05/03; [2003] VSC 11

SUPREME COURT OF VICTORIA

REAL ESTATE CITY PTY LTD v MOUSTAFA

Williams J

11-14 November 2002; 11 February 2003

CIVIL PROCEEDINGS – SALE OF PROPERTY – CLAIM FOR ESTATE AGENT'S COMMISSION PLUS MARKETING AND CONVEYANCING EXPENSES – EXCLUSIVE AUCTION AUTHORITY SIGNED BETWEEN VENDOR AND ESTATE AGENT - PRINTED TERMS IN AUTHORITY – HANDWRITTEN ENDORSEMENT MADE ON AUTHORITY – "NO SALE NO CHARGE" – FINDING BY MAGISTRATE THAT VENDOR NOT LIABLE FOR COMMISSION AND CHARGES WHERE NO SALE – WHETHER MAGISTRATE IN ERROR IN DISREGARDING THE PRINTED TERMS ON BACK PAGE OF THE AUTHORITY – WHETHER MAGISTRATE'S FINDING AS TO MEANING OF THE WORD "SALE" WAS REASONABLY OPEN ON THE EVIDENCE – WHETHER VENDOR GUILTY OF PROCEDURAL UNFAIRNESS IN FAILING TO CROSS-EXAMINE AGENT ABOUT THE SIGNING OF THE AUTHORITY – WHETHER MAGISTRATE IN ERROR IN FAILING TO CONSIDER WHETHER THE AGENT WAS ENTITLED TO DAMAGES BY REASON OF BREACH OF AN IMPLIED TERM BY THE VENDOR.

REC P/L and M. signed a written Exclusive Auction Authority for the sale of M.'s property. The printed part of the Authority set out certain terms including the price of $450,000 and the definition of "Sale". A handwritten endorsement on the Authority provided: "No sale no charge No sale – no charge for conveyancing". The agent subsequently filed a complaint in the Magistrates' Court seeking amounts for commission, marketing and conveyancing expenses. The notice of defence alleged the existence of additional terms of the agreement to the effect that the agent would sell the property at a price which ensured that M. received an amount of $450,000 nett and that if the property did not sell the agent would not charge M. any commission and marketing/conveyancing expenses. At the hearing, the magistrate found in interpreting the meaning of the handwritten endorsement that the terms on the back page of the Authority could be disregarded. Further that the word "sale" in the endorsement meant a completed sale. In evidence, M.'s son said he signed the Authority at the agent's request; however, he was not cross-examined on this point. The magistrate dismissed the claim. Upon appeal—

HELD: Appeal dismissed.

1. When interpreting the meaning of the handwritten endorsement on the face of the Authority the magistrate was not in error in disregarding the terms on the back page of the Authority. There was ample evidence which supported the Magistrate's finding that the terms of the Authority did not include the clauses or any other term set out on the back page of the Authority.

2. It was open to the magistrate to find that the word "sale" in the handwritten endorsement meant a completed sale.

3. The rule in *Browne v Dunn* (1894) 6 Co Rep 67 is one of procedural fairness and if breached, the procedure to be adopted is a matter for the magistrate. In the circumstances no injustice resulted from the admission and acceptance by the magistrate of M.'s evidence concerning the signing of the Authority.

4. In relation to the agreed price of $450,000 in the Authority, the magistrate was not in error in failing to consider whether the parties had agreed upon a price of $450,000 gross.

WILLIAMS J:

1. This is an appeal under s109 of the *Magistrates' Court Act* 1989 (Vic) from an order of the Magistrates' Court at Melbourne made on 19 June 2002 dismissing the appellant's claim for estate agent's commission and payment of marketing and conveyancing expenses in relation to the alleged sale of the respondents' property at 9 Station St Coburg Victoria ("the property").

The claim and defence

2. By its statement of claim attached to the complaint filed on 11 May 2001 in the Magistrates' Court the appellant claimed the total sum of $16,150, being commission of $13,500, marketing expenses of $2,200 and conveyancing expenses of $450, under an agreement relating to the marketing and sale of the property ("the agreement"). It alleged that the terms of the agreement were partly written and contained in a written Exclusive Auction Authority document dated 8 February 2001 ("the Authority") and partly to be implied.

