22/05; [2005] VSCA 181

SUPREME COURT OF VICTORIA — COURT OF APPEAL

REAL ESTATE CITY PTY LTD v MOUSTAFA & ANOR

Ormiston and Charles JJ A, Hansen AJA

17, 18 August 2004; 29 July 2005

CIVIL PROCEEDINGS – SALE OF PROPERTY – CLAIM FOR ESTATE AGENT'S COMMISSION PLUS MARKETING AND CONVEYANCING EXPENSES – EXCLUSIVE AGENTS 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 THE MEANING OF THE WORD "SALE" WAS REASONABLY OPEN ON THE EVIDENCE.

REC P/L and M. signed a written Exclusive Agents 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. An appeal to a judge of the Supreme Court was dismissed. Upon appeal—

HELD: Appeal allowed. Remitted to the Magistrates' Court for rehearing according to law.

1. The principal conflict in this case centred on the agreed sale price of the property and the effect of the appellant's notation "No sale no charge; no sale – no charge for conveyancing" on the Exclusive Agents Authority. The Authority stated the price as "$450,000 or any other price agreed to by the Vendor" and provided that the Agent's fees were "3% of selling price". RECP/L submitted that it was entitled to its commission and fees if it obtained a minimum price of $450,000 for the property. M. submitted that they required $450,000 clear of all fees and expenses with the agents to retain any amounts obtained above that amount. As events transpired, the appellant procured a purchaser who was willing to pay $450,000 whereupon the respondents refused to complete the purchase by signing the contract and refused to pay the appellant's commission and fees.

2. Upon the face of it the signed authority comprehended both front and reverse pages and until it was shown that they did not form part of the agreement between the parties, or could otherwise be disregarded on the basis of fraud, mistake or for any other specific reason of the kind adverted to in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471; (2004) 211 ALR 101; (2004) 79 ALJR 206; 57 ATR 556 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165; (2004) 211 ALR 342; (2004) 79 ALJR 129; 1 BFRA 280; [2005] Aust Contract Reports 90-204, then the magistrate was not entitled simply to put to one side the explicit terms of the document. From the terms of the agreement it was clear that the word "sale" was given a special meaning which was wide enough to comprehend the receipt of a binding offer which "would … result" in an enforceable contract.

3. The magistrate erred in construing the authority as requiring that there should be a completed sale before commission was earned. The vice of the magistrate's conclusion was his process of reasoning and the factors which he wrongly took into account, in saying that a completed sale was required before the appellant agent earned its commission.

***Real Estate City Pty Ltd v Moustafa* [2003] VSC 11; MC05/03, overruled.**

ORMISTON JA:

1. This appeal (brought by leave) arises out of a highly unsatisfactory decision given in the

Magistrates' Court relating to a claim for $16,150 for commission and related expenses (including conveyancing charges) by the appellant real estate company for the alleged effectuation of the sale of a house property on behalf of the respondents as owners of that property. The magistrate's express reasoning in rejecting the appellant's claim was so incomplete and uncertain that most of the time taken on this appeal was spent in trying to interpret what in fact had been decided by him. The reasoning (taken from the transcript), which may or may not have been the complete reasoning of the magistrate for reaching his conclusion to dismiss the appellant's claim, is set out in the reasons of the learned judge of the Trial Division from whom this appeal is brought: see [2003] VSC 11 at 3-5 para.[9]. For the purposes of this judgment I shall refer merely to those passages which were and are of present relevance.

2. Those reasons dealt, *inter alia*, with the principal, but not the only, issue at the trial, namely the meaning and effect of endorsements on the face of a conventional R.E.I.V. exclusive auction authority which read:[1]

> "NO SALE NO CHARGE" and
> "NO SALE - NO CHARGE FOR CONVEYANCING."

The critical issue was a finding by the magistrate "as a fact" to the following effect:

> "'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."

The main debate on this appeal arose out of the second and third grounds of the appeal to the Court of Appeal which were in turn directed to the first question of law identified by the order of a Master for the purpose of the appeal to the Trial Division, which was expressed in its essential terms as follows: "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 ...?"[2] It should be noticed that the premise on which this question was asked was an allegation by the appellant that there had been a "sale" within the meaning of the authority as so amended, by reason of the fact that the appellant had procured the signature of proposed purchasers to a conventional contract of sale of the property at a price of $450,000, although that "offer" had not been signed or accepted by the respondents as vendors for various reasons. A secondary issue was raised as to whether the parties had agreed that the agent would be entitled to commission if it achieved a price of $450,000 net of commission and whether the first endorsement was intended to reflect that agreement.

3. Other questions were raised on the appeal both to the judge in the Trial Division and to this Court, especially as to whether the second named respondent had signed (or authorised the signature of) the authority, but they might most conveniently be dealt with after stating briefly some more of the relevant facts and after dealing with the primary question. For the present it is sufficient to remark that, for one reason or another, the magistrate said, before giving his final reasons, that he would leave the other "arguments" and "look at [the respondents'] first proposition first", referring to the construction argument. Then, at the end of his reasons, his Worship said, just before dismissing the claim: "I do not have to look at the Section 32 and signature arguments".

4. It seems that dealings between the appellant and respondents[3] had commenced with a visit by the appellant, through one of its directors and one of its sales representatives, to the respondent vendors' home in Coburg. The agent sought to persuade the respondents to place their property on the market for sale and to that end sought to obtain an exclusive auction authority from them. The first respondent and his son seemed loathe to agree to the proposed sale, but, as ultimately agreed, it involved, at least in the first place, an offering for sale by auction. (The respondents' defence asserted a term that they wished to obtain $450,000 clear of all expenses, but it will be seen that, although it is likely that the magistrate accepted that this was their object, he appears not to have made any specific finding to that effect, whatever be its relevance.) These events took place during an extended discussion which involved, on the one side, the appellant's two representatives and, on the other, Mr Moustafa and his son Mohammad[4] (who appeared to act at least in part as an interpreter for his father because of his imperfect understanding of English) and, possibly, his daughter Ms Naula Moustafa, who was present in the house at the time. The first respondent's wife, the second respondent, was also in the house but seems not to have participated.

5. The evidence as to what took place at that discussion was by no means consistent and the conflict between the various witnesses' testimony was not only of importance in the trial before the magistrate, but it also remains of some (though tangential) significance for the purposes of this appeal, being an appeal restricted, as it must be, to questions of law. One can give but a summary of the evidence which is relevant to this appeal. Although both Mr Spano, seemingly the manager and principal of the appellant company, and Mr Spinello, a sub-agent employed by it, were both present, Mr Spinello was the first witness called for the company, but it is apparent that his knowledge and experience of real estate practice were relatively limited. It is not clear how enthusiastic the respondents were to sell their house, certainly in the first place, and it further seems that they were unhappy at the estimate of price given by Mr Spano of somewhere between $380,000 to $420,000. Mr Spinello gave evidence that the first respondent had stated that, unless he "got" $450,000, he was not willing to sell. From that it appears that the appellant's representatives suggested that to obtain that price it would be necessary for the property to be marketed by auction, without specifying a price in the advertising material they would publish. It was necessary to have an auction authority for that purpose. The first respondent had agreed that the reserve should be $450,000. Mr Spinello said that he explained what was on the front of the authority, although he did not refer to the back of the document, of which it seems that he was largely ignorant. He had told those present that the appellant would be paid its commission out of the agreed selling price. He was then asked who had written the endorsements and the reason for their inclusion. He explained that, if they did not achieve the reserve price, or one agreeable to the respondents, "there will be no charge for the auction and no charge for the advertising or putting up of the board". In saying that he conceded that he had used the word "sale" without reference to the definition on the reverse of the document (see below at para.[14]) which in substance extended "sale" to the mere receipt of a "binding offer" to sell. To the magistrate Mr Spinello said that the property was not sold in that the respondents did not accept the purchasers' offer at $450,000 and then conceded, in response to his Worship's arguably irrelevant question as to what "no sale, no charge" meant, that it meant: "Exactly what it says: 'no sale, no charge'". After conceding at first, seemingly, that there should be no charge, he then maintained that they had in fact reached the stipulated price, albeit that the offer was not accepted. It seems that an auction had in fact been conducted earlier at which no more than $390,000 had been offered, but that some time later the appellant had received an offer from the proposed purchasers at the stipulated price of $450,000. When the offer had been put to the first respondent he said it was not sufficient because of the commission. On that day, according to Mr Spinello, but not earlier, Mr Moustafa had said that "he wanted $450,000 clear".

