred in by Pape J, another member of the Full Court; Gillard J delivered a separate judgment and on this point of non-correspondence and its effect, he said at the foot of p564:

> "If the transaction were compendiously described in the written engagement or appointment and might be readily identified with the transaction finally entered into by the principal, yet was not congruent in its terms with the engagement or appointment, then, in my view the engagement or appointment as agent was nevertheless in respect of such transaction sufficient compliance with the paragraph is achieved if there is a description, even broad in its description, which <u>can fairly fit</u> the transaction for which the services of the agent were engaged, and which he was the effective cause of bringing into existence."

I accept these tests, and I think there is no substantial difference between that as stated by Smith J and that suggested by Gillard J; I think perhaps the test of whether there is in substance identity between the transaction as effectuated, and that for which the agent was appointed is perhaps more precise than the question whether it fairly fits the transaction, but think they really come to the same thing.

It is necessary in applying such test to consider the extent of the non-correspondence. The extent of the correspondence between the appointment to act in writing and the contract of sale of course is evident. The appointment was to act as agent in respect of this very property and to sell at a price which was the price procured by contract, that it should be a sale on terms; that was provided in the appointment to act and in the contract, a five year term for the completion of the contract appears in both documents and the rate of interest payable on the unpaid purchase money, under a terms contract of course, corresponds as between the appointment to act and the contract of sale. As mentioned, the disconformity is confined to the amount of the deposit. Does that provide some distinction in substance so that the transaction is affected? Should that be considered to be the transaction referred to the appointment to act as agent? Is it in substance the same transaction?

It is necessary, I think, to consider the nature of a deposit. A deposit on a terms contract is a sum specified which is forfeitable to the Vendor should the purchaser fail to carry out his contract. It may be forfeitable in other events, but it is in that case. It provides an earnest of the purchaser's good faith. Obviously, in the ordinary course, it is to the interests of the vendor in a terms contract to procure as large a deposit as is consistent with the nature of a deposit, that is to say as large an amount as would be forfeited as a deposit should the sale go off through the purchaser's default.

If, in a contract of sale procured by an agent, the principal's instructions as to the deposit to be obtained are not complied with in that a lesser deposit is taken without his consent, it is quite clear that by reason of this departure from the authority given to the agent there is, and particular if it is not *de minimus* in respect of quantum there is a substantial difference between what was authorised and what was obtained by the agent. When the disconformity is the other way and what the agent procures is an amount in excess of what he was authorised to sell for, it is, as a matter of reality, all in favour of the vendor who with a larger deposit received by him has an additional guarantee against loss should the purchaser make default.

It is very difficult to conceive of any circumstances in which a vendor could complain at his agent obtaining more by way of a genuine deposit than he, the vendor, had insisted upon; and I would think that only in most exceptional circumstances that it could be said, that a contract of sale otherwise literally conforming to the authority given to the agent to sell, could be said to differ in substance if the amount of the deposit obtained by the agent was more than that required by the vendor, the principal.

There is one possible prejudice to a vendor who obtains a larger deposit than he was prepared to accept as a term of his sale, where it is a sale on terms. It is that the balance of purchase money is necessarily reduced to the extent that the deposit is increased, and where interest is payable on the unpaid balance of purchase money of course it follows that, regarded purely as an investment carrying interest, the vendor's position is prejudiced because he will be receiving less interest. As against that, he has received the deposit with all the virtues incident to a deposit in cash available to him to do with it what he likes.

Mr Kay suggests that notwithstanding that the deposit was larger than the agent was required under the authority to obtain, there was such a substantial difference between the transaction effected and the terms of the appointment in writing that s33(1)(b) was contravened. Mr Fogarty urged to the contrary, and said that within the principles expressed in *Theobald's case* the lack of conformity did not alter the substance of the identity of the transaction envisaged in the appointment to act as agent, and the transaction effected by the contract of sale.

Mr Kay relied strongly on a very early Victorian case of *Ronald v Lalor* 3 AJR 12; [1872] 3 VLR (E) 98 and particularly at p102. That was a case not arising under this Act but not irrelevant to the problem arising under this Act. The question there was whether an agent who was only

authorised to sell half for cash and held on credit could bind his principal by a sale effected by him for cash. The authority within which the agent acted was to sell a very substantial property of, I think, 1600 acres at £2.12.6 an acre, terms – half cash, half over a period to bear interest. In deciding the negative, Molesworth J at p102 said:

> "An agent authorised to sell part cash, part credit though he may generally expect that his principal will accept all cash, is not warranted in so selling. A seller who can wait for his money may prefer in getting the price increased by giving credit, or may like to have part of the price invested for some time."