3. By their notice of defence dated 18 December 2001, the respondents denied liability for the sum claimed or for any amount. They admitted the agreement, but alleged the existence of additional terms of the agreement that:

> "a. the [appellant] would sell the property at a price ("the said price") which ensured that the [respondents] received nett proceeds after deduction of all expenses of an amount not less than $450,000;
>
> b. if the property did not sell for the said price, the [appellant] would not charge any fees, commission or marketing expenses;
>
> c. if the property did not sell for the said price, the [respondents] would not be charged for any conveyancing or legal expenses."

The endorsement

4. In support of their argument the respondents relied upon a handwritten endorsement on the Authority in the following terms:

> "No sale no charge No sale - no charge for conveyancing" ("the endorsement").

The terms of the Authority

5. The appellant however relied upon the terms of the Authority, generally and, in particular, for the purpose of defining the word "sale" in the endorsement.

6. The relevant clauses of the Authority were in the following form:

> "Particulars of Appointment ... PRICE $450,000- or any other price agreed to by the Vendor, payable * 60/90 days from the day of sale ... AGENT'S FEES *$ 3% OF SELLING PRICE plus any GST payable ... If commission is calculated as a percentage of the price, the dollar amount of the commission which would be payable upon a sale at that price must also be inserted - $450,000-, plus any GST payable, on a selling price of $13,500- excluding GST. MARKETING EXPENSES *$2,000 maximum amount for advertising costs & other related expenses. *$200 maximum amount for other authorised expenses TOTAL *$2,200 plus any further amount agreed to in writing by the Vendor. ... (1) The Vendor acknowledges - (a) having been informed by the Agent, before signing this Authority, that the Agent's Fees and the Marketing Expenses are subject to negotiation. ... (2) The Vendor is obliged to pay the Agent – (a) the Marketing Expenses incurred during the currency of this Agreement whether or not a sale takes place. (b) the maximum amount specified above for marketing expenses *upon signing this Authority *upon demand. (c) the Agent's Fees if the Vendor sells the Property during the currency of this Agreement. (Note particularly the meaning of 'sells' as defined in Agreed Condition 1.16 over page). ... 1. Meaning of Expressions - unless inconsistent with the context, the following definitions apply to this Appointment which includes any attachments. ... 1.5. "Binding Offer" is an offer on the terms set out in the Particulars of Appointment which, if obtained in compliance with this Appointment would (or does) result in a contract enforceable against the Purchaser. ... 1.16. "Sale" is the result of obtaining a Binding Offer and "sell" and "sold" have corresponding meanings in the same situations."

The Magistrate's decision and reasons

7. The learned Magistrate's decision and his reasons for decision were transcribed and the transcript was exhibited as exhibit "KJS-1" to the affidavit of Kamilla Jane Shaw of the appellant's solicitors sworn on 22 August 2002. (The transcript references in these reasons are to the pages of the Magistrates' Court transcript.)

8. His Worship held that the Authority was to be construed with reference to the endorsement, but without reference to the definition of "sale" in cl1.16[1]. He found that the appellant was not entitled to the amounts claimed because there had been no "sale" of the property, apparently in the sense of a completed sale. He held that the definition of "sale" in cl1.16 did not apply, describing it as a "separate addendum" of which the appellant's agent himself was not aware.

9. The Magistrate made findings at different times throughout the course of the proceeding. He gave some reasons from time to time and [at T153 l31 - T156 l9] his Worship said :

> "As I said this morning, this whole saga began with agents going about their lawful business, as they were entitled to do. They are entitled to be keen to get commission, entitled to be keen to get