6. In the course of cross-examination Mr Spinello agreed that they were prepared to "punt" that the respondents would ultimately receive $450,000. He said that they were prepared to risk the appellant's commission, its advertising expenses, including a board, and the necessary conveyancing costs, including the preparation of a section 32 certificate. In re-examination Mr Spinello said that the idea of including the endorsement "no sale, no charge" was in fact Mr Spano's idea.

7. Mr Spano then gave evidence along similar lines. He agreed that the respondents "wanted $450,000, otherwise they would not sell the property". Asked why those representing the appellant had agreed to the endorsements, he said that he knew that the property would create interest and they were "prepared to spend money on advertising", so they could reach the figure of $450,000. He had also hoped that members of Mr Moustafa's family might buy other properties through his estate agency. As to the $450,000 fixed as the price on the authority he said that, although many clients do not wish to fix a reserve for an auction, the first respondent had insisted that there be a reserve of $450,000 for, unless he got that sum, he would not sell. Asked by the magistrate why he was prepared to "punt" obtaining such a price, Mr Spano said that, if they were "good enough to get the $450,000, it would be a good commission, so it was worthwhile punting". He was asked whether clients ever sought to get a clear price after expenses, to which he said that on rare occasions that would happen but there would be written on the authority "clear of commission and clear of advertising". To the magistrate Mr Spano said that "there was never any mention of any clear figure". When they got the offer of $450,000, he had believed it had been sold, for that price was to him the sale figure "as per the authority".

8. In the course of an extensive cross-examination Mr Spano had various hypothetical situations put to him. As to what would happen if a lower price had been obtained at the auction,

he said merely that the vendors might accept a lower sum but his company ordinarily would obtain an amended authority. He agreed that for the purpose of the auction his agency had engaged a firm of solicitors to prepare a section 32 certificate and related documentation. When asked about the endorsement "no sale, no charge", he said that that simply referred to the charges for the advertising, but he conceded that generally, if there were no sale at any price, then there would be no charge by the agent for its commission. If the property is sold, then the agent would be paid. The magistrate asked why the endorsement needed to be put on the authority, to which Mr Spano explained that in most cases agents will charge advertising "up front", as they would not do any work unless they received it in advance, but here Mr Moustafa had not agreed to that, saying to Mr Spano: "You give me the price, and you get paid". But it did not mean that the first respondent wanted $450,000 "in his pocket", for, if that had been the case, that would have been written on the authority. There was much cross-examination of Mr Spano about what would happen if a different price from the $450,000 had been offered. Further cross-examination related to whether there was any agreement that the vendor should receive $450,000 clear, but he denied that, saying that, if that were the case, it was easy to add a standard endorsement to that effect. The subject was simply not mentioned, according to Mr Spano. What he was attempting to do through the endorsement was to ensure for the vendors that, if the price was not achieved and the property not sold, they would not be out of pocket in relation to advertising and conveyancing costs which ordinarily had to be outlaid before auction.

9. The respondents' story was significantly different. The thrust of their version was that at all times they had maintained that they would not sell their property for less than $450,000 clear after payment of all expenses including commission. According to the first respondent they were not enthusiastic to sell and said from the outset that they wanted to sell the place but under their conditions. He said that he had asked for: "450 clear for myself, and whatever you can get more extra, you can have that profit". He had wanted to sell it privately but the appellant's representatives had said that it was better to have an auction, "but you don't have to pay anything". He said that he had been taken through the terms of the authority but had only been referred to matters on the front page of it and was in fact ignorant of what appeared on the reverse.

10. Little more of relevance was said by Mr Abdul Moustafa before he was cross-examined in detail. At this stage he said in answer to the question, as to fixing the minimum price of $450,000, that, if the appellant "wanted to sell it for more, they could have the profits out of that extra". When asked specifically whether that meant that the appellant could keep everything above the price of $450,000, he answered that he had said to them: "Yes, you can take the profit if you sell for more". To the magistrate and to the appellant's counsel he repeated in terms that the appellant could "take anything extra" and secondly that "you can take the rest". A particular example was given of a sale for $500,000 to which the first respondent answered twice that the appellant could keep the $50,000 profit. Later he agreed that during their conversation the agent had said that, if it could put up its sign, the respondents would not have to pay any expenses, "you will not lose any money". He had been told by his son that if the house was sold the agent would take 3% but, he continued, not from the $450,000, "they [bet] on getting more".

11. His son, Mohammad Moustafa, gave evidence along similar lines. He said that he acted as interpreter for his father and that they had made it clear that, if there was no sale, then "we weren't liable to pay". Asked whether that was written on the authority, he replied: "By my knowledge they wrote it, they said: 'No sale, no charge'". Nevertheless his father had wanted "450 clear in his pocket". In cross-examination he was asked of these matters in somewhat greater detail and said that the agents had explained the auction authority to him. He was asked about the stated figure of $13,500 commission on a sale price of $450,000, but maintained that they conveyed to the appellant that they wanted $450,000 clear. Most of his cross-examination, however, was directed to the son's signature of the document in circumstances where he maintained that he was not authorised by his mother to sign.

12. The first respondent's daughter, Naula Moustafa, was also called, stating that she was in the house on the day the agents were present. She did not participate in the conversation but she heard at least part of their discussion. She said she heard how her father had wanted an amount "which was $450,000 clear in his pocket and the agents, there were two there at the time, they said they'd try and get that amount". Her father said that if they could not get that amount he did not wish to sell. The second respondent was also called but she maintained that she was in

the kitchen, so that the evidence she gave about the price and the discussion she had with her husband about that subject was clearly hearsay insofar as it purported to describe what had been said between her husband and the agent's representatives.

13. Eventually the agent's representatives had filled out an 180 day auction authority in the substantially conventional terms of the then current REIV form, in which the price was stated as "$450,000 [which was handwritten] or any other price agreed to by the vendor ..." [the latter words were printed on the form]. The agreed "agent's fees" or commission was 3% of the selling price plus GST, which was also expressed (as required[5]) as amounting in the circumstances of a sale for $450,000 to a commission of $13,500. There were provisions for the payment of up to $2,200 by way of "Marketing Expenses", of which $2,000 could be expended on "advertising costs and other related expenses" and $200 on "other authorised expenses". (The expression "Marketing Expenses" was defined in condition 1.10 on the reverse as comprehending "Marketing Expenses and charges of the Agent and include advertising expenses and other outgoings in respect of which any rebate, discount, or commission that the agent may receive is to be calculated") On the front of the form[6] there was also the following clause numbered 2:

> "(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).*" (Emphasis added.)

The expressions in bold type and marked with an asterisk required, as appeared later on the form, that one or other should be deleted, but no such step had been taken. To the left of these terms and in handwritten capitals appeared the two endorsements set out in para.[2] above. In due course the document was signed on its face on behalf of the appellant agent and on behalf of the respondent vendors, although there remained a live dispute as to whether it had been signed by or on behalf of the second respondent, Mrs Moustafa.

14. Before considering the construction of those endorsements I should point out that, as foreshadowed by clause 2(c), there were set out on the reverse of the authority some detailed "agreed conditions". These included definitions of "sale", "sell" and "sold" in condition 1.16, which were expressed, somewhat inelegantly, as follows: "'Sale' is the result of obtaining a Binding Offer and 'sell' and 'sold' have corresponding meanings in the same situations". In turn, in condition 1.5, "Binding Offer" was defined as "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".