It was on the later part of that statement that Mr Kay relied. As I have indicated, the departure from the quantum of deposit required by the vendor incidentally did minimise the amount of the balance of purchase money resulting of course in the interest not thereafter being paid on what was paid by way of deposit. In return for the loss of interest in this case, the vendor got the deposit with all the advantage of a deposit.

I consider that the case of *Ronald v Lalor* is really as a matter of substance quite distinguishable from the present. There is as pointed out a substantial difference between money in hand and leaving money out in investment. For that reason a sale half cash, half on credit is not identical in substance with a sale for cash which eliminates any benefit by way of investment accruing to the vendor of the land. Here although to some extent the value, or the extent of the monies invested, is reduced when the deposit is increased, the position, it seems to me, is distinguishable. It still remains as was originally authorised a sale on terms at a rate provided for unpaid purchase money, and it would be quite unrealistic to treat the nonconformity which was entirely for the real benefit of the vendor as one which was so removed from the terms of the appointment to act as agent, as to make such a transaction a different transaction. Indeed it appears to me when one has regard to the nature of the deposit, that in construing an appointment to act as agent on terms of a deposit of $500, $500 deposit should be treated as a minimum – as a deposit below which the agent is not entitled to sell – and not as excluding, in any event, from the ambit of that authority, any increase over that $500 by way of deposit if the agent can manage to procure it. In effect the authority should be construed to sell with a deposit of $500 or better.

Mr Fogarty has suggested that in determining whether by reason of giving the vendor the benefit of a bigger deposit there has been a substantial difference between the contract of sale and the appointment in writing then one can look at the extrinsic evidence. I may say at once, if one can, it is quite clear that the vendor had no complaints about any increase beyond the $500 deposit referred to in the appointment to act in writing. On the uncontradicted evidence he was anxious for more if he could get more. The agent knew of the vendor's wishes although he held an authority which would certainly entitle him to sell on a $500 deposit.

If that evidence is admissible it would confirm the conclusion that there was no difference in substance between the appointment in writing to act as agent and the terms thereof and the contract of sale as finally procured. But, I think it proper to say that I have grave doubt as to whether in a case of this sort such evidence is admissible. I think the problem is comparable to the problems that arise in regard to extrinsic evidence in relation to documents under the *Statute of Frauds*.

I am certainly supported in my doubts as to the admissibility of such evidence to prove substantial identity by such cases as *Boyd v O'Connor* [1923] VicLawRp 76; [1923] VLR 603; 29 ALR 458; 45 ALT 63 to which Mr Kay referred me where oral evidence was excluded in what may be considered to be somewhat analogous circumstances although not dealing of course with this *Real Estate Agents Act.* In any event I would not rest my decision on any ground other than that I consider within the tests applied in the applied in *Theobalds case*. The contract of sale as signed by the purchasers was, to use the words of Smith J:

> "in substance the same transaction as that in respect of which the agent was engaged or appointed to act."

Mr Kay did refer me to some further authorities which I have considered but I am not persuaded that I could really obtain much assistance from them. The one just before lunch was to a case from Alberta, *King v Schom* 44 DLR 111, particularly the judgment of Stewart J. I am satisfied from a perusal of that case it turned on quite a different point. The Court was able to

construe a document which was relied upon as constituting the agent's authority as a document not intended to tie the agent down to its terms but as merely providing with a basis for negotiating a contract. That being so, the obtaining of a contract for a deposit of $8,000 instead of the $10,000 referred to in the document did not disqualify the agent from commission. I find little, if any, assistance in coming to a conclusion in this case on that authority.

What 1 have said will indicate my views upon the ground of the order nisi reading:

> "That the Stipendiary Magistrate was wrong in law in holding that the complainant was entitled to the commission awarded notwithstanding that the complainant's engagement or appointment pursuant to s33(1) of the *Estate Agents Act* 1958 as amended, authorised acceptance of a portion of the purchase price by way a deposit of $500 whereas the contract of sale claimed by the complainant to be the basis of its claim for commission, provided for payment of a deposit of $1000".

In answer to that I hold the Stipendiary Magistrate was not wrong in so holding. As any other defences to the claim have now disappeared and I am required only to consider that ground, I must discharge this order nisi with the usual consequences of costs to be paid by the defendants.

APPEARANCES: For the complainant Trotter & Greer Auctioneer & Estate Agents: Mr JF Fogarty, counsel. JH Kinnear & Co, solicitors. For the defendants Dascoli: Mr JV Kay, counsel. Portelli & Co, solicitors.