> sales, and they were keen to get commissions and they were keen to get sales. But sometimes when agents do that, in this case, they forget to dot the Is and cross the Ts of the documents that they are hurriedly preparing in their anxiety to make money. In this particular case the agents knew that there were two other properties that they could get, and they were willing to punt. That was said on numerous occasions by the agents. They were willing to risk getting any commission at all, even to the ridiculous point where they said even if they only got - if they got as much as $449,000, they would then not get a commission. It sounds ridiculous, but that is what he said on his oath many times. Now, in that context, you have got the kitchen table scenario, and the agents signing up the prospective purchasers. The son was the interpreter, and I find that is what he was. He was basically helping his mum and dad – not his mum and dad – his father, understand the English that was involved in getting the authorities together. An authority was filled out, as we know, stating a price of: '$450,000, or any other price agreed to by the vendor'. Now, whether they had meant to cross that or not, I do not know, but the word: 'Or any other price agreed to by the vendor', is still in it. It is sloppy drafting; they drew the document, they bear the consequences of that document still bearing the expression: 'or any other price agreed to by the vendor.' Now, there is a conflict in the facts as to what was the situation as about whether it was 450,000 clear to the vendors, or out of which commission was to be paid in accordance with the agents. Now, if the document had have stayed as it was, without the side piece being written in, clearly, unless some argument could have been built on the expression: 'or any other price agreed to by the vendor', the agent would have had his document giving him the commission, depending, as I say, upon any argument about: 'any other price agreed to by the vendor', not being crossed out. Now, we have got the scenario of the price in the document, we have got a scenario of commission in the document. What does the document mean without the endorsement? Quite simply, that the agent gets his commission out of the 450,000. What does it mean with the endorsement? It must mean something in addition. It is just common blooming sense. The vendor was anxious, so he says, to have it clearly expressed that he was not going to pay any commission, he wanted his money clear. He is not a man who knows English, but he was relying on his son. So an endorsement was put down the side, and I find as a fact it was put down the side by the agents, in the context of an anxiety to get work, and in a context where they were willing, in some circumstances, to forego commission. So at that particular point the vendor is halfway there. Then, bearing in mind that the vendors have been insistent, so he says, I find as a fact: 'No sale, no charge', means exactly what no sale, no charge means. He did not get a sale, he's not going to be charged anything. I will leave it at that. It is a simple question of a finding of fact that that corroborates in my mind the insistence of the vendor that he was not going to sell, he had no intention of selling the property to begin with until the agents came knocking on his door, and I find that: 'No sale, no charge' means, strangely enough, no sale, no charge, and I so find. As [Counsel for the Respondents] has said, if that is the case, I do not have to look at the section 32 and signature arguments. That being the case, I dismiss the claim. (Sic)"

The questions of law

10. The questions of law identified by order of the Master on 22 August 2002 were:

> 1. Did the Magistrate err in holding that the [respondents] were not required to pay commission by virtue of an endorsement to wit "No Sale No Charge, No Sale - No Charge for Conveyancing" on the Exclusive Auction Authority, admittedly placed there by the [appellant's] representative?
>
> 2. Did the learned Magistrate err in accepting the evidence as to the circumstances of the execution of the Exclusive Auction Authority allegedly by [the second respondent] where that matter had not been raised in the defence, and the [appellant's] witnesses were not cross-examined regarding their version of the events surrounding the execution?

11. There was a further question identified by the Master, but not relied upon on appeal.

12. In the course of the hearing the appellant successfully applied for a direction under Order 58.13 of the *Supreme Court (General Civil Procedure) Rules* 1996 that a further question of law be answered by the Court, namely:

> 3. Whether the learned Magistrate erred in law by failing to consider whether the [appellant] was entitled to damages by reason of a breach by the [respondents] of an implied term of the agreement between the parties that they would accept an offer of $450,000 and do all things necessary to complete the sale of the property?

Question 1

Did the Magistrate err in holding that the [respondents] were not required to pay commission by virtue of an endorsement to wit "No Sale No Charge, No Sale - No Charge for Conveyancing" on the Exclusive Auction Authority, admittedly placed there by the [appellant's] representative?

13. The respondents' obligation to pay commission to the appellant arose under the terms of the agreement, express or implied. Commission contracts are not subject to special rules or principles.[2]

14. Counsel for the appellant submitted that the Magistrate erred in his construction of the endorsement by:

(a) failing to interpret it in the context of the entirety of the Authority;

(b) failing to have regard to the whole of the endorsement;

(c) disregarding or misapprehending the evidence of witnesses for both parties;

(d) misconstruing the word "sale".