15. It is important also to note that most of the "Particulars of Appointment" on the front page were just that, being the bare particulars of the agent, vendor, property, auction date, authority period, price, agent's fees, marketing expenses and the like. But the only conventional contractual terms of the parties' agreement on that front page were those comprising clause 2 (see para.[13] above), as well as (arguably) five other clauses which were essentially declaratory and are not of present relevance. The operative provisions were more truly to be found on the back of the form which, as well as the relevant definitions, of which there were many more than those that I have quoted already, included a condition numbered 2 giving the agent authority to sign a contract of sale, expressed substantially in these terms:

> "If the Agent sells the Property (either at the auction or by private treaty) during the Authority Period upon these conditions the Vendor authorises the Agent to sign on behalf of the Vendor a Contract of Sale in the form prescribed by the Rules or a Contract of Sale prepared by the Vendor's solicitor including ... the Price and the above conditions ...".

Secondly, the right of the agent to receive his fees and expenses was contained in a condition numbered 3 which contained also the agent's own obligations, in substantially the following terms:

> "The Agent will arrange the auction and endeavour to sell the Property in consideration for which the Vendor agrees (subject to conditions 4 and 11 below) to pay the Professional Fees if the Property is sold –

> 3.1 during the Authority Period by the Agent or by another person (including the Vendor) for the Price and upon the above conditions; or 3.2 within 120 days after the expiration of the Authority Period for the Price and on the above conditions to a person introduced to the Property [defined in Condition 1.9] within the Authority Period...;
>
> 3.3 after the expiration of the Authority Period to a person introduced to the Property within the Authority Period ... and to whom as a result of that introduction the Property is sold."

Condition 4 dealt with the circumstance where the purchaser did not complete a purchase and the obligation of the vendor to recover any unpaid deposit and to pay the professional fees from that deposit. Next, Condition 11 may also have some importance, not in the present circumstances, but generally inasmuch as at the top of the front page there was a printed endorsement in bold type: "This is a continuing Authority – see Condition 11". The condition provided that, if the property was not sold within the authority period, then, unless the vendor advised to the contrary, the vendor appointed the agent to sell the property and, in consideration of the agent agreeing to endeavour to sell it, the vendor would pay the agent the agent's fees if the property was sold by the agent for the price and upon the stated conditions at any time after that period expired.

16. Condition 7 may also be noted by which the vendor "reserves the right to refuse any Binding Offer made between the date of this Appointment and the date of the auction by any person to purchase the Property and the Vendor will not be liable for the Agent's Fees if the Vendor refuses the offer between those dates even if the Agent may have 'sold' the Property within the definition of that word". There were many other conditions, including detailed provisions relating to the right of the agent to make deductions of professional fees and the like from the deposit. In particular Condition 8.3 stated:

> "Unless stated above to the contrary, the Vendor will pay the maximum amount of Marketing Expenses to the Agent upon signing this Agreement and in any event Marketing Expenses will be payable to the Agent upon demand ..."

17. As to these terms, it should be noted that the magistrate expressed the view that none of these conditions appearing on the back of the form were relevant to the construction of the authority, largely because the evidence revealed that none of the witnesses appeared to refer to or even (in most cases) to know of those conditions. This was stated, not in the magistrate's final reasons for judgment, but in the course of an exchange between him and appellant's counsel as to the proper construction of the authority. There was no reference at all to these conditions in his final reasons, so that there must have been some basis for his ignoring them, and the only rational explanation is that he excluded consideration of them for reasons similar to those which he had already stated in the course of argument. This, I regret to say, is but one example of how the reasons given by the magistrate in this case appear to be unsatisfactory.

18. The issues at the trial in the Magistrates' Court are by no means clear since the magistrate chose to deal with only one, or arguably two, of those issues in giving the reasons to which I have already referred. The appellant's claim had two bases, first that it was entitled to commission at three per cent on the price of $450,000 contained in the purchasers' offer to buy, together with the relevant marketing, advertising and conveyancing expenses. There seems also to have been a second, alternative claim, presumably made upon an unaccepted but implicit assumption that it was necessary for the respondents to accept the offer and proceed with the sale, to the effect that, if they wrongly failed, refused or neglected to proceed with that sale, they should therefore be liable in damages.

19. As best one can ascertain, the respondents' case at trial relied on a number of matters. First, insofar as the second respondent was concerned, they disputed that she had signed the authority and that anybody, including her son, had the power to sign on her behalf. Secondly and more fundamentally, the respondents said that, for various reasons, but essentially because of the endorsement "no sale no charge", they were not obliged to pay any commission unless and until the binding offer resulted either in a completed sale or, at the least, in a binding contract of sale executed also by them. Thirdly, they contended that the arrangements between the parties had resulted in an additional term to the effect that the appellant was obliged to sell the property at a price which would result in their receiving not less than $450,000 net "after deduction of all expenses" and that, if the property did not sell for that net price, the appellant was not entitled

to charge any commission or other marketing and conveyancing expenses. This was said to flow from the oral conversations between the parties but also, so it seems, from the endorsements on the authority. Finally there was an argument based on the necessity for a s32 certificate under the Sale of Land Act 1962, but ultimately that seems not to have been the subject of any decision by the magistrate, nor has it formed part of the arguments advanced on appeal to the Trial Division or to the Court of Appeal.

20. As already noted[7], the magistrate decided to give reasons on the construction question without feeling the necessity to deal with either the signature question or the s32 question. His Worship's reasons began by recounting the circumstances in which the appellant had come to meet the respondents, observing that "they were keen to get commissions and they were keen to get sales". The appellant's representatives had known that there were two other properties that they might obtain and so, as his Worship noted, they were "willing to punt", as they had stated frequently, and were "willing to risk getting any commission at all, even to the ridiculous point where they said that even if they only got – if they got as much as $449,000, they would then not get a commission". For reasons which are not immediately apparent he said the appellant's latter concession "sounds ridiculous".

21. After referring to the circumstances surrounding the discussion and the presence of the son as the first respondent's interpreter, the magistrate found that the authority was filled out stating the price to be "$450,000, or any other price agreed to by the vendor". He said he was not sure whether or not the agents meant to cross out the latter words, but he observed, again for reasons which are not entirely apparent, that it was "sloppy drafting" but, as they had drawn the document, they bore the consequences.

22. His Worship then correctly observed that there was "a conflict in the facts as to what was the situation as about whether it is $450,000 clear to the vendors, or out of which commission was to be paid in accordance with the agents" (sic). He said that, if the document had stayed as it was, without the endorsements being added, then the appellant agent "would have had his document giving him the commission, depending ... upon any argument about: 'any other price agreed to by the vendor', not being crossed out".

23. It is desirable to set out the next two, concluding, paragraphs of his Worship's reasoning in full:

> "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 a 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."

After observing that he then did not have to look at the arguments relating to the wife's signature or the issue relating to the s32 certificate, the magistrate dismissed the claim and subsequently made an order for costs in favour of the respondents.

24. When the appellant appealed to the Trial Division the Master identified three questions of law, the first of which appears in paragraph [2] above and asked whether the magistrate erred in holding that the endorsement meant that the respondents were not required to pay commission. The second question asked whether the magistrate erred in accepting the evidence as to the non-execution of the auction authority by the second respondent where that matter had not been raised in the defence and witnesses were not cross-examined as to their version. The third question identified by the Master was not pursued but the judge at the hearing identified a third question,

namely, whether the magistrate erred "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".