(a) Did the Magistrate err by failing to consider the entire Authority?

15. Counsel for the appellant argued that the endorsement should have been construed by the Magistrate in the context of the definition of the word "sale" in cl 1.16 on the second page of the Authority. He also submitted that his Worship had misconstrued the word as referring to a completed sale of the property.

16. He relied upon the statement of principle in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*[3] where Gibbs J stated:

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another."

17. Evidence in the Magistrates' Court about the circumstances of the execution of the Authority was given by the appellant's agents, Mr Guiseppe Spinello and Mr Vito Spano who were present at its execution at the home of the respondents on 8 February 2001 and by the respondents, their son, Mr Mohammed Moustafa, and their daughter, Ms Naula Moustafa.

18. There was no evidence that cl1.16 or any of the other terms set out on the second page of the Authority had been brought to the attention of either of the respondents. There was no evidence that either of them had read or had been aware of the definition of the word "sale" in cl1.16 at any time, much less at the time of the first respondent's execution of the Authority. Further there was no direct evidence of the second respondent signing the Authority.

19. The first respondent's unchallenged evidence was to the effect that he could not read and that, in the negotiations with the agents, he had relied upon his son, Mr Mohammed Moustafa, to interpret for him.

20. When Mr Mohammed Moustafa was taken to the Authority in the Magistrates' Court under cross-examination, he was directed only to read the handwritten sections on its front page. After having been asked to look at those handwritten sections, immediately before the end of his cross-examination by counsel for the appellant, the following exchange took place involving the Magistrate, Mr Mohammed Moustafa and counsel for the appellant:[4]

> "HIS WORSHIP: But nobody has bothered to read the back part, even the agents, it seems, in the relevant part of this document. Have you read it now?-Yes. So he hasn't read the back part, but nobody is much interested in that, it would seem. [COUNSEL FOR THE APPELLANT]: Well, sir, he is not the owner of the property, but you were translating for your father on the day when the agents came to visit?—I beg your pardon? You were the one who was translating for your father on the —?—I was translating. Now, it doesn't say it on there anywhere: "450,000 clear", does it?—No, it doesn't say that on the paper."

21. The appellant's employee sales executive, Mr Spinello, conceded that he had made the endorsement on the Authority without knowing of the definition of the word "sale" in cl1.16. He said that he and Mr Spano, the principal of the appellant at all relevant times, had explained the

front page of the Authority to the first respondent and his son, but had not explained or referred to the second page. He also agreed, under cross-examination, that when he had written the endorsement "No sale" it was not with reference to the back of the document.[5] Mr Spano gave no evidence as to which of the written terms of the Authority were the subject of agreement between any of the parties.

22. I am satisfied that the Magistrate did not err in disregarding the terms on the back page of the Authority when interpreting the meaning of the endorsement which appeared on its face. There was ample evidence which in my view supported the finding of fact implicit in his reasons that, in so far as the terms of the Authority were intended to form a record of the agreement, they did not include cl1.16 or any other term set out on its second or back page.

23. I note that I was not persuaded to any contrary conclusion about the exclusion of cl1.16 by the appellant's submissions that, because cl1.16 did not limit or exclude the appellant's liability, no special notice of its provisions was required, or by his arguments based upon the evidence of the first respondent's previous experience of property sales, dealings with agents or his familiarity with the process of signing forms.

(b) Did the Magistrate err by failing to take into account the whole of the endorsement?

24. Counsel for the appellant also argued that the learned Magistrate had erred by not taking into account the words "No sale - no charge for conveyancing" in the endorsement. He submitted that the Magistrate's construction of the first part of the endorsement rendered the balance redundant.

25. In my view, the Magistrate's interpretation of the words "No Sale No Charge" does not deprive the balance of the endorsement of meaning. The balance of the endorsement deals with conveyancing charges not otherwise referred to on the face of the Authority and may be taken to refer to those charges separately.

(c) Did the Magistrate err by disregarding or misapprehending evidence?

26. In his written submissions counsel for the appellant also argued that the learned Magistrate had erred in arriving at his decision when evidence had been given by Mr Spinello and Mr Spano that the endorsement was placed upon the Authority only to indicate the parties' agreement that the respondents would not be obliged to pay the appellant's advertising or auction expenses or the costs of preparation of contracts if the property was not sold during the period of the Authority.

27. I was not persuaded by this submission: the cited passages of transcript did not appear to contain such evidence and in any event and more significantly, it was open to the learned Magistrate to accept or reject the whole or any part of the evidence of a witness.[6]

28. I am further not persuaded that he misapprehended any of the evidence.

(d) Did the Magistrate err by misconstruing the word "sale"?
Could he reasonably have found that the endorsement referred to a completed sale?

29. Further in my view the Magistrate's finding that the word "sale" in the endorsement meant a completed sale was reasonably open to him on the evidence.

30. There was evidence of the first respondent referring to the receipt of money which would only occur as a result of the completion of a sale transaction, namely that:

> (a) he had wanted to receive the sum of $450,000.00 (in his words) "clear for myself" and that he consented to the erection of the auction sign at the property on the basis that he did not have to pay anything;[7]
>
> (b) he had wanted $450,000 and that the agent could keep any extra money obtained by the sale;[8] and
>
> (c) his son had told him that if the agent sold the property it would take 3 per cent which was not to come from the sum of $450,000, but rather from extra money obtained.[9]

31. There was evidence from Mr Mohammed Moustafa, who acted as his father's interpreter during the relevant discussions with the agents, that "... we made it clear that if there was no

sale, that we weren't liable to pay".[10] Evidence to similar effect was given by Ms Naula Moustafa, the respondents' daughter, who said that she had overheard the relevant discussions and that her father had told the agents that if he didn't obtain $450,000 "clear in his pocket" he did not want to sell.[11]

32. There was evidence from the second respondent about her agreement with the first respondent that they should sell for $450,000 clear.[12]

33. Further the appellant's agent, Mr Spinello, gave evidence of the appellant's preparedness to "punt" its commission, advertising expenses and any conveyancing costs on the hope of obtaining a sale.[13] He said that the agents were optimistic about achieving a sale because of the type of property to be offered.

34. Mr Spano of the appellant stated that "[t]hey said they wanted 450, otherwise they would not sell the property"[14] and "[u]nless he got the 450, he would not sell".[15] He too told his Worship that he was a salesman and willing to "punt".[16]

35. The Magistrate was able to properly accept or reject all or any part of the evidence and I am satisfied that his finding as to the agreed meaning of the word "sale" in the Authority was reasonably open to him on the evidence.

Question 2: Did the learned Magistrate err in accepting the evidence as to the circumstances of the execution of the Exclusive Auction Authority allegedly by Khaldiea Moustafa where that matter had not been raised in the defence, and the [appellant's] witnesses were not cross-examined regarding their version of the events surrounding the execution?

36. Counsel for the appellant submitted that the learned Magistrate erred in accepting the evidence of Mr Mohammed Moustafa and the first respondent that Mohammed had signed the Exclusive Auction Authority at the request of one of the appellant's representatives and concluding that he had not signed as the agent of his mother, the second respondent.[17] Counsel argued that the admission of such evidence contravened the principle in *Browne v Dunn*[18] and was not admissible and should have been excluded or disregarded by his Worship.

37. Detailed submissions and many authorities were referred to on this point.

38. As the appellant's submissions noted, the rule in *Browne v Dunn*[19] is one of procedural fairness and if breached, the procedure to be adopted is a matter within the jurisdiction of the trial judge or magistrate.[20] The applicable test is as to whether any lack of procedural fairness would have resulted in a miscarriage of justice.