25. In dealing with these questions her Honour saw the first question, which is the matter of principal concern upon the appeal to this Court, as involving a series of sub-questions, at least as presented in argument by counsel for the appellant at that time. Those sub-questions involved contentions that the magistrate erred in particular ways, one, by failing to consider the entire authority, secondly, by failing to take into account the whole of the endorsements, i.e. both of them, thirdly, by disregarding or misapprehending evidence and fourthly, by misconstruing the word "sale". In each case her Honour rejected those contentions and so answered the first question in the respondents' favour by answering the question "No". She likewise answered the second question relating to the signature of the second respondent and which raised in effect a *Browne v Dunn*[8] argument by again answering the question "No". She likewise held that the magistrate had not erred in failing to consider whether the appellant was entitled to damages by reason of the respondents' failure to accept the offer of $450,000. The reasoning relating to these latter two questions is not central to the present appeal but some observations relating to the third question may appear to have some relevance to the first question.

26. In the absence of explicit findings by the magistrate, her Honour, in upholding his decision, recited and summarised some of the relevant evidence for the purpose of demonstrating that the magistrate must have made findings accepting the respondents' version of events. Her Honour said[9], in dealing with the first question before her and, in particular, the first sub-question, that there was "no evidence" that any of the terms on the reverse of the authority had been brought to the attention of either of the respondents or that they had read or been aware of the definition of the word "sale". Moreover she said[10] that there was "unchallenged evidence" that the first respondent could not read and that he relied upon his son to interpret for him. The judge said that the appellant's employee, Mr Spinello, had conceded that he had made the endorsement on the authority without knowing of that definition, that he had explained only the front page to the respondents and that, when he had written the endorsement "no sale no charge", he had not been referring to the definition on the reverse of the document. Mr Spano, as principal of the appellant, gave no evidence as to any of these written terms.

27. As to these matters the judge then expressed her conclusion on the first contention or sub-question as follows[11]:

> "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 clause 1.16 or any other term set out on its second or back page."

28. The second sub-question relating to the first question raised the issue whether the magistrate failed to take into account the whole of the endorsement, in other words both parts of it. Her Honour briefly stated that she could not accept an argument that the second part of the endorsement stating "No sale – no charge for conveyancing" made the first endorsement redundant. The magistrate's interpretation of the words "No sale no charge" did not deprive the balance of the endorsement of meaning. She concluded[12]:

> "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."

The third sub-question raised an allegation that the magistrate had erred by disregarding or misapprehending the evidence given by Mr Spinello and Mr Spano to the effect that the endorsement had been placed on 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 cost of preparation of contracts if the property was not sold during the relevant period. Her Honour said that she was not persuaded that the various passages in the transcript contained any such evidence, but in any event she concluded[13], "more significantly", that it was open to the magistrate to accept or reject the whole or any part of any witness's evidence.

29. Finally on the first question her Honour rejected the fourth contention (or sub-question) that the magistrate had misconstrued the word "sale". The issue here was whether the magistrate was right to find that the word "meant a completed sale" and as to that she said[14] that such a conclusion "was reasonably open to [the magistrate] on the evidence". She recited parts of the evidence in which the first respondent had said that he wanted to receive $450,000 clear and had consented to the erection of the auction sign "on the basis that he did not have to pay anything"; that he wanted $450,000 but that the agent "could keep any extra money obtained by the sale"; and thirdly, that the first respondent's son had told his father that if the agent sold the property it would take three per cent which was not to come from the price of $450,000 but from any extra money obtained. The judge also referred to the daughter's evidence of her overhearing the discussion in which her father had said that, if he did not obtain the $450,000 clear, he did not want to sell. Again her Honour relied on the evidence of the first respondent's son who had said that they had made it clear that, "if there was no sale, that we weren't liable to pay", as well as the second respondent's hearsay evidence (so it would seem) that they should sell for $450,000 clear. For this purpose her Honour also relied on the evidence of the agent to the effect that it was prepared to punt its commission, advertising expenses and conveyancing costs in the hope of obtaining a sale and in particular to Mr Spano's evidence that the respondents (or more precisely the first respondent and his son) had said that they "wanted 450, otherwise they would not sell the property". From this her Honour concluded[15]:

> "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."

30. Before the Court of Appeal four grounds of appeal were raised in the appellant's notice of appeal. The first related to the issue concerning the second respondents' alleged signature of the authority and the manner in which the magistrate had rejected the appellant's arguments thereon, all of which may for the time being be deferred. The second ground alleged that the judge had erred in holding that the magistrate "did not err in his construction of the authority". Thirdly, it was asserted that the judge erred in holding the magistrate "did not fail to have regard for the whole of the endorsement". Finally, a fourth ground asserted that the judge had erred in holding that the magistrate had not erred in failing to consider the argument relating to breach of an implied term of the agreement that the respondents would accept the offer of $450,000.

Whether magistrate's conclusions as to construction of authority were correct

31. I have already observed that in many ways the magistrate's reasons were unsatisfactory and the question on this appeal really is whether, notwithstanding those defects, his conclusion should be upheld. For this purpose the Court must make all due allowances for the difficulty of bringing appeals from Magistrates' Courts, the nature of hearings before those courts and the difficulties of obtaining a full account of what there occurred. The Court must also bear in mind that the appeal which lies to the Trial Division, which this Court is reviewing, is one confined to questions of law. It would follow that, on questions of fact, it would not be proper to allow an appeal as to such conclusions unless there was no evidence on which such a conclusion might have been based or if the conclusions were founded on some misconception of legal principle. The learned judge characterised most of the disputes before her as involving merely questions of fact and upon that basis, and after much careful consideration of the evidence, she concluded that it had not been shown that the magistrate had erred.

32. Unfortunately, what appear to be decisions of fact have been founded in a number of instances in the present proceedings, as I would perceive the matter, upon erroneous conclusions of law or at least upon misconceptions as to what the nature of the contractual relationship between the parties truly was. Over the years there have been frequent difficulties in construing contracts between vendors of property and agents engaged by them to sell properties on their behalf and different lines of authority have been discerned which have been explained in varying ways. It is sometimes said that contracts relating to agents and the payment of commission are merely instances of contracts which have to be resolved by ordinary common law and equitable principles relating to contracts and agency.[16] But this generalisation, with respect, hides many of the difficulties inherent in resolving disputes of this kind. Insofar as they relate to authorities to sell given to real estate agents, one has to bear firmly in mind that the sales which vendors desire and agents seek to achieve are controlled largely by conveyancing law and practice in the

particular jurisdictions in which the cases arise. Legislative differences, both as to conveyancing practice and as to the conduct of real estate agents, again may justify seemingly inconsistent approaches. For example, one must be cautious about treating as generally applicable all that has been said about the earning of commission by estate agents in two Queensland cases considered by the High Court: see *Anderson v Densley*[17] and *Moneywood*.

33. Fortunately it is not necessary to resolve any apparent differences between what has been stated in those cases and what appears to have been laid down by appellate (and other) courts in Victoria in cases extending *from Scott v Willmore and Randall*[18] to *Phillipson v Indus Realty Pty Ltd*[19] The difficulties revealed by the cases have resulted in the drafting of common form authorities for use by agents in the hope of providing a degree of certainty, but that has not always proved possible.[20]

34. At the end of the day the present appeal, as is almost invariably the case, depends primarily upon the proper construction of the agreement reached by the execution of the auction authority. As to that there ought not to be much doubt as to what constitutes the present agreement, although, regrettably, much time has been taken up in seeking to ascertain what the parties *thought* the terms were.

35. For present purposes it is sufficient to recall some of the general contractual principles which must here apply. To that end I shall cite a few passages from two decisions of the High Court handed down since argument was concluded in the present case. If I had thought that either stated any new principle, I would unhesitatingly have given counsel an opportunity to make submissions on them, but their essential significance is that they have restated, as representing the present common law, well-known principles taken from cases decided (for the most part) many years ago.

36. In the first place, where oral discussions lead to the making of a written agreement, signed by the parties, it is the ultimate signed document which is ordinarily the sole repository of their binding obligations to each other. As was said by the Court in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*[21]:

> "Having executed the document, and not having been induced to do so by fraud, mistake, or misrepresentation, the respondents cannot now be heard to say that they are not bound by the agreement recorded in it."