39. The authorities make it clear that an appeal court is not entitled to interfere with a decision of a magistrate in relation to the exercise of a discretion unless the court is satisfied that the decision is clearly wrong. See *Urban No. 1 Co-operative Society v Kilavus and Anor*[21] where his Honour said:

> "The principles governing appeals against discretionary judgments are well-established. The appellate court is not free to act upon its own conclusions but may only alter the decision of the tribunal at first instance if it has acted on a wrong principle of law, misapprehended the facts or made a wholly erroneous assessment of the relevant issue. In such cases, there is a strong presumption in favour of the correctness of the decision appealed from and the general rule is that the decision should be affirmed unless the appellate court of review in court is satisfied that it is clearly wrong: *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621, at p627; *Gronow v. Gronow* [1979] HCA 63; (1979) 144 CLR 513; (1979) 29 ALR 129; [1979] FLC 90-716; (1979) 54 ALJR 243; (1979) 5 Fam LR 719; 44 ALT 153; *McKenna v McKenna* [1984] VicRp 58; [1984] VR 665 at p683; *Australian Dairy Corporation v Murray Goulburn Co-operative Ltd.* [1990] VR 355. It is sometimes said that the appellant must show that it will suffer a substantial injustice if the order sought to be appealed from is allowed to stand."

40. Applying these tests, and taking into account the conduct of the proceeding before him, I am not satisfied that the Magistrate's discretion should be interfered with. I am not persuaded that any miscarriage of justice occurred.

41. At the outset counsel for the respondents stated that the evidence would be that the Authority was signed by Mr Mohammed Moustafa and noted that the appellant was required to establish that he signed it as agent of the second respondent.[22] In preliminary discussions with the Magistrate, counsel for the respondents conceded that he had no evidence that the son signed it as the agent of his mother.[23] During the examination in chief of Mr Spinello the learned Magistrate questioned the witness as to whether he saw the second respondent sign the Authority. Mr Spinello stated that the son had taken the document into another room and, upon his return, had told the agents that his mother had signed it.[24] He repeated the account under cross-examination.[25]

42. The appellant's witness, Mr Spano, was not asked about the signing of the Authority in examination in chief. Under cross-examination he said that he believed that the second respondent had signed it and " ... the son picked up the file and went into the - and that's all we know. We don't know anything—.".[26]

43. During his examination in chief the first respondent said that the agents asked his son to sign the Authority[27] and that he saw him do so in the presence of the agent.[28] He repeated the evidence under cross-examination.[29]

44. Mr Mohammed Moustafa gave the same account of his signing the document at the request of the agent in the presence of his father and the agents.[30] He was cross-examined by counsel for the appellant in the Magistrates' Court on the basis that he had signed the document[31] and it does not appear to have been put to him that his evidence on this point was false. (It should be noted however in this regard that a break in the recording of proceedings is noted at page 118 line l2 of the transcript).

45. The learned Magistrate accepted the evidence of Mr Mohammed Moustafa in relation to the signature and found it "very pertinent" that his signature appeared before that of his father on the document. His Worship expressly stated that he made the finding of fact "in spite of any *Browne v Dunn*".[32]

46. The second respondent was not cross-examined as to the circumstances of the signing of the Authority, although she had given evidence in chief to the effect that she had not been asked to sign and had not instructed her son to sign on her behalf.[33]

47. No request was made for the recall of the appellant's witnesses in order that they might have the opportunity to meet the allegation that Mr Mohammed Moustafa had signed the agreement.

48. In final submissions counsel for the appellant also referred to the "issue of *Browne v Dunn*" and the Magistrate noted that "it [was] certainly a factor that one must take into account in a very realistic way".[34] He agreed that the *Browne v Dunn* "factor" went to what counsel for the appellant described as "fundamental issues at the very core" and was very important.[35] It would appear that the Magistrate had taken the procedural breaches into account in assessing the evidence.

49. In all the circumstances, I am not satisfied that the learned Magistrate erred in making his findings in relation to the signature of the Authority by Mr Mohammed Moustafa. Any alleged procedural unfairness resulting from the respondents' failure to put to the appellant's agents the alleged signing by Mr Mohammed Moustafa at their request could have been redressed by their recall for further examination, in my view. I am not satisfied in any event that in all the circumstances any injustice resulted from the admission and acceptance by the Magistrate of the respondents' evidence on the question.

Question 3: Did the learned Magistrate err in law by failing to consider whether the [appellant] was entitled to damages by reason of a breach by the [respondents] of an implied term of the agreement that they would accept an offer of $450,000 and do all things necessary to complete the sale of the property?

50. The appellant argued that the learned Magistrate had failed to consider the alternative claim set out in its statement of claim. In the statement of claim the appellant had claimed to be entitled to damages in the total amount of $16,150, being the total of commission, marketing

expenses and conveyancing expenses allegedly lost by reason of the respondents' breach of an agreement.

51. Although the appellant had pleaded certain express terms of the agreement, it had not expressly referred to the implied term which the respondents had allegedly breached by a pleaded failure, refusal or neglect to proceed with the sale of the property. Nevertheless the appeal proceeded on the basis that a claim for damages based upon an alleged breach of such an implied term was an alternative claim before the Magistrates' Court.

52. Whilst the appellant alleged that the learned Magistrate had not considered the alternative claim, the respondents argued that no error was made. They submitted that, by dismissing the appellant's claim, the Magistrate must be taken to have accepted the respondents' evidence to the effect that the sale price agreed between the parties was to be an amount which would provide the respondents with the sum of $450,000 net, after allowance for the total amounts payable in respect of commission, marketing and other expenses and conveyancing expenses in relation to the property. As there had been no evidence of an offer of such an amount, there could have been no breach of the alleged implied term.

53. The respondents submitted that the Court should take into account grounds supporting the order made, despite the Magistrate's failure to make the express finding of fact which would have justified the dismissal of the alternative claim without consideration of whether the alleged term should have been implied or whether such an implied term had been breached.

54. Counsel for the respondents submitted that the Court should take account of evidence favourable to the respondents to the effect that they wished to receive $450,000 clear after payment of commission and expenses. He relied upon the unreported decision of Mr Justice Hansen in *Harris v QBE Workers Compensation Victoria*[36] as authority for the proposition that the Court must take the view of the evidence most favourable to the respondents when reviewing a failure of a Magistrates' Court to make any decision in relation to a question of fact and the consequential question of law on appeal. He also relied upon authorities which established that it is a question of law as to whether there was evidence on which a particular finding of fact could have been reached by a Magistrate.[37]

55. Counsel for the appellant responded that the authorities relied upon by the respondents related to the different challenge to a finding of fact on appeal.

56. Counsel for the respondents conceded that it would have been an error of law for the Magistrate not to have considered the appellant's claim for damages, if he had not already disposed of the question by his finding of fact in relation to the meaning of the endorsement on the agreement. He argued that the learned Magistrate had indicated his preference for the evidence of the respondents to the effect that the agreement was for the sale of the property for $450,000 "clear". He referred in particular to those passages in the Magistrate's reasons where he had expressed the view that the endorsement was placed on the agreement because of the respondents' insistence upon the receipt of $450,000:

> "[COUNSEL FOR THE APPELLANT]: There is also the matter of whether it was 450 and they take their commission, we want 450 — HIS WORSHIP: This is a question of fact, isn't it? This is not a question of (indistinct)? [COUNSEL FOR THE APPELLANT]: Except, Sir, in one regard. HIS WORSHIP: Yes. [COUNSEL FOR THE APPELLANT]: There are three possible alternatives, and again it comes back to the *Browne v Dunn* point - was it 450 as the bare minimum and you can have your commission, 450 in our pockets for you to get your commission, and you were saying yesterday, Sir, I think you were suggesting that a minimum price of round 465 would have to be found for that. HIS WORSHIP: Well, whatever you add on top of the 450 to make up all those commission figures. [COUNSEL FOR THE APPELLANT]: Indeed, Sir, which is — HIS WORSHIP: But there is no - this is a question of fact though. I mean, at all stages the defendants have adamantly said they were wanting 450 clear in their pocket, absolutely clear amount."[38] "HIS WORSHIP: There was an anxiety and a determination to get this business. Your fellow was determined to get this business. These people didn't go to him, they went to him. Your agents went to them. They went there hoping that they could get the sale of two other properties later on, and they were willing to punt this, and it's premised on all of that, that they then — (At this point there was a break in the recording) HIS WORSHIP: - Hopefully get this fellow to sell at some particular point that he'd be happy with, and they gave him the protection: 'No sale, no charge'. [COUNSEL FOR THE RESPONDENTS]: Sir, that handwriting does not replace