The Court stated two fundamental reasons why this is so, the first being the pervasive influence of the general test of objectivity in the law of contracts. As the Court said[22]:

> "The legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions."

Secondly, they noted[23] the difficulty and expense in resolving disputes about oral agreements, as follows:

> "Where parties enter into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement. At least, it will do so unless relief is afforded by the operation of statute or some other legal or equitable principle applicable to the case ... This is not a time to ignore the rules of the common law upholding obligations undertaken in written agreements. ... They are not unbending. They allow for exceptions. But the exceptions must be proved according to established categories."

The Court then gave[24] examples of those exceptions, such as earlier collateral agreements and agreements partly oral and partly in writing. Here it should be noticed that the respondents pleaded and relied upon such a term, but as an additional term and not by way of substitution, relating to the net price of $450,000 asserted by the respondents, to which it is necessary to return.

37. In the second place, in a further decision of the High Court given at about the same time, the Court (slightly differently constituted), expressed similar opinions but turned to consideration of cases where parties have asserted their ignorance of written terms: see *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*[25]. After extensive examination of well-known and undisputed authorities, the Court said[26]:

> "Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution. It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief."

After referring to the ameliorating principles concerning *non est factum*, rectification and the like, and related statutory remedies, the Court expressly distinguished what have been called the "ticket cases" when considering written contracts, by saying[27]:

> "When an attempt is made to introduce the concept of sufficient notice into the field of signed contracts, there is a danger of subverting fundamental principle based on sound legal policy. There are circumstances in which it is material to ask whether a person who signed a document was given reasonable notice of what was in it. Cases where misrepresentation is alleged, or where mistake is claimed, provide examples. No one suggests that the fact that a document has been signed is for all purposes conclusive as to its legal effect. At the same time, where a person has signed a document, which is intended to affect legal relations, and there is no question of misrepresentation, duress, mistake, or other vitiating element, the fact that the person has signed a document without reading it does not put the other party in the position of having to show that due notice was given of its terms."

None of this, of course, is new but it is important to recall such principles because there was in the present case no such claim that a vitiating element such as misrepresentation or mistake denied effect to what had been signed by the parties.

38. In the present case one starts with an admission of the written agreement on the pleadings. All that thereafter was asserted in answer by the respondents were the additional terms to which I have referred, but there was no suggestion, until the magistrate's intervention, that the contract constituted by the authority was other than what it purported to be. The difficulty is that the present case appears to have been decided upon the basis of an unpleaded term or at least of a variation of a term, which was not pleaded and which was not directly asserted except in the course of argument, to the effect that "sale" in both the authority and the endorsement meant "completed sale" or, possibly, a sale constituted by a contract of sale executed by both parties. The difficulty with the latter contention was that such a term appeared to run contrary to the definition of that word in the signed authority but that contention was dealt with, not by treating the written authority as varied to the relevant extent but by considering the oral arrangements and discussion as somehow denying effect to the relevant provisions, possibly on the basis that the respondents did not have notice of the definition and other terms on the reverse of the authority.

39. Thus, what seems to have been a dispute as to whether there was some term to the effect that unless the vendors received $450,000 net for their property, there would be no right in the agent to commission, was diverted into an argument as to whether the word "sale" in the endorsements, especially the endorsement "No sale no charge" meant a completed sale or not. The magistrate's reasons seem to have led to his conclusion that the offer in the form of a contract of sale signed by the purchasers was not sufficient to earn the stipulated commission. But the reasoning, as best one may discern, seem to have derived from an implicit acceptance that the respondents had wished to obtain $450,000 clear but this in some way had led to the endorsement which the magistrate had interpreted in the manner stated in his reasons.

40. There were, however, two quite separate issues. The first went to the alleged additional term as to obtaining $450,000 clear, in other words net of commission, auction expenses and conveyancing and other charges. But the second involved interpreting the endorsements as requiring a completed sale at whatever the stipulated or agreed price might be. The principal difficulty, however, is that the magistrate, after expressing some views which seemed to point to a conclusion that he was resolving the "conflict in the facts" so as to hold that the agents had failed to get a sale at $450,000 net and thus had not achieved a sale in the terms agreed by the parties, at least orally, nevertheless proceeded to relate that issue to the meaning of the endorsement, or at least the first endorsement. So, because there seemed little or no discussion between the parties as to the nature of the "sale" which was required under the authority, except by reference to the desired price, he discerned, at least in the first place, the endorsement as meaning "something in addition" and further, after expressing himself in terms of gardening vernacular, he said the vendor was anxious to "have it clearly expressed that ... he wanted his money clear". If that was so, then the language of neither endorsement appears to have any reference to price, nor to any

agreement as to a price based on a figure clear of commission, for in terms, in the case of each endorsement there was to be no "charge" unless there was a sale. However the magistrate did not seem to think that these broadly-expressed conclusions as to the vendors' intentions was the end of the matter. So he said that the endorsement was put down the side of the document by the appellant "in the context of an anxiety to get work and where they were willing in some circumstances to forego commission". But all that he concluded at that stage was that "the vendor is half way there", an expression which is hardly judicial, if I may say so, and which has no clear connotation.

41. Thereafter, in concluding his reasons, after "bearing in mind that the vendors have been insistent", the magistrate found "as a fact" that the expression meant "exactly what no sale, no charge means" and, more importantly, that, as the respondents did not obtain a sale, they could not "be charged anything". The passage appears at the beginning of these reasons in paragraph [2] and in full context again in paragraph [23], but the conclusion appears twice, namely, that "no sale, no charge" meant exactly what it said. From that one would infer that there was no question of inferring that it meant impliedly "no sale at $450,000 clear of commission etc.", for his Worship never addressed that question, so that one is left to infer that he was considering merely the meaning of the word "sale", finding that the form of offer received was not sufficient to satisfy his interpretation.

42. The very fact that it is difficult to interpret with precision what the magistrate stated in his recorded reasons points to the conclusion that it is difficult to uphold his reasoning. Moreover, the gaps in the reasoning again show how unsatisfactory the decision was.

43. The meaning of the word "sale", both in the printed authority and in the endorsements, was especially a matter with which the reasons dealt unsatisfactorily, inasmuch as the magistrate failed in his concluding reasons to consider the relationship of the word as found in various places in the document, including the definitions appearing on the second or reverse page. Nothing in fact was said by him at that stage as to the meaning of the printed terms on either the front or the reverse pages, nor was anything said explicitly as to the significance and relevance of the definitions contained on that reverse page including those in conditions 1.16 and 1.5. The failure to deal with the document as a whole again in itself would most probably render the reasoning unsatisfactory, for his apparent acceptance that the word meant "completed sale", was inconsistent with those definitions. It could only be justified by a conclusion, not stated anywhere, that the admitted authority was varied by the parties to the extent of deleting all provisions on the reverse page but it might have been justified, if that had been possible, from what was said between the parties at the time, by inferring that the agreement authorising the auction was partly oral and partly written with the written part comprising (if possible) only that which appeared on the front page. These hypothetical means of justifying the magistrate's conclusions simply did not form part of his final reasoning.

44. In dealing with the argument that the magistrate failed to consider the entire authority the learned judge did her best to extract from the totality of the hearing a finding by the magistrate that the reverse page was irrelevant and did not form part of the contract between the parties. She noted that none of the relevant terms on the reverse had been brought to the attention of the respondents and that there was no evidence that they had read or been aware of them. She noted also that towards the end of the cross-examination of the first respondent's son his Worship had observed: "But nobody has bothered to read the back part, even the agents, it seems, in the relevant part of this document …". From this her Honour said, as stated in the passage set out in paragraph [27], that the magistrate had not erred in disregarding the terms on the reverse page and that there was in her opinion "ample evidence" supporting "the finding of fact implicit in his reasons" that, insofar as the terms of the authority were intended to form a record of the agreement, "they did not include clause 1.16" or any term on the reverse page.