> everything on the face of the authority. HIS WORSHIP: But it changes what was on the authority, otherwise there is no point in putting it. [COUNSEL FOR THE APPELLANT]: Yes, Sir. But it does not change - nowhere does it change the agreed price on the face of it of $450,000 and the commission that would follow of $13,500. HIS WORSHIP: It does, it does, because your fellow insisted - and this is corroborative of what his insistence was, that he wanted the money clear in his pocket. [COUNSEL FOR THE APPELLANT]: Not my fellow. Why is it corroborative of that? HIS WORSHIP: No, the defendants. They wanted it clear, and it corroborates them. There is not the slightest reason for putting it there otherwise."[39]

57. Despite his failure to make an express finding of fact in relation to the agreed price in the agreement, it would appear, in my view, from a close reading of the learned Magistrate's reasons that he had accepted the existence of a causal link between the making of the endorsement and the first respondent's anxiety to have it expressed in the agreement that "he wanted his money clear". The acceptance of this evidence would appear to have led the Magistrate to interpret the endorsement as he did.

58. In those circumstances, although not articulated, the learned Magistrate would seem to have at least declined to find as a fact that the parties had agreed upon a price of $450,000 "gross" in relation to the sale of the property. Such a finding of fact was a necessary prerequisite to a finding that the respondents had breached any implied term by failing to accept an offer of $450,000.

59. Accordingly I am not persuaded that there was any error on the part of the Magistrate in failing to consider whether any such alleged implied term had been breached.

Conclusions

60. The answers to the three questions before the Court are therefore:

> Question 1: No
> Question 2: No
> Question 3: He did not.

61. The appeal is dismissed.

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[1] T152 l12-6.
[2] See *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* [1977] HCA 13; (1977) 138 CLR 52 at 66 per Gibbs J; (1976-1977) 13 ALR 161; (1977) 51 ALJR 413; *Di Dio Nominees v Brian Mark Real Estate* [1992] VicRp 99; [1992] 2 VR 732 at 738 per Marks J; [1993] ANZ Conv R 86; [1992] V Conv R 54-445.
[3] [1973] HCA 36; (1973) 129 CLR 99 at 109; 47 ALJR 526.
[4] T120 l14-25.
[5] T39 l24-27.
[6] *Ericsson Pty Ltd v Popovski* [2000] VSCA 52 at [14]; (2000) 1 VR 260 per Brooking JA.
[7] T92 l16-18.
[8] T92 l11-13, T99 l14-18.
[9] T107 l27-T108 l1.
[10] T111 l15-6.
[11] T121 l16-21.
[12] T129 l15-16.
[13] T52 l21-22.
[14] T58 l14-15.
[15] T59 l27.
[16] T59 l28-62 l19.
[17] T146 l24-30.
[18] (1894) 6 R 67; (1894) 6 Co Rep 67.
[19] (1894) 6 R 67; (1894) 6 Co Rep 67.
[20] See *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) NSWLR 551.
[21] [1993] VicRp 69; [1993] 2 VR 201 at 211; [1993] ANZ Conv R 397; [1992] V Conv R 54-452.
[22] T17 l1-T18 l12.
[23] T31 l30-T32 l1.
[24] T41 l12-5.
[25] T55 l24-25.
[26] T84 l10-12.
[27] T95 l23-24.
[28] T96 l16-10.

[29] T104 ll10-14 and, by inference, at T109 ll8-11.
[30] T113 ll14-20.
[31] T114 l12-T120 l25.
[32] T147 ll14-15.
[33] T129 ll6-8.
[34] T137 ll12-13.
[35] T137 ll16-18.
[36] No 5417 of 1994 Unrep.
[37] *Transport Accident Commission v Hoffman and Ors* [1989] VicRp 18; [1989] VR 197; (1988) 7 MVR 193; *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301.
[38] T136 ll2-22.
[39] T144 ll2-27.

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