45. Such reasoning, with respect, seems to me unacceptable inasmuch as it is by no means clear that the magistrate made any concluded finding on the subject, let alone did he seek to incorporate it in his reasons for dismissing the appellant's claim. Upon the face of it the signed authority comprehended both front and reverse pages and until it was shown that they did not form part of the agreement between the parties, or could otherwise be disregarded on the basis of fraud, mistake or for any other specific reason of the kind adverted to in Equuscorp and Toll,

then the magistrate was not entitled simply to put to one side the explicit terms of the document. The terms have already been set out and it is clear that the word "sale" is given a special meaning in the REIV form which is wide enough to comprehend the receipt of a binding offer which "would ... result" in an enforceable contract. The case-law leading to the insertion in authorities to sell of terms such as this need not be examined and, although it may thought otherwise to be unusual, there has been no attempt as part of the respondents' case to show that the terms, especially the agreed conditions, had been misrepresented to them.

46. It should be added that it is by no means clear that one can treat the front sheet of the auction authority independently of the reverse page, if only because there appeared at least two references of relevance on the front page to the conditions which appear on the reverse. Most significantly, in the only operative term on the front page (clause 2), which included the direct obligation of the vendor to pay the agent its fee if the vendor sold the property during the currency of the agreement, there followed immediately the advice to "Note particularly the meaning of 'sells' as defined in Agreed Condition 1.16 over page" (emphasis added). In addition, in bold type at the top of the page, there was a reference to a condition on the reverse page where it was pointed out that "This is a continuing Authority – See Condition 11", immediately under the heading of the authority and immediately above all particulars. Although not presently relevant, the fact that an authority is a continuing authority is frequently of importance to sellers, especially where they, as here, contemplate an auction which may or may not result in a sale. More importantly, in general terms, as already pointed out, most of the true contractual provisions appeared on the reverse page, including the terms of the actual authority of the agent to sign a contract, as well as the detailed provisions relating to the right of the agent to receive not only its fees but marketing and other expenses. The mere fact that the endorsements were written on the front page could not detract from the totality of the document and indeed the word "sale" is one of the defined terms, albeit that the only reference on the front page to the definition was that to the related meaning of "sells".

47. In truth, however, this is the very kind of case contemplated by the High Court of a party or parties signing a document, ignorant for various reasons (as is by no means uncommon in this era even with highly-educated or experienced contracting parties) as to the law requiring the signed document to be treated as the repository of the parties' intentions unless and until it is shown that it was not and regardless, short of misrepresentation or the like, of the parties' direct knowledge of those terms. In the context of auction authorities one may observe that in various jurisdictions more stringent requirements are imposed on agents but, so far as the present case is concerned, no provision of the *Estate Agents Act* 1980 or the relevant regulations was drawn to the Court's attention, nor am I aware of any for myself, which would preclude the agent from relying on the whole of the authority. Finally, it should be repeated that there was no argument advanced which relied on any special circumstance as denying the inclusion of the reverse page, save for the imprecisely-expressed opinion that, because a number of the parties were unaware of what appeared thereon, it should not be treated as binding. I think I have said sufficient to show that that is not a correct understanding of the law, but its adoption has the consequence that the magistrate made an error of law in construing the terms of the authority, including the endorsements, as he did and in ignoring what otherwise were relevant provisions on the reverse page. His failure to deal with that aspect at all merely makes his reasoning the more unsatisfactory. With respect, nothing in the judge's reasons would justify the conclusion that this was a mere question of fact dependent on the judge's assessment of the witnesses, nor was anything contained in her reasoning or in counsel's arguments which would justify the conclusion that it was a mere question of fact or that the word "sale" should be construed without consideration of the meaning in the definition, at least as those arguments were presented to this Court. I would add that the Court drew attention to the recent decision in Phillipson in which the word "sale" in a similar but by no means identical authority was considered, but the language was clearly distinguishable from the present case and nothing in that decision has persuaded me that the magistrate reached a correct conclusion in the present case.

48. There was a second, if subsidiary, defect, or at least arguable defect, in the magistrate's reasoning as to the meaning of the expression "No sale, no charge". It has been contended that the magistrate failed to take into account the whole of the endorsement, meaning both lines, including the second endorsement "No sale - no charge for conveyancing". The assumption behind the magistrate's reasoning was that, once it was concluded that there was no sale, it followed that

the appellant agent was entitled to neither commission nor to any other charges referred to in the authority. A reading of both endorsements suggest the possibility of the meaning being narrower inasmuch as the word "charge" is used in each. "Charge" could in many circumstances, I would concede, be a sufficiently broad description to comprehend a charge for commission, although that is more frequently described as a fee. If the magistrate had looked at both lines as part of the construction exercise he may have realised that there were a number of charges and that there may have been a purpose in distinguishing between them. As was argued below, "charge", if given its wide meaning, would be sufficient to comprehend every one of the fees, expenses and charges which the respondents were obliged to pay to the appellant. The word "charge" was not defined in the authority and it appears that the more general words used therein were "professional fees", which were in fact defined in clause 1.2 as a total of the agent's fees and the marketing expenses. So far as I am able to see the only use of the word "charges" was in the definition of "marketing expenses" which were said to comprehend both the "marketing expenses and charges of the agent", in terms which suggest that the agent's expenses comprehended outgoings and that charges were somewhat more general but would not have comprehended the agent's fees.

49. Although the magistrate appears to have rejected the evidence of the appellant as to the nature of the discussion relating to the endorsement, it is difficult to be confident that he reached that specific conclusion because he appears to have slid from his discussion as to receiving the $450,000 minimum price net of commission and other expenses to a conclusion that "No sale no charge" meant that nothing was to be paid unless and until there was a completed sale. The one simply does not lead to the other. Moreover the magistrate failed to consider what "charge" meant in the context of this agreement. Without having his full findings on the relevant facts, there remains the evidence that the appellant as agent included the endorsements so as to make clear that there would be no relevant charge made unless and until there was a sale. It might otherwise be thought to be obvious to the point of not requiring repetition or endorsement that, if there were no sale, there could not possibly be a charge for commission, assuming the word "sale" to be used consistently throughout. The agent's evidence suggested that the respondents, or at least the first respondent and his son, were emphatic that they wished to be under no obligation to pay anything unless and until the property had been sold. In the case of an auction authority, it may be said to be so well-known as to be capable of judicial notice, that, although an ordinary sale by private treaty frequently does not require the payment of any sum by the vendor until the property is sold, (save possibly for some special advertising), nevertheless in the case of a sale by auction the marketing expenses, especially the advertising costs, are to be paid "up front". That is indeed, regardless of one's understanding, what clause 2 here stated in that it said that the marketing expenses incurred were to be paid "whether or not a sale takes place" and, but for the failure to strike out one alternative, were to be payable on signing the authority or at least upon demand. By contrast paragraph 2(c) made clear that the agent's fees were not to be paid unless the vendor sold the property. Now, although his Worship emphasised the unwillingness of the vendors to put their property up for sale, that might equally suggest that they would be unwilling to suffer the burden of paying out the marketing expenses before a sale at their price was achieved.

50. One might say that conclusions of this kind are essentially those on issues of fact but the difficulty is that the magistrate appears at least to have inferred that they were relevant to the construction of the document put before him. Moreover his reasoning seemed inexplicably, at least at first, to treat the vendor's insistence on obtaining $450,000 net as leading to the inclusion of the endorsement, a conclusion which to my way of thinking is simply untenable as there was no relationship, one to the other, on the face of the document or even on the oral evidence as presented to the Court. This argument of the appellant formed part of a general argument under the ground relating to the magistrate erring by misconstruing the endorsement. The failure to take into account relevant aspects of the evidence may be so characterised but I am not entirely clear that the appellant did not slip into an argument merely to the effect that the magistrate reached an erroneous conclusion of fact, a matter which is incapable of correction on appeal to this Court.

51. Finally on the matter of construction there remains the argument directed to the magistrate's conclusion that, notwithstanding the terms of the authority, there was an additional term that the property would not be sold unless a price of $450,000 net of commission and expenses was received on the completion of a sale. The magistrate's reasoning leading to this conclusion of fact

may be thought to be not entirely consistent but in the end I believe it is clear enough that this is the view of the facts which the judge accepted. I say that, notwithstanding that her Honour appeared to express the opinion that the conclusion had not been expressly stated by the magistrate in his reasoning, certainly when she was considering the third ground of appeal relating to the alternative claim for damages for breach of an implied term. This then would seem to be a decision on a question of fact but the difficulty is that the magistrate did not make a finding that there was such an additional term as pleaded but rather treated it as a basis for his construction of the endorsement "No sale, no charge". If it were so used, and I am inclined, as was her Honour, to think that was the sole way in which a conclusion of that kind was used, then, as stated earlier, one does not follow from the other. The difficulty with the additional term is that it was pleaded as additional and not as a variation of any explicit term of the authority. The authority stated the price to be $450,000 or any other price agreed to by the vendor, the latter part of which seemingly attracted criticism by the magistrate as being "sloppy drafting".[28]

52. More importantly the magistrate seems to have overlooked that not only was the sum of $450,000 included as the authorised sale price but that in addition, in handwriting, the rate of commission had been converted into a figure payable on a sale of $450,000. The Estate Agents Act seems to require that a clearly stated figure should be notified to the vendors on an authority. The figure of $13,500 which there appears, however, is in fact three per cent of $450,000 which in the ordinary course of events would mean that that amount could be taken out of the sale price of $450,000, not added on. If the parties had intended that the $450,000 price should be clear of commission (let alone expenses), then the relevant figures appearing on the document should, on my calculations, have been $463,917 as the authorised price, with the stated commission at three per cent being $13,917. Perhaps one cannot expect perfection or arithmetical accuracy in circumstances such as here occurred but, as it stands, the form is inconsistent with the alleged additional term. It may be, as I will suggest, that on a retrial some different way of approaching the allegation may be made but at present the question of the agreed selling price has not been satisfactorily resolved by the judge. Indeed, as an alleged additional term, there has not been any specific finding, and, if it should be treated as found, then it has not been satisfactorily explained in terms of consistency with the written terms of the agreement. One would hesitate to remit on this basis only, but the magistrate's reasoning, being deficient in so many respects, seems again erroneous.

53. Having regard to the various matters discussed above, and in particular to the first matter raised and the relationship of the endorsement to the whole of the authority, I consider that the magistrate did err in construing the authority as requiring that there should be a completed sale before commission was earned. The learned judge was also wrong in her conclusion rejecting this principal ground and in concluding that the question was essentially a matter of fact which was open to the magistrate on the evidence. In saying that the magistrate erred I am not, however, concluding that it follows as night the day that the appellant's construction had to be accepted and must now be accepted by this Court. The vice of the magistrate's conclusion is his process of reasoning and the factors which he wrongly took into account, so it appears to me, in saying that a completed sale was required before the appellant agent earned its commission. It may be, having considered all the various arguments which might tend to a conclusion that "sale" meant a sale as defined in the authority, nevertheless the term might be given a meaning consistent with the respondents' argument. More importantly, even if that argument of construction were rejected, there remains the significance of the pleaded additional term which might, upon proper consideration, be treated as a term varying or amending those contained in the authority or it may be treated as a collateral term requiring that a price of $450,000 net of all charges and expenses be obtained. Such a term might be considered as qualifying the language of the printed and written authority. The magistrate failed to make any appropriate findings to that effect, whatever he may have suggested in his reasons and in the course of argument for, to the extent that he accepted that there was some such term, he thought that its acceptance meant that the vendor was only, in his terms, "half way there". In other words, despite the difficulties which may be seen to face the respondents, a new trial properly conducted may result in the respondents' still defeating the appellant's claim for commission and other expenses. I would not, however, on the present materials wish to suggest that any specific outcome should be preferred.[29] The relevant ground is made out and the matter must, therefore, be remitted for rehearing by the Magistrates' Court.

Ground relating to implied term

54. It was here argued that the magistrate overlooked an alternative claim for damages based on the proposition that, the respondents having received an offer capable of being accepted by them, they were impliedly obliged to take such steps as were appropriate as not to deny the appellant's rights. There is not the slightest doubt that, insofar as it had been argued before him (for there was no doubt that some such term was pleaded, however imperfectly drafted), his Worship had failed altogether to consider the argument and to rule upon it. There is no reasoning of the magistrate which this Court is able to consider. On the other hand, the learned judge attempted to justify the magistrate's failure by saying that his construction was such that there could be no basis upon which such term might be implied for there was no offer of a kind which might be accepted within the terms of the authority, at least as varied by agreement between the parties. So her Honour said that in substance the magistrate had accepted the view that there was a term whereby the minimum price on sale should be $450,000 net of all commission, marketing, conveyancing and other charges and expenses. So she concluded that "although not articulated", the 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". A finding of fact of the latter kind was in her opinion a necessary prerequisite to a finding of any breach of implied term resulting from the alleged failure of the respondents to accept an offer of $450,000 as made by the purchasers.

55. The difficulty is that these conclusions were in fact not articulated by the magistrate, let alone related to the alternative claim. After referring to some of the evidence and to a long and convoluted exchange between counsel and the magistrate, her Honour gave her reason for accepting this approach in these terms[30]:

> "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."

With respect, I find this reasoning difficult to follow and in particular I remain of the opinion that the magistrate found a causal link between the desire of the respondents to have their money clear and the terms of the endorsement which cannot be justified, at least on my understanding of the evidence. I am by no means saying that the magistrate had not expressed a view that the respondents wished to get $450,000 free of commission and expenses, but there is clearly a difference between what they wished and what was the subject of the agreement between the parties. Again, taking into account what has been so clearly stated recently in the High Court on the relationship between oral negotiation and written agreement, the failure to take his apparent findings and convert them into a conclusion as to a term of the contractual relationship between the parties means that the hypothesis for her Honour's conclusion cannot be supported. It may be, again at the end of the day, that such a conclusion ought to be reached on the evidence but, in the absence of a finding and in the absence of consideration of the relevant claim, I cannot accept that the magistrate properly dealt with the issues before him. This matter must likewise be remitted for further consideration.

Ground relating to signature by second respondent

56. So far as this ground is concerned, there can be no doubt that the magistrate deliberately refused to deal with it and with the question of the second respondent's signature or the right of the son to sign as her agent. If his reasoning had been correct on the first issues then there was no reason to deal with the question of signature. Of course, where matters can go on appeal, it is frequently inadvisable to leave such questions of fact for another day in case an appeal may be brought successfully and in a way which may raise the question as a live issue at a later stage. It is not possible to reach any conclusion on the matter because of the absence of findings and it is preferable not to express any conclusion upon them. Naturally, however, the issue, not having been resolved by the magistrate, will remain for consideration by the Magistrates' Court when the matter is remitted.

Conclusion

57. For the reasons I have stated I believe that both the magistrate was wrong and the learned judge was in error in rejecting this appeal from the Magistrates' Court. The appeal to this Court should be allowed, as should the appeal to the Trial Division. The orders made below should be

set aside as should the orders in the Magistrates' Court and the proceedings should be remitted to the latter court for rehearing according to law. Consequential orders for costs should be made.

CHARLES JA:

58. Having had the advantage of reading the reasons for judgment prepared by Ormiston JA, I agree that the appeals to this Court and to the Trial Division should be allowed and orders made as proposed, for the reasons given by his Honour.

HANSEN AJA:

59. I have had the advantage of reading in draft the reasons for judgment prepared by Ormiston JA. I agree, generally for the reasons his Honour gives, that the appeal should be allowed and that the proceeding should be remitted to the Magistrates' Court for rehearing and determination according to law. Without disagreeing with anything said by the learned presiding judge, I briefly state my view on the essential issues in the case.

60. The principal conflict in this case centred on the agreed sale price of the property and the effect of the appellant's notation "No sale no charge; no sale – no charge for conveyancing" ("the endorsement") on the Exclusive Agents Authority ("the Authority"). The Authority stated the price as "$450,000 or any other price agreed to by the Vendor" and provided that the Agent's fees were "3% of selling price". The appellant submitted that it was entitled to its commission and fees if it obtained a minimum price of $450,000 for the property. The respondents submitted that they required $450,000 clear of all fees and expenses with the agents to retain any amounts obtained above that amount. As events transpired, the appellant procured a purchaser who was willing to pay $450,000 whereupon the respondents refused to complete the purchase by signing the contract and refused to pay the appellant's commission and fees.

61. The Magistrate found the presence of the endorsement on the Authority to be significant and acknowledged that had the document stayed in its original form without the additional endorsement, the appellant "would have had his document giving him the commission" out of the $450,000, subject to any argument concerning the qualifying words "or any other price agreed to by the Vendor". However, considering the Authority with the addition of the endorsement, the Magistrate found that the Authority had to mean something in addition. The Magistrate outlined the context in which this endorsement was made, namely a desire by the appellant to obtain work and a willingness, in some circumstances, to forego its commission; and an anxiety to avoid paying commission by the respondents. From there the Magistrate made an apparent quantum leap to a factual finding that "no sale no charge" meant exactly that. As the respondents did not get a sale, they were not going to be charged anything.

62. With respect, the Magistrate's reasoning is flawed as he confused two separate and distinct questions. First, what was the agreement as to the selling price? Secondly, what event or circumstance was required to occur before the appellant became entitled to the payment of its commission and fees?

63. It is clear, and was conceded by the respondents, that the respondents' desire for $450,000 clear does not appear anywhere on the Authority. To establish their contention the respondents and their children all gave evidence before the Magistrate that they required $450,000 clear of all expenses. Mr Spinello and Mr Spano, on behalf of the appellant, denied this was the case. This conflict went to a central point on the pleadings. Yet at no stage did the Magistrate in his reasons make a factual finding that there was an oral agreement, varying the terms of the written Authority, that the sale price should be $450,000 clear of all expenses. It goes without saying that the determination of the agreed selling price was a necessary pre-requisite in determining whether a "sale" was made which entitled the appellant to its commission and fees.

64. On appeal, the judge acknowledged that the Magistrate had failed to make an express finding of fact in relation to the agreed sale price in the Authority. Her Honour stated that:

> "... 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."[31]

Her Honour further interpolated that:

> "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."[32]

As this finding of fact was a necessary pre-requisite for a finding that the respondents had breached an implied term by failing to accept the offer by the purchaser of $450,000, her Honour did not consider that submission. Accordingly, her Honour concluded that there had been no error on the part of the Magistrate in failing to consider the appellant's submission of whether such an implied term had been breached.[33]

65. I am not satisfied that on the evidence it can be said that there was a causal link between the respondents' desire to obtain their money clear and the making of the endorsement on the Authority. However, in any event, the existence of any such causal link is not to the point. The endorsement describes the circumstances in which commission and fees are payable to the appellant, namely upon a "sale", which expression is defined in the Authority. This does not shed any light on whether it was determined that the respondents required $450,000 clear before a sale could occur.

66. The matter should return to the Magistrates' Court for rehearing. A rehearing will also ensure that any unfairness or prejudice allegedly incurred by the appellant by reason of the respondents' breach of the rule in *Browne v Dunn* by failing to cross-examine the appellant's witnesses in relation to the signing of the Authority and later leading contradictory evidence from the respondents, can be cured. That is not an issue on the pleadings as the Authority was admitted.

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[1] Each endorsement was written vertically to the left of the printed wording on the front of the authority and appeared one above the other. The authority was described as "Copyright (c) 1995 The Real Estate Institute of Victoria Ltd.", but it clearly was a later version as several terms referred to the Goods and Services Tax. It bore a notation at the foot of the front page "003 02/00", which one might guess referred to a version published in February 2000.
[2] The full terms of the question appear in the judgment of the trial judge at para.[10].
[3] For convenience I shall use the word "respondents" to include those giving the authority, which may or may not have included the second respondent, although it seems she never directly participated in the discussion.
[4] I have taken this spelling (or transliteration) from paras.2 and 3 of the respondents' own Summary of Facts, although the son's name is spelled differently elsewhere, including in the transcript.
[5] By s49A(1)(c)(ii) of the *Estate Agents Act* 1980. In fact the "dollar amount" was expressed to be "commission which would be payable upon a sale at that price ... - $450,000 [plus GST] on a selling price of $13,500 excluding GST". So the figures were mistakenly reversed, but the meaning is plain.
[6] The layout of the authority appears in greater detail in para.[6] of the judge's reasons.
[7] See the quotations at the end of para.[3] above.
[8] (1893) 6 R (HL) 67.
[9] See paras.[18]ff.
[10] At para.[19].
[11] At para.[22].
[12] At para.[25].
[13] At para.[27].
[14] At para.[29].
[15] At para.[27].
[16] See *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 124; [1941] 1 All ER 33, *LJ Hooker Ltd v WJ Adams Estates* [1977] HCA 13; (1977) 138 CLR 52 at 66; (1976-1977) 13 ALR 161; (1977) 51 ALJR 413 and *Moneywood Pty Ltd v Salamon Nominees Pty Ltd* [2001] HCA 2; (2001) 202 CLR 351 at 389; (2001) 177 ALR 390; (2001) 75 ALJR 408.
[17] [1953] HCA 47; (1953) 90 CLR 460.
[18] [1949] VicLawRp 21; [1949] VLR 113; [1949] ALR 510.
[19] [2004] VSCA 61; (2004) 8 VR 446; [2004] ANZ Conv R 280.
[20] Cf. *Cannon Real Estate Pty Ltd v Hubble* [2000] VSCA 116 at [4].
[21] [2004] HCA 55; (2004) 218 CLR 471; (2004) 211 ALR 101; (2004) 79 ALJR 206 at [33]; 57 ATR 556.
[22] At para.[34].
[23] At para.[35].
[24] At para.[36].
[25] [2004] HCA 52; (2004) 219 CLR 165; (2004) 211 ALR 342; (2004) 79 ALJR 129; 1 BFRA 280; [2005] Aust Contract Reports 90-204.
[26] At para.[47].

[27] At para.[54].
[28] Parenthetically one may observe that the term is hardly "sloppy", for the expression is part of the printed terms and is clearly common enough in authorities of this kind. In any event it is simply common sense to make provision for the possibility of a change of mind by a vendor of land. There is, of course, no obligation on vendors to change their minds. The term merely recognises that vendors may not achieve the price they hope and it is thus included in the authority, which, it must be firmly remembered from special Agreed Condition 2, includes a power to the agent to sign a contract on behalf of the vendor. If at the end of the day and after much unsuccessful negotiation, vendors change their mind, it is not unreasonable to make such a provision, so that the agent can obtain its desired commission when it has introduced a purchaser and effectuated a sale.
[29] The s32 argument also remains to be considered.
[30] At para.[57].
[31] *Real Estate City Pty Ltd v Moustafa* [2003] VSC 011 at [57].
[32] At [58].
[33] At [59].

APPEARANCES: For the appellant Real Estate City Pty Ltd: Mr J Slonim, counsel. Velos Lawyers. For the respondents: Mr GP Colquhoun, counsel. Pearce Webster Dugdales, solicitors.
